REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 35 OF 2019

JOHN MUNYAO KYALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in **Thika Senior Resident**

Magistrate's Court Criminal Case No 84 of 2016 by Hon. B.M. Ekhubi (SRM) on 11/10/18)

J U D G M E N T

1. John Munyao Kyalo, the Appellant, was charged with **defilement** contrary to **Section 8(1) (3)** of the Sexual Offences Act **No. 3 of 2006.** Particulars of the offence being that on the **3rd day** of **January, 2016,** in **Thika Central District** within **Kiambu County,** intentionally caused his penis to penetrate the vagina of **RW.** a child **aged 12 years.**

2. In the alternative the appellant faced the charge of **committing an indecent Act with a child** contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **3rd** day of **January, 2016**, in **Thika East District** within **Kiambu County**, intentionally touched the vagina **RW.** a child **aged 12 years** with his penis.

3. Facts of the case were that the victim herein, a child who is mentally challenged lived and schooled at an orphanage known as **[Particulars Withheld] Children Home/ Watoto Wenye Nguvu.** During December holidays she was at home with her mother. On the **3rd January, 2016** the Appellant, who cohabited with her mother escorted her to school. Along the way he molested her. On arrival she reported to the housemother. She was escorted to hospital where she was examined and the matter reported to the police. The Appellant was arrested and charged.

4. Upon being put on his defence, the appellant stated that he was requested by the complainant's mother to take her to school. They went up to school and she handed over the child to the teachers. He was offered tea and rice and as he ate he was arrested.

5. The trial court considered evidence adduced and reached a finding that the Appellant took advantage of the victim. It convicted and sentenced him to twenty (20) imprisonment.

6. Aggrieved, he appealed on grounds that; Allowing the victim to testify through an intermediary was erroneous; an essential witness (the *mother of the minor*) did not testify; elements of defilement were not proved and the prosecution's case was based on suspicion.

7. The Appellant canvassed the appeal through written submissions. He urged that failure to avail the victim to testify was in violation of the Appellant's rights. That failure to avail the victim to testify denied the appellant the right to cross examine and especially so considering the fact that nobody else witnessed the alleged offence. That the witness did not appear in court for purposes of ascertaining if she was a vulnerable witness.

8. He questioned why it was alleged that the victim was twelve (12) yeas old if she was born on **19/6/2001** which means that she was 14 years old.

9. Further, he argued that discharge on the vagina caused by an infection and a broken hymen was not proof of penetration of the victim. He concluded by stating that the prosecution's evidence was based on suspicion yet as held in the case **of Sawe versus Republic [2003] KLR 364;**

"…suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt….

10. The State through Ms Muthoni, learned State Counsel opposed the appeal. She argued that the victim was a child with intellectual disability therefore the court declared her a vulnerable witness. That through evidence of PW2 the Appellant was placed at the scene and his defence did not refute it.

11. That the age of the complainant was proved by a birth certificate, penetration did occur and failure of the mother of the complainant to testify was not fatal to the case.

12. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

13. The competency of witnesses to testify, generally, is stipulated in **Section 125** of the **Evidence Act** that provides thus;-

"(1) **All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.**

(2) **A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them".**

14. In the instant case following an application by the prosecution the victim was declared a vulnerable witness by the court. A vulnerable witness is stated to include a child and a person with mental disabilities (See Section 31 of Sexual Offences Act). The court had a duty of satisfying itself of the need to have the victim declared vulnerable, considering the likelihood of being stressed mentally. A cursory look at the proceedings does not show if the victim was before the court, but the court did rely upon a report on the status of the victim. The report was authored by Dr. Njeri Mungai, a Consultant Psychiatrist at Thika Level 5 Hospital who found her to be of below average intelligence quotient (IQ). The Psychiatrist found it difficult to establish a rapport with her as she was not answering questions or even audible and was poor in speech. As a result she got the impression that she had a learning disability/mental retardation.

15. It was on that basis that the trial court satisfied itself of the need to declare her vulnerable and consider having an intermediary testify on her behalf. PW1, Linah Mwangi who was appointed by the court as an intermediary was a Children Officer.

16. The victim was subjected to medical examination. Per what was captured on the medical examination report (P3) she had a bacterial infection, was swollen and the hymen was missing/broken. This perse was not conclusive proof of defilement **(See P.K.W. –VS- Republic (2012)Eklr**. But in the case of **Kassim Ali versus Republic Cr. Appeal No. 84 of 2005 (msa)** it was held that:-

"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

17. Looking at the circumstances that led the school management conclude that the child had been molested, there is the evidence of PW2 Joylet Chebet, a social worker at the school who stated that when the victim saw her she cried a lot and she proceeded to narrate what transpired. She had stayed with the child for seven (7) years therefore knew her very well. From her interaction with the child she learnt that she had been molested by the Appellant.

18. PW3 **Elijah Munene** a Social worker at the school who had known the victim for seven (7) years was on duty when the victim arrived having been escorted by the appellant. She was crying therefore he asked PW2 to investigate, the explanation the appellant gave at the outset was that the victim's mother had delayed in taking her to school. Female care givers examined the child and found her with wet substance in her genetalia.

19. PW4 **Anne Njeri Ngugi** who was asked to examine the child by PW3 interrogated her and the victim said the person disturbed her. She inquired how and she pointed at her private parts (genetalia). She observed her and checked her genetallia only to find mucous that was smelly. The child identified the appellant as the person who violated her sexually.

20. The intermediary who testified on behalf of the complainant, PW1 **Linah Mwangi,** stated that the victim stated that as the Appellant escorted her to school they passed a bushy area where he undressed her, removed his trouser, lay on her and removed a big thing that he uses to urinate and inserted the same in her vagina. And she cried after he removed the thing of urinating. He then dressed up and took her to school and she reported to the housekeeper.

21. The victim was a child with special needs. She communicated to those who understood her in the best way possible. The appellant appreciated that she was mentally challenged and admitted having taken her to school all the way from home.

22. It is contented by the appellant that the mother of the child did not testify. He cited the case of **Juma Ngodia versus Republic [1982-88) KAR 454** to buttress the fact that she was an essential witness. In the cited case it was stated that;-

"The prosecutor has, in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution."

23. The stated witness was called to testify on the 27/11/17. Margaret Waithira introduced herself as the mother of the complainant and went on to state that she was born on a date that she could not remember. Her statement prompted the prosecuting officer to apply to have her stepped down for purposes of doing a pre-trial event, an application that was allowed. Thereafter she was called to the witness box on the 7/2/18 and after she gave her name the prosecutor told the court that she was not able to proceed with the witness as the prosecutor who was to lead her in examination –in-chief was away. In the premises the case was adjourned. Thereafter she was not called to testify. Circumstances in which she did not testify were unexplained.

24. The question to be answered is whether the mother of the complainant was a crucial witness. In her testimony she was to tell the court of the age of the complainant and probably how she permitted the appellant to take the child to school.

25. To prove the age of the child a birth certificate was adduced in evidence which established as correctly argued by the Appellant that she was born on the **19/6/2001**. This would mean that at the time of the in incident she was **aged 14 years 5 months.** Having been of that apparent age she was a child.

26. In the case of **Tumaini Maasai Mwanya versus Republic Mombasa Cr. Appeal No. 364 of 2010** it was stated that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of various statutory categories of age.

27. The Appellant was alone with the complainant when she was violated sexually. Her mother having not been with her was not a crucial witness. Therefore the learned magistrate did not fall into error when he reached a finding that failure to testify was not fatal to the prosecutor's case.

28. In the premises, contrary to the contention of the Appellant, the prosecution adduced circumstantial evidence that pointed at the Appellant as the individual who abused the trust bestowed upon her by the victim's mother by defiling her.

29. On sentence it was established that the victim was a minor. Looking at the circumstances in which the offence was committed, the sentence meted out was not harsh.

30. In the premises, I find the appeal lacking merit. I uphold the conviction and sentence and dismiss the appeal accordingly.

31. It is so ordered.

DATED, SIGNED and **DELIVERED** at **KIAMBU** this **12th** day of **September, 2019**

L.N. MUTENDE

JUDGE