REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 23 OF 2019

FMN..APPELLANT

VERSUS

THE REPUBLIC....................................RESPONDENT

{Being an appeal against the Conviction and Sentence of Hon. N. M. Kyanya – RM Thika delivered on the 12th day of November 2018 in the original Thika Chief Magistrate's Court Sexual Offence No. 14 of 2018}

JUDGEMENT

The appellant was sentenced to life imprisonment for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. It was alleged that on 10th February 2018 in Juja Sub-county within Kiambu County he intentionally and unlawfully caused his penis to penetrate the vagina of CN a child aged 2 years.

The appellant was alternatively charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act the particulars being that alternatively in the same date and in the same place he intentionally and unlawfully touched the vagina of CN a child aged 2 years.

He denied both charges but after hearing and weighing the evidence of the prosecution witnesses against the unsworn statement of the appellant, the court found him guilty on the charge of defilement.

This appeal is against the conviction and the sentence. The grounds of appeal are: -

> **"1. THAT, the Hon. Trial magistrate erred in matters of law and fact by failing to find that penetration by the accused person was not proved by the evidence on record.**
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> **2. THAT, the Hon. Trial magistrate erred in matters of law and fact by misapplying Section 31 of the Sexual Offences Act (S.O.A) thereby denying the accused person an opportunity to cross examine the witness on the adverse evidence adduced.**
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> **3. THAT, the Hon. Trial magistrate erred in matters of law and fact by failing to find that the prosecution's evidence was so inconsistent and contradictory and thus could not sustain conviction.**
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> **4. THAT, the Hon. Trial magistrate erred in matters of law and fact by failing to find that essential witnesses necessary to corroborate the prosecution's case were not availed hence violating Article 50 (2) (c) and (j) of the Constitution.**
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> **5. THAT, the Hon. Trial magistrate erred in matters of law and fact by erroneously holding that Section 77 of the Evidence Act was complied with while in fact it had not.**
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> **6. THAT, the Hon. Trial magistrate erred in matters of law and fact by rejecting the cogent defence case which not only exhibited bad blood between the appellant and pw1 but also reasonably exonerated him from any wrongdoing."**

The appeal is opposed. The appellant canvassed his appeal through written submissions to which Counsel for the prosecution replied orally.

An appeal is in the nature of a retrial and I have analysed and re-evaluated the evidence in the trial court afresh so as to arrive at my own independent conclusion bearing in mind that I did not see or hear the witnesses give evidence **(see Okeno v Republic [1972] EA 32).**

The main elements of the offence of defilement are that **the victim is a child, penetration of the genital organ of the victim by the genital organ of the perpetrator** and **the positive identification of the perpetrator**. It is also crucial to prove the age of the complainant for

purposes of determining the sentence to be imposed should the accused be found guilty.

Briefly the facts of this case were that the complainant's mother left the complainant who was 2 years old under the care of their neighbour one JN and her husband JMN (Pw1) and went to work at a bar. The complainant's mother had allegedly given 50/= to JN and requested her to give the complainant food when she cooked. JN's husband (Pw1) testified that when JN went to give the child food she found the child could not walk. She therefore went and called other women who resided in that plot and they went and looked at the child and suspecting she had been defiled, reported the matter to a nearby Police Post. According to Sergeant Jared Mulwa when he received the report at around midday he accompanied the reportees (Pw1 and his wife) back to the scene and when he saw the complainant he too concluded something had been done to her. He requested an elderly woman called Nancy to take the complainant to Thika Level 4 Hospital. A few hours later the child was taken back to him with a P3 Form which confirmed she had been defiled. When he asked the complainant who had done that to her she told him it was **"uncle".** It was then that he looked for A (Pw3) the girl's mother who in turn went for the appellant and he and JMN(Pw1) were put in custody. J was later released.

AN (Pw3) testified that she went to work at 7am and left the children alone; that however J (Pw1) told her that her husband had gone back to the house to change. She stated that J (Pw1) also told her that when he went to give her children food he found the child lying on her back on a mattress on the floor with her legs open and a discharge coming out of her vagina. J also told her that the child's skirt was up to the waist and further that he had heard the appellant telling the child that he was going to buy her doughnuts.

At the trial the child was declared a vulnerable witness and was allowed to testify through the Children Officer Linah Muthoni Mwangi (Pw4). She testified that her father put his **"dudu"** meaning genital organ into her **"cucu"** (genital organ); that she felt pain and cried but he only stopped when she stopped crying. She stated that he promised to buy her soda and cake. After the children officer finished testifying the complainant was taken into the court to identify the perpetrator. The record reveals that the children officer asked her – **"is that Baba"** and she nodded. The child is alleged to have told the investigating officer (Pw5) the same thing. Pw5 testified that the hospital records confirmed the child had been defiled and so he charged the appellant.

The appellant made an unsworn statement. He confirmed that he was married to the mother of the complainant and that he lived with her and the complainant in a dwelling house rented from J (Pw1). He stated that on 9th February 2018 he arrived home at 10.30pm to find their house locked. He knocked but the door was not opened so he went and slept in a lodging. The next day he went to work only for his wife to go there later and tell him they had been given a notice to vacate the house by J. He gave her Kshs. 200/= for food and told her to go prepare the house they would move to. He contended that their child must have been defiled when his wife went to see him. He asserted that the person alleged to have seen him go to the house should have testified. He vehemently denied the offence.

An appeal is in the nature of a retrial and I have analysed and evaluated the evidence before the trial court so as to arrive at my own conclusion bearing in mind that I did not see or hear the witnesses give evidence **(see Okeno v Republic [1972] EA 32).** I have also considered the submissions of the parties.

The ingredients of the offence of defilement are that **the complainant was or is a child, that there was penetration of the genital organ of the child with that of the perpetrator** and of course **the identification of the accused person as the perpetrator of the offence**. All the above elements must be proved beyond reasonable doubt.

In this case there is no doubt that the complainant was a child. Although no documentary evidence was tendered to prove her age her mother (Pw2) testified that she was 2 years old. Treatment notes produced at the trial also gave her age as 2 years old and when the trial Magistrate saw her he noted her apparent age was 2 years old. The children officer (Pw4) also estimated her age as 2 years. I am therefore satisfied that age was proved to the standard required.

On the issue of **penetration,** the child testifying through an intermediary gave evidence that establishes she was defiled and there is medical evidence to corroborate that. The only issue for determination **is whether the prosecution proved beyond reasonable doubt that the appellant was the perpetrator of this heinous crime**.

On this, my finding is that the appellant's guilt was not proved beyond reasonable doubt. I find there is doubt in the evidence of the prosecution witnesses the benefit of which should have been given to the appellant. To begin with there is no direct evidence that it is the appellant who defiled the complainant. If we can start with the complainant herself her first communication to the police was that she was defiled by **"uncle".** To a child of her age **"uncle"** can be anybody other than her father who she referred to as Baba. It is instructive that the only time she made reference to her Baba was in court when she was called in to identify him. Even then the question that was put to her by the intermediary was **"is that Baba"** to which she nodded. He was her father and the answer would have been nothing but affirmative. It would have been more desirable if the question put to her was if he was the one who put his **"dudu"** in her **"cucu."** Had that been the case and she nodded, that would have been different. That was not what she was asked and my finding is that the fact that she nodded to the question posed does not indicate that he was the perpetrator of the offence. The court can convict on the evidence of the victim of a sexual offence without requiring corroboration but only if it believes her. In this case I find no evidence upon which I can conclude that the child identified the appellant as her assailant.

What of the evidence of the other witnesses? My finding is that the same was so inconsistent and shaky that it cannot be trusted. For Pw1, he merely narrated what his wife JN allegedly told him. That is hearsay evidence as she was not called to testify. A, the complainant's mother (Pw3) based her evidence on what Pw1 told her. Her evidence juxtaposed with that of Pw1 is however not corroborative of each other. In court, Pw1 did not mention that he found the girl lying on her back on a mattress with her skirt to the waist. Indeed, from what he told the court, he did not go to the scene himself and it was his wife J who told him the condition in which she had found the child. Pw3 told the court that she left the children alone, meaning the appellant was not in the house when she left for work. Indeed, the case against him is based on evidence that he went to the house to change after A left for work and found the child alone. It is A who testified that the appellant went to the house to change and that he told the child he was going to look for money to buy her a doughnut. It is however noteworthy that it was her testimony that she was told about this by Pw1. In his evidence, Pw1 did not mention that he told her that hence creating doubt on whether she could have made it all up. His own evidence (Pw1) during cross examination was that he only saw the appellant at the time he

was arrested. His evidence does not disclose that the appellant had gone to the house to change. There was therefore no evidence to place the appellant at the scene of the crime. It is curious that the appellant who alleges to have been at home all along could not have seen the person who defiled the child go to the child's house as according to the child's mother the houses were adjacent and one in either of the houses could hear what was happening in the other. Could it be that it was him who defiled the child? It is even more curious that his wife Jane did not testify yet she was the first person to come into contact with the child. The appellant's submission regarding the failure to call her as a witness cannot be taken lightly much as the law does not require the prosecution to call any number of witnesses to prove a fact. In **John Mutua Munyoki v Republic [2017] eKLR,** the Court of Appeal stated**: -**

> ***"How about inconsistencies and contradictions" There were quite a number though the respondent dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully."***

In the case of **Michael Mugo Musyoka v Republic [2015] EA** the same court observed: -

> ***"We have looked at the evidence on record, there is no evidence or testimony to prove that there was any contact between the genital organs of the appellant with that of the minor. We are of the considered view that the evidence of Pw1 was hearsay and did not carry much weight. We say so because she was not present at the house and did not witness what actually happened. She relied on what her daughter had allegedly told her. Without the evidence of the said or eye witness we find that the prosecution did not prove that the appellant had intentionally and unlawfully indecently touched the child….***
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> ***We find that the case against the appellant was based on a mere suspicion. In Mary Wanjiku Gichira v Republic Criminal Appeal No. 17 of 1998, this court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."***

In this case there was no evidence placing the appellant at the scene of the offence and whatever evidence was adduced to do so was hearsay. The child's evidence identifying him as the perpetrator was weak and did not prove either the main charge or the alternative charge beyond reasonable doubt and in my view he ought to have been accorded the benefit of doubt.

The upshot is that I find merit in his appeal. **The conviction is quashed, the sentence of life imprisonment set aside and it is ordered that he shall be set at liberty forthwith unless otherwise lawfully held**. It is so ordered.

Signed and dated this 15th day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17th day of October 2019.

C. W. MEOLI

JUDGE