



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

**CRIMINAL APPEAL NO. 95 OF 2019**

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

**BETWEEN**

**DENIS MURANGIRI GITUMA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon.E. Ayuka, SRM*

*dated 6<sup>th</sup> June 2019 at the Magistrate's Court at Nkubu in Sexual Offence Case No. 5 of 2019)*

**JUDGMENT**

1. The appellant, **DENIS MURANGIRI GITUMA**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8 (1)** as read with **section (2)** of the *Sexual Offences Act* (“the Act”). The particulars of the charges were that on 6<sup>th</sup> February 2019 at about 0700 HRS at [particulars withheld] Location, Imenti South Sub-County within Meru County, he intentionally caused his penis to penetrate the vagina of PK, a child aged 6 ½ years.

2. The appellant now appeals against conviction and sentence on grounds of appeal set out in the petition of appeal and amended grounds of appeal and written submissions filed on 28<sup>th</sup> April 2020. The thrust of the appeal is that the prosecution relied on inconsistent, contradictory and conflicting testimonies and that critical witnesses were not called to testify. The appellant also stated that the age of the child was not proved and consequently the sentence imposed was harsh and excessive.

3. In its written submissions, the respondent supported the conviction on the grounds that the prosecution proved all the elements of the offence.

4. It is the duty of this court, being a first appellate 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*). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.

5. The complainant, PK (PW 1), made an unsworn statement after a *voire dire*. She stated that she was in Class 1 and was aged 7 years old. She narrated what happened as follows:

*I met the accused while on the way to school. He held my hand and took me into the napier grass. He lay me on the ground. I lay on the back. The accused lay on me. He removed my biker. He did not undress. After he was done. He told me to go to school. We were spotted by someone. It was a lady. She called someone else. She called my parents. They came to the scene. I was taken to hospital at Nkubu. The doctor treated me. I was taken to the police station. The accused pushed his penis in my vagina.*

6. PW 2, identified herself as a neighbour to the appellant and to PW 1's father, PW 3. She recalled that on the material day at about 8.00am, she was on the way from delivering milk when she heard people in the napier grass. She saw the appellant emerge from the napier grass holding PW 1's hand. PW 1 was crying. She saw the appellant push PW 1 and tell her to go to school. She took PW 1 and called people nearby to assist. PW 1 narrated to her what the appellant had done.

7. PW 3, testified that PW 1 was his daughter and she was born on 24<sup>th</sup> August 2012. He told the court that he knew the appellant as he was a neighbour. On the material day after PW 1 had left to go to school. He was called and told to go where she was. He found PW 2 and PW 1 who was crying. PW 1 told him what the appellant had done to her. He took the child to the police station to report the incident.

8. Among those who were called to attend to PW 1 was PW 4, the area manager. He stated that he was called by PW 3. He went to the scene where he found PW 1 crying. She also narrated to him what happened to her. He also arrested the appellant and handed him over to the area

chief.

9. The clinical officer, PW 5, testified that he examined PW 1 on 6<sup>th</sup> February 2019. He noted that her vagina walls were inflamed but the hymen was not broken. There was a whitish discharge. He was of the opinion the presence of the inflamed vagina was as a result of the attempted vaginal inflammation while the intact hymen indicated non full length penetration. He produced the Post Rape Care (PRC) Form and the P3 medical form.

10. The investigating officer, PW 6, told the court that on 6<sup>th</sup> February 2019, he was instructed by his Commanding Officer to proceed to a scene where an incident of defilement had taken place. He proceeded to the Chief's Camp where he found the appellant who he re-arrested. They also found PW 1 who narrated what had taken place. He later recorded witness statements and charged the appellant.

11. In his sworn testimony, the appellant (DW 1) denied the offence. He told the court that all witnesses had lied, that he was not caught with PW 1 and that he was only arrested much later by PW 4 whereupon he was beaten. He accused PW 2 of fomenting the case against him because he refused to work for her.

12. In order to prove the offence of defilement under **section 8(1)** of the **Act**, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person.

13. On the element of penetration, PW 1 gave clear testimony on how the appellant waylaid her on the way to school and proceeded to insert his penis in her vagina. At that particular time, PW 2 emerged and saw PW 1 together with the child. The child was in a state of distress as confirmed by PW 3 and PW 4 who came after a while. The incident took place at daytime and the appellant was known not only to the child but also to PW 2, PW 3 and PW 4 who all stated that he lived in the location. All this evidence displaces any doubt about the appellant's identity.

14. The complainants' evidence alone is capable of supporting a conviction as the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth. In this case the trial magistrate recorded the following:

*I also observed the complainant's demeanour throughout her testimony. She was eloquent and consistent in her evidence, both in chief and in cross-examination. She was very specific in her narration of what transpired. I am convinced she told the court the truth. I trust her testimony.*

15. In addition to the testimony of PW 2, PW 3 and PW 5, the medical evidence was additional corroborative evidence of penetration. PW 5 examined PW 1 on the same day and he noted inflammation of the vaginal wall which is evidence of penetration. "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." From that definition, it does not matter whether there was complete insertion of the penis into the vagina or whether in fact the hymen was broken.

16. The appellant's defence was a mere denial. The allegation that he was framed by PW 2 was an afterthought as he did not raise the issue in cross-examination of the witness. The contention that the prosecution's evidence was contradictory lacks merit is not borne out by the evidence of the witnesses which formed a complete picture of what took place on the material day. The claim that an essential witness was not called is also not substantiated as it is not shown which witness was not called. The totality of the evidence is that the appellant committed an act of penetration against PW 1.

17. The age of a child is a question of fact. As regards PW 1, she testified that she was 7 years old and was school going. PW 5, who examined her recorded that she was 6 years old and finally, the birth certificate indicated that she was born on 24<sup>th</sup> August 2012. PW 1 was therefore 6 ½ years when the offence took place. At any rate the prosecution proved that PW 1 was a child.

18. The prosecution thus proved all the elements of the offence of defilement. I therefore affirm the conviction.

19. Before I deal with the sentence, I propose to dispose of an issue raised by the appellant that the child had mental incapacity. Under **section 151** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, "every witness in a criminal trial shall be examined on oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath." **Section 125** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** provides;

*(1) All persons shall be competent to testify unless the court considers that they are prevented from undertaking the questions put to them, or from giving rational answers to those questions, by tender of extreme old age, disease (whether of body or mind) or any similar cause.*

*(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers.*

20. The effect of the provisions is that every adult, and in the case of children where the provisions of the **Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)** apply, is a competent witness unless they are, by reason of infirmity, from understanding the questions put to them and giving rational answers. There is no evidence from the record that PW 1 was mentally challenged to the extent that she could not understand the proceedings. What is clear though, is that the appellant is the person who took advantage of her.

21. The appellant has complained that the sentence imposed on him was harsh and excessive. Under **section 8(2)** of the **Act**, the life sentence is mandatory where victim is below the age of 11 years. In the circumstances, the sentence was lawful. However, 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.

22. The appeal is dismissed save that the life sentence imposed is quashed and set aside and substituted with a sentence of **twenty (20) years imprisonment** from the date of arraignment, that is, 7<sup>th</sup> February 2019.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT MERU THIS 8TH DAY OF JUNE 2020.**

**A. MABEYA**

**JUDGE**

Appellant in person.

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