REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 21 OF 2016

SHIDA KARISA KAMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*An appeal against the original conviction and sentence of Hon L.K. Gatheru RM,**

delivered on 17th February 2016 in Criminal Case No. 578 of 2015 in

the Senior Principal Magistrate's Court at Mariakani)

JUDGMENT

The Appeal

1. The Appellant was charged in the trial Court with the offence of defilement , contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the offence were that on the 24th November 2015 at about 14.00hrs at [Particulars Withheld] village, Ruruma Location in Rabai Sub–county of Kilifi County within Coast Region, he unlawfully and intentionally caused his penis to penetrate the genital organs namely anus of S.M., a child aged 7 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

3. The Appellant pleaded not guilty to the charge in the trial court on 7th December 2015, and he was tried, convicted of the offence of defilement, and sentenced to life imprisonment.

4. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal filed in Court on 7th March 2016, and Amended Grounds of Appeal that he availed to the Court are as follows:

a. That the learned trial magistrate erred in law and fact in treating a life sentence as the minimum sentence to the defilement case under section 8(1) as read with section 8(2) of the Sexual Offences Act.

b. That the learned trial magistrate erred in law and fact in finding for the Appellant's conviction for defilement without properly finding that the doctor's evidence was that the test done on the complainant showed that nothing abnormal was found on the complainant's anus.

c. That the learned trial magistrate erred in law and fact in convicting the Appellant by failing to find that the alleged boys who were with the complainant were not called to testify in the trial to corroborate the complainant's allegation.

d. That the learned trial magistrate's conclusion was based on speculation that the complainant and the other boys went to buy doughnuts at Mutua's shop which was not supported by any evidence on record.

e. That the learned trial magistrate erred in in law and fact by dismissing the Appellant's defence which was reasonable enough to

cast doubt on the Prosecution's case.

5. The appeal proceeded for hearing on 27th August 2018, and the Appellant submitted that he would rely on his written submissions that he availed to the Court. Ms Mutua, the learned Prosecution counsel, made oral submissions at the hearing on behalf of the Respondent.

6. The Appellant in his submissions stated that the sentence of life imprisonment was not a minimum sentence, given that the doctor's evidence showed that the complainant's anus showed nothing abnormal, and he should therefore have been convicted for the offence of an indecent act with a child. Further, that PW4 in his evidence was not sure if the complainant was defiled or not, as he stated that an inflamed anus could also be caused by constipation or worm infection. Therefore that his evidence was not reliable.

7. It was also urged by the Appellant that the boys who were alleged to have been defiled together with the complainant were not called to corroborate the act, and reliance was placed on the decision in **Bukenya & Others vs Uganda (1992) EA 549** for the position that the failure to call the said boys can only lead to the inference that their evidence would have been adverse to the prosecution's case.

8. Lastly, the Appellant submitted that the finding by the trial magistrate that after the defilement the complainant and the other boys went to Mutua's shop to buy doughnuts was speculation, and was not based on any evidence. The Appellant cited the decision in **Oketh Okale and Others vs Rep (1965) EA 555** that a conviction should be based on the weight of actual evidence. Therefore, that the present case was not proved to the required standard, and should be evaluated independently.

9. Ms Mutua for the Respondent submitted that section 8(1) and (2) of the Sexual Offences Act provides for a minimum sentence of life imprisonment,and that the sentence meted out on the Appellant was lawful. Further, that PW4 who was a medical doctor testified on the injuries inflicted upon the complainant, and produced a P3 form which established that the complainant anus was inflamed, and his evidence corroborated that of PW1 that there was defilement.

10. On the witnesses who were not called to testify, Ms. Mutua submitted that section 124 of the Evidence Act provides for conviction on the evidence of a single minor witness, and that the trial court warned itself of this danger in its judgment. In addition that the failure to call other witnesses was not fatal so long as the requisite ingredients of defilement were proved, and reliance was placed on the Court of Appeal decision in **Fappyton Mutuku Ngui vs Republic (2014) eKLR** for this position.

11. Further, that the evidence supported the conviction, as the medical evidence being the P3 form and treatment notes produced as the Prosecution's Exhibits 2 and 3 respectively corroborated that of PW2 on penetration, and the child immunization card produced as the Prosecution's Exhibit 1 confirmed the child's age. Lastly, the counsel submitted that the Appellant's defence was a mere denial which did not create any doubt, and that he did not deny knowing the complainant, and placed himself at the scene of the crime.

12. Having heard the arguments made by the Appellant and Respondent, my duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

13. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses. PW1 was S H S, the complainant's mother, while PW3 was H W, the complainant's aunt, who both testified as to how they came to know of the defilement five days after the event. Their testimony was that the complainant revealed that he had been defiled was upon inquiry, after they observed that he was unable to sit. PW2 was S M, the complainant, and who testified after a *voire dire* examination as to the events of 24th November 2015, when the alleged offence was committed, and the subsequent actions that were taken.

14. Dr. Barrington Edwrd Charo, a clinical officer at Mariakani Sub-County Hospital was PW4, and he testified on the results of the medical examination of the complainant conducted on 30th November 2016, and produced a P3 form dated 1st December 2016 as the Prosecutions Exhibit 2, and treatment notes as the Prosecutions' Exhibit 4.

15. The last prosecution witness (PW5) was Inspector Julius Thumbura, the Deputy OCS of Rabai Police Station, and he testified as to the report he received of the defilement of the complainant on 30th November 2015, and stated that he then arrested and charged the Appellant. PW5 also produced the complainant's Child Immunization Card as the Prosecution's Exhibit 1.

16. The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. The Appellant gave unsworn testimony and did not call any witnesses. He testified that some boys used to come to his house to collect milk, and that on the material day they came to his house as usual and played for a while before going home, and that nothing abnormal happened.

The Determination

17. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are three issues for determination raised in this appeal, namely, whether the Appellant was convicted for the offence of defilement on the basis of sufficient and satisfactory evidence; secondly if so, whether the sentence imposed on his was unlawful and/or excessive; and lastly whether his defence was given due consideration

18. On the first issue, the Appellant was charged with the offence of defilement, which is provided for in section 8 of the Sexual Offences Act as follows:

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

(**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.**

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(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."

19. Penetration is on the other hand defined under section 2 of the Act as the partial or complete insertion of the genital organs of a person into a genital organs of another person, while genital organs are defined in the same section as the whole or part of male or female genital organs, and for purposes of the Act includes the anus.

20. The ingredients of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

In the present appeal, PW5 produced as the Prosecution's Exhibit 1 a Child Immunization Card that showed that the complainant's date of birth was 7th May 2008, and at the time of the commission of the alleged offence on 24th November 2015 was therefore 7½ years old. To this extent as the complainant was aged below twelve years, the Appellant was properly charged and sentenced under section 8(1) as read together with 8(2) of the Sexual Offences Act.

21. In addition, both PW1, PW2 and PW3 testified that they did know the Appellant by name, and he was their neighbor. PW1 in addition saw him at 14.00 hrs on the material day which was daytime and identified him. Therefore, this was not merely a case of identification, but also of recognition of the Appellant by the complainant. It was in this regard held by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

22. The above findings notwithstanding, it is nevertheless my view that the evidence adduced by the prosecution was insufficient to prove the ingredient of penetration. In this respect, PW1's evidence was as follows:

"We were coming from taking a bath and the accused person called us. He was outside his home. He told us to get inside the house. All of us went inside the house. The accused then did "tabia mbaya" (bad manners) to me. He did the same to my friends. The accused told me to lie on his bed. I laid on the bed on my stomach. I had removed my clothes. It's the accused who told me to remove. He also removed his clothes. He then defiled me on my buttocks. He then told me not to tell anyone. He also told others not to say. He gave me Ksh 40/=. Each was given Ksh 40/=. I went home after that. I was feeling pain on the anus. I did not tell anyone I had pains""

24. Upon examination of PW1 on 30th November 2011, PW4 noted that his anus was inflamed, and there was no discharge. He also stated that the inflammation could be caused by either constipation, sodomy or worm infestation. There was thus no specific evidence given as to any penetration by the Appellant of his genital organ in any part of the complainant's genital organ, and the term used by PW1 of having been "defiled" is a technical term that needed to have been demonstrated by the various ingredients shown in the foregoing. There was also doubt caused by the evidence by PW4 as to the cause of the inflammation of the complainant's anus that can only be resolved in favour of the Appellant.

24. The evidence adduced however established the alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act which provides as follows:

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

An indecent act is defined in section 2 of the said Act as an unlawful intentional act which causes—

"(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will".

25. The provisions of **section 179** of the *Criminal Procedure Code in this regard empower a* court to convict an accused person for an offence which he was not charged but which is proved and was a lesser offence than that charged. The said section provides as follows:

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

26. It was explained by Asike-Makhandia J. (as he then was) in ***Kyalo Mwendwa v Republic*** **[2012] eKLR that** the *jurisdiction of the Court is to impose a substituted conviction for a minor cognate offence only. The* offence of committing an indecent child contrary to section 11(1) of the Sexual Offences Act, is a lesser cognate offence as it does not require penetration as one of its ingredients, and carried a lesser sentence that of defilement contrary to section 8(1) and (2) of the Sexual Offences Act.

27. On the last issue as to whether the defence of the Appellant was considered, I have examined the judgment by the learned trial magistrate, and I find that the Appellant's claim is not supported., I note that the trial magistrate did in his judgment record the testimony given by the Prosecution witnesses and Appellant, and found the Appellant merely alleged that he was arrested for unknown reasons. The evidence by the prosecution did indeed place the Appellant at the scene of the crime and he was also arrested at the said location. His defence was thus considered, and did not weaken the prosecution's case

28. On the appeal against the sentence, I note that the minimum sentence for the alternative offence of indecent act with a child aged is ten years imprisonment, and this Court can therefore revise or reduce the sentence imposed upon the Appellant.

29. I hereby therefore quash the conviction of the Appellant of the offence of defilement of a child contrary to section 8 (1) and (2) of the Sexual Offences Act, and substitute it with the conviction of the Appellant for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, pursuant to the provisions of section 179(2) of the *Criminal Procedure Code*. I also substitute the sentence of life imprisonment with a sentence of ten (10) years imprisonment for committing an indecent act with a child, which sentence is to run from the date of the Appellant's conviction by the trial Court.

30. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 5th DAY OF SEPTEMBER 2018.

P. NYAMWEYA

JUDGE