REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 34 OF 2020

JKN.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. M. Makari (Mrs.) – SRM Gatundu dated and delivered on the 30th day of January 2019 in the original Gatundu Senior Principal Magistrate's Court Sexual Offence No. 7 of 2017}

JUDGEMENT

In the court below the appellant faced a charge of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between September 2016 and December 2016 within Kiambu County the appellant intentionally and unlawfully did an act which caused penetration with his genital organ namely penis into the genital organ namely vagina of JWW a child aged 14 years old.

The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act where it was alleged that during the same period and at the same place he intentionally and unlawfully touched the buttocks and vagina of JWW a child aged 14 years with his penis.

After hearing and evaluating evidence from five prosecution witnesses and the unsworn statement of the appellant, the trial Magistrate made a finding that the prosecution had proved the charge of defilement against the appellant beyond reasonable doubt and convicted him and subsequently sentenced him to imprisonment for twenty years. Being aggrieved by the conviction and sentence he now appeals on the following grounds: -

> **"a. THAT, the learned trial Magistrate erred in law and fact by failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by the law.**
>
> **b. THAT, the learned trial Magistrate erred in law and fact by failing to find that the Prosecution witnesses' narrations of evidence were unbelievable and illogical.**
>
> **c. THAT the court failed to record the reasons for believing that the complainant was telling the truth contrary to the provisions of Section 124 of the Evidence Act.**
>
> **d. The learned trial Magistrate erred in fact and law when he failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong decision that the Appellant had defiled JWW.**
>
> **e. THAT, the trial Magistrate erred in law by failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice."**

The appeal was canvassed through written submissions. The appellant acted in person while the respondent was represented by Learned Prosecution Counsel, Mr. Ongira.

My duty as the first appellate court is well defined. It is to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses and making provision for it – ***(See Okeno v Republic [1972] EA 32)*** and also ***Kiilu & another v Republic [2005] 1 KLR 174)***. I have also carefully considered the grounds of appeal, the rival submissions and cases cited.

The offence of defilement is created by **Section 8 (1) of the Sexual Offences Act** which states: -

> **"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

In interpreting this Section, the courts have invariably held the key ingredients of the offence to be that **the victim (complainant) is a child, that there was penetration** and **that the penetration was by the appellant (positive identification of the appellant)** – (***See Raphael Mutunga Mutinda v Republic [2019] eKLR, Pappyton Mutuku Ngui v Republic [2012] eKLR*** and ***Charles Wamukoya Karani v Republic, Nyeri Criminal Appeal No. 72 of 2013).***

The meaning of **"child"** is found in **Section 2 of the Children's Act** as well as in **Article 260 of the Constitution** and it is **"an individual who has not attained the age of eighteen years."** The word "**penetration"** is defined in the **Sexual Offences Act** to mean the **"partial or complete insertion of the genital organs of a person into the genital organs of another person."** Identification is a matter of fact and evidence.

The prosecution tendered a certificate of birth that indicated the complainant herein was born on 24th December 2002 thereby conclusively proving that at the material time she was a child aged fourteen years. Under the law she was therefore legally incapable of consenting to sexual intercourse.

I am also satisfied that there was credible evidence to prove penetration beyond reasonable doubt. Medical evidence showed that the complainant was pregnant. The treatment notes, P3 Form and Post Rape Care Form (PRC) confirm that when the complainant was first seen at Gatundu Hospital on 3rd March 2017 she was already pregnant. It is my finding that in the circumstances of this case and taking the evidence as a whole her being pregnant is proof that there was penetration and that she had been defiled. I note however that in the proceedings the trial Magistrate used the phrase ***"defiled me"*** rather than the actual words that may have been used by the child herself and would like to bring the following exhortation by the Court of Appeal in the case of **Muganga Chilejo Saha v Republic [2017] eKLR** to the minds of the Learned Magistrates who hear similar cases: -

> **"Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like,** *"alinifanyia tabia mbaya",* **(IE V R, Kapenguria H.C Cr. Case No. 11 of 2016),** *"he pricked me with a thorn from the front part of this body.",* **(Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."**

Having found that the age of the complainant and penetration were proved beyond reasonable doubt, **the only other issue for determination is whether the appellant was positively identified as the perpetrator of the offence.** The complainant testified that the appellant was her father. It transpired from the evidence that he was in fact her step-father. The appellant confirmed this and also the complainant's evidence that she lived with her grandmother and had only moved to her parents' house when her mother was admitted to hospital. In his defence, the appellant also confirmed that they stayed together peacefully until 26th February 2017 when the complainant dropped the bombshell that she was pregnant and he was responsible for it. **Section 124 of the Evidence Act** empowers a court to convict solely on the evidence of a victim of a sexual offence provided for reasons to be recorded it believes the victim is telling the truth. The complainant in this case knew the complainant very well as he was her step-father, and it is my finding that she positively identified him as the perpetrator of the offence. He corroborated the complainant's evidence that her mother was away in hospital for about seven days and it is my finding that it was during that period that he got an opportunity to commit the offence. The complainant's mother also confirmed that the complainant did not open up until months later when her uncle came to visit and she insisted on going away with him and she (mother) insisted on knowing the reason the complainant wanted to leave. The appellant confirmed that it was around the period the complainant's uncle came calling that the complainant disclosed what he had done. I am therefore satisfied from the evidence as a whole that the complainant was a truthful witness. The key ingredients of the offence of incest with a child and that of defilement are the same save that for incest it must be shown that the perpetrator and the child have a filial relationship (***see Section 23 of the Sexual Offences Act).*** Penetration and age of the complainant must be proved in both offences. **Section 63 of the Interpretation and General Provisions Act states: -**

> **"63. Where an act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any of those laws, but shall not be liable to be punished twice for the same offence."**

That the appellant was charged with defilement but not incest does not therefore entitle him to an acquittal and his submission to that effect is rejected. I also refuse to accept the submission that the charge was defective for that reason.

It was the complainant's evidence, and from the evidence as a whole this court believed her, that during the period in issue she was not defiled by a person other than the appellant. As to whether the failure to do a DNA test was fatal to the prosecution's case my finding is that it was not. DNA test is in the discretion of the court and is not mandatory (***see Section 36 (1) of the Sexual Offences Act)*** and it has also been held time and again that medical evidence is not a requirement in sexual offences; that the evidence of the victim is enough provided the court for reasons to be recorded believes him/her (**Section 124 of the Evidence Act).** In the case of **Geoffrey Kioji Vs Republic, Crim. App. No. 270 of 2010 (Nyeri)** the Court of Appeal held: -

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person."***

In this case the trial court ordered a DNA test which could not be carried out for lack of chemicals. I do not therefore draw any adverse inference from the omission. Moreover, there is sufficient evidence independent of that medical examination to prove the appellant defiled the complainant.

The appellant also submitted that the burden of proof was shifted to him. I do not believe so and like the trial Magistrate I state that the defence did not rebut the cogent and watertight evidence of the prosecution witnesses. There was nothing in the evidence to demonstrate that the testimony of the complainant or that of her mother was a fabrication. There was no grudge between them and the appellant himself did not allege any that could have motivated them to lie against him. In her judgement, the trial Magistrate stated as follows in regard to the evidence of the complainant: -

> ***"……. Her evidence was remarkable for its clarity and valor. Further, on cross examination the complainant was consistent and remained unwavering and maintained it was the accused person who had defiled her and the court had no reason not to believe her."***

The appellant's submission that the court did not comply with the proviso to **Section 124 of the Evidence Act** is therefore not correct. As for the complaint that the defence was ignored the record shows that the trial Magistrate analysed the appellant's defence but found the evidence against him overwhelming. As has always been stated the standard of proof in criminal cases is not one beyond a shadow of doubt but one beyond reasonable doubt – **See Miller v Ministry of Pensions [1947] 2 ALLER 372** where Lord Denning stated: -

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***

I am satisfied that the prosecution proved the charge against the appellant to the standard required and that his appeal against conviction has no merit. The trial Magistrate arrived at the sentence upon considering the nature and circumstances of the offence as well as the plea in mitigation and I see no justifiable reason to disturb it. In the premises the appeal is dismissed in its entirety. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE