REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 199 OF 2019

ANDREW MUNENE THAMBURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence by Hon. J.

Irura PM made on 22/10/2019 in Nkubu PM S.O No. 11 of 2019)

J U D G M E N T

1. **Andrew Munene Thamburi ('the appellant')** was charged with the offence of defilement contrary to ***Section 8 (1)*** as read with ***Section 8 (2)*** of ***the Sexual Offences Act No. 3 of 2006***. It was alleged that on 24/3/2019 at Taita Location, Imenti South Sub-County within Meru County, the appellant intentionally caused his penis to penetrate the vagina of **WK ("the complainant")** a child aged 2 years old.

2. He also faced an alternative charge of committing an indecent act with a child contrary to ***Section 11 (1) of the Sexual Offences Act No. 3 of 2006***. It was alleged that on the same day and place, the appellant intentionally touched the vagina of WK a child aged 2 years old with his penis.

3. The trial Court convicted him of the main charge of defilement and sentenced him to serve life imprisonment.

4. Aggrieved by the said decision, the appellant filed this appeal challenging both the conviction and sentence raising 10 grounds that can be collapsed into 4 as follows; ***that the trial court convicted him on the prosecution evidence that was inconsistent and contradictory, failed to consider the appellants defence, that the prosecution case was not proved beyond any reasonable doubt and that the sentence was unconstitutional.***

5. As held in **Okeno v. Republic [1972] EA 32**, this Court as the first appellate Court must re-appraise the evidence afresh review the same and come up with its own findings and conclusions but having in mind that it did not have the advantage of seeing the witnesses.

6. The evidence before the trial court was that, on the material day at about 3.00 pm while **PW2 AK** was washing utensils, the appellant entered the compound and when the complainant (her daughter) saw him she ran towards him. He lifted her up and the complainant followed him into his house. About two hours later, **Pw2** heard the complainant crying loudly.

7. She went to investigate and found the complainant leaving the appellant's house. When asked what was wrong, the complainant could not answer but continued to cry while pointing at the appellant's house. **Pw2** gave the complainant a *pottie* but she refused to use it. When she asked the appellant what had happened to the child, the appellant's response was that nothing had happened.

8. **Pw2** then sought the help of the caretaker, **Pw3 Luciana Kajuju** who examined the complainant's private parts and found nothing. She advised that they take the complainant to hospital where she was examined and treated.

9. **Pw1 Bayaine Moses,** a clinical officer at Kanyakine Sub-County Hospital examined the complainant. He produced the P3 and PRC forms in respect of the complainant. On examination, he found the complainant's vulva and the libia minora to be inflamed. There was also laceration on the interior side of the vagina. The hymen was intact and no discharge was noted. He opined that the said injuries were indicative of forcible vaginal penetration. He told the court that other than a penis, any other object could have caused the inflammation.

10. **Pw4 CPL Anne Mwende** investigated the case. On the report being made, she commenced investigations and established that at the time of the incident, the complainant was aged one year and eleven months. The appellant was a neighbor to the complainant. She referred the complainant to hospital and on being provided with the necessary documents, she arrested the appellant.

11. **Pw5 Dr. Daniel Muriuki Muthomi** of Kanyakine sub-county hospital examined the complainant on 23/7/2017. He found her to be able to walk and run slowly. She could speak a word or two of what is in her surroundings. He opined that the child was too young to give evidence in court as she had not reached the age of interacting with other people. The child was not able to talk but she appeared traumatized. He produced a medical report to that effect.

12. In his defence, the appellant told the court that on the material day at about 12-1 pm, he entered his house to prepare lunch. Two children followed him to his house but one later left. The complainant started touching her private parts which prompted him to think that she wanted to go to the toilet. He called **Pw2** and asked her to give the complainant a *pottie.* **Pw2** took the child and stayed with her outside for thirty minutes. Another woman came and told PW2 that they should go to hospital and when they came back, they claimed that the child had been defiled. That is when he was arrested.

13. The court has carefully considered the submissions of the respective parties.

14. The first ground was that the trial court erred in not considering that the prosecution witnesses gave inconsistent and contradictory evidence. In his submissions, the appellant contended that **Pw1** had testified that the complainant had told him that bad manners had been done to her. This contradicted the evidence of **Pw5** who stated that the complainant was of tender years and could not utter more than two words.

15. From the record, it is clear that **Pw1** told the court that when he interviewed the minor, she told him that bad manners had been done to her. However, it later transpired on the evidence of **Pw5** that the minor could not communicate because of her tender age. That was obviously a contradiction.

16. Despite the said contradiction, the trial court did not base its decision on the evidence of **Pw1's** assertion that bad manners had been done to her. Even if that was the case, the contradiction was in my view too minor to be material. It is only when the contradiction and inconsistencies in evidence is material that such evidence is supposed to be wholly disregarded.

17. In **Eric Onyango Ondeng' v. Republic [2014] Eklr,** the Kenyan Court of Appeal quoted with approval the holding by the Uganda Court of appeal in **Twehangane Alfred v. Uganda[2003] UGCA, 6** wherein it was held that: -

> ***"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained will usually, but not necessarily, lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".***

18. This Court finds that the contradiction alluded to was not material as to affect the prosecution case. That ground lacks merit and it therefore fails.

19. The second and fourth ground are related. These are that the prosecution case was not proved to the required standard and that the appellant's defence was not considered. It was submitted for the appellant that there was no evidence that the injuries on the complaint's private parts were caused by a human genital organ. That there was a possibility that the complainant was penetrated by any other body organ or object which would consequently amount to a different offence. That there was no one who witnessed the incident.

20. It was further submitted that it was probable that the complainant's inflammation and irritation may have been caused by the use of pampers which children of that age are often dressed with. The cases of **Queen v. Manuel Vincent R.V. Josphat Kipruto Bett [2015] eKLR, Quintanilla 1999 ABOB 769, Kipng'etich v. Republic [1985] KLR 392,** and **Sawe v. Republic [2003] KLR 364** were relied on in support of those submissions.

21. There are three key ingredients in proving defilement. These are; the age of the complainant, penetration of the complainant's sexual organ and that an accused is the perpetrator.

22. The age of the complainant was settled by the Child's Clinical Health Card which indicated the complainant was born on 4/4/2017. That being the case, the complainant was aged 1 year 11 months as at the time of the incident.

23. On penetration, ***section 2 of the Sexual Offences Act*** defines penetration as, *'the partial or complete insertion of the genital organ of a person into the genital organ of another person'.*

24. In **Mark Oiruri Mose vs R [2013] Eklr,** the Court of Appeal stated: -

> ***'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. 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'.***

25. Further, in **Erick Onyango Ondeng v. Republic (2014) Eklr**, the Court held: -

> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."***

26. In the present case, **Pw1** told the court that on examining the complainant, he found the vulva and the libia minora inflamed and there

was laceration on the interior side of the vagina. He was of the opinion that this was indicative of forceful sexual penetration. He however observed that apart from a penis, other objects could cause such injuries. In the present case, there was no evidence or suggestion of any such other objects.

27. The appellant submitted that the inflammation might have been caused by diapers. There was no evidence that the minor was wearing any such diapers at the time or any other time. When both **Pw1 and Pw2** testified, no such suggestion was put to them. The appellant cannot purport to suggest the same at the submission stage.

28. In any event, in his defence, the appellant stated that he saw the minor touch her private part while in his house. He never told the court the object with which she was touching her vagina. Neither did he tell **Pw2** of that fact when she asked him what had happened to make the minor for her to have started crying.

29. In this regard, the Court is satisfied that the prosecution established that there had been penetration of the minor. That ingredient was proved.

30. The final ingredient is whether the appellant was the perpetrator. Both the testimony of **Pw2** and the appellant were that the minor was in the house of the appellant. She entered the said house and remained for a long time. She only emerged therefrom crying uncontrollably while pointing at that house. There was no other person in that house except the appellant. The appellant attempted to introduce a third person in his defence. However, the appellant neither named that person nor called him to testify. Further, he did not raise it while cross-examining the prosecution witnesses.

31. In this regard, this Court finds that the trial Court did not only fully and sufficiently consider the appellant's defence, but that it rightly dismissed the same as being an afterthought. Accordingly, the third ingredient was sufficiently proved.

32. In this regard, the prosecution case was proved beyond any reasonable doubt. The appellant's defence could not displace the same. That ground also fails.

33. The final ground was that the sentence handed down was constitutionally unfair, disproportionate and inappropriate. The cases of **Christopher Ochieng v. Republic [2018] Eklr** and **Jared Koita Injiri v. Republic [2019] Eklr** were relied on in support of those submissions.

34. While the ***Sexual Offences Act, No. 3 of 2006*** provide life sentence as the minimum sentence, the cases cited by the appellant indicate the existence of discretion in sentencing. Considering the circumstances of the offence, I consider life sentence as being disproportionately excessive and hereby set it aside.

35. In the circumstances, the appeal on conviction is dismissed. The appeal on sentence is successful. The life sentence is set aside and substituted with imprisonment for 15 years.

DATED AND DELIVERED AT MERU THIS 16TH DAY OF JULY, 2020.

A. MABEYA

JUDGE