REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 53 OF 2019

MICHAEL NDULILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. Otieno J. (RM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 18 of 2017 delivered on 1st April 2019)

JUDGMENT

1. **Michael Ndulili** the Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on 15th September 2017 at Kyumu area Kilala location Makueni sub-county Makueni county intentionally caused his penis to penetrate the vagina of M.M a child aged 6 years. He faced an alternative count of committing an indecent act with a child M.M aged six (6) years.

2. The prosecution case was premised on the evidence of six (6) witnesses while the Appellant elected to remain silent. The Appellant was later found guilty, convicted and sentenced to life imprisonment.

3. Being dissatisfied with the judgment he filed this appeal raising the following amended grounds:

a. **That** the learned trial Magistrate erred in law and fact by convicting him while the prosecution failed to prove all the elements of the offence beyond reasonable doubt.

b. **That** the learned trial Magistrate erred in law and fact by convicting him whereas the prosecution failed to prove through identification, that it was him who committed the offence.

c. **That** the learned trial Magistrate erred in law and fact by convicting him while the prosecution failed to avail the most essential witnesses.

d. **That** the learned trial Magistrate erred in law by convicting him without upholding his right to a fair trial while not adhering to his right to a fair trial as guaranteed under Article 50(1) of the Constitution by failing to appoint an intermediary.

e. **That** the learned trial Magistrate erred in law and fact by convicting him whereas the medical evidence and the DNA test could not conclusively link him to the offence.

f. **That** the learned trial Magistrate erred in law and fact by convicting him whereas the prosecution case was based on suspicion which cannot be a basis of conviction.

g. **That** the learned trial Magistrate erred in law and fact by shifting the burden of proof on him while failing to appreciate that the burden always lies with the prosecution.

4. The prosecution case was that Pw5 (M.M) a child then aged six(6) years was on her way from school on 15th September 2017 at around 4:00 pm when she met the Appellant at Kaiti river. He grabbed her and defiled her. He had cows and had taken her to his house.

5. **Pw1 Henry Mutisya Kimeu** the father to M.M received a report of the defilement and rushed to where M.M was with his brother. He found her with blood stained clothing namely, biker, school uniform, underwear and tee-shirt (EXB1-4). She told him she had met the Appellant who tricked her into the forest from where he defiled her. She was taken to hospital by her mother and a report made to Kilala A.P camp and Makueni police station. He said on the date of incident he was grazing cows not far from the scene. He gave the name of the defiler

who was arrested while in the forest on the 3rd day of incident.

6. **Pw2 Mary Ndanu Mutunga** who is Pw5's father said the child was admitted for five days at Makueni referral hospital. Her clothes (EXB1-4) had been soaked in blood. She availed the child's notification of birth (EXB6) showing she was born on 3rd July 2011. She confirmed that the Appellant's home is across Kaiti river.

7. **Pw3 Stella Muasya** produced the P3 form (EXB 8) on behalf of Dr. Loiposha who made the following findings.

- *Perennial tear (2nd degree)*
- *Surgery of the tear*
- *Blood and fiscal matter due to anal sphincter, and loss of sphincter muscle.*
- *Pervaginal bleeding.*
- *Had an abnormal walking gait*
- *She sustained both anal and vaginal injuries.*
- *Torn/broken hymen*
- *Severe lacerations (EXB5)*

8. A medical examination was also done on the Appellant and he was found to have no injuries (EXB8).

9. **Pw6 No. 83607 Corporal Esther King'ori** was at Makueni police station on 19th September 2017 when Pw1 reported the defilement of M.M. She went with him to Makueni referral hospital children's ward where the child was admitted. She could not talk much as she had just come from theatre. The defilement had occurred on 15th September 2017. This witness recorded the child's statement on 22nd September 2017 after her discharge from hospital.

10. She told her how she had met Michael on her way from school and how he had taken her to the bush, removed her inner clothes and his trouser half way and defiled her. She screamed and he arose and left her there.

11. She produced the child's blood stained clothes EXB1 – 4. M.M identified the defiler as Michael whom she used to meet herding at the same place on her way to school. In cross examination, she denied that the Appellant had been beaten to confess to the offence.

12. **Pw4 Eva Aluvala** from Kenya medical research institute and incharge of DNA testing lab testified to having received (EXB1-4) which contained human blood stains. They also collected blood samples from M.M and the Appellant. They examined for presence of semen having noted that it was a sexual assault but none was found.

13. They extracted DNA from the exhibits and generated a DNA profile. They only found a female DNA. On comparison of the profiles on the exhibit they confirmed them to belong to the samples from M.M. No DNA profile of the Appellant was found and his DNA could not be linked to the exhibits. The report was produced as EXB9. The Appellant when placed on his defence elected to remain silent.

14. The appeal was canvassed by way of written submissions. The Appellant has repeated himself so much in his submissions. He has however raised issues of contradictions and inconsistencies in the evidence of M.M and that of the other witnesses. He has further submitted on the failure by the prosecution to call key witnesses like the arresting officer and Pw1's brother called Alloys Muthoka Kimeu. He also wonders how M.M was so open with her step father (Pw1) and not the mother (Pw2).

15. He has further raised issue with the failure by the trial court to appoint an intermediary for the victim which prejudiced him. On this he has referred to the case of **M.M –vs- Republic (2014) eKLR** where the Court of Appeal addressed the role of an intermediary. All in all he says M.M Pw5 was not truthful and other independent evidence was required to support her evidence.

16. He contends that the case was poorly investigated as crucial evidence was left out e.g. the jacket that was recovered from the forest. Secondly the scene was not visited. He adds that from the evidence of Pw1 and Pw2 he was arrested and charged on the basis of suspicion.

17. The Respondent through Mrs. Anne Penny Gakumu the learned counsel has opposed this appeal. She states that age and penetration were proved and the finding should not be disturbed. She submits that M.M and Appellant were not strangers to each other and she identified the Appellant very well.

18. Relying on the case of **Richard Munene –vs- Republic Criminal Appeal No. 74 of 2016 (Nyeri)** she submits that its only substantial contradictions and inconsistencies that would be fatal to the prosecution's case. She did not see any defect in the charge sheet.

19. It's her submission that the charge was proved to the required standards and the sentence meted out is lawful.

Analysis and determination

20. This being a first appeal, the court is under duty to re-analyse and re-consider the evidence on record and arrive at its own conclusion. In the case of **Boru & Another –vs- Republic (2005) I KLR 650** the court of Appeal stated thus:

> ***(4) "A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions***

in deciding whether the judgment of the trial court should be upheld, as well as to deal with any questions of law raised on the appeal."

Further in **Kiilu & Another –vs- Republic (2005) I KLR 174** it held that:

> **(2)** ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh exhaustive examination and to the appellate court's decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> **(3)** ***"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 courts' 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.***

21. I have therefore considered the evidence on record, the grounds of appeal, both submissions and the law. The main issue I find falling for determination is whether the evidence adduced linked the Appellant to this offence. In other words was the Appellant identified as the perpetrator?

22. A birth notification S/No BA xxxxxx (EXB6) showed that M.M was born on 3rd July 2011. The incident occurred on 15th September 2017. She was therefore aged six (6) years, two months and two weeks. The Appellant is not contesting age. I therefore find age to have been established.

23. M.M did not fully explain to the court what happened to her. She talked of being grabbed and then pointed at her genitals and thereafter went mute. The medical evidence by Pw3 and the P3 and PRC forms (*EXB5 and 7*) confirmed that the child had been penetrated and hence defiled. She sustained both anal and vaginal tears and had to be taken for surgery. The ingredients of proof of age and penetration of M.M's genitals were satisfactorily established by the prosecution.

24. The remaining key issue is that of identification of the Appellant as the perpetrator. The Appellant has raised issue with the failure by the trial court to engage an intermediary for M.M. M.M was aged six years and the trial court took her through a *voir dire* examination. The first time this was done was on 18th January 2018 when the trial Magistrate found the child to be intelligent but ordered that she be taken for counseling before she could testify.

25. She next came to court on 22nd November 2018 and was taken through another *voir dire* examination. The trial Magistrate found her intelligent but did not appreciate the nature of an oath. She directed that she gives unsworn evidence. This is all that transpired:

> **Pw5 – Examination in chief female minor of tender years**
>
> *I am* M.M. *I know that I am in court (Note the witness appears traumatized). On that day, I was from school when I met someone (witness points at the accused person) we met at Kaiti river. He grabbed me. (witness points at her genital). He took me to his home. (Witness goes mute and does not answer questions put across to her).*
>
> **Court:** I find her testimony sufficient.
>
> **Cross examination**
>
> **Question:** On the day you were defiled did you see me?
>
> **Answer:** Yes. (Witness nods head).
>
> **Question:** When you were grabbed, were you taken home?
>
> **Answer:** Yes, (*nods head*).

26. It is clear that the court did not ascertain if the child had undergone counseling as earlier ordered. She was in fear and did not give the court the evidence that was expected. This child needed support from the court and the prosecution which had presented her as a witness. This support is provided for under the Sexual offences Act.

27. **Section 31** of the Sexual Offences Act provides:

> **31.** (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is –
>
> (a) the alleged victim in the proceedings pending before the court;
>
> (b) a child; or (c) a person with mental disabilities.
>
> (2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection

(1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of –

(a) age;

(b) intellectual, psychological or physical impairment;

(c) trauma;

(d) cultural differences;

(e) the possibility of intimidation;

(f) race;

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the nature of the subject matter of the evidence; or

(k) any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection(5), direct that such witness be protected by one or more of the following measures –

(a) allowing such witness to give evidence under the protective cover of a witness protection box;

(b) directing that the witness shall give evidence through an ntermediary;

(c) directing that the proceedings may not take place in open court;

(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the Rev. 2009] Sexual Offences Act No. 3 of 2006 21 court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may - (a) convey the general purport of any question to the relevant witness; (b) inform the court at any time that the witness is fatigued or stressed; and (c) request the court for a recess.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

28. All the above options were open to the prosecution and the court to act on but they elected not to. The Appellant has submitted that failure to appoint an intermediary for M.M prejudiced him and he was therefore not able to cross examine the witness the way he would have wished to.

29. There is really nothing that barred the prosecution from applying for an intermediary for M.M and neither was there anything that stopped the court on its own motion from effecting section 31 of the Sexual Offences Act. It is the court that examined M.M through a *voir dire* examination and saw the vulnerability of the child.

30. Both parents of the child testified and they must have known what she was going through. This child was not even able to explain to the

court what had exactly been done to her. On that point I agree with the Appellant that there was need for an intermediary.

31. In her evidence she said she met with the Appellant at Kaiti river and he grabbed her. She only pointed at the Appellantwhile testifying. Had she identified him prior to his arrest? If she had not then it amounts to dock identification which cannot stand on its own without corroboration. In the case of **Ajode –vs- Republic (2004)** the Court of Appeal stated this:

> "***Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition."***

32. The court will now look at the evidence to see if any corroborates the dock identification. Pw2 who is the child's mother said she got information of the defilement from one Mbondo who was at river Kaiti. He never told her who had defiled M.M and he did not record a statement.

33. Pw1 is Pw4's stepfather. He said on the material day he was called by a brother of his called Alloyce Muthoka Kimeu who was with the child at Kaiti river. He told him the child had been defiled. Once at Kaiti he only says Pw5 fainted. He says nothing else about Alloyce who allegedly called him and was even with the child.

34. If this was anything to go by then Alloyce should have been called as a witness to inform the court how and where he met with M.M and who told him she had been defiled. Mbondo and Alloyce Muthoka Kimeu were crucial witnesses who should have been called to testify on behalf of the prosecution in view of the evidence given. See **Republic –vs- Cliff Macharia Njeri (2017) eKLR Sahali Omar –vs- Republic (2017) eKLR, Bukenya & Others –vs- Uganda 1972(E.A and Juma Ngodia –vs- Republic (1982 – 1988) KAR 454.**

35. Pw1 told the court how M.M had told him she had been defiled by Michael Tom. How was he able to know that the child was talking about Michael Tom? Did the child know Michael prior to this incident? Had M.M answered question put to her by the prosecution, I am sure this could have been one of them.

36. Pw1 further said he reported the matter to Kilala AP camp the next day and gave them the Appellant's name. He was arrested by officers from Kilala. There was no officer from Kilala AP who testified in this case. The investigating officer who testified as Pw6 said M.M identified the assailant as Michael. She did not expound on how this identification was done. There is nowhere indicated that the Appellant was subjected to any identification parade.

37. In **Anjononi & Others –vs- Republic (1976 – 1980) KLR 1556 at 1568** the Court of Appeal stated as follows:

> **"*The recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."***

38. In the recent case of **Eric Oduor Odhiambo & Another –vs- Republic (2019) eKLR** the Court of appeal clarified that:

> "*Of importance is the caution in **Anjononi and Others –vs- Republic (1976 – 1980) I KLR 1566**, that although recognition of an assailant is more satisfactory than identification of a stranger, the possibility of someone making a genuine mistake even in recognition of someone known to him particularly in circumstances that are not favourable for identification cannot be ruled out and therefore there is need to test and weigh the evidence of identification."*

39. In **Francis Kariuki Njiru & 7 others –vs- Republic (2001) eKLR** the Court of Appeal stated that:

> "*The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all".*

40. In **Simiyu & Another –vs- Republic (2005) I KLR** the Court of Appeal stated that:

> ***In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused, and then by the person or persons to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity.***

41. As stated earlier, no officer from Kilala A.P camp testified on the report they received and whether M.M gave them any name or description of the assailant. Pw6 was not of much help either. She did not say how M.M was able to describe Michael to her. Did the single name Michael enable her know who he was? This Michael was arrested on 21st September 2017. Pw6 as an investigating officer should have organized for an identification parade to satisfy herself that the Appellant was the Michael M.M was talking about.

42. Section 124 Evidence Act provides:

> ***"Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him."***

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

43. The Appellant did not say anything in his defence. Does the court then take it that the prosecution case was not challenged and so rely on M.M's evidence to convict the Appellant based on section 124 of the Evidence Act? The proviso to section 124 of the Evidence Act can only stand when the court is satisfied with the evidence of the victim on all fours. Pw5's dock identification was not sufficient by all standards.

44. Pw1 and Pw2 told the court that the person Michael was a known child defiler in the village. Pw1 further said the Appellant had defiled the sister's daughter. Did that in itself make him the perpetrator of the offence against M.M? The answer would be NO. Evidence had to be led to pin down the Appellant as the person who committed this offence. Suspicion alone is not sufficient. In **Sawe –vs- Republic 2003 KLR 364** the Court of Appeal said the following of such evidence:

> ***(7) Suspicion, however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.***

45. After analyzing all the evidence and the law I find that the identification of the perpetrator was not proved beyond reasonable doubt. There is crucial evidence that was not availed to the court by the investigating officer.

46. The upshot is that the appeal has merit and is allowed. The conviction is quashed and the sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 11th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge