



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 179 OF 2019**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**LUKAS M'RAMI MBERIA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. S. Ndegwa, PM dated 8<sup>th</sup> October 2019 at the Magistrate's Court at Githongo in Sexual Offence Case No. 11 of 2019)*

**JUDGMENT**

1. The appellant, **LUKAS M'RAMI MBERIA**, was charged with the offence of defilement contrary to **section 8 (1) and (2)** of the **Sexual Offences Act** ("the Act"). It was alleged that on 5<sup>th</sup> March 2019 at [Particulars Withheld] Sub-location, Ntakira location, Imenti Central Sub-county, he intentionally caused his penis to penetrate the vagina of MAM, a child aged 9 years.

2. The appellant was convicted and sentenced to life imprisonment. He now appeals against conviction and sentence based on the petition of appeal filed on 18<sup>th</sup> October 2019 and the amended supplementary grounds of appeal. The thrust of those grounds is that the prosecution failed to prove its case beyond reasonable doubt. That the evidence against him was contradictory and full of falsehoods. He also complained that the trial magistrate did not consider that he had a cogent defence.

3. Counsel for the respondent filed written submissions. The respondent supports the conviction and sentence and urged that the prosecution had proved all elements of the offence of defilement.

4. As this is the first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**). It is for this reason that I now proceed to set out the evidence that emerged at the trial.

5. The complainant in this case, MAM (PW 1), gave unsworn evidence after a *voire dire*. She stated that she was 9 years old, and in Class 3. She testified that on 5<sup>th</sup> March 2019 at about 9.00am she was with the appellant and her aunt uprooting beans. The appellant called her to his house to help him cook. She went to his house and she narrated what happened as follows:

*He went with me to his house and told me to get in, which I did. He locked me in the house. He told me not to scream or to tell anyone what he was doing or he would kill me. He removed my clothes. I was wearing a trouser, shirt. He slept with me in his bedroom on top of his bed. He did 'tabia mbaya' on me. He put his thing for urinating into mine. That was between my legs. He told me to put on my clothes and we went to take food to [my aunt].*

6. PW 1 further testified that she did not tell anyone what happened because she had been threatened. She added that the appellant told her to implicate one *Kevin*, if she was asked what had happened. PW 1 also stated that the appellant had sexually assaulted her twice before.

7. Because PW 1 was limping, her teacher, PW 5, asked her what happened, she informed her that she fell and was cut. When the teacher pressed her further she implicated *Kevin* who she said had raped her at her aunt's place. Her teacher called her grandparents to the school and the local chief. When the local chief interrogated her, PW 1 told him it was the appellant who was in fact responsible for her injury.

8. PW 5, testified that on 11<sup>th</sup> March 2019, PW 1 came to school limping. She inquired from her what happened and she told her that she had fallen but when she inquired further, PW 1 stated that one *Kevin* had done 'tabia mbaya' to her. She informed the school director to call her parents. Together with another teacher, they took PW 1 to the dormitory and examined her private parts and noticed bruises and a whitish

discharge and a foul smell.

9. PW 2, the complainant's grandfather, recalled that on 14<sup>th</sup> March 2019, he received a phone call from PW 1's school. He proceeded to the school with PW 1's grandmother. While at the school, the Assistant Chief, PW 3, who was called by the school director, also arrived. Another Assistant Chief, PW 4, was also called. PW 3 recalled and narrated to him how she suspected that PW 1 had been subjected to sexual assault. PW 3 asked PW 1 what happened and she confirmed that it is the appellant who had defiled her. PW 3 and PW 4 proceeded with PW 2 to the appellant's home where they arrested him.

10. The investigating officer, PW 7, recalled that PW 1 was brought to the police station accompanied by PW 2 and PW 3 on 14<sup>th</sup> March 2019. She took down witness statements and issued the P3 medical form and organized for medical examination. PW 6, a medical doctor, testified that he examined PW 1 on 18<sup>th</sup> March 2019 and prepared the P3 medical form. When he interviewed her, PW 1 stated that she had been subjected to sexual assault three times by a person known to her and the last incident was prior to the examination. On examination, he noted that there were bruises on the labia majora and minora and her hymen was perforated. The vagina had a whitish discharge. He also examined the appellant and noted that the appellant had a urinary tract infection.

11. When put on his defence, the appellant denied the offence in his sworn testimony. He stated that on the material day, he was at home with his daughter FK (DW 2) who prepared lunch for him. Thereafter he went to collect napier grass, came back for lunch and proceeded to the market where he remained with his friends. He further stated that he had a land dispute with PW 1's grandparents. DW 2 told the court that she was home with the appellant on the material day and that he left to cut napier grass, came back for lunch and left again. DW 3 testified that she was a friend to the appellant's wife. She was with her from 6.00am upto 4.00am selling bananas. She stated that the appellant's wife had never run away from him.

12. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "Penetration" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

13. The prosecution's case principally rested on the testimony of PW 1. She narrated how she was lured to the appellant's house and subjected to an act of penetration. Her testimony was clear and straightforward and unshaken in cross-examination. Because she had been threatened by the appellant, she did not tell anyone until her teacher, PW 5, noticed her limping gait. It was only when pressed on the matter, that she disclosed to PW 2, PW 3, PW 4 and PW 5 how the appellant had subjected her to an act of penetration. PW 1 also narrated her ordeal to a person known to her when she was examined by PW 6. The injuries in her private parts observed by PW 3 and also by PW 6 were consistent with an act of penetration. All this evidence confirmed that PW 1 was indeed subjected to an act of penetration.

14. As to whether the appellant was the person responsible for the act of penetration, the evidence is that the appellant was known to PW 1 as they were neighbours. The appellant contended that he was framed as a result of the land dispute between him and PW 1's grandfather, PW 2. PW 1 readily stated that she had been sent by PW 2 to the appellant to inform him not to cut some trees that were falling on his side. PW 2 denied that there was a land dispute but admitted that the appellant sold some trees from the boundary. He denied any dispute.

15. Like the trial magistrate, I do not consider the appellant was framed as a result of a land dispute for the reason that the issue of PW 1's defilement was discovered independently of PW 1 and PW 2. It is PW 5 who noticed that she had been injured and pressed her to tell the truth. I therefore dismiss the appellant's defence that he was framed.

16. The appellant complained that the prosecution did not call essential witnesses. He referred to the decision in **Bukenya v Uganda [1972] EA 549** where the court held that the prosecution ought to summon all important witnesses whose testimonies are essential and that failure entitles the court to infer that those witnesses had evidence adverse to the prosecution case. The appellant submitted that the Kevin who had been implicated was not called to clear his name, and it was PW 1's aunt who had been with her on the day the incident took place.

17. As regards the testimony of the aunt, I do not find it direct as PW 1 admitted that she did not tell the aunt what happened on the material day. Likewise, PW 1 testified that it is the appellant who told her to implicate Kevin but after she was pressed on the issue, she implicated the appellant.

18. The learned magistrate who heard the matter and assessed the evidence concluded that, "*I however had the benefit of observing the demeanor of the girl as she testified. She was straight forward and struck me as a truthful witness with no reason to lie to the court.*" Taking into account the finding on the trial magistrate and the totality of the evidence, I find that it is the appellant who committed the act of penetration.

19. The final element of the offence of defilement is the age of the child. The age of a child is a question of fact and in this case, PW 1 testified that she was in Class 3 and was aged 9 years old. She was obviously below the age of 18 years hence a child. Her age was also established by age assessment and the report produced by PW 6. She was confirmed to be between 8 and 9 years old. PW 1 was therefore aged 9 years old. For purposes of the sentence, PW 1 was aged below 11 years old and in accordance with **section 8(2)** of the **Act**, the court was entitled to impose a mandatory sentence which is life imprisonment.

20. The Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; **BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**. Based on those decisions, I quash the sentence of life imprisonment and substitute the same with a term of 20 years' imprisonment.

21. I therefore affirm the conviction and allow the appeal only to the extent that the sentence of life imprisonment is quashed and the appellant is sentenced to **twenty (20) years imprisonment**.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of MAY 2020.**

**D.S. MAJANJA**

**JUDGE**

**Appellant in person.**

**Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.**