



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCRA NO. 10 OF 2019

REPUBLIC.....APPELLANT

VERSUS

JOSEPH AMOS SAMBAYI.....RESPONDENT

(Being an appeal against the acquittal of the accused by Hon. Kahara Senior Resident Magistrate sitting at Chuka Law Courts in Criminal Case Number S/O 2 of 2018, delivered on 29th April 2019)

J U D G E M E N T

1. **JOSEPH AMOS SAMBAYI**, the Appellant herein was charged with four counts of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of Sexual Offences Act No. 3 of 2006.
2. In Count I the particulars were that on 10th January, 2018 within Tharaka Nithi County, the Appellant defiled (name withheld) a girl aged 6 years. In the same charge he faced an alternative count of indecent Act with the same child contrary to **Section 11(1)** of the **Sexual Offences Act**.
3. In Count II, the particulars were that on 10th January 2018 within Tharaka Nithi County the Appellant defiled one (name withheld) a girl aged 7 years. He also faced an alternative charge of indecent Act with the same child.
4. In Count III, the particulars were that on diverse dates between year 2016 and 10th January 2018, the Appellant defiled one (name withheld) a girl aged 10 years. He also faced an alternative charge of indecent act with the same child.
5. In Count IV, the particulars were that on 10th January 2018 within Tharaka Nithi County, the Appellant defiled one (name withheld) a girl aged 11 years. He also faced an alternative charge of indecent act with the same child in the same place.
6. The Appellant denied all the counts before the trial court and after trial he was found not guilty of all the charges and acquitted. The State through the Director of Public Prosecution felt aggrieved and preferred this appeal raising the following 9 grounds namely;

i. That the learned trial magistrate erred in law and fact by finding that the prosecution did not establish a prima facie case.

ii. That the learned trial magistrate erred in law and fact by failing to consider the overwhelming evidence on record in relations to the serious offences committed.

iii. That the trial court erred by holding that the Respondent did not commit the offence yet all the ingredients of the offence of defilement were presented and proved.

iv. That the learned trial magistrate erred in law and fact by failing to consider that there was no reason for the minors to lie in their evidence which were seriously corroborative.

v. That the learned trial magistrate erred in law and fact by not making a finding on the alternative charges brought against the Respondent yet enough evidence was tendered.

vi. That the learned trial magistrate erred in law and fact by disregarding the fact that the offences were committed over a long period of time and not 10th January 2018.

vii. That the learned trial magistrate erred in law and fact when she failed to consider the age of the complainant and their relationship with the Respondent.

viii. That the learned trial magistrate erred in law and fact by erroneously concluding that a finding of no injuries on the genitalia of the victims meant that the Respondent had not committed the offence..

ix. That the leaned trial magistrate erred by misinterpreting and misapplying the law in making her decision that no prima facie case was established.

7. A brief summary of the facts presented to the trial court reveals that, all the four children were alleged to have been defiled by their father who is disabled and moves with the assistance of a wheel chair. The red flag regarding defilement was raised by teachers of the school that all the minors attend and it is apparent that their mother said to be a bar maid was away from home most of time and hence the opportunity afforded for the offence to take place over a long period of time. The trial court found the medical evidence regard to the defilement wanting and in conclusive and based on that the trial court found it unsafe to place the Respondent on his defence.

8. I have perused through the evidence tendered by all the prosecution witnesses. This court as an appellate court is being called upon to overturn a finding of no case to answer to a positive finding of a case to answer. For reasons that will be obvious at the end of this judgment, this court finds that it is undesirably and may be prejudicial to delve into the details of the evidence tendered and analyse them.

9. I will therefore go straight to the main issue for determination in this appeal which is whether based on the evidence tendered the trial magistrate erred by concluding that no *prima facie* case had been established. Given the fact that this is a first appeal, I appreciate the fact that this court unlike the trial court does not have the privilege of witnessing the witnesses and especially the minors testifying on the stand. This court is mandated on appeal to analyze the evidence placed before the trial court in order to ascertain if the trial court properly considered the evidence on record and arrived at the correct or right conclusion.

10. The charges facing the Respondent were related to defilement and defilement is defined under **Section 8** of **Sexual Offences Act** as;

" A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. "

'**Penetration**' is defined under Section 2 as partial or complete insertion of the genital organs for a person into genital organ of another person. Under **Section 8(2)** any person convicted of defilement with a child aged 11 years or less is liable to be sentenced to imprisonment for life.

11. For the offence of defilement to be established three ingredients must be established and proved.

- i. Victim must be a minor
- ii. There must be penetration whether complete or partial
- iii. Identity of the offender

12. The Appellant has contended in its submissions that it established and proved all the above elements. Without necessarily going into the details of the evidence tendered by the prosecution witnesses, what appears to have swayed the trial court's mind was the apparent inconsistency on the date(s) of the alleged offences as narrated by the minors and their teachers (PW1 and PW3) and the dates on the charge sheet. Save for the 3rd count which reflected that the offence of defilement was committed over a long period of time, the other counts indicate that the offence took place on 10th January 2018. It is apparent from the medical evidence tendered that all the minor (victims) were examined on 11th January 2018 and the medical evidence as per the P3 failed to note any lacerations bruises or any sign of defilement. That evidence in my view is understandable given that the incident of defilement in respect to all the minors did not occur on 10th January 2018. All the four minors save for PW6 were categorical that the indecent occurred on diverse dates they could not remember. From the evidence given by the teachers (PW1 and PW3) one can clearly see a case of negligence and irresponsibility by the teachers who despite having received information regarding defilement never took decisive action immediately because they allegedly did not believe the minors at first but later took action after they eventually believed them. The victims in my view had no role in failure by the teachers to quickly take action. In fact two of the minors stated that they informed their mother who did not believe and instead of taking time to listen and/or interrogate the issue further she proceeded to beat the minors as per the evidence of PW6.

13. This court finds that while the investigating officer and prosecution could have made errors by indicating that the minor were defiled specifically on 10th January 2018 when the evidence indicated a prolonged period of abuse, the victims who are minor of tender years really had nothing to do with those errors. The trial court's decision seemed to have misdirected herself on that score and had it properly directed itself, perhaps its conclusion would have been to the contrary. In fact the trial court found that the minors were not defiled on 8th November 2018 as they also disputed. But that did not mean they were not ever defiled. The question of anomaly on the dates in the charge sheet could have been an issue for determination at the end of trial particularly as to whether the error or omissions in the charge are one of those errors curable under **Section 382 of Criminal Procedure Code**.

14. I am further persuaded that by relying heavily on medical examinations which apparently was done much later after the ordeals the trial court misdirected itself instead of applying mind to the provisions of **Section 124 of the Evidence Act**.

15. The trial court also appears to have fallen into error by not making a finding on the alternative count because it was upon the court to state exactly that the evidence tendered was either sufficient or insufficient to sustain the main charge and the alternative charge because the evidence was presented to her. The question that begs answers is if the minors were found to be credible or truthful but the medical evidence failed to establish or prove penetration, surely a finding on the alternative charge of indecent act with a minor should have been made.

16. There is also disturbing question of how come all the minors presented same result upon examination which was absence of hymen or broken hymen. These are minors aged between 6 and 11 years and all have then have broken hymens and all claim to have been defiled by their father when their mother was away. With this facts/evidence presented by prosecution was the trial court really correct to find that there was no prima facie case or sufficient evidence to place the Respondent to answer to the charge? I have considered the prosecution's case in its entirety and based on the evidence presented it was erroneous for the trial court to make a finding of no case to answer. I agree with the Director of Public Prosecution's contention that the expert's opinion was erroneous because it was based on erroneous report that the minors had been defiled on 10th January 2018 rather than over a lengthy period of time.

17. The standard of proof applicable at the stage of making a finding under **Section 210 of Criminal Procedure Code** i.e whether an accused has a case to answer, is lower than beyond reasonable doubt. The evidence presented should establish a prima facie case against an accused person so that if he chooses to remain silent, the evidence should be sufficient to find a conviction. This court is persuaded by the decision in the case of *Daniel Maina wambugu -vs- Republic [2018] eKLR* where the court upheld a conviction by the lower court based on the credibility of the minor who testified that she had been defiled. The court held that penetration need not be absolute or ejaculation be present for the offence to be established and that offence of sexual intercourse can be proved without medical evidence. The minor had made reference to past sexual encounters which was corroborated by the ruptured hymen. The same set of facts seem to be replicated in the instant case and this shows that the learned trial magistrate as I have observed above appears to have misdirected herself on this critical point of law and fact and in the end arrived at the wrong conclusion that there was insufficient evidence to place the Respondent on his defence. The prosecution's case in my view apart from the anomaly in 1st, 2nd, and 4th count on the issue of dates, had no gaps.

18. The Respondent has submitted that the minors could not be believed by their own mother and therefore it could not be expected that the learned trial magistrate should have believed them. However there was evidence tendered indicating that the mother was irresponsible and a drunkard and that fact appears to be well grounded because she took no action even when she learnt of the case and never presented herself as a witness. In such circumstances the minors who obviously have nothing to do with their mother's odd behaviour, should not be left exposed. Such vulnerable children require equal protection of the law and it would be a miscarriage of justice, if the minors fail to get justice on account of acts of omission and commission of an irresponsible parent more so when the man she is living with is accused of sexually molesting the children.

19. The Respondent has also contended that the teachers of the minors who testified did not corroborate the minors' claims because they did not witness the incident and that their evidence could not have been used by the trial court to find that there was a case to answer. However I have keenly considered what and how the minors narrated their ordeals and I find no basis to question their credibility. It is also unfounded that corroboration of a case can only be provided by an eye witness. If that was the case, no case of sexual offence could be sustained because it is often committed in secrecy or privacy. The minor's are of tender ages and the description by one of the offender's of sexual organ as "*snake*" or "*dudu*" in my view added weight rather than doubt to prosecution's case.

20. This court is convinced that even if the standard used in the decision of *Rannalal Bhat -vs- Republic (Criminal Appeal No.76 of 1957)* was used, the results would have been the same. The Respondent based on the evidence tendered had a case to answer.

In the end this court finds merit in this appeal. The decision by the trial court on 29th April 2019 that the Respondent had no case to answer is set aside and in its place a finding is hereby made that the Respondent has a case to answer. Consequently, I will refer this file to another court of competent jurisdiction to proceed by dint of **Section 200(1)** of the **Criminal Procedure Code** and **Section 211** and proceed to finalize the trial given that ordering a pre-trial as prayed by the state may not be in the interest of justice because of many factors such as possible loss of memory by witnesses, witness apathy, trauma and pain caused to the minors by asking them to begin the narrative again and the likelihood of prejudice to the Respondent who would have been forced to stand trial where 10 witnesses would be heard afresh. This court is well guided in that regard with the Court of Appeal decision in *Abdi Adan Mohammed -vs- Republic [2017] eKLR* where the court held inter alia that starting cases afresh three times can cause witness fatigue and apathy. The proceedings of 10 witnesses heard during trial are typed and it is in the interest of justice in my view to direct that given the circumstances of this case including the fact the Respondent herein is a foreigner and not likely to raise bond, the matter should proceed before another magistrate of competent jurisdiction under **Section 200 of Criminal Procedure Code**. To that end, I direct that the lower court file be mentioned before the duty court a day after delivery of this Judgment.

Dated, signed and delivered at Chuka this 13th day of November 2019.

R. K. LIMO

JUDGE

13/11/2019

Judgment dated, signed and delivered in the open court in presence of Momanyi for Appellant and Mutani for Respondent.

R.K. LIMO

JUDGE