



**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 24 OF 2019**

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

**BETWEEN**

**MM.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon.T. Madowo, RM*

*dated 31<sup>st</sup> May 2019 at the Magistrate's Court at Meru in Sexual Offence Case No. 4 of 2018)*

**JUDGMENT**

1. The appellant, **MM**, was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section (4)** of the **Sexual Offences Act** ("the Act"). The particulars of the charge were that between 16<sup>th</sup> and 17<sup>th</sup> December 2017 at [particulars withheld] Location, Imenti North Sub-county within Meru County, he intentionally caused his penis to penetrate the vagina of RK, a child aged 13 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 3<sup>rd</sup> May 2020. The thrust of the appeal is that the prosecution failed to prove the offence to the required standard and in particular it failed to call a vital witness and produce vital exhibits. He complained that the medical report was insufficient to support his conviction and that the medical evidence did not link him to the offence. He also stated that the trial magistrate failed to consider his cogent defence.
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, RK (PW 1), gave sworn testimony after a *voire dire*. She stated that she was 13 years old and attending school in Class 4. She stated that the appellant was her step-father. She told the court that on 16<sup>th</sup> December 2017, the appellant came home from work during the day. She narrated what happened as follows:

*He came and laid me down on a chair. It was in the day. I was wearing a trouser. The accused removed my clothes. He removed my trouser and underwear. He started inserting his penis inside my vagina. He inserted it, I tried to stop him but he continued. He had held me on the throat. I was unable to scream. He removed himself from me. I fell and I put on my clothes. I went and told my neighbour. She is a woman. I can't remember her name. She did not do anything. After that time, he defiled me again.*

She further testified about the next incident as follows:

*[O]n 17<sup>th</sup> December 2017, the next day. My mother left. It was Monday. I had not gone to school. I was alone. He came and held me and put me on his bed. I was wearing a panty and trouser. He started inserting his penis in my vagina. I tried to scream but he held me on the neck again. When he was done, I went and told my aunt.....*

6. PW 1 further recalled that her aunt sent her to her grandmother's place. Her grandmother took her to hospital. She stated that the appellant paid her grandmother but her aunt insisted that the appellant should be arrested. At the time, her mother continued to live with the appellant. She later decided to inform her teacher, PW 2, about the incident.
7. PW 2 recalled that on 18<sup>th</sup> January 2018, while in class, she noticed that PW 1 was uncomfortable. She was concerned and decided to ask her what was wrong outside the class. PW 1 opened up and told that, "*Nilifanyiwa tabia mbaya na baba yangu*". PW 2 reported to the head teacher. The headteacher, PW 3, confirmed that she received the information from PW 2 and when she interrogated PW 1, she narrated her ordeal at the hands of the appellant. PW 3 called the area chief, PW 4, and informed him about the incident. When he arrived at the school, she found PW 1, PW 2 and PW 3. She spoke to PW 1 who narrated what had taken place. He took the child to the Children's office and then proceeded to arrest the appellant.
8. PW 5, a medical doctor, produced the P3 medical form on behalf of his colleague who examined PW 1 and filled the P3 medical form on 19<sup>th</sup> January 2018. The doctor's main observations were that PW 1's hymen was perforated and there was a whitish discharge. The doctor noted that the child was able to recollect the incident and in his view, an act of penetration had taken place.
9. The investigating officer, PW 6, stated that the report of the incident was made on 18<sup>th</sup> January 2018 at the police station by the area chief. In cross-examination, he stated that the appellant ran away and was arrested in January 2018, a month after the incident.
10. When put on his defence, the appellant gave sworn testimony. He denied the case against him. His case was that PW 1's aunt, had a grudge against him and that he had made a complaint to PW 4 about the fact that she came to his home and took his wife away in 2013. He stated that in 2017, PW 1's aunt came with the child's grandmother and they took away PW 1 without his consent. He testified that in December 2018, the child was staying with her aunt hence he was not with her.
11. The complainant's mother, DW 2, testified on behalf of the appellant. She stated that she was staying with PW 1, the whole of December 2018 and that PW 1 did not inform her of the incident. The appellant's son, DW 3, testified on oath after a *voire dire*. He stated that although they went to the same school, they did not live together and that she left before Christmas with the grandmother.
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. "*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. On the element of penetration and identity of the appellant, PW 1 narrated two incidents when the appellant inserted his penis into her vagina. Her testimony on what took place was clear and consistent. The complainant's 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 that, "*Her testimony is consistent with what she reported to the other prosecution witnesses, hence I am convinced that she is telling the truth.*"
14. In addition to the testimony of PW 3, PW 1's testimony was confirmed by that of PW 2 who she had narrated her ordeal to her. PW 2 was an independent witness. She noted that PW 1 was in a state of distress and that PW 1 told her that she did not report the incident earlier because she had been threatened by the appellant. The medical evidence, which was merely corroborative, produced by PW 5 was consistent with acts of penetration. Since the appellant was a person well known to her and the incidents of penetration took place over a period negating any opportunity for mistaken identity.
15. In his defence, the appellant alleged that he was framed by PW 1, her aunt and the grandmother. He also stated that at the time the incident took place PW 1 was not staying with him. From PW 1's testimony both in chief and in cross-examination and the totality of the evidence is that she was caught in between her mother and step father on one hand and her aunt and grandmother, that is why the person she could report to was the teacher who took action. Additionally, the defence case that PW 1 was not at home with the appellant was supported by the contradictory testimony of DW 2 and DW 3.
16. 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 1 was a child as testified not only by herself but also by PW 2 who stated that PW 1 was in Class 2. The age assessed by the doctor who examined PW 1 and recorded the P3 medical form established that she was 13 years old.
17. The prosecution thus proved all the elements of the offence of defilement. I therefore affirm the conviction.
18. The appellant has complained that the minimum and mandatory sentence of 20 years' imprisonment imposed on him under **section 8(3)** of the **Act**, was harsh and excessive. 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, the trial magistrate in sentencing an accused is required to consider the facts of the case, taking into account aggravating and mitigating factors then impose an appropriate sentence. The starting point for consideration is that the gravity of the offence is reflected in the sentence prescribed under the **Act**.
19. I have considered and taken into account the following factors; that the appellant was first offender, the mitigation offered by the appellant, age of the child, the fact that she was defiled twice by the appellant who was in a position of a parent and the resulting psychological injury to the child. I have also taken into account sentences imposed in under the **Act** which set out graduating penalties on account of the age of the child, I therefore quash the sentence of 20 years' imprisonment and substitute it with 15 years' imprisonment.
20. The appeal is dismissed save that the sentence of 20 years' imprisonment is quashed and set aside and substituted with a sentence of **fifteen (15) years** imprisonment.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MERU this \_\_8<sup>th</sup>\_\_ 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.