IN THE HIGH COURTOF KENYA AT MOMBASA

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 187 OF 2017

BETWEEN

CHIGONGO DZINYE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J.M. Nang'ea, CM dated 5th October 2017 at the Chief Magistrate's Court at Mombasa in Criminal Case No. 334 of 2017)

JUDGMENT

1. The appellant, **CHIGONGO DZINYE**, was charged and convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars were that on 27th February 2017 at [particulars withheld] area, Changamwe Sub-county within Mombasa County, he unlawfully and intentionally caused his penis to penetrate the vagina of AN, a girl aged 11 years old. He was sentenced to life imprisonment and now appeals against the conviction and sentence.

2. In support of the appeal, the appellant relied on the petition of appeal and written submissions. The thrust of the appeal is that the prosecution failed to prove the offence to the required standard. The appellant complained it was unsafe to rely on the unsworn testimony of the child to support the conviction. Further that additional evidence was inconsistent and could not corroborate the child's evidence. The appellant also submitted that the evidence of identification was wanting as the perpetrator was a stranger to the child and the chain of identification was full of contradictions. The appellant also complained that the trial court also failed to consider his defence.

3.The respondent opposed the appeal and urged that the prosecution proved all the elements of the offence. Counsel for the respondent submitted that the appellant was positively identified and that the conviction was therefore safe.

4. As this is a first appeal, I am aware that it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

5. The evidence emerging from the trial was as follows. The complainant, PW 1, gave unsworn testimony and stated that on the material day at about midday, she met a man who convinced her to go to his house so that he could buy her juice. She went with him and when she was in his house, the appellant told her to remove her panty, he proceeded to insert his penis into her vagina then applied coconut oil. Thereafter the man escorted her and helped her cross the road whereupon they met some ladies in a house who inquired about what was happening.

6. The complainant's grandmother, PW 2, recalled that on 27th February 2017, PW 1 came for lunch but disappeared. After about 30 minutes, she was brought home by a group of people who alleged that she had been defiled. PW 2 examined her private parts and noted that she was discharging a watery substance. PW 1 narrated to her what the man had done to her but she did not know the man's name. Thereafter PW 2 started looking for the man who had defiled PW 1.

7. PW 3, testified that she met PW 1 with a lady. PW 1 was crying and when she asked her what happened. She informed her what the man had done. The lady who was with her told her he knew the man as a neighbour. They both escorted PW 1 to PW 2's first before proceeding to search for the man. The lady directed them to the house of a man and when they went inside the house, PW 1 pointed out the man as the person who had defiled her.

8. On the same day, PW 6 was at a neighbour's house, when one of the children in that house told them that the appellant who was referred to as Omar had taken PW 1 to his house. She went outside and saw the appellant holding PW 1's hand walking away from his house. She and other ladies trailed them and saw the appellant buying for the child some juice. She told the court that when the appellant notice them, he chased her friends while she picked up PW 1 and took her to PW 2's home.

9. A member of the community policing, PW 4, recalled that on the material day he received information that a girl had been defiled. He proceeded to find out what was happening and found a mob outside the home of the appellant. He arrested the appellant who had been beaten and took him to the police station. PW 1 was also at the home and was taken by her relatives.

10. The investigating officer, PW 7, testified that on the material day at about 4.00pm, PW 2 brought PW 1 to the police station. He advised her to take PW 1 to hospital and issued a P3 form. In the meantime, she re-arrested the appellant who had been brought to the police station by members of the public. A doctor working at the Coast General Hospital, PW 5, testified that when PW 1 was examined on 28th February 2017 and 30th March 2017, the vagina oozed a bloody discharge, the vagina was tender and there were multiple abrasions and the hymen broken.

11. In his unsworn defence, the appellant denied that he had committed the offence.

12. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the ***Act***, the prosecution must show that the appellant did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

13. I have evaluated the evidence and I find that PW 1 narrated clearly how she was lured into a house and subject to an act of penetration. The fact of penetration was corroborated by several witnesses who saw her in a state of distress after the act. PW 2, who saw her so soon thereafter, examined her private parts and noted that she had been injured. The medical examination of PW 1 confirmed that an act of penetration had taken place as her vagina was swollen and the hymen broken.

14. Before I proceed to consider the next point, I will deal with the complaint by the appellant that the medical evidence relied on hearsay as the prosecution did not call the maker of the P3 and PRC form. The answer to this issue is to be found in **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which allows a person other than the one who prepared a report such as the Post Mortem report in issue to produce it provided the presumption of authenticity is met. The section provides as follows:

> *77. (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
>
> *(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*
>
> *(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.*

15. The main issue for determination is whether the appellant is the person who committed the felonious act as PW 1 admitted that the person who had sexually assaulted her was a stranger. The key witness who put the appellant together with PW 1 was PW 6 who stated that she saw him with PW 1 and followed as they were leaving the appellant's home. She followed them and saw the appellant buying PW 1 juice. Counsel for the appellant submitted that the testimony of PW 6 was in stark contrast to that of PW 1 who told the court that as soon as they left the house they were accosted by some women in a verandah who asked what was happening. In addition, the appellant assailed the testimony of PW 3 as hearsay. In view of these contradictions, the appellant urged that the identity of the appellant was not proved.

16. I have considered the evidence and I find that the testimony of PW 1 and PW 6 was not necessarily inconsistent as PW 1 testified that after she was escorted by the appellant from his house she met some people at a verandah who asked the appellant whether he knew the child. The people she met on the verandah included PW 6 who then followed them. I also find that it is PW 3 who assisted PW 6 to search for the appellant until he was found and identified by PW 1. I do not think that anything turns on whether he was identified by PW 6 as Omari because he was a person well known to her as he was a coconut oil dealer in the neighbourhood and was clearly identified by PW 1 before he was arrested. I therefore find and hold that it is the appellant who caused the act of penetration.

17. The age of the child is a question of fact. PW 2 produced her clinic card which showed that she was born on 6th April 2005. Her age was consistent with the fact that she was in standard 4. I therefore find that she was aged 11 years at the time the offence was committed. Her age falls within **section 8(2)** of the ***Act*** which mandates the court to impose a life sentence. The sentence was within the law.

18. I affirm the conviction and sentence.

19. The appeal is dismissed.

DATED and DELIVERED at MOMBASA this 5th day of *September* 2018.

D.S. MAJANJA

JUDGE

Ms Kimuli, Advocate for the Appellant.

Ms Mutua, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.