REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 65 OF 2019

LESIIT, J

GNK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Judgment of 21st November, 2018

by Hon. J. Kibosia (Miss) SRM in Makadara Chief Magistrate's Court,

Criminal Case No. 54 of 2016)

JUDGMENT

1. The Appellant **GNK** was charged with one count of **Defilement** contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act (hereinafter SOA)**. The particulars of the charge were:

> **"On the 21st day of April 2016 at [Particulars Withheld] area in Kasarani Distict within Nairobi County intentionally caused your penis to penetrate the anus of AK a child aged 8 years."**

2. The Appellant was also faced an alternative count of **Indecent Act** with a child contrary to **section 11(1)** of the **Sexual Offences Act** whose particulars were as follows:

> **"On the 21st day of April 2016 at [Particulars Withheld] area in Kasarani within Nairobi County intentionally touched the Anus of AK a child aged 8 years with your penis."**

3. He was convicted of the main count of **Defilement** and sentenced to life imprisonment. He filed this appeal challenging both the conviction and sentence.

4. The Appellant has raised 14 grounds of appeal in his Petition of Appeal dated 5th February, 2019. I summarize them as follows. The Appellant decries failure by the Learned Trial Magistrate to provide him with legal representation *sua moto*, this being a serious case; that the court misdirected itself by failing to appreciate that the Appellant had sought leave to produce an OB No.35/27/4/16 of a report he had made to police against PW2; failing to resolve doubt in Appellant's favour by allowing inconsistency on the OB Number as per charge sheet compared with the evidence of PW3; admitting medical evidence by PW4 and 5 without supporting treatment records; rejecting the Appellant's defence that he had the complainant treated of pneumonia at the time of alleged offence; penetration was not proved as against the Appellant beyond reasonable doubt and finally carrying out a partial evaluation of the evidence thereby convicting the Appellant wrongly.

5. The Appellant prays for his appeal to be allowed, conviction quashed and sentence set aside and his immediate release. In the alternative one, he seeks to have his sentence varied and two, afresh hearing he ordered with admission of new evidence by the Appellant.

6. The facts of the prosecution case are that the complainant was a son of the Appellant and PW2. At the time of the incident the two had

separated since 2012. The complainant was 8 years old at time of incident. The complainant was sent to the Appellant to visit him as it was during school holidays. He spent 5 days with him and his wife DW2.

7. It is the complainant's evidence that he shared the bed with the Appellant and DW2 but that on the material night, the Appellant and DW2 disagreed causing DW2 to sleep in the couch. He testified that they retired for bed at 8 p.m. that as he slept next to the Appellant, he pulled down his trousers but that he pulled them back up. That the following day when he woke up, he felt pain in his anal region. He went to his mother on the evening of that day and by then he was incontinent unable to control his stool.

8. The Clinical Officer (PW4) who first examined the complainant on 27th April 2016 told court that the date of the alleged defilement was given to her as 21st April 2016. Upon examining the complainant, she noted a laceration on the posterior region of the anus, loose sphincter muscle and pain in the anal region. PW5 the Police Surgeon who examined the complainant on 6th May, 2016 found that he had pain in the anal region and also a small laceration.

9. The Appellant gave a sworn defence and called his (current) wife DW2. In his sworn defence the Appellant denied the charge. He stated that he brought up the Appellant from the age of 8 months, with Nan formula, after PW2 proved to be unruly and irresponsible until age 3 years when she took him away. The Appellant stated that he and PW2 had unresolved issues. He said his son loved his company a lot and he could never harm him.

10. DW2 on her part testified that the complainant visited them on the 8th April 2016. She testified that that night the complainant declined to sleep on the coach and instead slept in bed with his father. She slept on the coach. She said that the next day she saw the complainant naked as he played with other boys near the river. She reported it to the Appellant and on being questioned, he said ants were biting him. DW2 said that the same day in the evening, PW2 called her and spoke vulgar words against her. DW2 said that the day after that the complainant spent the whole day watching TV until 4 a.m. when she covered him. When she asked why the complainant should be allowed to watch TV that long, the Appellant told her to leave him alone.

11. DW2 testified that the very next day her brother took the complainant to hospital where he was treated for pneumonia. It was after this that her brother took the complainant back to her mother.

12. The Appellant relied on written and filed submissions which I have considered. They seem to raise grounds of appeal in them not as presented in the Petition of Appeal. I will deal with that later. Ms. Nyauncho, learned Prosecution Counsel opposed the appeal and urged the court to find that all the ingredients of the offence of defilement had been proved, and that the prosecution case was proved beyond any reasonable doubt.

13. This is a first appellate court and that being the case, I have the duty to analyze and evaluate afresh all the evidence that was adduced before the lower court, and draw my own conclusions of the matter, while giving an allowance for not having had the benefit of observing the witnesses. I am guided by the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic, Criminal Appeal No. 272 of 2005** where it was stated as follows:

> **"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of** *Okeno vs Republic [1972] EA 32* **will suffice. In this case, the predecessor of this court stated:**
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> 'The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.' **"**

14. I will deal with all grounds of appeal, those in the Petition of Appeal, and the ones contained in the written submissions. The submissions have raised a technical ground of appeal regarding the charge being defective and also being the wrong charge the Appellant should have faced.

15. Regarding defect, it is the Appellant's submissions that the word "unlawful" is missing on the particulars of the charge. He urged that the mistake was fatal, citing **ACHOKI VS. REPUBLIC [2000] 2EA** for that proposition. First of all, the cited case regarded a charge of **Rape** under the **Penal Code**. The offences are not similar. Secondly, I fail to perceive when a charge of defilement can be lawful. That ground is a technicality that was attractive in charges under the **Penal Code**. For offences under **Sexual Offences Act**, a technicality that urges that the word 'unlawful' should be included in the particulars of the charge is spurious and has no merit. I reject it accordingly.

16. The second technical point raised is fact the Appellant was charged with **defilement** yet the complainant is his biological son. That the charge ought to have been that of **Incest** contrary to **section 20(1)** of **Sexual Offences Act**. The case he cited of **Z.W.O VS. REPUBLIC KAKAMEGA HIGH COURT CAP 30 OF 2017** does not support him. The relationship between the complainant and accused in the cited case was that of cousins, who have been found not to fall within incestuous relationships. The court in the cited case held that the charge framed against the accused should have been **Rape** and not **Incest**.

17. In this case, it is true the Appellant and complainant were father and son. **Incest** contrary to **section 20** of **Sexual Offences Act** should have been the proper charge to prefer against the Appellant. That notwithstanding, the charge of **Defilement** contrary to **section 8(1)** of **Sexual Offences Act** was still appropriate given the age of the Complainant. I find nothing turns on this point.

18. The Appellant challenged the sufficiency of the evidence on penetration. The Appellant urged that the complainant alleged that the Appellant did *'tabia mbaya'* but when asked to say the meaning of that word, he did not respond. The Appellant urged the court to note that the complainant did not even complete the word buttocks. He urged further that the trial Magistrate observed that the complainant avoided eye contact with the Appellant, fidgeted throughout the time he testified, an action which Appellant urged was associated with a minor who is lying.

19. Appellant was mistaken about 'butt' being incomplete word for buttocks. "Butt" is a slang word for buttocks and is complete in itself. The complainant did not answer to the question by the prosecution as to what *'tabia mbaya'* stood for. However, he explained in plain words that *"he inserted his penis in my butt"*. He then explained his feelings the following day as including pain in his anus and incontinence. I find, this if believed is sufficient to prove that penetration took place.

20. As for the complainant fidgeting as he testified and the Appellant's argument that it was proof he was lying. I see no scientific finding to that effect. People can fidget for many reasons including lying. For a child it could mean they are uncomfortable especially of the onerous task of testifying against a parent. He was only 8 years old. He built confidence as he neared the end of his testimony going by the learned trial Magistrate's observations which were put on record. I cannot make a firm finding whether the complainant was lying or not lying as the reason he fidgeted.

21. The Appellant raised the issue of inconsistency in the evidence of prosecution witnesses. He argued that the number of days the complainant stayed in his house was contradicted. I agree with Appellant that the number of days the Appellant remained in his home is not clear. PW1 himself said he spent 3 days there. His mother PW2 stated that the complainant was in Appellant's house for five days and specified that it was from Friday to Wednesday. The difference of two days is significant especially because of PW2's evidence on the sequence of events leading up to the time she reported the matter to the police.

22. There is some disparity in the complainant's evidence in court and the narration he gave to PW4, the Clinician who examined him. According to what he told PW4, he did not accuse his father of defiling him and made it clear that he did not feel anything until he woke up the next day.

23. Apart from that disparity is the more disturbing detail. For a child who has been defiled changes of mood and behavior become apparent immediately the incident happens. Children cannot hide their feelings that easily. In this case the complainant said he did not tell any one about the incident until he went home to his mother. Further he said he remained in the Appellant's home until 1 pm playing in the grounds before returning to his mother.

24. From this it is rather curious that it is only when the Complainant went to his mother, PW2, that the behavioural and mood changes were noted. The Complainant made no explanations because according to PW2, it was after they spent a night with the complainant that he finally accused his father of sexual assault. That is when PW2 reported to the police. This was on the second day after the complainant returned to her house.

25. I have considered that according to the charge, the Appellant defiled the complainant on 21st. The complainant then went back to his mother's place on 22nd. The mother came to know of the incident on 23rd and reported to the police on the following day.

26. The OB record of the report to Police is No. 24 dated 27th April 2016. That was the day that PW2 reported the matter to the police. That date does not tie up with her evidence of the sequence of days between the day the complainant left the Appellant's house to the day she reported to police. There is a lacuna of 4 days unexplained. If the Appellant defiled the complainant on 21st, and PW2 reported to police 2 days later, it could not have been any date after 23rd April.

27. The prosecution needed to adduce evidence to create a nexus between the Appellant and the sexual assault. There should be no doubt regarding the Appellant's involvement in the incident. There should not be an unexplained gap in the evidence. A difference of 4 days from the date of incident to the day the incident is alleged to have been reported to the police is a long time.

28. Over all, I find that the learned trial magistrate did not interrogate the lapse in the evidence of PW2 and that of the complainant regarding the dates involved in this case. The complainant's behavior after the alleged offence as he explained to court was also not interrogated. Had the learned trial Magistrate interrogated the two issues, the court would have found that the evidence does not add up. A defiled child will not be able to behave normally after the fact. In his case, the complainant was able to wake up to eat food at 1 am of same night of assault. He then woke up to play until 1 pm the next day. He then went home by 5 pm. He was even able to climb walls to enter his home through the window. It is only after that that the mother noticed a difference in countenance and Complainant's behaviour. This does not make any sense to me.

29. There is no explanation why PW2 took 4 days to report the incident to police after she discovered it. Why does the OB read 27th if she claimed she reported on 23rd according to her evidence? This is unexplained and more importantly it is critical to the prosecution case.

30. I am fully aware that this is a child of 8 years old. The Appellant said he literally brought him up from 8 months old. In fact, PW2 corroborates this fact when she said that it was the Appellant who had the clinic card and birth certificate of the complainant. Why would the father have these two documents and not the mother? It is clear the Appellant cared more for the complainant than his mother did. I am not convinced he could turn against him in the night. More so I do not understand how the complainant told no one about it, and no one noticed anything until 2 days later. Could it be that the appellant was defiled elsewhere after he left his father's house before reaching his mother's place? That is a possibility from the circumstances of this case.

31. On the whole, I find that the evidence before court raises a nagging doubt in the mind. The law is clear that any doubt should be resolved in an accused person's favour. For these reasons, I find that the learned trial Magistrate ought to have observed the disparities in the

prosecution case which could not be resolved as against the entire evidence before court and should have given the Appellant the benefit of doubt.

32. In the result, I find merit in the Appellant's appeal, quash the conviction and set aside the sentence. The Appellant should be released forthwith unless he is otherwise lawfully withheld.

DELIVERED THROUGH TEAMS THIS 6TH DAY OF JULY, 2020.

LESIIT, J.

JUDGE