



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. 18 OF 2020**

**KENNEDY HAROLD OUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**{Being an appeal against the judgement of Hon. BJ Bartoo RM - dated and delivered**

**on the 19th day of September, 2018 and sentenced on 27<sup>th</sup> day of September, 2018**

**in the original Chief Magistrate's Court Criminal Case No. 51 of 2017}**

**JUDGMENT**

The Appellant was charged with Defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the offence were that; Kennedy Harold Ouma, on 28<sup>th</sup> May 2017 at [Particulars Withheld] area of Juja Location within Kiambu County intentionally and unlawfully caused his penis to penetrate the anus of EMO a girl aged 6 years.

The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the alternative offence are that; Kennedy Harold Ouma, on 28<sup>th</sup> May 2017 at [Particulars Withheld] area of Juja Location within Kiambu County intentionally touched the anus of EMO with his penis a child aged 6 years.

The Appellant was convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act.

Being dissatisfied with the outcome of the case, the Appellant lodged an appeal before this honorable court on the following grounds: -

**“1. That the learned trial magistrate erred in matters of law and fact for failing to find that the charge sheet as was tabled before the honorable court was incurably defective and cannot sustain a conviction.**

**2. That the learned trial magistrate erred in matters of law and fact for failing to find that the penile penetration of the complainant genitalia was not proved to the requisite threshold as required by the law for the reasons that the medical examination report was tainted by authenticity.**

**3. That the learned trial magistrate erred in matters of law and fact for failing to find that I was not properly identified as the perpetrator of the offence charged.**

**4. That the learned trial magistrate erred in matters of law and fact for failing to find that the entire of the prosecution's case was premised on hearsay evidence generally inadmissible in criminal cases.**

**5. That the learned trial magistrate erred in matters of law and fact for failing to find that my mode and circumstances of arrest were not justifiable by the evidence tendered.**

**6. That the learned trial magistrate erred in matters of law and fact for failing to find that the prosecution failed to prove that the appellant either owned or occupied the house where the offence was allegedly committed.**

**7. That the learned trial magistrate erred in matters of law and fact for failing to note that the essential prosecution witnesses necessary to prove basic facts were not produced.**

**8. That the learned trial magistrate erred in matters of law and fact for failing to find that there was variance between the evidence given by the prosecution witnesses to the police and that adduced in court.**

**9. That the learned trial magistrate erred in matters of law and fact for failing to find that there existed explicit evidence of grudge sufficient in itself to justify a framed case.**

**10. That the learned trial magistrate erred in matters of law and fact for failing to find that the entire prosecution's evidence was self-contradictory and unsafe to base a conviction."**

The appeal was heard by way of written submissions. The Appellant contended that there was no proof of penetration. It was also his submission that the prosecution's case was full of contradictions; that there was contradiction on the degree of injuries occasioned to the genitalia of the complainant and that he was not properly identified as the perpetrator of the alleged offence. It was his submission that the arresting officer was not called as a witness. The Appellant further submitted that the charge sheet was defective in that all the evidence adduced referred to vaginal penetration whereas the charge sheet makes reference to anal penetration. He submitted that there was also contradiction as to the dates of the occurrence of the alleged defilement hence raising doubts as to whether the alleged offence really occurred. He also contended that the prosecution left out witnesses who he deemed to be crucial in the case. He urged this court to find that the prosecution did not prove his guilt to the required standard and the appeal ought to be allowed, conviction quashed, sentence set aside and he be set free.

Ms. Muthoni Learned Counsel for the State opposed the appeal stating that the ingredients of the offence were proved. On penetration, Counsel submitted that the victim testified that she was "**raped**" and that the Appellant inserted his penis into her vagina. Counsel stated that this was corroborated by the evidence of the medical officer who examined the minor and noticed that the minor had a swelling on the vulva and a tear extending to the anal region hence confirming that there was penile penetration even though the hymen was intact. She also submitted that the integrity of the P3 form and Post Rape Care (PRC) form was unsuccessfully challenged. Counsel stated that on age, PW1, the victim's mother, testified that the complainant was 6 years at the time of the alleged defilement.

On the issue of identification, Counsel submitted that the Appellant was well known to the victim as it was both the evidence of the complainant and PW1 that they lived in the same plot with the appellant and his wife and child and therefore they were neighbors. Counsel asserted that identification was not merely visual but by recognition hence more reliable.

In response to the Appellant's contention that the charge was defective, Counsel submitted that the Appellant was charged under the correct provision of law - Section 8(1) which provides for the offence and subsection (3) which provides for the penalty. Counsel also submitted that the prosecution's case was not based on hearsay since the minor gave direct evidence in line with **Section 63 of the Evidence Act**. Counsel contended that the oral evidence was corroborated by the medical evidence as well as the evidence of PW1 and PW4 who were reporting what the child had told them. Counsel made reference to **Section 124 of the Evidence Act** which gives exception to the general rule for corroboration. In regard to the issue of crucial witnesses, Ms. Muthoni asserted that there is no requirement for any particular number of witnesses to prove a fact and that moreover the evidence of the victim's aunt and that of the landlord were not key in proving the ingredients of the offence. She cited Section 143 of the Evidence Act to buttress her submission.

On the mode of arrest, Ms. Muthoni submitted that no complaint was raised by the Appellant during his arrest which would have prompted the trial court to summon the arresting officer for a response. In conclusion, Ms. Muthoni urged this court to consider that all the circumstances pointed to the Appellant as the perpetrator of the heinous crime against the child who was only six years old and to find that there was no other reasonable explanation for the child's injuries other than that the Appellant defiled her. Therefore, she urged this court to uphold the conviction and the sentence of the trial court.

I have considered the Appellant's grounds of appeal, submissions by both parties and the authorities cited. This is a first appeal and the duty of the first Appellate court was succinctly stated in *Okeno Vs. Republic (1972) EA 32*. Briefly put, this court must reconsider the evidence before the trial court, evaluate it itself and draw its own conclusion though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in that respect.

The issues for determination are: -

- 1. Whether the charge is defective.**
- 2. Whether there is inconsistency on the date in which the alleged defilement occurred.**
- 3. Whether the offence of defilement was proved beyond reasonable doubt.**
- 4. Whether the conviction and sentence is proper.**

#### **1. Whether the charge is defective**

The particulars of the offence read as follows: -

***"Kennedy Harold Ouma; on the 28<sup>th</sup> day of May 2017 at [Particulars Withheld] area of Juja Location within Kiambu County intentionally and unlawfully caused his penis to penetrate in the anus of EMO a girl aged 6 years."***

However, the evidence adduced at the trial was that the appellant inserted his genital organ into the vagina of the complainant. It is therefore correct that in so far as the charge sheet makes reference to anal penetration but not **“insertion of his genital organ into the genital organ of the complainant”** meaning vagina as was the evidence adduced, the same is defective. However, I am not persuaded that the use of the word **“anus”** rather than vagina was fatal. **Section 8(1) of the Sexual Offences Act** gives a description of the offence as meaning: **“...a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”** **Section 2 of the Act** defines penetration as; **“...the partial or complete insertion of the genital organs of a person into the genital organs of another person.”**

In the case of **Christopher Ochieng V Republic (2018) eKLR** the Court of Appeal stated that: -

*“When the wording on the charge sheet is considered against the wording of section 8(1), what becomes clear is that the words are merely lifted from the wordings of the provision. And when this wording is read together with the definition of “penetration” there can be no doubt that the offence concerned the penetration of the genital organs of one person with the genitals organs of another. In effect, the charge sheet made it abundantly clear that the appellant was facing the offence of defilement under the Sexual Offences Act where he was charged with penetrating MO with his genital organ. The evidence adduced also left no doubt that penetration was by the appellant’s genital organs.”*

**Section 134 of the Criminal Procedure Code** which deals with framing of charges states: -

*“.....Every charge...shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.” (See also Section 137 of the Criminal Procedure Code).*

In my view therefore, the wording of the charge sheet sufficiently communicated the nature of the charge and provided particulars necessary for the Appellant to comprehend the charge and the offence that he faced. From the record it is clear that the Appellant was throughout the trial aware that what was alleged was that he inserted his genital organ (penis) into the child’s genital organ (vagina). He did not raise any objection to the charge and in my view the defect is curable under **Section 382 of the Criminal Procedure Code** as he was not in any way prejudiced by what I consider to be a typographical error in the charge sheet.

## **2. Whether there is inconsistency in the date in which the alleged defilement occurred.**

On the issue of inconsistency in the date of the occurrence of the alleged defilement, the complainant’s mother (PW1) testified that it was on 30.5.2017 that she reported the incident to Gachiru AP Post since she had been away from home for three days running some errands. PW4 also confirmed that the matter was reported on 30.5.2017. If PW1 was away for three days and she returned on 30.5.2017, it thus places the incident to have occurred between 28<sup>th</sup> and 30<sup>th</sup> May 2017. This means that the incident might have happened on 28<sup>th</sup> May 2017 as captured in the charge sheet hence no inconsistency on the dates as alleged by the Appellant. Moreover, any inconsistency would be curable under **Section 214 (2) of the Criminal Procedure Code**.

## **3. Whether the offence of defilement was proved beyond reasonable doubt.**

It should be noted that to secure a conviction on the offence of defilement, one should be mindful of the ingredients of defilement as highlighted in the unreported case of **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013**, which has been cited with approval in the reported case of **Kyalo Kioko v Republic [2016] eKLR** that: -

*“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”*

On age, PW1 (the complainant’s mother) testified that the Complainant was 8 years old and was born in 2010. She produced a clinic card indicating the date of birth as 12/6/2010 placing the complainant (PW2) at 6 years old at the time of the incident. The complainant (PW2) testified she was 7 years old. The charge sheet and the doctor (PW3) who examined the complainant placed the complaint at 6 years old. Though there is inconsistency on the age of the complainant, the fact in issue was whether she was a child. **Section 2 of the Children Act** defines child as **“any human being under the age of eighteen years.”** Therefore, I find that the fact that she was a child was proved beyond reasonable doubt. Her exact age becomes material only for purposes of sentencing and in this case it is not in contention as what was crucial was to prove she was less than eleven years old and that was proved.

On the issue of penetration, the complainant (PW2) testified that the Appellant raped her. She expounded that the Appellant inserted his penis, the one used to urinate, into her vagina. PW3 (the medical officer) corroborated her evidence. He produced a P3 form in which it was his finding that although the hymen was intact there was swelling on the vulva and a tear on the vagina extending to the anal region indicating that there was partial vaginal penetration.

In the case of **Raphael Mutunga Mutinda V Republic (2019) eKLR** it was held that;

*“Therefore, for the offence of defilement to be proved, evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purpose of penetration as the said insertion need not be complete.”*

I therefore find that penetration was proved to the standard required.

Finally, on issue of identification, PW2 testified that she knew the Appellant and further stated that he lived with his wife and child and that they were neighbors as they lived in the same plot. She also identified the place where she was defiled as the Appellant's house. This was corroborated by her mother (Pw1) and I find that the Appellant was positively identified through recognition as the perpetrator of the offence.

As for the Appellant's submission that the prosecution left out persons, the children, particularly S who reported the matter to PW1 and JM, who were deemed to be crucial in this matter, it is my considered view that not calling them is not fatal. Under **Section 124 of the Evidence Act** the evidence of the complainant is sufficient to convict the Appellant provided the court believes her to be telling the truth and records the reasons for doing so. In this case I believed the complainant and found that in itself it was sufficient to convict the appellant. Her evidence was very consistent and the support it received from the evidence of her mother and the doctor prove she was a truthful and reliable witness. I am not persuaded that this is a case where the evidence was barely sufficient hence warranting the court to draw an adverse inference from the prosecution's omission to call the alleged witnesses.

#### **4. Whether conviction and sentence was proper in law.**

It is my finding that all the elements that constitute the offence of defilement were proved beyond reasonable doubt and that therefore the conviction was safe. In regard to the sentence the victim of the offence was 6 years.

**Section 8(2) of the Sexual Offences Act** provides for a mandatory sentence. The section states: -

**“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 am alive to the jurisprudence emerging from the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another V Republic (2017) eKLR**. I am also alive to the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** in which the Court of Appeal imported the **Francis Karioko Muruatetu decision (supra)** to sexual offences. However, it is my finding that in the circumstances of this case the sentence imposed by the trial court was justifiable and fair. Moreover, apart from making a fleeting mention of the word sentence the appellant did not challenge the sentence either in the grounds of appeal or in the submissions. In the premises I find no merit in the appeal and the same is hereby dismissed in its entirety. The entire judgement of the trial court and the sentence are upheld. It is so ordered.

**Signed and dated this 28<sup>th</sup> day of October 2020.**

**E. N. MAINA**

**JUDGE**

**Judgement dated and delivered Electronically via Microsoft Teams on this 9<sup>th</sup> day of November 2020.**

**MARY KASANGO**

**JUDGE**