



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 56 OF 2018

ROBERT MUHANDA ASHIONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Criminal Case No. 4163 of 2012 delivered by Hon. Jalang'o (SRM) on 17<sup>th</sup> November 2017)*

JUDGEMENT

1. The Appellant, **Robert Muhanda Ashiono** was charged with the offence of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 24<sup>th</sup> day of June, 2012 and 11<sup>th</sup> day of August, 2012 at [Particulars withheld] Estate in Embakasi Division within Nairobi area province he intentionally caused his penis to penetrate the vagina of SK, a child aged twelve (12) years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** No. 3 of 2006. The particulars of the same were that on diverse dates between 24<sup>th</sup> day of June, 2012 and 11<sup>th</sup> day of August, 2012 at [Particulars withheld] Estate in Embakasi Division within Nairobi Area province intentionally touched the breast and vagina of SK, a child aged twelve (12) years with his penis. He pleaded not guilty to both counts. Upon trial and pursuant to **Section 179** of the **Criminal Procedure Code**, he was found guilty of a lesser offence of sexual assault contrary to **Section 5 (1) (2)** of the **Sexual Offences Act**. He was convicted of the same and sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by that decision and preferred an appeal to this Court.

Grounds of Appeal

2. The Appellant raised eight (8) grounds of Appeal in his amended Petition of Appeal filed on 23<sup>rd</sup> October 2018. He was aggrieved that the learned magistrate convicted him of the offence of sexual assault in the absence of the requisite elements of penile penetration and positive identification. He faulted the trial magistrate for convicting him on the basis of untrustworthy evidence marred with material contradictions. He was also of the view that the learned magistrate erred by convicting him on the basis of medical evidence which did not support the charge against him. Further, he was aggrieved that his conviction was premised on the evidence of a single witness and the learned magistrate failed to record reasons for believing the truthfulness of the said witness. He complained that the learned magistrate erred by convicting him on the evidence tendered by the prosecution which was not sufficient and trustworthy. He was further aggrieved that the prosecution did not prove beyond a reasonable doubt that he committed the offence in question. Finally, he faulted the learned magistrate for failing to consider his sworn evidence.

Summary of Evidence

3. This being a first appeal, this court is enjoined to analyze and re-evaluate the evidence adduced by the witnesses before the trial court afresh so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard any of the witnesses. (See **Okeno v Republic (1972) EA 32**).

4. The Prosecution's evidence can be summarized as follows: the complainant **SK** (PW1) gave a sworn testimony. She stated that she was a class seven (7) pupil at [Particulars withheld] Primary School in Kinoo and she was born on 23<sup>rd</sup> December, 2001. She recalled that in the month of May 2012, she came to Nairobi to look for her father but ended up in the custody of one Maxwell and his wife Eunice who lived in Tassia Embakasi. Eunice worked during the day while Maxwell went to work at night. The Appellant used to visit his guardians occasionally and had been introduced to her as an uncle. One morning as she was still sleeping on the chair in the sitting room after Eunice had left for work, she heard the door open. Immediately thereafter, she felt someone sit on her laps and leg. She rose up and discovered that it was the Appellant. He pushed her back on the chair and blocked her mouth using his hand. He took the seat pillow and covered her face. He then removed her underpants and defiled her. She struggled with the Appellant while screaming for help but her screams could not be heard since her mouth had been covered with a pillow.

5. The house was made of iron sheets and PW1 hit the walls in the course of the struggle which made the Appellant stop. He warned her against disclosing the incident to anyone or else her life would be in danger. A neighbour called "Mama Sammy" who saw the Appellant enter the house and heard the commotion that followed thereafter informed Eunice about the same. They enquired from her what had happened but she refused to disclose to them out of fear. The Appellant, Eunice and Maxwell's brother were later arrested and taken to Tassia Police Post and later Embakasi Police Station. While at Embakasi, PW1 was interrogated by a lady police officer whom she told everything that had happened. She was later taken to a hospital in Mathare for examination and treatment after she complained of pains while urinating. She also had white discharge from her vagina which she had never experienced before.

6. PW2, **Dr. Joseph Maundu** of Nairobi police surgery examined PW1 on 21<sup>st</sup> August 2012. She had her birth certificate. No injuries were noted on her external genitalia upon physical examination. However, her hymen was broken and the injury thereon was fresh. She also had an abnormal discharge with blood stains. He stated that it was possible to have blood stains even after a week or a month after defilement. He produced the P3 form filled and signed by him as prosecution's exhibit number 2.

7. PW3, **Mawell Muhlamu Kanga** was the guardian of PW1. He stated that on 24<sup>th</sup> June, 2012, he had gone for a manual construction job in Westlands when he met PW1 trying to cross the road alone. He questioned her on where she was going. She told him that her aunty whom she was staying with in Kikuyu had put her in a matatu and told her to alight in Westlands where she would meet her father. He took her to Muthangari police station where she was booked in the Occurrence Book after which he was advised to take her to his home. He also took her to ABC Children's Home along Waiyaki Way but was turned away. He therefore took PW1 to his home in Tassia Embakasi where he was staying with his wife.

8. On 11<sup>th</sup> August 2012, the Appellant who was his neighbour and cousin informed him that PW1's parents had been traced. He requested him to release her to him but PW3 refused to do so. While at work at about 8.00 pm, he received a phone call from his wife that she had been arrested together with the Appellant and taken to Tassia Police Post because of PW1. He went to Tassia Police Post and was also arrested and placed in custody on the allegation that he had defiled PW1. He talked to PW1 who informed him that it was the Appellant who used to defile her.

9. PW4 **Corporal Regina Kitalia** of Embakasi Police Station was the investigating officer. She stated that on 11<sup>th</sup> August, 2012, she interrogated the Appellant and PW3 who had been arrested and placed in police cells. She established that the Appellant had been arrested for defiling PW1 while PW3 had been arrested for abduction. She also interrogated PW1 who informed her that she had been defiled by the Appellant. PW1 was taken to MSF Hospital, Mathare for examination and treatment. Later, she took her to PW2 for further examination and filling of P3 Form. She charged the Appellant with defilement and released PW3.

10. PW5, **Penina Angwenyi** a Clinical Officer from MSF Hospital stated that PW1 was examined on 11<sup>th</sup> August, 2012 at their facility by her colleague Kajuju who had since left. According to the medical report, PW1 was born on 23<sup>rd</sup> December, 2000. She gave a history of being sexually assaulted several times in July 2012 by a person known to her as Robert who was introduced to her as an uncle by her guardians. She however could not recall the specific dates of assault. On physical examination, the external genitalia was normal. She had smelly creamy discharge oozing from her vagina. The hymen was broken and star shaped with multiple healed tears. She produced a Certificate of Medical Examination together with the Post Rape Care Form as prosecution exhibits 1 and 2 respectively.

11. When placed on his defence, the Appellant gave sworn a testimony and called no witness. He stated that he knew PW1 through PW3 who used to stay with her. He denied committing the offence and claimed that PW1 informed him that she had been defiled by PW3. On 8<sup>th</sup> August, 2012, he went to Tassia Police Post to report that PW3 had been keeping PW1 without the knowledge of the police but was arrested instead. He was then charged with the offence which he knew nothing about.

### **Analysis and determination**

12. This Appeal was disposed off by both written and oral submissions. The Appellant's written submissions are dated 23<sup>rd</sup> October, 2018 and those of the Respondent 25<sup>th</sup> February, 2018. During highlighting of the same, the Appellant was represented by learned counsel Mr. Kubai whilst learned State Counsel, Ms. Sigei represented the Respondent. The Respondent opposed the appeal and urged that the same be dismissed and the conviction and sentence by the trial court be upheld. This court has carefully re-evaluated the evidence on record and considered the parties respective submissions and found that there are only two issues for determination. The first issue is whether the prosecution established their case beyond a reasonable doubt. The second is whether it was proper for the trial court to convict the Appellant of the offence of sexual assault contrary to **Section 5 (1) and (2) of the Sexual Offences Act**.

### **Whether the case was proved beyond a reasonable doubt**

13. As regards this issue, this court is enjoined to determine whether the three key elements of the offence of defilement were sufficiently established. The elements are penetration, identification of the offender and the age of the complainant.

14. On the element of penetration, the Appellant contended that the prosecution did not establish whether indeed there was penetration. He submitted that the charge sheet stated that PW1 was defiled on diverse dates between 24<sup>th</sup> June, 2012 and 11 August, 2012 whereas PW1 only testified about one incident without specifying a particular date. He took issue with the medical certificate which indicated that PW1 was sexually assaulted in the month of July, 2012. He argued that the said evidence was at variance with PW4's testimony that she took PW1 for medical examination on the same date that she was assaulted. He further submitted that the medical evidence which stated that PW1 had multiple healed tears and the P3 form which indicated that PW1 was in general fair condition with no injuries was not in tandem with the alleged sexual penetration. The Appellant also argued that the blood stained skirt which PW1 wore on the material day should have been presented in court to prove that she was indeed defiled. In rebuttal, the Respondent submitted that PW1's testimony that she had been defiled was well corroborated by the medical evidence tendered by PW3 and PW5.

15. Further, the Appellant submitted that there were material contradictions in the evidence tendered by the prosecution's witnesses which affected the credibility of the witnesses. In particular, he pointed to the evidence of PW1 and PW4. He argued that PW1 stated that she was taken to hospital two days after the incident while PW4 stated that she took PW1 to hospital on the date she was defiled. The Appellant also argued that PW1 and PW4 in their evidence only referred to one incident of defilement which occurred in August 2012. This in his view contradicted the medical exhibits which show that PW1 was examined in respect to incidents which occurred in the month of July 2012. As regards the alleged contradictions, the Respondent submitted that the evidence tendered in court was consistent, corroborative and reliable.

16. This court's review is that the prosecution tendered credible, consistent and corroborated oral and documentary evidence to prove that PW1 was defiled. PW1 testified that the Appellant removed her underpants and forcefully inserted his penis inside her vagina thereby causing her to feel great pain. This evidence was corroborated by the Certificate of Medical examination and Post Rape Care Report tendered in evidence by PW5. The same was further corroborated by the P3 Form tendered in evidence by PW2 who examined PW1 much later. Indeed, it suffices to particularly point out that on both occasions when PW1 was presented for examination, her hymen was found to be broken and she had an abnormal discharge from her vagina. In the premises, this court finds that the prosecution proved that PW1 had been defiled notwithstanding the fact that the blood stained skirt that she wore at the time of the incident was not presented in court.

17. As regards the positive identification of the Appellant as the offender, it was his contention that the evidence adduced by the prosecution witnesses did not positively identify him as such. He faulted the trial court for relying on the sole evidence of PW1 in that regard. In his view, PW1 was not honest and her evidence was full of contradictions thus unreliable. Further, he submitted that there was no medical evidence that attributed the foul smelling discharge oozing from PW1's vagina to him. In rebuttal, the Respondent submitted that PW1's identification of the Appellant by way of recognition was positive since he was well known to her.

18. It is important to note that the only evidence regarding the identity of the Appellant was that of PW1 since there was no other eye witness. She testified that the Appellant used to visit her guardians and was therefore well known to her. She stated that the Appellant defiled her one morning as she was sleeping in the sitting room. She however did not disclose that to her guardian as the Appellant had threatened her. She only revealed that to PW4 when she was interrogated at the police station. Both PW2 and PW5 informed the court that PW1 gave a history of having been defiled by a person known to her. In particular, the PRC report indicate that upon examination, PW1 was categorical that she had been defiled by a person known as Robert who had been introduced to her by her guardians as an uncle. It is therefore obvious that identification was by way of recognition since the Appellant was well known to PW1. There was therefore no chance that she may have been mistaken about his identity. Indeed, it is trite law that recognition evidence is more satisfactory and reliable than identification of a stranger because it depends upon the personal knowledge of the assailant. (See **Anjononi & Others v Republic [1980] KLR 59**)

19. Further and in any event, I note that the trial court correctly concluded that PW1 was truthful and thus applied the proviso to **Section 124** of the **Evidence Act** which empowers a court to convict an accused person in defilement cases on the sole evidence of the minor if the court believes that the minor is telling the truth. In any case, this court is aware that medical evidence is not the only way of proving that an accused defiled a child. I am guided by the case of **George Kioji vs. R: Nyeri Criminal Appeal No. 270 of 2012 (unreported)** where it was held that-

***“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.”***

20. In the circumstances, I am satisfied that the Appellant was positively identified as the offender.

21. As regards the third element, the Appellant submitted that PW1's age was not proved conclusively since her birth certificate was not tendered in evidence. He submitted that this is a critical ingredient of the offence of defilement since sentencing is premised on the age of the child. He argued that PW1's age could only be determined by medical assessment or documentary evidence. The Respondent on the other hand submitted that PW1's age was sufficiently established. The Respondent noted that PW1 stated that she was twelve years old at the time of the incident. PW2, PW3, PW4 and PW5 all referred to her as a child. This therefore proved that PW1 was a child aged below eighteen (18) years even though no birth certificate was tendered in evidence to that effect.

22. It is well settled that in defilement cases, the age of the child victim must be conclusively proved. This is in view of the fact that the sentence to be imposed is pegged on the same and the younger the child, the stiffer the penalty. In the instant case, it is not in doubt that PW1's birth certificate was not produced in evidence. It is on that basis that the trial court determined that PW1's age was not proved conclusively. However, it is well settled that documentary evidence is not the only way of proving the age of a child in defilement cases. Age can be established through documentary evidence, age assessment and/or other reliable evidence.

23. During trial, PW1 testified that she was thirteen years old and a standard seven (7) pupil. She stated that she was born on 23<sup>rd</sup> December, 2000. PW2 who examined PW1 and filled the P3 Form stated that she had her birth certificate at the time of examination. The said P3 Form indicates PW1's known and estimated age at the time of examination on 21<sup>st</sup> August 2012 as twelve (12) years. The charge sheet which was drawn in the year 2012 also indicated that PW1 was aged twelve (12) years. Further, the medical certificate and PRC report produced by PW5 both indicated that PW1 was born on 23<sup>rd</sup> December 2000.

24. This court takes judicial notice of the fact that standard seven pupils are ordinarily aged between twelve (12) and fourteen (14) years. I am also of the view that both PW2 and the Clinical Officer who examined PW1 were able to assess her properly and determine her apparent age. Further, I am certain that the trial court had the opportunity to see PW1 and determine that she was a child and that is why a *voire dire* examination was conducted to establish that she knew the importance of telling the truth and oath taking. As such, I find no reason to doubt that PW1 was twelve (12) years old when she was defiled even though her birth certificate was not tendered in evidence. Accordingly, I do not agree with the trial court's finding that PW1's age was not proved merely because no documentary evidence was adduced to that effect.

25. Accordingly, I am guided by the case of Evans Wamalwa Simiyu vs. R [2016] eKLR, where the Court of Appeal addressed itself as follows;

*“As to whether the Appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”*

26. Further, in the case of Richard Wahome Chege v Republic Criminal Appeal No 61 of 2014, the Court of Appeal held as follows while considering the question of proof of age of the victim:

*“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself”*

27. In the circumstances, I am satisfied that the prosecution indeed proved beyond a reasonable doubt that the Appellant was guilty of the offence of defilement since all the three elements were sufficiently established.

28. The Appellant contended in his amended Petition of Appeal that the trial court did not consider his sworn defence. He however did not tender any submissions in that respect. The Respondent on the other hand submitted that if indeed PW3 continuously defiled PW1 as stated by the Appellant in his defence, PW1 would have had severe injuries in her genitalia as opined by PW2. However, having established that the prosecution proved its case to the required standard, I am satisfied that the Appellant’s defence could not dislodge the watertight evidence tendered by the prosecution.

*Whether it was proper for the trial court to convict the Appellant of the offence of sexual assault contrary to Section 5 (1) and (2) of the Sexual Offences Act.*

29. The trial court convicted the Appellant of the offence of sexual assault contrary to **Section 5 (1) and (2)** of the **Sexual Offences Act**. This was pursuant to **Section 179** of the **Criminal Procedure Code** which entitles a court to convict on a minor and cognate offence which an accused was not charged with if the evidence on record establishes the minor offence.

30. The **Black’s Law Dictionary 9<sup>th</sup> Edition page 1186** defines a cognate offence as:-

*“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”*

31. **Section 5** of the **Sexual Offences Act** provides for the offence of sexual assault as follows:

*“5(1) Any person who unlawfully- penetrates the genital organs of another person with- any part of the body of another or that person; or an object manipulated by another or that person except where such penetration is carried out for proper and professional medical hygiene or medical purposes; manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body, is guilty of an offence termed sexual assault.*

*(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”*

32. Sexual assault is a cognate and/or minor offence to defilement which the Appellant was charged with. However, unlike defilement which is pegged on the age of the victim, sexual assault is not confined to children only. It can be committed against any person be it a child or otherwise. In the circumstance, I find no reason to interfere with the trial court’s decision to convict the Appellant of sexual assault. The Appellant’s conviction and sentence was legal and proper. I therefore uphold the same accordingly.

33. It is so ordered.

**DATED and DELIVERED** this 13<sup>th</sup> day of **March, 2019**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Kubai h/b for Mr. Chemei for the Appellants.

2. Mr.Momanyi for the Respondent.