THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL 88 OF 2019

(CORAM: F. GIKONYO J.)

JEREMIAH MUCHOKI...................................APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

(An appeal from the original conviction and sentence in Nkubu S.O No. 6 of 2019 by E.M Ayuka S.R.M on 31/5/2019)

JUDGMENT

1. **Jeremiah Machoki** was charged with defiling two female children on diverse dates. The first count was defilement contrary to section 8 (1) as read with 8 (2) of the sexual offences act No. 3 of 2006. The particulars of the offence were that on diverse dates between January and 3rd February 2019 at Marimba Sub-location in Imenti South within Meru County he intentionally and unlawfully caused his penis to penetrate the vagina of MN a child aged 9 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between January and 3rd February 2019 at Marimaba Sub Location in Imenti South within Meru County he intentionally caused his penis to come into contact with the vagina of MN a child aged 9 years old.

3. Count 2 was defilement contrary to section 8 (1) as read with 8 (2) of the sexual offences act No. 3 of 2006. The particulars of the offence were that on diverse dates between January and 3rd February 2019 at Marimba Sub-location in Imenti South within Meru County he intentionally and unlawfully caused his penis to penetrate the vagina of VM a child aged 9 years.

4. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between January and 3rd February 2019 at Marimaba Sub Location in Imenti South within Meru County he intentionally caused his penis to come into contact with the vagina of VM a child aged 9 years old.

5. He was tried for the offence, convicted on count 1 and 2 and sentenced to serve life imprisonment in each of the two counts

6. Having been dissatisfied with the conviction and sentence he filed this appeal setting out 8 grounds of appeal that can be collapsed into 6:

> *a. That the learned trial magistrate erred both in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.*
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> *b. That the learned trial magistrate erred both in law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt*
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> *c. That the learned trial magistrate erred both in law and fact by failing to note that the teacher told the court that the complainant was found having sex with other students in the school.*
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> *d. That the learned trial magistrate erred both in law and fact by failing to note that the appellant was not supplied with witness statements in time which is contrary to article 50 (2) (j) of the Constitution of Kenya, 2010*
>
> *e. That the learned trial magistrate erred both in of law and fact by rejecting the appellant defense without giving cogent reasons.*

f. *That the learned trial magistrate erred both in law and fact by failing to note that the medical report does not support the allegations of the complainant*

Appellants Submissions

7. The appellant in his submissions argued that the trial magistrate failed to analyze the evidence tendered before the court as the P3 forms indicated that the complainants were defiled by their elder brother and his friend on different occasions. Additionally the evidence adduced by the clinical officer did not indicate that the hymen was freshly broken. The evidence given by PW4 was inconclusive to establish that the appellant was guilty of the ordeal.

Submissions by the State

8. Mr Maina prosecution counsel for the state in his submissions argued that the complainants who were children went through an age assessment which put their age as between 10-11 years old. Secondly, both PW1 and PW2 testified to the fact that the appellant used to call them to his house on Sundays as they went to church and defile them and would keep one outside as he defiles the other. This was then corroborated by the evidence by PW4 a clinician who testified that PW2 had a broken hymen with foul smelling discharge and a vaginal swab revealed red blood cells and he concluded that the child had been sexually penetrated. On PW1 he noted that the hymen was broken and had a whitish foul smelling discharge from the vagina and concluded that the child had been sexually penetrated. This therefore proved the issue of penetration. Finally, on the issue of identification the offence happened over a long period of time and in broad daylight and the complainants knew the appellant as their neighbor. Therefore there was no margin of error as to the identity of the assailant as he was well known to the victims.

ANALYSIS AND DETERMINATION

Duty of court

9. As first appellate court, I should re-evaluate the evidence afresh and come to own conclusions. Except, I should give allowance of the fact that I neither saw nor heard the witnesses. See **OKENO vs. REPUBLIC [1972] E.A 32.**

Elements of crime to be proved

10. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(2) of the Sexual Offence Act. Section 8(1) is the offence clause and provides that: -

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

Section 8 (2) provides that

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

11. From these sections, the prosecution must establish three things, namely:

> **1) That the person defiled was a child and state the age thereof;**
>
> **2) That there was penetration of the child; and**
>
> **3) That the person who caused penetration with the child is the Appellant.**

Age

12. PW1, witnesses, treatment chits as well as the P3 Form stated the age of the complainants at the time of the offence to be 9 years. The medical age assessment carried out on the two twins by Dr. Njuguna on 26th March, 2019, gave their approximate age to be between 10-11 years. In the absence of official Certificate of Birth, the medical age assessment reports are conclusive on this matter. The trial magistrate found that the age of the complainants is 10 years. Notably, the trial court was careful to observe the children during their testimonies and was satisfied that their age was approximately 10 years. Notably, the relevant penalty clause provides for sentence of defilement of a child of 11 years or less. Accordingly, no prejudice is suffered by the appellant in the adoption of the age of 10 years. In sum, I find the complainants were aged ten years at the time of the commission of the offence.

Of penetration

> [1] **Section 2(1) of the Sexual Offences Act** defines penetration as:
>
> ***"The partial or complete insertion of the genital organs of a person into the genital organ of another person."***
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> [2] For better understanding of the scope of this statutory term see in the case of **Mark Oiruri Mose v R [2013] eKLR** where the

Court of Appeal stated that:

"Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." *(Emphasis added).*

13. The appellant argued that absence of or broken hymen does not necessarily prove penetration. I agree as other factors such as intrusive exercises or accident may cause hymen to break. What does the evidence say?

14. **PW1, VM** told the court that she and her twin sister, M were going to church when the appellant called them to his house. He then removed her clothes and did 'Tabia mbaya" to her. They were on the appellant's bed and he removed his clothes. He used something on his bed which he put on his penis, then he inserted his penis in her vagina. He would take one in the house in turns and do *tabia mbaya* as he kept the other outside and vice versa. to them in turns. They were taken to a hospital at Kanyakine where they were treated.

15. **PW2 MN** corroborated the evidence by PW1 who is her twin sister. She only added that he inserted his fingers in her vagina and he then inserted his penis into her vagina.

16. **PW4 MOSES BAIYANE** a clinical officer at Kanyakine Sub County Hospital told the court that examination of MN aged 9 years revealed that her hymen was torn, no lacerations or bruises and she had a whitish foul smelling discharge from the vagina and so he concluded that there had been penetration. On examination of VM also aged 9 years he found that her hymen was broken, no lacerations, no bruising, and foul smelling discharge was noted. The conclusion was that there had been penetration.

17. Contrary to the assertions by the appellant, these pieces of evidence conclusively proved beyond reasonable doubt that there was penetration of the two children.

Was the appellant the perpetrator?

18. **PW1, VM** told the court that she and Melody, her sister, met the appellant who was a neighbor at their plot on their way to church. The called them to his house. He then removed her clothes and did 'Tabia mbaya" to her. They were on the appellant's bed and he removed his clothes. He used something on his bed which he put on his penis, then he inserted his penis in her vagina. The appellant kept her sister outside as he had sex with the other. The appellant would then buy them sweets and they went to church. At school her sister removed her clothes and told teacher Nancy that the appellant had defiled them. She then called teacher Charles to whom they also narrated what happened. They were then taken to the police station and narrated what had transpired. They were taken to a hospital at Kanyakine where they were treated.

19. **PW2 MN** told the court that PW1 is her twin sister. She knows the appellant as he was a neighbor at their plot. The appellant used to do "tabia mbaya" to them. The accused would call them to his house and kept PW1 outside and he took her to the house. He removed her pants, stocking and biker. He then inserted his fingers in her vagina and he then inserted his penis into her vagina. After he was done he told her to go to church. The accused then called PW1 into the house and locked the door. When they went to school the teacher observed them and when she questioned them they told her what had happened. They were escorted to the police station then to hospital.

20. Upon inquiry, they narrated their ordeal in the hands of the appellant to their teachers who had noted their queer behavior. They also narrated the incident to the police. The prosecution called these witnesses whose evidence is recast below.

21. **PW3 LOICE NAITORE** a teacher at [particulars withheld] Primary School told the court that on 7/2/2019 she was at the school and so were the children when she was called by their teacher who had observed them acting funny. He took the children to the office where they told them that there was a neighbor who defiles them on Sundays whenever they go to church. She passed the information to the secretary and they took the children to Nkubu police station and they were referred to Kanyakine Sub County Hospital.

22. **PW5 AP JACOB MWABILI** testified and told the court that he was the investigating officer. He recalled that on 8/2/2019 he was at the police station when 2 children MN and VM aged 9 years were escorted to the station by their teacher and social worker. The teacher reported that the children were exhibiting weird behavior and after inquiry they said that the appellant had defiled them. He interrogated the children who narrated what happened to them. The children later took him to the scene and showed him where the appellant lived; they found and arrested him.

23. The evidence above is consistent and cogent. The complainants knew the appellant as he was their neighbor. They gave such succinct details of the incident and the perpetrator. The appellant was therefore identified by the complainants by recognition. I do not find anything which would suggest that any or both of them was under any delusion or cloud of mistaken identity of the appellant as the person who sexually assaulted them. The events as narrated were consistent and corroborated by PW3 and PW4. But before I conclude, what is the defence that was offered?

24. **DW1 JEREMIAH MUCHOKI** in his testimony stated that the complainants' mother was using this case to frame him. That since august 2018 the complainants' mother was his lover. In December she came home drunk and insulted him and that is when they parted ways. On 18/1/2019 the complainants' mother threatened him and in the evening he reported the matter to the area manager who advised him to relocate.

25. This defence consists in very serious allegations. I have said time without number that such serious matters should be prosecuted seriously as they hinge on perversion of justice. Nonetheless, other than making the allegations, the appellant did not provide concrete material to support the allegation. The defence remained hollow and mere allegation. I dismiss it.

26. Therefore, the prosecution provided solid evidence that the appellant defiled the two twins in the manner borne out in the evidence. They proved their case beyond reasonable doubt.

27. In the upshot, the appeal on conviction fails.

On sentence

28. The appellant submitted that his sentence did not accord with article 25 of the Constitution. He relied on the case of **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR** where the Supreme Court stated the following;

> **"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.**
>
> **…………**
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> **Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the Penal Code, it becomes crystal clear that that Section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically; Articles 25 (c), 27, 28, 48 and 50 (1) and (2)(q)."**

29. The principle in this case is that any sentence which takes away or restricts the discretion of the court in sentencing is unconstitutional. Minimum sentence ties the hands of the court. Accordingly, fettering of discretion of the court occasions prejudice to the accused in sentencing. Consequently, I am inclined, in the spirit of the progressive and transformative approach to fair trial propagated by the Constitution, to interfere with the life sentence imposed herein. As a consequence, I set aside the life sentence imposed on him.

30. In this case the complainants PW1 and PW2 were of the aged 10 years at the time of the offence and the appellant, by his unlawful acts, snatched their innocence and childhood. In the circumstances, I impose a sentence of 25 years' Imprisonment for each count with effect from 31/5/2019 when the appellant was first sentenced. The sentence to run concurrently.

31. It is so ordered.

Dated, signed and delivered at Milimani this 7th day of May 2020

F. GIKONYO

JUDGE

Representation: -

Appellant acting in person

Counsel for the state – Mr Maina