REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.24 OF 2017

(Appeal Originating from Nyahururu CM's Court

Cr.No.361 of 2012 by: Hon. D.K. Mikoyan – P.M.)

LAWRENCE GACHUHI MATHENGE.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

Lawrence Gachuhi Mathenge, the appellant, was convicted for the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between January, 2012 and 21/2/2012 in Nyandarua North District, unlawfully and intentionally caused his penis to penetrate the vagina of **P.W.M**. a child aged 10 years.

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. It was alleged that on diverse dates between January, 2012 and 21/2/2012, at **[Particulars Withheld]**, intentionally and unlawfully caused his penis to come into contact with the vagina of **P.W.M**. a child aged 10 years.

No finding was made on the alternative charge. The appellant was sentenced to serve life imprisonment.

The appellant was aggrieved by the conviction and sentence and lodged this appeal based on the amended petition of appeal filed in court on 14/7/2017 in which he cited 4 grounds, namely:

(1) That penetration was not proved;

(2) That the appellant was not at the scene when the offence was allegedly committed;

(3) That the witnesses' testimonies were contradictory;

(4) That the court erred by prosecuting Criminal Case No.360/2012 and 361/2012 separately.

Mr. Obutu counsel who represented the appellant submitted that PW6, the doctor who examined PW1 indicated that the hymen was broken but did not estimate the age of the injuries; that PW1 stated that three people defiled her and one was charged in Criminal Case No.360/2012 and there was no explanation why they were not jointly charged in the same file; that therefore, the charges offended Sections 135 and 136 of the Criminal Procedure Code on joinder of counts ; that PW1 testified that other children were present when she was defiled but the said children were never called as witnesses; that PW1 mentioned one Muchemi as the perpetrator who is not the appellant; that PW3 & 4's testimonies as to what PW1 told them contradicted PW1's testimony; that PW2 who is PW1's grandmother told the court that PW1 said she was forced to implicate the appellant.

The appeal was opposed by learned counsel for the State **Mr. Mutembei,** who stated that the complainant clearly narrated how the appellant defiled her when her father and grandmother were away; that the evidence was corroborated by the doctor's findings that the hymen had an old tear; that the teachers inspected PW1 and found her to have a discharge and foul smell which was consistent with penetration; that the appellant was living with the grandmother and that PW2 confirmed that the appellant was living in her home too; that evidence of PW3 corroborated PW1's testimony that she noticed PW1 having difficulty in walking and PW4 then talked to PW2 about their observations and

allegations made by PW1, that the appellant and a neighbour were defiling PW1. Counsel admitted that 2 other people were named as defiling the complainant but only the appellant was charged.

This being a first appeal, it is the duty of this court to re-examine all the evidence tendered before the trial court and arrive at its own conclusions and determinations but bearing in mind that this court did not have an opportunity to observe the witnesses' demeanor whereas the trial court did. *See* ***Okeno v Republic (1972) E.A. 32***.

The prosecution called a total of 6 witnesses in support of its case. After a *voire dire* examination, the court allowed the complainant, P.W.M. who was aged 9 years, to give unsworn evidence. PW1 told the court that she was going home with some girls when Muchemi got hold of her by force and slept on her but that Muchemi was not in court; that Lawrence who was living with the grandmother, also took her to his bed by force and slept on her after removing his trouser; that she felt pain between her legs; that this incident occurred when her grandmother had gone for firewood and the father had gone to the clinic. She did not tell her parents; that she started screaming at school and it is then Mrs. G and M (PW3 & 4) enquired and she told them she was in pain; that her grandmother came enquiring and was told that Lawrence Gachuhi and Muchemi had abused her; PW1 said she identified Muchemi at Mairo Inya while the appellant was ferrying water with a donkey and both were arrested. PW1 maintained that the appellant was living with them when he defiled her.

PW2 PMG, grandmother to PW1 recalled that police went to her home in February 2012, but there were no boys in her home except PW1's father; that she was arrested and at Mairo Inya, found PW1 with two teachers and a chief at the police station and that PW1 told her that the teachers forced her to implicate some boys and after that PW1 was taken to St. Martin. PW2 said that the appellant used to live with her but left in December, 2011 when Maina got well and returned to her home in February, 2012.

PW3 Christabel Nyawira Mbuthia, a teacher at **[Particulars Withheld]** Primary School which PW1 attended testified that on 22/2/2012 at break time, she saw PW1 moving with difficulty and went to sit alone. PW3 called PW1 but she could not run and she started to cry. After questioning her, PW1 revealed that somebody did '*tabia mbaya'* to her. PW3 informed **Euginia Githinji (PW4)**, PW1's teacher and they examined her private parts PW1 during the long break and found she had a discharge and smelling and PW1 named Karundu and Gachuhi, her cousin, as the perpetrators; that PW1 informed them that the act had been ongoing for sometime and that they were defiling PW1 both in the vagina and anus. They handed over the matter to head teacher.

PW4 testified that earlier on 24/1/2012, she had noticed that PW1 was unable to walk and on questioning her, PW1 told her that her cousin and neighbour had abused her that is Maina and Gachuhi. PW4 summoned PW1's grandmother PW2, they discussed the issue and PW4 told PW2 to be observant and then PW1 again named the culprits in the presence of PW2; that in February, 2012, PW1 was not able to walk and PW3 told her to interrogate PW1 and they examined the girl after which they reported to the Head teacher who in turn informed the Area Chief.

PW5 PC Benson Onkoba of Mairo Inya Police Station recalled that on 22/2/2012, a teacher escorted PW1 to the station after the teacher noticed the girl walking with difficulty and upon questioning, PW1 named Lawrence Mathenge and Samuel as having sexually assaulted her. He sent PW1 to Nyahururu Hospital for examination where the P3 form was filled following which the two suspects were arrested. According to PW5, Samuel Muchemi was also charged.

PW6 Dr. Kori, produced the P3 form that had been authored by Dr. Ng'ang'a who examined the complainant on 3/4/2012. The doctor used the medical history from Nyahururu Hospital where PW1 was seen on 22/2/2012 . The Doctor noted that PW1 had pain when walking or going for short call. He did not find any injuries but the hymen was broken with an old tear, which was a sign of penetration.

When called upon to defend himself, the appellant in his unsworn defence stated that he works in a hotel at Mairo Inya; that he went to work on 22/2/2012 at 4.00 a.m. till 6.00 p.m. He was called out of the hotel and a police officer told him to go to Mairo Inya Police Station where he was arrested and charged.

The appellant faces a charge of defilement and the prosecution has to prove the following:

(1) That there was penetration;

(2) The age of the victim;

(3) The identity, of the perpetrator.

PW1 is a child of tender age. The trial court found that she could not give sworn evidence as she did not understand the meaning of the oath. PW1 told court that she was 9 years old. The doctor estimated her age at 10 years and an application for birth certificate Ex.(No.1) shows that she was born on 3/2/2002. PW1 was therefore 10 years at the time of the act.

Under Section 2 of Sexual Offences Act, penetration is defined as ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person".***

The actual date of the commission of the offence is not known because PW1 being a child of tender years, did not keep track of the dates and it is not until the teachers at the school noticed PW1 walking with difficulty, that the matter came to the fore. PW1 told PW3 and 4 that she had been defiled severally there before and PW4 confirmed that she noticed it on 24/1/2012, and even notified PW2 who did nothing about it.

PW1 narrated what the appellant, Lawrence, did to her; that he took her to his bed and slept on her after removing his trouser upto the knees and also removed her pant upto her knee and she felt pain in between her legs. On 22/2/2012 when at school, PW3 & 4 noticed PW1

walking with difficulty and examined her private parts and noticed a discharge and foul smell. PW1 was examined by the doctor on 3/4/2012 who found no injuries on PW1's genitalia but the hymen had an old tear and PW1 had complained difficulty in walking. PW3 and 4 had noticed the complainant walking with difficulty on 22/2/2012 and it was not until over a month later, on 3/4/2012, that PW1 was taken to the doctor. If there were any injuries, they had healed. PW1's testimony is corroborated by the evidence of PW3 & 4 as to the fact that on 22/2/2012, PW1 had difficulty walking, with a whitish discharge and foul smell and the fact that the doctor found the hymen broken with an old tear, is evidence of penetration. I am satisfied that penetration was proved.

PW1 was categorical that both Lawrence and one Muchemi defiled her. She knew Lawrence very well because he was staying with her in the same house. PW1 said the act took place in her parent's house when her grandmother had gone to look for firewood and the father had gone to the clinic. She named Lawrence, her cousin, to PW3 & 4 as the perpetrator and even to PW5 the police officer and in court, she maintained in her cross examination that it is Lawrence, her own cousin who was living with them at the time, who defiled her. PW1 told the court that she was defiled at 4.00 p.m. in broad daylight and therefore saw the perpetrator well. In any event, it had not happened once but severally there before. PW1 was consistent in that, apart from naming the appellant and Muchemi to PW3 & 4, she also told PW5 the same names. Contrary to defence counsel's submission that Pw1 alleged to have been defiled by three people, the record shows that she only named Muchemi and Lawrence and counsel was aware that Muchemi had also been charged in a different case (Nyahururu Cr.360/2012). The trial court was satisfied that PW1 identified the appellant as the culprit and this court has no reason to find otherwise.

PW4, PW1's class teacher told the court that on 24/1/2012, she noticed PW1 walking with difficulty, she interrogated her and PW1 told her that Maina and Gachuhi (appellant) had defiled her. PW4 took steps of calling PW2 to school, informing her what she had observed and had been told by PW1. PW4 told PW2 to be on guard. It seems PW2 never took any steps towards protecting PW1. Even from PW2's testimony it is clear that she was reluctant to say exactly what transpired and whether the appellant was living with her at the time the offence took place. It is noteworthy that from the onset, PW2 had been trying to frustrate this case by not availing PW1 to court until the court summoned her and warned her. It is no wonder the case took so long before it was heard and the P3 form was not filled for over a month long. It seems PW2 was trying to protect the appellant who is also her grandchild.

The defence complained that there were contradictions in the evidence of PW3 and 4 but the court did not find any. PW4 was the first to notice PW1 walking with difficulty on 24/1/2012 and interrogated her and informed PW2 but no further steps were taken to intervene. It is the second time when PW3 and 4 noticed PW1 walking with difficulty and crying that they observed her and reported to the Head teacher who in turn reported to the Chief and the police. As to whether PW3 informed PW4 or vice versa is a mere discrepancy that would not be fatal to the case.

The other ground raised by the defence is that the charge offended the provisions of Section 135 and 136 of the CPC on joinder of counts and persons. Sections 135 and 136 of the Criminal Procedure Code provides as hereunder:

> ***"135. (1) Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character;***
>
> ***(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count;***
>
> ***(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.***
>
> ***136. The following persons may be joined in one charge or information and may be tried together-***
>
> ***(a) Persons accused of the same offence committed in the course of the same transaction;***
>
> ***(b) Persons accused of an offence and persons accused of abetment, or of an attempt to commit the offence;***
>
> ***(c) Persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code or of any other Act or law) committed by them jointly within a period of twelve months;***
>
> ***(d) Persons accused of different offences committed in the course of the same transaction;***
>
> ***(e) Persons accused of an offence under Chapters XXVI to XXX, inclusive, of the Penal Code (Cap. 63), and persons accused of receiving or retaining property, possession of which is alleged to have been transferred by an offence committed by the first-named persons, or of abetment of or attempting to commit either of the last-named offences;***
>
> ***(f) Persons accused of an offence relating to counterfeit coin under Chapter XXXVI of the Penal Code, and persons accused of another offence under that Chapter relating to the same coin, or of abetment of or attempting to commit any such offence."***

PW1 named Muchemi as having defiled her and so did the appellant. The offences were not committed at the same time or jointly. PW5 confirmed that Muchemi was arrested. The appellant alleges discrimination against him because he should have been jointly charged with Muchemi. The appellant cannot allege discrimination against him because it is the defence counsel who revealed that indeed Muchemi was also charged in Criminal No.360/2012 though the court was not told what the outcome was. The conviction cannot be defeated for non joinder of parties because this is an issue that could have been raised during the trial but was not. Besides, such defect if any, is curable under Section 382 of the Criminal Procedure Code because the appellant has not demonstrated how the non joinder has prejudiced him.

As to the allegation that relevant witnesses were not called; PW1 stated that she was with other children when Muchemi got hold of her when she was going home. That was evidence as against Muchemi. It did not involve the appellant.

The appellant's defence was a bare denial. He only referred to the day of arrest. PW1 placed him at the scene of crime and there was no reason for the minor to frame him. PW3 and 4 did not even know the appellant in order to frame him. Although the trial court did not address the defence, I find that it is a sham and is dismissed as such.

Having considered all the grounds raised, I do not find merit in any. The conviction is well founded and I confirm it. The sentence meted on the appellant is lawful and this court has no discretion to interfere. In the end, I find the appeal to be without merit and it is hereby dismissed.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***5th*** day of ***April***, 2018.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut - Prosecution Counsel

Soi - Court Assistant

Appellant - present