THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 41 OF 2017

TIMOTHY MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Magistrate E.K. Too (SRM) Mavoko Principal Magistrates Court at Mavoko delivered on 9.2.2016 by the Senior Resident Magistrate in Mavoko Criminal Case S.O No. 5 of 2015)

JUDGEMENT

1. This is an appeal from the judgment, conviction and sentence of Hon. E.K. Too, Senior Resident Magistrate in Criminal Case S.O. 5 of 2015 on 18.7.2017. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. When the matter came up for trial, the prosecution presented four witnesses in support of the charge. Pw1 was MMA voire dire was conducted upon her and she indicated that she was a 9 year old student in class two at [particulars withheld] Primary School. The court was satisfied that she was competent to testify on oath and was put on the witness stand. She testified that she is aged 9 years and in class two. It was her testimony that the appellant was her father and that on 7.2.2015 at about 1 pm the appellant removed her skirt trouser, shirt and underpant and put his penis in her vagina and she felt pain. She told the court that he was about to put his penis in her anus but then changed his mind. She then left him sleeping and went to play with the other children but later told her mother about it when she noticed that she was bleeding. She showed her mother who then had her father arrested. She was taken to Athi River Medical Centre where she was examined and treated. On cross-examination, she testified that her father had been putting his penis in her vagina and she had been telling her mother about it and he had been threatening her with death. She told the court that he had been doing so since she was in class one. She stated that the appellant assaulted her mother on the day he defiled her.

3. Pw2 was MM who testified that on 7.2.2015 she had gone to the posho mill and left the appellant with Pw1 and on return she found Pw1 crying inside the house and who informed her that the appellant had defiled her. She examined her and found that she had blood in her stool and wounds in her anus. She reported to Nyumba Kumi representatives who had the appellant arrested and she went to the police and recorded a statement and was given a P3 form that she took to the hospital where she was also given a PRC form. She testified that the appellant was her husband for ten years and on cross-examination, she told the court that the appellant had been arrested over defilement in Loitoktok and Mlolongo and that the appellant had also assaulted her.

4. Pw3 was Maureen Maitha, a clinical officer at Athi River health Centre who testified of an examination that was carried out on the victim on 10.2.2015 who had a history of defilement. The examination revealed bruises on the left buttocks, parts of the vaginal and anal orifice. She was sent to the lab where it was revealed that she had an infection and that she had been defiled several times. Her hymen was broken but it was not a new breakage. The PRC form was prepared as well as an age assessment report and the P3 form filled produced as exhibits. On cross-examination, she testified that the age of injury was three days and on re-examination, she testified that a penis was used to break the hymen and it was not the first time.

5. Pw4 was No. 85435 Pc Benson Mururu who testified that on 7.2.2015 he received a report of a defilement in the OB. He recorded witness statements and took the victim to hospital then went to the scene and arrested the appellant. On cross examination, he testified that the appellant was arrested on 7.2.2015 and that he was brought to the station by many people and that Pw1 indicated that she was in pain. The learned trial magistrate found that a prima facie case had been established and put the appellant on his defence.

6. The appellant opted to give a sworn statement. He testified that on 7.2.2015 he differed with his wife and left home and came back at 7.45 pm and found the children alone. His wife arrived ten minutes later and that on Friday he slapped her because they had a brawl over household chores. He stated that his wife came back with eight people who called him out and then had him taken to the police station where

he was locked up and on 9.2.2015 the investigating officer accused him of defiling a child. His finger prints were taken and on 11.2.2015 he was taken to court. He testified that Pw2 did not witness the incident and the people who arrested him did not testify. He told the court that the investigating officer relied on hearsay evidence. On re-examination he testified that Pw1 is his child. The appellant was convicted of defilement because the court relied on the evidence of the victim. He was sentenced to life imprisonment.

7. The appeal was canvassed vide written submissions. It is the appellant's case that the trial court went into error in failing to find that the charge sheet was defective as he was charged with defilement yet the evidence on record shows commission of the offence of incest. Further he submitted that the prosecution did not prove its case and he was not identified as the perpetrator; further that absence of a hymen is not evidence of defilement. He argued that there are inconsistencies in the prosecution evidence because Pw2 testified that she saw the appellant defile Pw1 and earlier testified that she came and found the victim crying and was told that the appellant defiled her. The other inconsistency noted is on the date of arrest in that the charge sheet indicated 8.2.2015 whereas Pw4 testified that he was arrested on 7.2.2015. He questioned why the investigating officer did not testify and this was a breach of his rights under Article 50 of the Constitution. The appellant submitted that his defence was rejected. On the sentence, he submitted that he be given a minimum sentence as per the case of **Yawa Nyale v R (2018) eKLR**. He urged the court to allow his appeal

8. The state submitted that the age of the victim was proved to the required standards by the age assessment report that was produced and the same was in tandem with the birth certificate that proved that Pw1 was aged 9 years. On the issue of penetration, this was established by the account of Pw1 as well as the clinical officer who confirmed absence of the hymen. It was submitted that this is indicative of penetration as per Section 2 of the Sexual Offences Act. With regard to the identification of the appellant, learned counsel submitted that the evidence of the complainant together with Pw2 and Pw3 positively identify the appellant as the father of Pw1. On the issue of the defective charge sheet, learned counsel submitted that Section 134 of the Criminal Procedure Code spells out the contents of a good charge sheet. Similarly section 382 of the Criminal Procedure Code states that the test to be met is whether injustice has been occasioned. The offence the appellant was charged with are known in law and the accused was aware of the charge facing him and hence there was no prejudice occasioned to him. On the issue of failure to consider the defence of the appellant, he submitted that the ground is devoid of merit since after he was put on his defence in compliance with section 211, he failed to offer any explanation to the charges he was facing. On the issue of inconsistencies, counsel submitted that the discrepancy in time of commission of the offence be disregarded because Pw1's account is the most accurate and therefore the discrepancies are curable under Section 382 of the Criminal Procedure Code. The state submitted that the court complied with Section 169 of the Criminal Procedure Code and that the prosecution's evidence is well corroborated, credible and therefore the appeal be dismissed. The court do uphold the conviction and sentence of the trial court.

9. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except bearing in mind that it did not have the advantage of hearing or seeing the witnesses.

10. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into two grounds:

> **1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;**
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> **2. That the trial magistrate erred in convicting the Appellant yet the charge sheet was defective;**

11. In cases of defilement the following ingredients are to be proven:

> 1. The age of the child.
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> 2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and
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> 3. That the perpetrator is the Appellant.

12. Having considered this appeal and the rival submissions, the issues for determination are whether the prosecution proved its case; whether the charge sheet was defective and whether the same should be substituted. From the evidence on record it is undisputed that the complainant was a person below 18 years as she was aged 9 years. What is in contention is the issue of identification of the appellant as the perpetrator.

13. The evidence on record points towards penetration and this was indicated on the P3 form, the PRC form and the account of the victim and the doctor.

14. The P3 form was filled by Dr. Maureen Maitha on 10.2.2015. She testified on the physical examination carried out on the victim and testified on the contents of the document. The Appellant did not object to its production. She concluded that the victim was defiled and signed the P3 form.

15. The P3 form indicates that, "the hymen was absent. To convict the appellant, there ought to have been no doubt in the mind of the court that the appellant was responsible as well as rule out other causes or explanations to the condition of the body of the complainant. **Maraga and Rawal, JJA**, as they then were), in **P. K.W v REPUBLIC [2012] eKLR** took this view.

16. The trial court took into account the medical evidence in totality and not in isolation of other factors surrounding the case.

17. The victim testified that the appellant was a person known to her and thus she recognized him. It transpired that the appellant was father to the complainant and there was no issue of mistaken identity. Further the appellant in his defence confirmed that the complainant was in

fact his daughter. The evidence of Pw1 and Pw2 placed the appellant at the scene of the crime and so was his own evidence.

18. The appellant denied defiling the victim but gave no explanation to the charges facing him. From the evidence on record there is no plausible explanation or defence or evidence to controvert the evidence against him and hence the appellant's evidence did not shake that of the Respondent.

19. From the foregoing, I did not have the benefit of seeing the witnesses testify. However from the proceedings and the court record, the trial court was satisfied of the evidence against the appellant. The learned trial Magistrate rightly relied on the evidence of Pw1, though he did not indicate the provisions of Section 124 of the Evidence Act as expounded in the case of **Mohamed v R (2006) 2 KLR 138**. **Section 124 of the Evidence Act** provides:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged 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 material evidence in support thereof implicating him.**
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> **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."**

20. The learned magistrate considered the surrounding circumstances that the appellant was at the scene of crime, coupled by the fact that the appellant was well known to the victim hence by default relied on Section 124 of the Evidence Act.

21. The appellant has raised the issue of failure to call the investigating officer. However the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available hence this ground has no merit. The appellant has raised the issue of a defective charge sheet and I note that the evidence on record supports an offence of incest yet the appellant was charged with defilement. Because the penalty for the offence is the same and the element of consanguinity was proven, the court ought to consider whether to substitute the charge.

22. From the evidence on record, I find that the same exhibits an offence that is minor and cognate to the main charge; this court being an appellate court has powers to invoke the provisions of Sections 179 and 186 of the Criminal Procedure Code and to substitute the conviction with an offence that is minor and cognate to the offence the appellant was charged with. This is particularly where all the key ingredients are in common and have been proved by the prosecution in which case the appellant can be convicted of the minor offence although he was not charged with it;

23. The facts and the evidence adduced herein are found to sufficiently prove the offence of Indecent Assault to a person who to his knowledge is his daughter contrary to Section 20(1)of the Sexual Offences Act; alternatively the offence of Sexual Assault contrary to Section 5(1) and (2) of the Sexual Offences Act. This court is therefore satisfied that this is a suitable case for substitution of the offence under the provisions of Section 179 and 186 of the Criminal Procedure Code which allow for the conviction on an offence even though the appellant was not charged with it;

24. The authorized sentence for Incest under proviso to Section 20 of the Sexual Offences Act which provides that where the minor is less than eighteen (18) years the sentence shall be life imprisonment; whereas Section 5(2) of the Act provides for a less severe sentence as it carries a minimum sentence of ten (10) years;

25. From the evidence on record, the conviction of the appellant on the main charge was erroneous and the same ought to be quashed and the sentence set aside.

26. From the evidence on record, and the analysis of the appellant, the victim was 9 years at the time of commission of the offence, and in exercise of the power of the appellate court under Section 179 and 186 of the Criminal Procedure Code this court enters a conviction for the offence of Sexual Assault contrary to Section 5(1)(b) of the Sexual Offences Act; and sentences the appellant to serve a term of thirty (30) years imprisonment because of the fact that the offence was committed repeatedly.

27. From the aforegoing it is clear that the prosecution's case was overwhelming against the appellant and that the appellant's evidence was rightly rejected by the trial court. It was highly unlikely for the mother of the victim to use her vulnerable daughter to act as victim so as to settle perceived differences with the appellant. The evidence tendered by the prosecution was cogent and believable.

28. In the result the appeal partly succeeds. The conviction and sentence of the trial court is hereby quashed and set aside and in its place substituted with a conviction for the offence of Sexual Assault contrary to section 5(1) (b) of the Sexual Offences Act and the appellant is sentenced to serve thirty (30) years imprisonment from the date of arrest namely 8.2.2015.

It is so ordered.

Dated and delivered at Machakos this 17th day of September, 2019.

D.K. Kemei

Judge