REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HIGH COURT CRIMINAL APPEAL NO. 46 OF 2016

MWAROME MUNGA NJAJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of L.N. Juma, Resident Magistrate,

delivered on 6th October, 2016 in Kilifi Senior Principal

Magistrate's Court Criminal Case No. 308 of 2014).

JUDGMENT

1. The appellant, Mwarome Munga Njaji was on 28th July, 2014 arraigned in court and charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 13th day of February, 2014 at [particulars withheld] village in Chasimba sub-location in Chonyi location within Kilifi County, intentionally and unlawfully caused his penis penetrate (sic) into the vagina of MCK [name withheld] a child aged 12 years.

2. The appellant also faced the alternative charge of indecent act contrary to Section 6(b) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 13th day of February, 2014 at [particulars withheld] village in Chasimba sub-location in Chonyi location within Kilifi County, intentionally touched the genital organs of MCK [name withheld] a child aged 12 years with his penis.

3. The appellant faced a 2nd count of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars are that on the 13th day of February, 2014 at [particulars withheld] village in Chasimba sub-location in Chonyi location within Kilifi County intentionally and unlawfully caused his penis penetrate (sic) into the vagina of CPK [name withheld] a child aged 9 years.

4. In addition to the above, the appellant faced an alternative charge of indecent act contrary to Section 6(b) of the Sexual Offences Act. The particulars are that on the 13th day of February, 2014 at [particulars withheld] village in Chasimba sub-location in Chonyi location within Kilifi County, intentionally touched the genital organs of CPK [name withheld] a child aged 9 years.

5. The Hon. Magistrate found the appellant guilty of the 1st and 2nd counts of defilement and convicted him accordingly. She sentenced him to serve 20 years imprisonment for Count 1 and to life imprisonment for Count 2.

6. The appellant being dissatisfied with the said Judgment filed a petition of appeal on 10th October, 2016. He thereafter filed an amended petition of appeal on 8th March, 2018 which the court deemed to have been properly filed. In the said amended petition, he raised the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and fact in not considering that the charge sheet as drafted was both null and void;

(ii) That the Learned Trial Magistrate did not consider that the minors' evidence had no value to sustain a safe conviction and sentence;

(iii) That the Learned Trial Magistrate did not consider that the age of both PW1 and PW2 was not proved beyond reasonable doubt;

(iv) That the Learned Trial Magistrate erred in law and fact by depending on the medical evidence tendered and produced in court in respect to Count Nos. 1 and 2, without considering that the same could not add any weight hence it was a made up case;

(v) That the Learned Trial Magistrate did not consider that the matter in question was poorly investigated; and

(vi) That the Learned Trial Magistrate erred in law and fact in not considering that the appellant's sworn defence was cogent and reliable to award him the benefit of the doubt.

7. The appellant filed written submissions to amplify his amended grounds of appeal. He stated that he was charged with two counts of defilement yet it was not possible for him to have defiled two girls at the same time, thus the charges were defective. He further stated that both PW1 and PW2 made up the case as he had disagreed with them. He argued that there was no independent evidence from a neighbour or a relative to confirm that he took the two children (PW1 and PW2) from their home and that he requested their parents to allow them to sleep at his house.

8. The appellant further argued that crucial witnesses such as the area sub-chief or the mother of PW1 and PW2 were not summoned to shed light on the allegations. He contended that their mother failed to check them in their private parts on receiving the report of their defilement. He relied on the case of **Ndungu Kimanyi vs Republic** [1979] KLR 252 where it was held that a witness upon whose evidence the court is to rely on should not create the impression that he or she is not a straight forward person.

9. The appellant referred to the PW1's and PW2's father, PW3, as a liar for having told the lower court that he summoned the appellant to his home, yet he did not do it and for failing to call evidence to support the allegations. He also wondered why it took 2 weeks for the victims to be taken to hospital and referred to the charges as a fabrication.

10. The appellant challenged the evidence of PW3 and stated that there was no credible evidence to support the age of PW1 and PW2. He stated that the age of a victim needs to be proved beyond reasonable doubt because dire consequences flow from proof of an offence under Section 8(1) of the Sexual Offences Act. He relied on the case of **Alfayo Gombe Okello vs Republic**, [2010] eKLR and **Chioroto Nyamawi vs Mumba,** Criminal Appeal No. 373 of 2010.

11. He disputed the results reflected on the P3 form for PW1 to the effect that she had scratches and epithelial cells and wondered how that outcome was possible given that the offence allegedly took place on 13th February, 2014 and PW1 was sent to hospital on 27th February, 2014. He submitted that it was not proved that he was the one who defiled PW1 as her hymen could have been broken by anything else.

12. With regard to the 2nd count of defilement, the appellant contended that PW2 was not defiled at all as her P3 form stated that there were some bruises on her labia minora and slight bleeding. Her hymen was intact. He referred to the provisions Section 2 of the Sexual Offences Act which define what penetration is. He stated that penetration was not proved in respect to PW2 and having been taken to hospital days after the alleged offence, slight bleeding could not have been observed on her as reflected on her P3 form. He therefore submitted that the charge of defilement in count 2 was not proved.

13. The appellant also argued that he was not positively identified as the offence was allegedly perpetrated by an old man of 60 years, which he is not. He prayed for the sentence of 20 years and life imprisonment to be quashed.

14. The Office of the Director of Public Prosecutions through Mr. Fedha filed written submissions on 19th March, 2018. Counsel stated that in his view, the charge as drafted did not cause any injustice to the appellant and that the difference in respect to the time in which the two offences were committed is not material. He cited the provisions of Section 382 of the Criminal Procedure Code and urged this court to cure the defect in the charge. He relied on the case of **JMA vs Republic** [2009] KLR 671 where it was held that;-

> ***'It is not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant is not discernible."***

15. It was submitted that PW1's and PW2's evidence as to their having been defiled was corroborated by that of PW4. Counsel relied on the case of **George Kioji vs Republic,** Nyeri Criminal Appeal No. 270 of 2012 where the court held that a conviction can be based on the evidence of a single witness in a sexual offence under the proviso to Section 124 of the Evidence Act, if the court believes the evidence of the victim and records the reasons for such belief.

16. It was further submitted that in the present case, PW1 and PW2 gave detailed accounts of what transpired between them and the appellant and that their evidence was corroborated by that of PW3 and PW4. Counsel stated that the trial court had the opportunity to observe the demeanour of the witnesses and found them to be truthful.

17. In response to the contention made by the appellant that the age of PW1 and PW2 was not proved, it was submitted that when being taken through voire dire examination, they informed the court that they were 13 and 10 years old, respectively and that PW1 produced a clinic card to prove her age. It was submitted that PW2 in her evidence stated that she was 10 years old. Counsel indicated that the issue of the age of PW1 and PW2 was corroborated through the evidence of their father, PW3. Counsel relied on the case of **Richard Wahome Chege vs Republic**, Criminal Appeal No. 61 of 2014 to show that age is not proved primarily by production of a birth certificate.

18. In response to the foregoing submissions, the appellant filed supplementary submissions on 18th April, 2018 and stated that the provisions of Section 382 of the Criminal Procedure Code should not be applied to cure the defect in the charges leveled against him.

19. He stated that the provisions of Article 35(2) of the Constitution of Kenya should be applied in his favour and that he is entitled to correction or deletion of untrue or misleading information that affects him. The rest of his submissions are a repetition of the ones he filed on 8th March, 2018.

THE EVIDENCE BEFORE THE LOWER COURT

20. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and reach its own independent conclusion. In the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** the Court of Appeal reiterated this duty as follows:-

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

21. PW1, a minor by the name MK [name withheld], was taken by the Trial Court through voire dire examination and thereafter gave sworn evidence. She stated that she was 13 years old, having been born in the year 2011. She had her clinic card which was marked as MFI-1. She testified that on 13th February, 2014 the appellant went to their home in the evening and told her mother that he wanted one of her children to go and stay with his children as he was going to Mwembeni. Her mother suggested that Salome should accompany him but the appellant said that PW1 and PW2 should go with him. They went to his house where they found his first wife. PW1 stated that she was given a pouch containing money which she was asked to count and that she counted Kshs. 1,000/=. He told her to hold it as he went to shower. She indicated that she was with her sister, PW2, and 2 of the appellant's children with whom they slept on the same bed.

22. PW1 gave evidence that the appellant inserted fingers in their vaginas and then inserted his penis. He later gave them Kshs. 50. He then took PW2 to his house and defiled her and she cried. PW1 further stated that the appellant left at 4:00a.m. In the morning, she and PW2 walked slowly to their home as they were in pain. They reported to their parents what had transpired. They were taken to the Police and to Hospital. She stated that a P3 form and post rape care form were filled, which she identified as MFI-2 and MFI-3, respectively. She indicated that the appellant was their neighbour.

23. PW2, CK [name withheld], was taken through voire dire examination by the Trial Court after which she gave sworn evidence. She stated that she was 10 years old and that on the evening of 13th February, 2014 the appellant made a request to her parents for them to go and stay with his children as he was going to Mwembeni. It was her evidence that after they went to his house, he gave them money to count which was Kshs. 1,050/= in total. She recounted that as they slept, the appellant inserted his fingers in her vagina. She stated that she had bathed and had a lesso only without a panty. He also squeezed her breasts and laughed when she told him to stop. He told them not to report him as he would give them money. She testified that the appellant inserted his penis in her. The following morning they went slowly home as they were in pain. They reported to their parents. Their father summoned the appellant. They then went to the Police and to Hospital where the Doctor examined them and filled some documents. She identified her post rape care form and P3 form, which were marked as MFI-4 and MFI-5, respectively. She stated that the appellant is their neighbour.

24. PW3, RK [name withheld], the father of PW1 and PW2 testified that at 9:00 p.m., on 13th February, 2014 (this court has confirmed the year in issue from the Hon. Magistrate's handwritten record), the appellant went to his home and told him that he had 2 wives but his younger wife who had children aged 5 and 2 years had gone. He said he wanted go to Ngombeni (sic) and asked if PW3's children could go and stay with his children. PW3 called his wife and told the appellant to ask her about the issue. She said there was no problem. PW3 told the appellant to take the children back in the morning so that they could go to school.

25. It was his evidence that the children went back at 6:00 a.m., the following morning and told him that the appellant did not go to Mwembeni and that he had defiled them. He got shocked and called the appellant who said he had gone to pick fish at Takaungu. He did not go to PW3's house. PW3 stated that he reported to the Sub-Chief who gave him a letter to take to the appellant but the latter failed to oblige. PW3 then went to Kilifi Police Station to report. It was PW3's evidence that he was sent to hospital where PW1 and PW2 were examined. He identified their post rape care forms and P3 forms. PW3 stated that PW1 was 13 years and PW2 was 10 years old as the time he testified in court. He identified the appellant.

26. PW4, Dr. Hashim Suleiman of Kilifi District Hospital produced the post rape care form for PW1 as P. exh. 2 and P3 form as P. exh. 3. He indicated that PW1 was examined by Dr. Busra and as at that time she was 12 years old. The examination revealed that PW1's hymen was not intact. Epithelial cells that were present in a specimen taken from her showed that she had been scratched. He indicated that the victim went to hospital 4 days after the incident. He further stated that the P3 form was filled by Dr. Busra on 27th February, 2014 and that the post rape care form was filled by Justina Chome, a Nursing Officer on 18th February, 2014. It indicated that PW1's hymen was broken.

27. PW4 also had with him a P3 form in respect to PW2 who was 7 years old as at the time she was examined. The P3 form which was filled by Dr. Busra stated that PW2 had small bruises on the labia majora (sic) with slight bleeding. Her hymen was intact. It showed that PW2 was examined 4 days after the incident. He produced the P3 from as P. exhibit 5. He indicated that Justina Chome who examined PW2 and filled the post rape care form, which he produced as P. exh. 4, reported that there were scratches on PW2's vagina with slight bleeding but it was intact. PW4 stated that he was familiar with both Dr. Busra's and Justina Chome's handwriting as he had worked with them.

28. No. 65592 Corporal Zainab Zaro attached to Kilifi Police Station testified as PW5. She informed the Trial Court that she was the Investigating Officer in the case. She stated that on 18th February, 2014 she was in her office when 2 complainants went with their parents. One was PW1 aged 12 years and PW2 who was 9 years old. They complained of having been defiled by the appellant on 13th (sic) after he requested their parents to allow them to take care of his young child as his wife had gone for a funeral.

29. She further testified that the children were shown where the appellant's child was sleeping in his bedroom. She stated that the appellant went to the bed they were sleeping in and caressed PW1 on her breasts, buttocks and private parts and then inserted his penis in her vagina thereby defiling her. He then went to PW2 and did the same. The following morning they went home and reported to their parents. The Chief was notified and they then reported to the Police. They were taken to hospital and P3 forms were filled.

30. In his sworn defence, the appellant stated that on 18th July, 2014 he woke up at Mwembeni, Digo and asked his young wife to prepare

food for him. He took the food and went to hospital. At 1.30 p.m., he closed his work of cutting stones and went home to his elder wife at Chonyi. He stated that on Monday 21st July, 2014 he heard a knock at his door and on opening it, he saw 2 people in plain clothes who told him that they were Police Officers from the DO's office, Chonyi. They further told him that one P C had made charges against him with regard her children. He thought it was because he had chased them from Church in the year 2013. He denied having committed the offence.

DETERMINATION

31. The issues for determination are:-

(i) If the age of the PW1 and PW2 was proved;

(ii) If there was penetration of the PW1's and PW2'S genital organs;

(iii) If there was positive identification of the appellant;

(iv) If there was corroboration of the evidence of PW1 and PW2; and

(v) If the prosecution evidence had discrepancies.

32. As submitted by the appellant, no birth certificates, age assessment reports or child birth health cards were produced as proof of the age of PW1 and PW2. Although PW1's clinic card was marked as MFI-1, it was not produced in evidence. There was however the evidence of PW1 who said that she was 13 years old as at the time she testified, having been born in the year 2011. PW2 said that she was 10 years old at the time she testified. Their father, PW3 confirmed that PW1 was 13 years old and PW2 was 10 years old as at 2nd February, 2015 when he testified. Going by the charge sheet, it is clear that as at the time PW1 was defiled she as 12 years old whereas PW2 was 9 years old. The said offence occurred on 13th February, 2014 and it follows logically that they were a year older in February, 2015 when they testified in court.

33. On the issue of proof of age, the Court of Appeal in the case of **Richard Wahome Chege vs Republic** [2014] eKLR, stated as follows:-

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth."***

34. In the present case, PW3, the father of PW1 and PW2 gave evidence as to their age, his evidence cannot be held in doubt by this court as any father who plays a pivotal role in the upbringing of his children would have knowledge of when his children were born. This court therefore accepts the evidence PW3 as adequate and cogent enough to support the age of his children, PW1 and PW2.

35. The evidence of PW1 and PW2 was clear that as they slept on a bed in the appellant's house he went to where they were, he shone a torch on their faces and caressed their breasts. He then defiled PW1 before moving to PW2. The latter witness also said that the appellant inserted his penis in her. Contrary to the appellant's submissions, PW1 and PW2 did not allege that the appellant defiled them at the same time. It is apparent from their evidence that he defiled them in turns. This court therefore finds no defect in the charges as drafted as against the appellant in that regard. Physical examination of PW1's vagina revealed that her hymen was broken. She also had epithelial cells. It is thus clear from the foregoing evidence that the charge of defilement as against PW1 was proved beyond reasonable doubt.

36. As for Count 2, the P3 form and the post rape care form establish that PW2's hymen was intact. This therefore shows that the appellant did not complete the act of defilement. There was however evidence of attempted penetration of PW2's genital organ as evidenced by the slight bleeding and small bruises that were noted on PW2's labia minora. Epithelial cells were also observed. I therefore hold that the charge that was proved in Count 2 was attempted defilement contrary to Section 9(2) of the Sexual Offences Act. Section 9(1) of the Sexual Offences Act defines attempted defilement as follows;

> ***"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."***

37. Penetration on the other hand is defined in Section 2 of the Sexual Offences Act as follows-

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

38. In **David Aketch Ochieng vs Republic [2015] eKLR,** Makau J stated as follows on attempted defilement:

> ***"The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration....."***

39. There was ample evidence regarding the perpetrator of the offence. PW1 and PW2 testified that it was the appellant who went to their

house and asked their parents to allow them to go to his house overnight to take care of his young children as one of his wives was away. The foregoing evidence was corroborated by that of their father, PW3. In the course of the night, the appellant went to the place they were sleeping in and shone a torch on their faces before he started touching and squeezing their breasts. The appellant was known to both PW1 and PW2 as their neighbour. In the circumstances, the issue of mistaken identity does not arise. Furthermore, according to PW2 the appellant would at times visit their home. On the day in issue, he had at his house talked to them asking if they wanted food, he had given PW1 a pouch containing money and asked her to count it. PW1 testified that they were crying and he said ***"wewe mdogo rudi hapa kati kati huyu arudi huko kuna watoto"***. PW1 also said that he left at 4.00 a.m., which means that he took a considerable duration of time with them.

40. The appellant in his submissions indicated that there was delay on the part of PW1 and PW2 in going to hospital as the P3 form was filled on 27th February, 2014 yet the alleged offence occurred on 13th February, 2014. PW4, Dr. Hashim Suleiman's evidence was that PW1 and PW2 were examined 4 days after the incident. The post rape care form for PW1 was filled on 18th February, 2014. That was on the same day that PW5, the Investigating Officer received a complaint from the parents of PW1 and PW2.

41. Even though there was delay in PW1 and PW2 being taken to hospital for examination, the injuries they sustained were visible upon examination by Dr. Busra who filled their P3 forms and Justina Chome who filled their post rape care forms. This court has been given no reason that raises doubt to the fact that PW1's hymen was broken and that PW2 had small bruises on her labia minora and she had slight bleeding. This court therefore believes the evidence tendered on the injuries sustained was correct. The P3 forms indicate that they were filled on 27th of February, 2018. The fact that PW1 and PW2 were examined at an earlier date but the P3 forms filled at a later date, does not vitiate the outcome of the medical examination.

42. The appellant raised the issue of the discrepancy as to the amount of money that PW1 was given to count by the appellant. Whereas PW1 said that she was given money in a pouch to count and she counted cash amounting to Kshs. 1,000/=, PW2 said that after counting the money, it came to Kshs. 1,050/=. In my considered view, the said discrepancy does not go to the substance of the charges facing the appellant. It is a minor discrepancy and it does not vitiate the evidence tendered by PW1 and PW2.

43. In the case of **Philip Nzaka Watu vs Republic**, 2016 eKLR, the Court of Appeal expressed itself thus on the issue of discrepancies in evidence:-

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".***

44. On the issue of corroboration, the Hon. Magistrate relied on case of **Oloo vs Republic,** 2009 KLR 416, where the court held as follows:

> ***"Corroboration of the evidence of a child of tender years was only necessary where such a child gave unsworn evidence. In law the evidence of a child of tender years given on oath after voire dire examination required no corroboration but the court had to warn itself that it should in practice not base a conviction on it without looking and finding corroboration for it".***

45. The Hon. Magistrate found that the evidence of PW1 and PW2 was corroborated by that of PW3, the Doctor, and the Investigating Officer who testified as PW4 and PW5, respectively. On my part, I am satisfied that the evidence of PW1 and PW2 was adequately corroborated by the evidence of PW3 and PW4.

46. In his defence, the appellant steered clear of the events of 13th February, 2014 and instead spoke of his arrest on 21st July, 2014. He also stated that PW1 and PW2 had a grudge against him as he had at one time in the year 2013 chased them away from church. It is the finding of this court that the said witnesses who were minors could not have made up a case of defilement as against the appellant. Medical evidence proved that PW1 was defiled and there was an attempt made to defile PW2. The evidence adduced by PW1, PW2 and PW3 shows that it is the appellant who had an opportunity to commit the offences in issue. The evidence adduced against him was overwhelming and his defence did not at all weaken the prosecution evidence.

47. I therefore uphold the conviction and sentence in Count 1. I set aside the conviction and sentence in Count 2 and substitute the charge of defilement in the said Count with that of attempted defilement contrary to Section 9(2) as read with Section 9(3) of the Sexual Offences Act. Section 9(2) of the said Act provides that a person who commits an offence of defilement with a child is liable upon conviction to imprisonment to a term of not less than 10 years. On count 2, I set aside the sentence of life imprisonment and impose a sentence of 10 years imprisonment.

48. This court notes that the appellant took advantage of the trust that PW1's and PW2's parents had bestowed in him by handing over their children to him allegedly to take care of his small children as one of his wives was not at home. He turned into a predator at night. In the said circumstances, I order that the sentences in Count 1 and 2 shall run consecutively. The appeal is allowed only to the above extent. The appellant has 14 days right of appeal, from the date of this Judgment.

DELIVERED, DATED and SIGNED at MALINDI on this 3rd day of July, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

.....for the respondent

.....Court Assistant