



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 9 OF 2018**

**MMM.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(An appeal from the conviction and sentence in Msa**

**CM CR. Case No. 1604 of 2016 (Hon. J. KASAM SRM)**

**delivered on 2/2/2018)**

**J U D G M E N T**

1. **MMM (“the Appellant”)** was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (3) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on diverse dates between January and 10<sup>th</sup> August, 2016 at [Particulars withheld] Area in Changamwe sub-county within Mombasa County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of UMM, a child aged 8 years.
2. There was an alternative charge of committing an indecent act with a child contrary to **section 11 (1) of the Sexual Offences Act No.3 of 2006 (SOA)**.
3. The appellant denied the charge and after trial, he was found guilty and convicted of the offence and sentenced to life imprisonment. He has now appealed to this court against both the conviction and sentence.
4. This being a first appellate court, the court is enjoined to re-appraise the evidence afresh and come to its own independent findings and draw its own conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA)**.
5. PW1 was the appellant’s daughter. They used to live together in Miritini. The complainant told the court that during that time, the appellant used to do bad things to her at night. He did so many times that she once told her mother when she came visiting who immediately alerted the village elder. The village elder took them to the police and reported the matter.
6. In cross-examination, she told the court that the last time the appellant was doing bad manners to her anus, she attempted to scream but he told her to shut up. That at one time Nyawa witnessed the appellant defiling the complainant.
7. **PW2 RM**, an estranged woman friend of the appellant, testified that on 3/7/2016, she received information from the village elder that the appellant was defiling the children. That she went and asked the children who admitted the fact. Before any investigations could be carried out, the village elder informed her that the appellant had been arrested and taken to Changamwe Police Station. She had lived with the appellant for 7 months before they separated in July, 2016. She denied having any vendetta against the appellant.
8. **Dr. Khadija Soud (PW3)**, a doctor at the Coast General Hospital produced the P3 form filled by Dr. Abdullaziz and the PRC form filled by Saida Mwinyi N/Officer at Coast General Hospital. He testified that the complainant had complained that the appellant had been inserting fingers in her vagina and anus.
9. He told the court that the victim was 8 years with a history of anal and vaginal defilement. That it had been happening between January and August, 2016. On examination, the complainant’s hymen was found to be broken with old scars. She also had healing vaginal abrasions and loose anal sphincter. The witness also produced an age assessment report which showed the complainant to be 8 years. The P3 was filled on 18/8/2016 while the PRC form was filled on 9/8/2016.

10. In his sworn statement, the appellant told the court how the village elder and his wife knocked door on 9/8/2016 and told him that he had defiled the village elder's daughter. He accompanied them to Changamwe police station. He was released on 10/8/2016 by the OCS but the investigations officer asked for Kshs.5,000/- which he failed to give as he did not have it. He was then charged with the offence facing him.

11. The appellant set out five (5) grounds of appeal; **that the offence of defilement was not proved to the required standard; that his defence was not considered; that the charge was defective; that the source of his arrest was not established to connect him with the offence charged and that the case was not investigated.**

12. The appellant submitted that while he was charged under **section 8(1) and 8(2) of the Sexual Offences Act (SOA)**, the evidence showed that since he was the father to the complainant, the proper charge should have been incest under **section 20(1) of the SOA**. That the prosecution case was marred with contradictions, fabrications, discrepancies, inconsistencies and invariances.

13. That since he was not in good terms with **PW2** with whom he had disagreed, her evidence should have been treated with caution. That **PW2's** testimony was that she received information from the village elder that the appellant was defiling the children while the complainant stated that she had told **PW2** about the alleged defilement who in turn reported the matter to the village elder.

14. That according to **PW3**, the complainant was defiled by her uncle. That since those who arrested him did not testify, the arrest was not proved to be connected with the present offence. He relied on the case **James Kuloba Walishe v. Republic [2008] eKLR**. That the investigations officer did not testify and that the appellant was wrongly convicted under **section 215 of the CPC**.

15. The prosecution opposed the appeal. **Mr. Mulamula** submitted that there was nothing wrong to charge the appellant under **section 8 (1) and (2) of the SOA** although he could have been charged under **section 20 (1) of the SOA**. The case of **DMM v. Republic [2012] eKLR** was relied on in support of that proposition. That the case was proved to the required standard. That the investigations officer could not testify due to unavoidable circumstances. That the appellant had admitted being arrested from his house. That the appellant was convicted under the proper provisions of the law.

16. The first ground was that the charge was defective in that the case that was proved was that of incest and not defilement as charged. It is true that while the appellant was charged for defilement under **section 8 (1) and 8 (2) of the SOA**, the evidence that came out was that he was the father of the complainant. In the circumstances, he should have been charged with the offence of incest contrary to **section 20 (1) of the SOA**.

17. This anomaly however is not material. The fact that the appellant was not charged with incest under **section 20 (1) of the SOA** does not make the charge defective. The difference between **section 8 (1) and section 20 (1) of the SOA** is that of the blood relation under the later section. Otherwise, the ingredients of the offence remain the same. There was no prejudice that was suffered by the appellant by failure to charge him with incest instead of defilement. He understood the charges and effectively cross-examined all the witnesses.

18. In **DMM v Republic [2012]**, the court held that the fact that the appellant in that case could have been charged for incest, that did not preclude him from being charged for defilement. I apply that dicta in this case and reject that ground accordingly.

19. The second complaint was that the source of the appellant's arrest was not proved. That those who arrested him were not called to testify. The prosecution was of the view that the appellant having admitted to have been arrested from his house, the scene of crime, that ground was baseless.

20. It is always important for the prosecution to connect the arrest of an accused with the offence charged. Where it is not clear the circumstances under which an accused is arrested, it will be unsafe to convict an accused in such a case.

21. In the case relied on by the appellant of **James Kuloba Walishe v. Republic [2008] Eklr**, the court was categorical that where it is unclear how an accused was arrested, it was unsafe to uphold his conviction. The court stated:-

***"We have noted that the prosecution did not call the person who arrested the appellant in order for us to understand why the appellant was arrested. All the prosecution witnesses confirmed that they did not arrest or participate in the arrest of the appellant. ... The arresting of the appellant and the circumstances that led to his arrest is very difficult to discern from the evidence tendered by the prosecution".***

22. In the present case, **PW2** stated that she learnt that the village elder had arrested the appellant. The village elder was not called to testify and no reason was offered for the failure to call him. Further, the investigations officer did not testify to shed light on the circumstances under which the appellant was arrested.

23. The only evidence on record as to the arrest of the appellant was the appellant's testimony. He told the court that the village elder and his wife had alleged that the appellant had defiled their daughter.

24. The copy of the investigations diary that was produced as D exhibit 1 disclosed that under OB63/9/8/2016, the appellant was brought to the station by the village elder one Omar Mohamed and other villagers on allegations that the appellant had defiled his daughters and had attempted to defile a neighbour's daughter. The appellant was released vide OB23/10/8/2016 pending medical check-up for the daughters.

25. In this court's view, it was imperative that the village elder should have testified in this case. He would have shed light on why he arrested the appellant in view of the contradictory evidence of **PW1 and PW2** on the source of his information. **PW1** had told the court that she informed **PW2** about the defilements who in-turn called the village elder leading to the arrest of the appellant. On the other hand, **PW2** testified that it is the village elder who informed her that the appellant had been defiling the complainant and his other daughters.

26. As it stands, it is not clear from whom the village elder got the information that the appellant was defiling his children. It is therefore not clear what informed the village elder's arrest of the appellant.

27. The failure of the investigations officer or the arresting officer to testify is compounded by the complaint that the appellant's defence was not considered. His defence was that the village elder and his wife claimed that he had defiled their daughter. That it was on that basis that he was arrested and not for the alleged defilement of his own daughter. That the complainant had told the court that she had been given KShs.50/- by **PW2** to implicate him.

28. The court dismissed the defence as an afterthought. The record does not show that the complainant stated that **PW2** gave her money to implicate the appellant. However, the issue was raised in re-examination of **PW1** when she denied having received any money to implicate the appellant. This means that it must have arisen during the cross-examination of **PW1** although the record is silent. The appellant had accused **PW2** of having a vendetta against him.

29. To my mind, the appellant's defence could not be peremptorily dismissed as an afterthought considering that both the village elder and the investigations officer had failed to testify. His defence remained unshaken.

30. Further, the prosecution case was that the defilement had been going on ever since January, 2016 till August, 2016. **PW2** told the court that she lived with the appellant for 7 months. She left the appellant in the month of July, 2016. She testified;

***“On 3/7/2016 I received a report from the village elder that the accused was defiling children. I took the opportunity to go and ask the children who agreed and stated it is true and I took the children to the village elder who admitted it is true. ... It was in August, 2016. I know the accused person. ... He used to be my man friend and had parted ways that July”***

31. The foregoing means that, the alleged defilement was taking place when **PW2** was living with both the appellant and the complainant. However, **PW1** did not report the defilement to **PW2** then. But immediately **PW2** parted ways with the appellant, **PW1** informed her about it. According to **PW2**, immediately she parted ways with the appellant, the village elder informed her that the appellant was defiling the children. The coincidence was too loud.

32. To this court's mind, because of the foregoing coincidence and the appellant's defence, it was important that the village elder should have testified to clarify as to how he got information that the appellant was defiling his children. It may not be far fetched that **PW2** would have framed the appellant as there seemed to be differences between them. Otherwise how does one explain that the issue of defilement that is alleged to have started in January, 2016 only popped up immediately they parted ways?

33. There was the aspect of the investigations officer failing to testify. I agree with the prosecution that it was hurried to close its case without calling her. However, there is no evidence on record to show the effort the prosecution made to avail her. The prosecution should have applied for a warrant for her arrest if she had failed to heed to the summons served upon her.

34. Since this case concerned a child, the prosecution could have applied for the officer's superior to be summoned to come and explain why the officer was not attending court. This did not happen. The trial court cannot therefore be blamed for declining to grant the adjournment that led to the prosecution to close its case prematurely.

35. The last ground was that, the offence was not proved to the required standard. The evidence of **PW1** was that it was the appellant who was defiling her. She very well knew him to be her father. However, the police indicated in the P3 form when sending her for examination on 18/8/2016, that the complaint was that she had been defiled by her uncle.

36. Earlier, on 9/8/2016 the complainant had told Saida Mwinyi, who examined her and filed the PRC form, that it was her uncle who had been defiling her. The nursing officer indicated in the PRC form; **“SURVIVOR STATES THAT ON SEVERAL OCCASSIONS HER UNCLE HAS BEEN INSERTING HIS PENIS IN HER VAGINA AND ANUS”**.

37. **PW2** admitted that the appellant's brother was living within the vicinity where they lived. The question that arises is, could the brother of the appellant be the uncle **PW1** was referring to when Saida Mwinyi was examining her? Who was the uncle that **PW1** was referring to? These questions were never answered.

38. It is trite law that an appellate court should be slow to depart from a finding of fact by a trial court. However, in view of the shortcomings I have set out above, it will be very unsafe to uphold the appellant's conviction in this matter. Considering the severe punishment that flow from a conviction. That is why a prosecution case should not leave any doubt in the mind of a court. In this case, there are doubts which should be resolved in favour of the appellant.

39. Accordingly, I find the appeal to be meritorious and I allow the same. I quash the conviction of the appellant and set aside the sentence imposed by the trial court. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED at Mombasa this 11<sup>th</sup> day of September, 2019.**

**A. MABEYA**

**JUDGE**