



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 87 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

MGM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. Ayuka, SRM dated 31st May 2019 at the Magistrate's Court at Nkubu in Sexual Offence Case No. 4 of 2019)

JUDGMENT

1. The appellant, **MGM**, 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 charge were that on diverse dates between 2018 and 2019 at [Particulars Withheld] Location, Imenti District within Meru County, he intentionally caused his penis to penetrate the vagina of LG, a child aged 10 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 28th April 2020. The thrust of the appeal is that the prosecution failed to prove the offence to the required standard as the evidence was insufficient, inconsistent and contradictory. The appellant contended that the police conducted shoddy investigations. He complained that the prosecution failed to call essential witnesses and produce vital exhibits. He noted that the medical evidence did not link him to the offence.
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, LG (PW 3), made an unsworn statement after a *voire dire*. She stated that she was in Class 2 and the appellant was her father. She told the court her father did to her, "*tabia mbaya*". She stated that on several occasions the appellant would call her to his bedroom, undress her and remove his clothes and insert his penis in her vagina. He defiled her several times but she did not tell anyone until she decided to tell her teacher, PW 2.
6. PW 2 testified that she knew PW 3 as she was her teacher and in charge of guidance and counselling at the school PW 3 attended. She recalled that on 28th January 2019, PW 3 approached her and told her to close the talk as she wanted to talk to her. She informed her that the appellant, her father used to sexually abuse her and that he would block her mouth and threaten to kill her if she told anyone. She also stated that the appellant would wash her after each ordeal. PW 3 reported to the head teacher and the child was taken to the police station where the incident was reported.
7. The investigating officer, PW 4, confirmed that on 28th January 2019, PW 3 was brought to the police station by PW 2 where PW 3 made a report of defilement. She issued a P3 medical form to the complaint who was taken to hospital for examination. PW 1, the clinical officer, who examined PW 3 on 28th January 2019, produced the P3 medical form and Post Rape Care (PRC) form. He stated that PW 3 told him that her father had frequently molested her. On examination of the vagina, he noted that the hymen was broken and there was tenderness of the vulva which was reddish in colour. There was no discharge or tears.

8. When put on his defence, the appellant denied the offence. He stated that he used to leave home early and come back late in the evening. He also stated that PW 3 used to sleep with her grandmother.

9. 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. “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.”

10. On the element of penetration, PW 3 gave clear testimony on how the appellant would force himself on her in his bedroom and proceed to insert his penis in her vagina. 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 as follows:

From the evidence on record, the incident herein took place over a period of time, in the accused’s bed. She was eloquent and consistent in her evidence, both in chief and on cross examination. She was very specific in her narration of what transpired. She appeared frightened at the sight of the accused. I am convinced she told the court the truth. I trust her testimony.

11. In addition to the testimony of PW 3, her testimony was confirmed by that of PW 2 to whom she narrated her ordeal. PW 2 was an independent witness. She noted that PW 3 was in a state of distress and that PW 3 told her that she did not report the incident earlier because she had been threatened. The medical evidence, which was merely corroborative, produced by PW 1 was consistent with acts of penetration. The appellant was a person well known to PW 3 and the incidents of penetration took place over a period negating any opportunity for mistaken identity.

12. The appellant’s defence was a mere denial and could not cast any doubt on the overwhelming prosecution evidence. The prosecution evidence was straight forward and consistent.

13. The age of a child is a question of fact. Although the birth certificate of the child was not produced, there is no doubt that PW 3 was a child as testified not only by herself but also PW 2 who stated that PW 3 was in Class 2. The age assessment by PW 1 established that she was 10 years old.

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

15. The appellant has complained that the life 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.

16. 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, 20th January 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.