



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: A.K NDUNG'U J.**

**CRIMINAL APPEAL NO. 66 OF 2019**

**KEVIN MANGONDI.....APPELLANT**

**VERSUS**

**REPUBLIC through ODPP.....RESPONDENT**

***(Appeal from the original conviction and sentence of Hon. D.K Matutu – SRM***

***dated 8<sup>th</sup> March, 2019 at the Principal Magistrate's Court at Kilgoris***

***in Sexual Offence Case No. 22 of 2018)***

**JUDGMENT**

1. The appellant was charged with defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 1<sup>st</sup> day of June 2018 in Narok County intentionally and unlawfully caused his penis to penetrate the vagina of EK a girl child aged 8 years.
2. He faced an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 1<sup>st</sup> day of June 2018 in Narok County intentionally and unlawfully touched the vagina of EK a girl child aged 8 years with his penis.
3. The appellant faced a second count of attempted defilement contrary to **Section 9(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of which are that on the 2<sup>nd</sup> day of June 2018 in Narok County, intentionally attempted to cause his penis to penetrate the vagina of GS a girl aged 7 years.
4. He faced an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. That on the 2<sup>nd</sup> day of June 2018 in Narok County intentionally touched the vagina of GS a girl child aged 7 years with his penis.
5. In a judgment dated and delivered on the 8/3/2019, the trial court found the appellant guilty as charged and convicted him of defilement contrary to **Section 8(1)** as read with **S 8(2)** of the **Sexual Offences Act** and sentenced to life imprisonment. He was acquitted of the offence of attempted defilement.
6. Aggrieved by the conviction and sentence, the appellant has now lodged this appeal. The appeal is anchored on the following grounds;
  1. That I did not plead guilty to the charges and I firmly maintain the same.
  2. That the learned trial magistrate erred both in law and fact to pass judgment against me while the doctor before court denied that he never examined me to have proof of connecting me with the alleged defilement.
  3. That the trial learned magistrate erred both in law and fact by sentencing the appellant to indefinite sentence which was harsh, excessive, callous and capricious sentence under the circumstances.
  4. That the trial learned magistrate erred in law and fact by failing to explain to the appellant the right of legal representation.

5. That the learned trial magistrate failed in both law and fact when basing conviction a non circumstantial evidence which was riddled with contradictions.

6. That the learned trial magistrate erred in law and fact by failing to appreciate and consider that the evidence on record when carefully analyzed and evaluated was not enough to sustain a conviction.

7. That the learned trial magistrate erred in law and fact by failing to consider that the evidence of the clinical officer was not consistent with the offence in question.

8. That the learned trial magistrate erred in law and fact by failing to accord the appellant the right of fair trial.

7. The appeal was canvassed by way of written submissions by the appellant and a response vide oral submissions by Mr. Otieno for the State.

8. I have considered the petition of appeal and the submissions on record. Two issues emerge for determination;

1. Whether the evidence on record was sufficient to secure the conviction.

2. Whether the sentence was harsh and excessive.

9. This being a 1<sup>st</sup> appellate court, I am enjoined by law to evaluate the evidence afresh and make my independent findings thereon, all along alive to the fact that this court never saw or heard the witnesses testify ( See Okeno –Vs- R [1972]EA 32).

10. A summation of the evidence tendered at the trial court is as follows;

PW 1 testified that she was 8 years old. She told the court that on 1/6/2018 the appellant asked for a broom from her. She took it to him at his house. They were neighbours. The appellant pulled her into the house and had sex with her. PW 1 reported the incident to her mother when she returned home.

PW 6 examined PW 1. He found that there was incomplete penetration of PW 1. The hymen was intact and the labia minora was hyperemic.

11. PW 2 testified that she was 7 years old. On 2/6/2018, she was playing outside when the appellant asked her to sweep his house. The appellant undressed her removing her skirt. She called Edna and screamed. The appellant went to the market. Examination by PW 6 revealed that her labia were intact. There was no evidence of penetration. There was no discharge.

12. On being placed on his own defence the appellant denied the offences. He said he was at work when he was arrested. He was a mechanic.

13. I have considered the evidence. The trial court properly directed itself in its finding in regard to the evidence adduced in support of Count II and the alternative charge thereof against the appellant. To quote from the judgement of the trial court at Page 5 paragraph 5 of the judgement;

*“As regards the second victim, the accused shall enjoy the benefit of doubt. The evidence as to what exactly he did is inadequate.”*

14. The evidence connecting the appellant to the second count and the alternative count thereof is scanty. PW 2 states that the appellant took her to his house and undressed her. She screamed and called Edna. Surprisingly, Edna (PW 1) states that on 2/6/2018 at around 1.00pm the appellant directed PW 2 to sweep his house. PW 2 refused. On cross examination PW 1 stated that the appellant pulled PW 2. PW 2 did not scream.

15. These contradictions were noted by the court and the acquittal on the respective charge was sound.

16. As regards the main count of defilement, the record shows that the trial court appreciated the applicable law. At Page 3 paragraph 9 of the judgement, the trial magistrate stated;

*“9 It is for the prosecution to prove the case against the accused to the required standard beyond reasonable doubt. It is not for the accused to prove his innocence. Has the prosecution proved its case? To answer this at other pertinent questions there is need to look at the evidence more critically. But first the law applicable.*

*“10 Section 8(1) of the Sexual Offences Act, 2006 (the Act) creates the offence charged in the following terms;*

*“S.8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

*“11 Section 8(2) provides the penalty thus;*

*“S.8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

17. It is clear from the judgement of the trial court that the court correctly applied its mind to the ingredients of the offence of defilement. The court addressed itself to the question of age and I note the birth certificate produced properly places the victim within the ambit of **S 8(2)** of the **Act** being a child under 11 years.

18. The identification of the appellant was proper given that the appellant was known to the victim before and the victim’s evidence was firm and consistent. The trial magistrate states at page 5 para 17 of the judgement;

*“... I had the opportunity of hearing the alleged victims testify. I believe the testimony of the alleged victims. The testimony of the alleged first victim is buttressed by the medical evidence adduced. The accused had defiled her .....*”

19. It is trite law that whoever alleges must prove. The **Evidence Act** at **S 124** provides, as correctly noted by the trial court, the law in relation to sole evidence of alleged victims of Sexual Offences. The section provides;

**“S 124** *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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: **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 trial court correctly applied this legal provision noting that the first victim told the truth and her evidence was buttressed by the medical evidence.

21. I need to say a thing about the medical evidence. True, the clinical officer indicates in her evidence that penetration was not complete. This in no way absolves the appellant from the offence of defilement.

22. The Court of Appeal in **George Owiti Raya –Vs- R [2015]eKLR** had this to say on the applicable Law;

**13:** *On our part, we have carefully considered the evidence on record. There is sufficient evidence that on the material day PW 1 was called by the appellant from their house and when she went and stood outside the appellant’s house, he pulled her inside and proceeded to defile her. The complainant had no reason to lie against the appellant. The evidence of PW 1 was corroborated by PW 2, PW 4 and PW 5.*

**14:** *The Sexual Offences Act defines “Penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.” It matters not whether the complainant’s hymen was found to be intact, suffice it that there was evidence of partial penetration and the evidence of PW 5 was categorical about that.*

23. The legal position is further expounded in the case of **Samuel Mburu Wanyoike –Vs- Republic [2018]eKLR** where again the Court of Appeal had this to say at page 5 paragraph 17 of its judgment;

**17:** *Regarding the question whether penetration as an ingredient of the offence, was proved, Section 2 of the Sexual Offences Act defines penetration as **‘the partial or complete insertion of the genital organs of a person into the genital organ of another person.’** In the case of **Mark Oiruri Mose vs R[2013]eKLR** this Court stated that, **“So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ ...”.***

**18:** *In the present case, there was the evidence of PW 1, who stated that immediately she got to the scene, she checked DN’s private parts and saw watery discharge which looked like semen. DN stated that the appellant removed her panty and did bad manners “tabia mbaya”. She stated that the appellant laid her on his bed and “he did bad manners in my vagina” and that she felt pain. The clinical officer (PW 5) testified that on examination, DN’s outer genitalia was tender and that although her hymen was intact, there was partial penetration. In light of all this evidence the conclusion reached by the courts below that penetration was proved was well supported by the evidence. There is therefore no merit in the appellant’s complaint.*

24. The trial court’s finding that the offence of defilement was proved is supported by the evidence.

25. As to the appropriateness of the sentence, under **S 8(2)** of the **Act** a person who commits the offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

26. Evidence of a birth certificate was tendered to show that the victim was 10 years old.

27. I note from the submissions by Mr. Otieno for the State that the State is not averse to the Court exercising discretion to interfere with the sentence, in his words *“in light of the decision of the Court of Appeal”*. I have been urged however to note the age of the victim.

28. Following the decision in **Jared Koita Injiri –Vs- R, Criminal Appeal 93 of 2014**, the mandatory minimum sentence under the Sexual Offences Act is unconstitutional. The trial magistrate ought to have exercised discretion in sentencing.

29. I have considered the mitigation offered by the appellant at trial. I have also considered the gravity of the offence. I am persuaded that I should interfere with the sentence metted on the appellant.

30. With the result, that I find the conviction of the appellant safe and I have no grounds upon which to interfere with the finding of the trial court, I however set aside the sentence of life imprisonment and substitute thereof a term of 20 years imprisonment to run from the date of conviction.

**Dated and delivered at Kisii this 5th day of December 2019.**

**A.K NDUNG’U**

**JUDGE**