REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA IN BUNGOMA

CRIMINAL APPEAL 41 of 2018

SAMUEL JUMA SEME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the conviction and sentence in original Kimilili criminal case No. 1716/2018 delivered on 3.7.2018 by Hon C.Menya ,RM]

J U D G M E N T

The appellant Samuel Juma Seme was charged with the offence of defilement of a child (girl) contrary to section 8(1) as read with sub-section 2 of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 19th September 2015 [particulars withheld] in Bungoma North District within Bungoma County he intentionally and unlawfully caused his penis to penetrate the vagina of BB a child aged 10 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No. 3 of 2006 based the same facts. The particulars of the alternative charge were that on the 19th September 2015 at [particulars withheld] in Bungoma North District within Bungoma County 6th day of January, 2018 the appellant intentionally and unlawfully touched the vagina of BB a child aged 10 years.

The evidence before the trial court was that Pw1 BBM was living in [particulars withheld] with her uncle K and was a standard 5 pupil at [particulars withheld]. On 19/9/2015 she was playing outside at around 10.00am and the accused came over, held her hand and took her to sugarcane and he wrestled her to the ground and slept on her.

She testified that the accused removed her panty, skirt and blouse and accused removed his trouser and put his "*thing of urinating in her vagina*". She testified that accused told her to tolerate and promised her Kshs.50/=.When the accused finished he told her to go home and she had milky substance in her vagina which he told her to wipe using her inner pant. She was feeling a lot of pain in her private parts and she informed baba Kere. She stated that K informed her dad and grandfather who went to accused home but accused had escaped. She was taken to Mbakalo Hospital but she does not recall the police station they reported the incident.

PW2 WKM testified that he lived with Pw1 in [particulars withheld]. He knew the accused and he used to work for his son. He testified that on 19/9/2015 he received a report from complainant's uncle that she had been defiled. He testified that the next day he went to accused home with village elder and complainant and she narrated what happened to accused's parents.

He testified that he reported the matter to Mbakalo Police Station and was advised to take complainant to the hospital where she was treated and issued with P3 form.

PW3 JW testified that he was guardian of complainant and lived with her during the occurrence of the offence. It was his testimony that on 19th September 2015 at 6.00pm the complainant went home and told him that the accused did something bad to her and he noted that she was walking with difficulty. He testified that the complainant was taken to the hospital the following day and was issued with a P3 form. On cross examination he testified that the accused is a neighbor's son.

Pw4 No.40810 P.C Sudi Rama of Mbakalo Police Station testified that she was the investigating officer in the matter. She testified that on 20th September 2015 while at the office, the complainant in the company of her grandfather reported that she had been defiled the previous day. He recorded their statements and issued them with a P3 Form and advised them to seek medical attention. He testified that the accused disappeared and resurfaced on 16th June 2016 and in the company of P.C Silas Cherono they arrested the accused.

Pw5 Jentrix Namaemba Baraza a clinical officer at Naitiri sub county hospital. She produced the complainant's P3 form who according to her was 10 years old at the time of occurrence of offence. She examined and the complainant who had a ruptured hymen with a hyperemic

vagina. She testified that on tests conducted the complainant had no STI and she was put on pain killers and issued with a filled P3 Form.

Upon close of prosecution's case the accused was placed on his defence and he opted to give sworn evidence. He testified that on 17th June 2016 he was at home and at around 4.00am when the police arrested him and took him to Mbakalo Police Station and charged him.

It is upon the above evidence that the trial court found the accused guilty and sentenced him to life imprisonment. Having been dissatisfied with the judgment the Appellant has appealed to this court on the following grounds:

i. That he pleaded not guilty at the trial.

ii. That the learned magistrate erred in law and facts when he failed to consider that accused was not examined of his specimen taken to government chemistry for examination to prove the allegation and no D.N.A. was carried out on the pants the complainant was wearing during the incident.

iii. That the trial court failed to consider the contradictions on the charge sheet, evidence given in court and the documents produced.

iv. That the trial court failed to consider the appellant's defence

v. ***That the trial magistrate relied on single evidence that was not proved beyond reasonable doubt.***

He equally filed his written submissions in which he submitted that the prosecution failed to comply with section 36(1) SOA and failed to the prove their case to the required standard.

He submitted that the trial court failed to consider his defence as well as mitigation. He submitted that the complainant is not credible witness and gave evidence that was contradictory, inconsistent and uncorroborated. He submitted his fundamental rights were breached as he was not informed of the reason for the arrest. He submitted that the charge sheet was defective and that the penetration was not proved during trial. He submitted that crucial witnesses were not summoned during trial and the trial court failed to consider his mitigation.

The state opposed the appeal through state prosecutor M/s Nyakibia who submitted that on age that the complainant was 9 years old and a birth certificate was produced. She submitted on identification that PW1 was able to identify the appellant and PW2 also identified the appellant as he was well known to them as he was an employee.

She submitted on penetration that the complainant testified on penetration and this was corroborated by evidence of Pw4 the clinical officer.

Finally she submitted on the sentence that the same should be upheld as the appellant is a dangerous man and the trial court considered the appellant defence.

This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno VS R 1972 EA** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to review the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt.

The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.

On the age of the complainant, the prosecution produced a birth certificate as MFI 3 that showed the complainant date of birth to be on 26/9/2005 and that indicated that the complainant was 9 years old at time of offence.

The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as ***"The Sexual Offence Act (Rules of Court) 2014*** which came into force on 11/07/2014 under Legal Notice No. 101.Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document. The prosecution produced birth certificate showing the age of the complainant. Age was therefore proved.

On the issue of penetration of the Complainant's private parts, Section 2 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.'

This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus:

"…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. <u>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</u>…."*** *(emphasis mine).*

The complainant testified that the accused removed her pants and then placed the thing he uses to urinate i.e. the penis into her vagina.

From by the foregoing evidence it is clear that the act of penetration was effectively proved.

On whether the Appellant was the perpetrator, as the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

Pw1 testified she was defiled by the appellant she stated on the material date while at home playing alone the accused grabbed her and pulled her to the maize plantation and defiled her by placing his thing he uses to urinate in her vagina. The complainant categorically stated the same during cross examination and stated further that the accused promised her Kshs.50/= which he did not give her. When the appellant was put to his defence he did not offer any evidence to rebut what the complainant had stated, all he stated was that he was surprised when he was arrested by the police. The accused was known to the accused ell and the offence occurred during the day. I am satisfied that identification was positive and free from error.

The appellant has prayed for leniency on the sentence. Sentencing is discretion of the court and the high court can only interfere if the sentence is illegal or was arrived at by applying wrong principles of law. From the evidence on record it emerged that the complainant was a minor aged 9 years old.

The appellant was charged with offence of defilement Contrary to Section 8(1) as read with 8(2) and Section 8(2) provides: -

> ***"2) 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."***

I have considered the mitigation and fact the accused is first offender. The sentence of life imprisonment is set aside and substituted thereof with imprisonment for **25 years** from date of conviction on **3rd July, 2018**.

Dated, signed and delivered at Bungoma this 5th day of June, 2020.

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S N RIECHI

JUDGE