REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 59 OF 2018

JUSTUS MUTUKU MUNGATU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. Patrick Wambua Mwangi (SRM) in the

Senior Resident Magistrate's Court at Kilungu Sexual Offence No.37 of 2017,

delivered on 22nd day of January 2018)

JUDGEMENT

1. The appellant was charged with offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 9th day of October, 2017 in Kulungu Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of WK a child aged 15 years.

2. On alternative charge appellant was charged of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

Particulars being that on the 9th day of October, in Kilungu Sub-County within Makueni County, intentionally touched the vagina of WK a child aged 15 years.

3. He pleaded not guilty and matter went into full trial. He was convicted and sentenced to serve 20 years imprisonment.

4. Being aggrieved with the above decision he lodged an appeal and complained of –

(1) That the trial court ignored the facts that there was grudge between appellant and the witnesses.

(2) That the trial court ignored appellant's defence.

(3) In submissions 2 more pleas were added that the sentence be reduced and same to run from the date of arrest.

5. The parties agreed to canvass appeal via submissions. The appellant filed his submissions but prosecution relied on evidence on record.

APPELLANT'S SUBMISSIONS

6. The appellant submitted that the charge of defilement which appellant was convicted and sentenced of was incurably defective in law and substance.

7. That the prosecution did not prove the age of the complainant. That the trial magistrate relied on hearsay from the prosecution witnesses and the testimony which lacked sufficient material to hold a conviction.

8. That the prosecution did not prove penetration. According to the doctor's report no spermatozoa was detected when the complainant

underwent medical examination.

9. Appellant submits that there was no eye witness. PW2 claimed to have seen the appellant coming from the bush zipping his trousers of which does not mean that he committed the offence.

10. That the prosecution failed to prove all the three ingredients of the offence of defilement beyond reasonable doubt.

THE DUTY OF THE FIRST APPELLATE COURT:

This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

EVIDENCE BY PROSECUTION:

11. **PW1 WK** stated that she is in Standard 7 at [Particulars Withheld] Primary School. On 9th October 2017 she was heading to school when she met the appellant.

12. The appellant asked her to accompany him to a bush along the road. He told her to remove her clothes and she removed her pantie. He also removed his by opening his zip. He laid on her. He had asked her to lie down which she did. He took his penis and put it inside her vagina. She was released and went to school. She was later taken to hospital by the head-teacher and her uncle. She was taken to the police station. That was the only time that appellant did that to her.

13. On cross examination by the appellant she stated that she was heading to school and that there was another lady behind her.

14. **PW2 PM** stated on oath that she was a Standard 8 student at [Particulars Withheld] Primary School. On 9th October 2017 she was heading to school. She passed through W's home as she usually calls her and accompanies her to school. She was told by W's mother that she had left.

15. She went to the road and ran after her. She then saw a red capon, an avocado tree and went to check and found the appellant (Mutuku) lying on top of W. She knew the appellant and also saw W's school bag lying on the ground. He laid on top of her and had lifted the W's leg. Mutuku had dropped his trouser.

16. She retreated slowly and went to W's uncle and informed him. The uncle woke up and when they went to the road met the appellant zipping up. W passed a different route and when she got to her she found her laughing and she informed her that Mutuku was trying to trick her. They went to school and the teacher called her and asked her what she saw. They then went to the police station.

17. On cross examination she said that she saw the appellant having sex with W. She saw the appellant very clearly and she knows him well.

18. **PW3 DKM** stated to court that on 9th October 2017 he was at home when MP came and told him that she had found the appellant having sex with PW1 under an avocado tree. He went to check and saw appellant come of under the avocado tree. W also got out from under the tree and went away using a different route.

19. MP showed him the person she found having sex with W. He ran to the appellant and asked him what he was doing with W. Appellant asked him not to discuss that issue on the road. He told him he did so because he was drunk. He had a bottle of alcohol and when he told him he will call the Assistant the appellant asked him to talk as a family.

20. He then called the Assistant Chief and the Assistant Chief asked him to go and report at the school. He went and reported to the Deputy Head Teacher. The Assistant Chief then summoned them to his office. They collected the appellant from his house with headman.

21. She went to the head-teacher's office and when W was called could not talk. She is 15 years and mentally slow. She went to Kilome Police Station and recorded a statement he knew the appellant and his family and appellant asked them to settle the issue at home and he refused.

22. On cross examination by the appellant he stated that he knew nothing about any land dispute. They interrogated the complainant in the appellant's absence that this was not a grudge about any land.

23. **PW5 PC FLORENCE MUNAYA MUKELEMANI** stated to court that on the 9th October 2017 she received the report from the complainant the complainant's uncle and the Assistant Chief Musalala Sub-Location and the teacher. She booked the report and recorded the

statements. She also talked to W the child and was informed that she was heading to school when she met the appellant who lured her to an avocado tree where they had sex. Then a schoolmate saw them.

24. On 9th October she filled the PRC form. On 10th October she filled the P3 form and visited the scene on 12th October and saw the avocado tree.

25. On cross examination she said that the appellant was in uniform but had no pantie. There was no DNA test done on the appellant. That she had no photos of the scene.

26. **PW6 ERIC KASYAMANI** was a clinical officer at Kilungu Sub-District Hospital who filled the P3 forms. He filled the P3 form for one WK. She was examined by one Dr. Patrick Kihiu on 10th October 2017. He was conversant with his handwriting examination. He found that the complainant's hymen was broken, she had no injury on the genitalia and she had an infection with pus cells. The appellant was also examined and his P3 form was produced in court as part of the evidence.

27. On cross examination he stated that there were no spermatozoa and no injuries. That the appellant had no infections. That DNA was not necessary and was not conducted.

28. The prosecution closed their case and the appellant was put to his defence. He opted to give unsworn evidence.

DEFENCE EVIDENCE:

29. He stated that he denied the charges. That on that day he got from work at [Particulars Withheld] Secondary School and headed home. He met David Kivuva and he informed him that somebody had slept with WK. He said it was the appellant and they quarreled and he called the Assistant Chief. He went home and Kivuva went to the school.

30. At 9.00 am Kivuva went to his home and told him that the Assistant Chief was calling them. They went to the Assistant Chief's Office and they went to the school. He was left outside and saw two girls enter the head-teacher's office and they stayed for half an hour. He was then called inside and told them he could remove his clothes to show he did not do it. They refused him and he told them to take him to the police station and they did so and he was locked up.

ISSUES, ANALYSIS AND DETERMINATION:

31. After going through the evidence on record and tendered submissions, I find the only issue is **whether the prosecution its case beyond reasonable doubt?**

32. The crucial ingredients forming the offence of defilement are:-

(1) ***The age of the complainant.***

(2) ***Proof of penetration; and***

(3) ***Positive identification of the assailant.***

33. From the summary of above testimonies by the witnesses, there is evidence that the appellant was found having sex under a tree by the PW2 with the PW1. That PW2 then rushed and called PW3 the complainant's uncle and then they went to the scene of the crime, saw the appellant appear from the bush and was zipping up his trouser. They also saw the complainant use a different route and then when they asked the appellant why he did so he said it's because he was drunk and they should discuss the issue at the family level.

34. The trial court examined the demeanour of the prosecution witnesses and found them truthful and credible. They were forthright to the court including the PW1 who the court found a bit slow in the mind but very clear and lucid, they were not lying. In the case of ***Ndungu Kamanyi vs Republic [1976-80] 1KLR:-*** the opined that;

> **"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person, or raise a suspicion about his trust worthiness or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."**

35. The appellant is said to have tried to allude about a grudge against him and about land dispute during cross examination. He however abandoned that line of defence during his defence hearing and thus since there was no demonstration on the same the court presumes the same does not exist.

36. He also tied to raise the defence of lack of DNA testing during cross examination. However in ***AML vs Republic [2012] eKLR (Mombasa),*** the High Court upheld the view that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

37. This was further affirmed in ***Kassim Ali vs Republic Cr. Appeal No. 84 of 2005 (Mombasa) (unreported)*** where the court stated 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."

38. Thus the fact that the P3 form was inconclusive in this matter is clearly rebutted by the clear evidence of PW1 in this case.

39. The trial court considered the appellant's defence which is unsworn.It also sought guidance In ***May vs Republic [1979] eKLR*** where the court considered the value of unsworn statements of defence. It quoted as follows quoting the case of ***Hale [48 Cr. R. 284)***. The court said this of an unsworn defence:

"In the opinion of the court it is quite unnecessary to consider what an academic question is really. Whether it is called evidence or not, it is clearly not evidence in the sense of sworn evidence that can be cross examined to. On the other hand it is evidence in the sense that the jury can give it such weight as it thinks fit and should take into consideration in deciding whether the prosecution have made out their case so that the prisoner is guilty."

40. In ***Coughlan's Case 64 Cr. App. R 11***, it held:

"When a person charged with an offence chooses to make an unsworn statement from the dock although such statement might throw light on the sworn evidence and thus influence the jury's decision, it is potential effect was persuasive rather than evidential for such a person was not a witness and thus his statement could not prove facts that were otherwise proved by evidence."

41. Thus with reference to section 1(h) of the Criminal Procedure Code Act [1898] which preserved the right of an appellant person in England to make a statement without being sworn, **Shaw L J** said;

"The section makes a clear distraction between the position where an appellant person elects to assume the role of a witness. In his defence and the situation where he makes unsworn statement. In the latter case he is not a witness and he does not give evidence... what is said in such a statement is not to altogether brushed aside; but its potential value is persuasive rather than evidential. It cannot prove facts not otherwise proved by evidence before the jury but it may make the jury see the proved facts and inferences from them in a different light. In as much as it may thus influence the jury's decision, they should be invited to consider the contents of the statements in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is right however that the jury should be told that a statement not sworn to and not tested by cross examination has less cogency and weight than sworn evidence."

42. From all the above, the trial court was satisfied that an unsworn statement is not evidence as generally understood. It has no probative value but should be taken into consideration in relation to the whole of the evidence.

43. weighing the evidence by the prosecution and appellant defence whereby noting that the appellant admits having been found by PW3 at the scene of the crime and also since he did not refute the evidence that he wanted the matter settled at home, thus this court agrees with trial court finding that, the appellant defence was a mere denial in the circumstances of this case. It was therefore properly rejected.

44. The appellant was found red handed by PW2 defiling PW1. He had no defence to that, he was well known to the PW2 and also PW1 told the truth in court. His identity thus could not be faulted. Thus in a nutshell the ingredient of penetration was well proved.

45. On the question of the age of the complainant, in the case of Fred Omar ***Omondi vs Republic [2014] eKLR,*** **Justice G. W. Ngenye – Macharia** sitting in **Eldoret** had this to say about the age of the victim:

"In the case of Rua Ngao Mwatuma vs Republic [2014] eKLR, KC at Malindi Criminal Appeal No. 21 of 2012, the learned Honourable Justice Angote while relying on the decision in the case of Kaingu Elias Kasomo vs Republic Malindi Cr. Appeal No. 504 of 2010 observed as follows:

"The date of birth was not given and it would seem that the only medical evidence tendered was the P3 form which gives the estimated age as 15 years. In the case of Kaingu Elias Kasomo vs Republic Malindi Cr. Appeal No. 504 of 2010 the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.

Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victim is carried out by dentist.

The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."

46. In the case of ***Gilbert Muriti Kanampius vs Republic [2013] eKLR, HC at Meru Cr. Appeal No. 97 of 2009,*** **Gikonyo J** while relying on the case of ***Fappyton Mutuku Ngui vs Republic, HC Machakos Cr. Appeal No. 296 of 2010*** noted as follows:

"Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J in Machakos HC

Criminal Appeal No. 296 of 2010 Fappyton Mutuku Ngui vs Republic... "that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

47. In the case of ***Lameck Okeyo Onyango vs Republic [2014] eKLR, HC at Kisii Cr. Appeal No. 2 of 2010,*** the learned **Nekoye Sitati J,** while relying on ***John Otieno Obwar vs Republic HC Cr. Appeal No. 34'B' of 2010*** reiterated as follows:

"In John Otieno Obwar vs Republic HC Cr. Appeal No. 34'B' of 2010 Makhandia J (as he then was) held:

"Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence. In the circumstances of the case, the charge sheet talks of the complainant being 14 years. Other than allegation, there was no other proof. The clinical officer who examined her never assessed her age. It would have been easy for the prosecution to tender in evidence like the complainant's birth certificate to prove her age. This was not done with the consequence that the age of the complainant was not proved as required."

48. In the case of ***William Odhiambo Siara vs Republic [2014] eKLR HC at Kisumu, Cr. Appeal No. 77 of 2012,*** the learned **Muchelule J** delivered himself as follows:

"In ground 4 of the petition of appeal it was contended that the age of PW3 was not proved beyond doubt. I agree that because of the fact that the various sentences under the Act are dictated by the age of the complainant, it is incumbent upon the prosecution to prove age beyond doubt. For PW3, her mother (PW1) gave her date of birth to be 2/3/99. That was not challenged. She also gave her baptismal card which showed date of birth. It is notable that documents like birth certificates, baptismal cards and school admission papers will indicate date of birth and, unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence. An age assessment by a doctor would be useful, but it should be borne in mind that any such assessment is a medical approximation. I am satisfied that PW3 was 12 going to 13."

49. In the case of ***Joseph Kieti Seet vs Republic [2014] eKLR HC at Machakos, Cr. Appeal No. 91 of 2011***, the learned **Mutende J** held as follows:

"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni vs Uganda, Court of Appeal Cr. Appeal No. 2 of 2000, it was held thus:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

50. The foregoing holdings are applicable in the instant case in various ways. At the trial, PW2, the complainant herein stated that she was 12 years old. Both PW3 and PW4 who were the complainant's biological parents stated that the complainant was aged 12 as well as the P3 form that was produced in court as Pexhibit 1.

51. Furthermore, the trial court which had the opportunity of seeing PW2 did not doubt her age. PW2's age was not set on a borderline. The trial court had no reason to doubt that, that was her age.

52. The clinical officer who filled the P3 form estimated the child's age to be 15 years. The charge sheet indicated that the child's age is 15 years of age. The child victim herself knew and testified on oath and which evidence the court believed entirely that she was 15 years old.

53. PW3 the child's uncle also stated in court that she was 15 years of age. The treatment card also indicated that the child was aged 15 years. The trial court did not see any justification to deviate from these estimates just for lack of paper proof.This court agrees that there was sufficient material to support prove of age of the victim. In any case the appellant never contest the element of age.

54. The trial court also took judicial notice that the children in this area are usually born at home and any form of age documentation may be a tall order and strictly insisting on the document or certificates would be limiting this court cognitive ability to papers. This court not fault trial court on that.

55. In any case the trial court had the opportunity to see the child in court and opined that it did discern by common sense that the the age that was given by oral evidence without doubt. Thus this ingredient of this offence was properly proved. The identity of the assailant is not in dispute.

56. Thus this court finds no merit in appeal on the finding on conviction, on sentence, the appellant has not shown any justification why the sentence should be interfered with. The same is legal. However the same should run from the date of arrest as appellant was in custody during trial.

57. Thus the court makes the following orders ;

i) The appeal is dismissed for want of merit.

ii) The conviction is upheld

iii) The sentence is confirmed but to run from the date of arrest.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE