REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MERU

CRIMINAL APPEAL NO. 87 OF 2017

(Arising from the original judgment of Hon. L. Mbicha, SRM in Meru CRC No. 902 of 2016 delivered on 3rd August 2017)

(CORAM: F. GIKONYO J)

BONIFACE MUTUMA.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Appellant was convicted and sentence of fifteen years for defilement. He had been charged with the offence of defilement contrary to Section 8 (1) (4) of the Sexual Offences Act No. 4 of 2006. The particulars of the offence are that the Appellant on the 20th day of March 2016 within Meru County intentionally caused his penis to penetrate the vagina of A. J. M a child aged 17 years old.

[2] The Appellant was aggrieved by the conviction and sentence and he filed this appeal citing several grounds which could be collapsed into three, namely;

> *1. That the learned trial magistrate erred in failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies,*
>
> *2. That the age of the Complainant was not confirmed, and*
>
> *3. That the case of the prosecution was not proved beyond reasonable doubt.*

[3] The appeal was canvassed by way of written submissions. The Appellant submitted that the prosecution solely relied on the evidence of PW1. The Appellant submitted that the evidence by PW1 was not clear as to what small restaurant she was taken to by the appellant. He also saw a contradiction in the evidence of PW1 that she attempted to run away but found the gate closed, for PW2 told the court that when he visited the scene there was no gate. Again, the prosecution failed to call two major witnesses, to wit, the guards at the Mathai supermarket who assisted PW1 to call the brother after the incident and her cousin N.M who allegedly escorted her to Meru. It should be taken that these witnesses were not going to support the case for the the prosecution. Anther contradiction the appellant saw was in the fact that PW1 claimed to have just completed Form 4 yet other evidence by PW5 suggest she had cleared it class 8. He also quipped; how could she be looking for a job when she was in the university? He concluded that he was merely a prime suspect and mere suspicion however strong cannot be a basis for conviction.

[4] The Respondent did not file any submissions as ordered.

Duty of court

[5] As first appellate court, I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses when they gave evidence. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. However, what must be avoided is merely rehashing of evidence as was recorded. Instead, the court should employ a style imbued with judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insist on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. I will then express my overall impression of the evidence, facts and the law applicable in absolute clarity and directness. I shall so proceed.

Analysis and determination

[6] The Appellant is accused of committing the offence of defilement. Section 8 (1) defines defilement as

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

Three ingredients must be established for one to be convicted of defilement, which are:

1. Age of the Complainant

2. Proof of penetration

3. Proof that the perpetrator of the offence was the Accused person.

Age of child

[7] Age of the victim of sexual offence determines whether the offence committed is defilement or not. If the victim is a child, it is defilement. Age also determines the applicable sentence. PEXB 6 is a birth certificate No. XXX for one A.M. It shows date of her birth is 3rd June 1999. Therefore, on 20th March 2016 when the defilement happened, the Complainant was 17 years old. Therefore, the age of Complainant was established to be 17 years.

Penetration

[8] Penetration must be proved. According to section 2 of the Sexual Offences Act;

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

The Court of Appeal in the case of **Mark Oiruri Mose v Republic [2013] eKLR** elaborated that penetration need not be deep; it could be just on the surface. See what the court stated as follows:

> ***"Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. 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."***

[9] **PW1** testified that the Appellant, *''…removed his penis and penetrated my vagina with his penis''*. The p3 form indicated that the hymen was not intact, no spermatozoa and no tears were noted. It also pointed out that the Complainant's clothes were stained with dust. The account given by PW1 that the Appellant threatened her with a weapon until she agreed to have sex with him is not controverted. There is enough evidence to demonstrate penetration.

Was penetration by the appellant?

[10] Is the Appellant the perpetrator of the offence herein? PW1 was categorical as to the person who penetrated her. **PW1**, told the court that on 20th March 2016 she received a call from telephone number 0735 340 506 and the caller identified himself as Mutethia. He told her that he had told her parents about a vacancy at a hotel which was urgent. They agreed to meet at 2.00 PM. She called her elder brother who was in Meru town to take her but she met her cousin N who decided to take her instead. At around 3.00 PM they met the man at Meru stage. As they waited, her cousin went to the salon and Mutethia took PW1 to show her a small restaurant where they found one worker and no other people. They sat down and Mutethia ordered tea and bread of which she refused at first but she drank tea and put the bread in her bag. Mutethia started telling her that he liked her and has an urge to have sex with her. He told her that he loves her and want to have sex with her and marry her. She pretended not to mind then she stepped on the table and began to run away when she found the gate locked. He caught up with her, grabbed her, dragged her to the kitchen and threatened to kill her using a piece of firewood from the fire. He then removed a knife from his pocket and ordered her to remove all her clothes and proceeded to have sex with her. After that he told her that he would take her to where he was to get her work. He took her bag and they started going. At the gate the other man who was there came and opened the gate. When Boniface went back to collect something he had forgotten she ran and went to Maathai supermarket. She told the guards what had happened who then called her elder brother. She reported the matter to the police and was taken to the hospital.

[11] From the evidence of **PW1** she met with the Appellant at the bus stage and waited for his brother. They were talking at the bus stage. They also walked together to a small restaurant. And, they talked at the restaurant when the Appellant was making sexual advances upon her. These was sufficient time for her to be familiar with the Appellant and to identify him. I concur with the trial Magistrate on this finding. **PW3** had also met the Appellant earlier and had carried her with his motorcycle. She also identified the Appellant. There is no doubt they are talking about the Appellant. **PW2 Elikana Ntarangwi** a nurse at Meru Teaching and Referral Hospital and the elder brother of the Complainant corroborated what was stated by PW1. On 25th April 2016 when they went to the scene they found the bag which belonged to the Complainant with two pieces of bread inside. **PW4 Dr. Job Mode Mogare** produced the P3 form. **PW5 No. 73128 CPL Jane Itangata** stated that she took up the matter from Sgt Naomi Maruka. When the matter was reported Sgt Naomi visited the scene where she recovered the Complainant's bag which was produced. Together with the blue jeans and dark sweater top she was wearing on that day. These testimonies and the recovery of the bag places the Appellant and the complainant at the restaurant. Therefore, the defence by the Appellant that he neither knew nor met the complainant at the restaurant is pumby-numby stuff. Again the testimony by **DW1 Bonifcae Mutuma**, the Appellant, that on the material day he was at his shop at Nkubu is mere afterthought. There was nothing to show that his safaricom number is

0797 156 981 and airtel is 0780 538 019. **PW3 N.M** sister of the Complainant stated that on 6th March 2016 she was going to Meru Level 5 Hospital when she found a motorcycle at the stage packed with her mother J.K as pillion passage; which was being driven by the Appellant. The Appellant asked her if she could get a lady to work at a hotel and that the person would earn Kshs. 12,000. That is the time she gave the Appellant her sister's number, the Complainant, and he told her that his name is Mutethia. His claim that he does not know the number of the complainant is just a lie. **DW2 Zakayo Ntabathiya**, father of the Appellant told the court that when he went to the police station he found the Complainant with her parents. He merely expressed a father's faith in his son that he did not commit the offence he is being accused of. The defence was hollow.

[12] The foregoing notwithstanding, *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. See* Section 124 of the Evidence Act which states:

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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 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."***

The evidence of **PW1** is cogent and will suffices to convict the Appellant.

Of witnesses not called

[13] At this juncture, I should discuss one point raised by the Appellant that the guard at Mathai supermarket and N were not called yet they were material witnesses. The prosecution is expected to call all witnesses necessary to establish the truth, even if the evidence may be inconsistent. This does not, however, mean that prosecution should call a superfluity of witnesses. It is, therefore, only where evidence is barely adequate and it appears that there were other witnesses available who were not called, that the court is entitled, under the general law of evidence to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. See the case of **BUKENYA & OTHERS vs. UGANDA [1972] EA 549**.

[14] In this case, there is sufficient evidence to convict the Appellant. Accordingly, the prosecution discharged its burden of proving beyond any reasonable doubt that:

1. The complainant was 17 years old and therefore a child; and

2. She was penetrated by the Appellant.

The penalty for this offence is provided under section 8(4) of the Sexual Offences Act as follows:-

> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

Given the manner the sexual assault was planned and executed a jail term of fifteen years is appropriate sentence. Therefore, I uphold the conviction and sentence imposed on the Appellant. The appeal is dismissed.

Dated, signed and delivered in open court at Meru this 6th June, 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Omari advocate for Appellant

Mr. Namiti for State

Appellant - present

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F. GIKONYO

JUDGE