REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 27 OF 2017

NICODEMUS YAA..................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 258 of 2016 of the Senior Principle Magistrate's Court at Kilifi – L.N. Juma, RM)

JUDGEMENT

1. The Appellant, Nicodemus Yaa was tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006 (S.O.A.). The particulars as stated in the main count, for which he was convicted, alleged that on 22nd July, 2016 at about 11.00 hours at (particulars concealed) village in Kilifi Township within Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of J.J. a child aged 4 years.

2. Dissatisfied with both the conviction and sentence the Appellant appealed to this court on the grounds that the trial court erred in convicting him on a defective charge sheet; that the evidence adduced by the prosecution witnesses was contradictory; that the medical evidence adduced did not prove defilement; and that his defence was not considered. At the time of filing his submissions the Appellant was allowed to file two additional grounds of appeal to wit: that the sentence imposed was manifestly excessive and that the trial was a nullity as the plea taking was unprocedural.

3. The Appellant's prayer is that the appeal be allowed and the conviction be quashed and sentence set aside. The appeal was canvassed by way of written submissions.

4. On the sentence imposed, the Appellant submits that the Section 8(2) of the S.O.A. provides a maximum sentence of life imprisonment. He urges this court to be guided by the decision of the Court of Appeal in **Daniel Kyalo Muema v Republic [2009] eKLR** where the Court cited with approval the decision of its predecessor in **Opoya v Uganda (1967) E.A.C.A. 752** that held that the term **"shall upon conviction be sentenced to life imprisonment"** does not make the sentence compulsory as it only provides the maximum penalty.

5. According to the Appellant, Section 8(2) of S.O.A. deprives the court of the power to exercise its discretion hence such a law is not only harsh but also unjust and unfair. In support of this assertion, the Appellant relies on the decision of **Godfrey Ngotho Mutiso v Republic, Criminal Appeal No. 17 of 2008** where the Court of Appeal found that a uniform sentence deprives the court of its authority to consider mitigation of the individual offenders. He urges this court, as commanded by Article 50(2)(p) of the Constitution, to consider that he was a first offender and prays for the least severe of the prescribed punishments.

6. On what I suspect is the Appellant's take on the alleged defective plea taking procedure, he submits that the right of an accused person to have an interpreter in court is a constitutional requirement. According to the Appellant, he was not provided with an interpreter during plea taking and the trial and this breached the Constitution as well as Section 198(1) of the Criminal Procedure Code. The Appellant contends that the trial court did not confirm whether he understood the language used hence negating the concept of a fair trial as guaranteed by Article 50(1) of the Constitution. The Appellant cites the decision in **Adan v Republic (1973) E.A.C.A. 445** in support of his assertion that the ingredients of the charge should be read out to an accused person in the language he understands. He also relied on the decision in the case of **Njeru Kathiani & another v Republic [2007] eKLR** in support of his submission that failure to keep records of the name of the interpreter and the nature of the interpretation rendered a conviction unsafe and unsustainable. He urges the court to disregard the trial and order a retrial if the chances of an acquittal are nil.

7. The submission on behalf of the Respondent in brief is that the charge was properly drafted, the ingredients of the offence sufficiently proved, and the evidence was uncontradicted and corroborated. It was further stated that the Appellant's allegation that there was bad blood between him and the father of the complainant was an afterthought. It is submitted for the State that the prosecution evidence was consistent

and compelling and this court is urged to uphold the conviction and sentence.

8. Although the Appellant limited his submissions to the further grounds of appeal, he clearly indicated to the court that he was also relying on the initial grounds of appeal filed together with the petition of appeal. All the grounds of appeal filed by the Appellant will therefore be taken into account in deciding this appeal.

9. This is a first appeal and this court is required to reconsider and re-evaluate the evidence adduced at the trial afresh in order to reach its own independent decision. In doing so, the court bears in mind the fact that, unlike the trial court, it did not have the opportunity of hearing and seeing the witnesses testify so as to form an opinion on their demeanour. In deciding this appeal, the court is also guided by the principle that a finding of fact by the trial court shall not be interfered with, unless, as was stated by the Court of Appeal in **Gunga Baya & another v Republic [2015] eKLR**, the finding of fact is **"based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles."**

10. In **Mary Njoki v John Kinyanjui [1985] eKLR; Civil Appeal No. 71 of 1984 (Nairobi)** the Court of Appeal commenting on the leeway granted to a first appellate court to interfere with the findings of a trial court stated that:

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide."**

11. I proceed to determine this appeal based on the stated principles.

12. Six witnesses were called in support of the prosecution case. The prosecution, on account of the vulnerability of the child complainant, applied and was allowed to have the mother of the child to act as an intermediary for the child under Section 31 of the S.O.A.

13. F.C., the mother of the child testified as PW1. Her evidence was that she knew the Appellant by the name Kabombo being the name they used at home. She stated that the Appellant was the cousin of her husband PW3 J.K.K. She had known him for four years and they resided in the same homestead. Her evidence was that on 22nd July, 2016 she was at home with her grandmother, her two children and the Appellant. The Appellant was in the house for about 30 minutes with J.J. while she sat outside with her grandmother and her other child. PW1 indicated that it was not unusual for the Appellant to be in that house as they lived with him and he slept in that house.

14. PW1 testified that after the Appellant left for work, J.J. went to her and informed her that she wished to urinate but she could not do so as the Appellant had inserted his penis in her vagina. PW1 telephoned her husband and informed him of the incident. She also telephoned and informed her mother-in-law of the occurrence. When she examined J.J. she noted a smelly whitish discharge on her panties and around her genitalia. She observed that the vagina was open and termed it unusual. It was further her testimony that the child had difficulty in walking. When PW3 later arrived with the Appellant, they took him to Kilifi Police Station from where they were referred to Kilifi County Hospital. At the Hospital the complainant was examined and a P3 form and a post rape care (PRC) form were filled for her. PW1 identified the forms and the health card in court. Her testimony was that she did not take J.J.'s panties to the hospital as she had thrown the same away.

15. PW1 testified that J.J. was born on 30th June, 2013 and was four years at the time of the incident. In addition she stated that from the time the incident occurred J.J. usually urinates on herself if not immediately taken to the toilet. PW1 further testified that there was no grudge between herself and the Appellant as they had lived peaceful prior to the event.

16. When cross-examined by the Appellant, PW1 stated that the act occurred at their home at Kibaoni behind the prison. Her testimony was that she had come to visit her husband on that day. She informed the court that she moved to another place when the Appellant started residing with her husband. On re-examination, she explained that PW2 and the Appellant resided together in their one-room house.

17. J.J. testified through the intermediary as PW2 stating that she knew PW1 who was her mother. She also stated that she was in baby class and knew the Appellant as Kabombo and that he resided at Prison. It was her testimony that on the material day she was alone in the house with the Appellant as PW1 was outside the house. She had a dress and the Appellant wore a shirt and a trouser. The Appellant put her on the bed, removed her panties and put his **"mdudu"** inside her vagina causing her to feel pain and she urinated. She explained that the **"mdudu"** was between the Appellant's legs. She later told her mother what had happened and that she could not urinate.

18. Cross-examined, PW2 stated that the Appellant put his **"mdudu"** inside her vagina at home near prison and the ordeal occurred at night. Upon re-examination, she stated that the act happened during daytime.

19. PW3 stated that he resides at Kibaoni near the Prison and that PW1 was his wife and he was the father of PW2. He stated that the children lived elsewhere where PW1 operated a small business but they would visit him over the weekend. He testified that the Appellant was his cousin and the name they used to refer to him at home was Kabombo.

20. PW3 stated that at the time of the incident he was living with the Appellant. He left for work at 6.00 p.m. and there was nobody at home at that time. His testimony was that PW1was taking their younger child to hospital and had left PW2 at the house of his uncle who lived in the same area. He stated that the incident occurred at the house of his uncle explaining that when the Appellant got employment he moved out of his house and went to live with his (PW3's) uncle because he had a big house.

21. PW3 told the court that the call he received from his wife was that PW2 was feeling pain and was unable to urinate. PW1 further informed him that the Appellant had defiled the child. PW3 went to the Appellant's place of work and asked him to escort him to his uncle's place. They went there and found PW2. Together with his friends and PW1, they escorted the child and the Appellant to Kilifi Police Station.

PW2 was also taken to hospital. According to PW3, the only people present at his uncle's home on that day were PW1, PW2, his aunt S.C. and the Appellant.

22. Answering questions put to him by the Appellant, PW3 stated that the incident must have occurred during the day as he received the call from his wife at midday. He stated that the Appellant worked in the night shift and would go to his uncle's place in the morning. He expounded that whenever he was leaving for work in the morning he would meet the Appellant coming from work.

23. PW4 Dr. Busra Mohamed from Kilifi County Hospital identified a P3 form that was filled for the complainant by PW6 Dr. Suchira. She also identified a post rape care form filled for the complainant by John Mwarana. She produced the two forms and was cross-examined on them extensively. The Appellant then asked that the maker of the P3 form be availed as a witness and his request was fulfilled.

24. In her testimony, PW6 told the court that she used a post rape care form to fill a P3 form for the complainant. Her testimony was that upon examination of the child she found the hymen broken although there was no blood. The child was examined on 22nd July, 2016 at 9.00 a.m. and the P3 form filled on 29th July, 2016. PW6 testified that at the time of the examination the child had changed clothes. The innerwear had been left at home. There was no laceration seen. A cloudy vaginal discharge was noted.

25. The testimony of the investigating officer PW5 Police Constable Beatrice Kenga is to the effect that on 13th July 2017, PW1 went with PW2 to the police station and reported to her that on 12th July, 2017 they were at home when a boy named Nicky arrived. He had been called by the husband of PW1 to do some work. Nicky entered the house and PW2 followed him. They stayed in the house for 30 minutes after which the Appellant emerged saying he was going to work. PW2 later found it difficult to urinate and informed PW1 that the Appellant had defiled her. PW1 called her husband who intercepted the Appellant, arrested him and took him to the police station. PW5 produced a birth certificate confirming that the complainant was four years old.

26. During cross-examination, PW5 stated that the doctor wo examined the child confirmed that the child was defiled. She told the court that it was reported to her that PW3 had called the Appellant so that they could work together but the Appellant arrived after PW3 had left. PW5 further stated that the Appellant had instructed the complainant not to scream.

27. In his defence the Appellant stated that on the material day he was followed by his brother who asked him to go and assist him with some work at home. They boarded a tuk tuk. Before reaching their destination his brother stopped the vehicle and started enquiring about his child who had been defiled. The brother who was in company of three other people started assaulting him. He denied knowledge of the defilement. He was rescued by prison officers who took him to the police station where he was charged with committing an offence he knew nothing about. He concluded that he had a dispute with his brother who had threatened to deal with him but he did not know that his prosecution was the manner in which his brother wanted to deal with him.

28. As is the case in most criminal appeals, the soft target of most appellants is the cogency of the prosecution case. That is where I will start.

29. The law places the onus on the prosecution of proving its case beyond reasonable doubt. In a charge of defilement the prosecution is required to prove the age of the victim, penetration and the identity of the perpetrator.

30. In the instant case the Appellant has not taken issue with the age of the complainant. For record purposes I will state that the evidence adduced established beyond reasonable doubt that J.J. was born on 30th June, 2013 and was actually three years on 22nd July, 2016 when she was allegedly defiled. The birth certificate produced by PW5 confirmed the evidence of PW1 as to the age of the child. The child was therefore aged under 11 years at the time of the incident and the applicable charge was that of defilement contrary to Section 8(1) as read with Section 8(2) of the S.O.A.

31. The issue of penetration and the identity of the perpetrator are better addressed together. From a distance the prosecution case looks neat with an aura of believability. A closer scrutiny will however reveal some cracks that will plant some doubts in the mind of this court.

32. The evidence of PW1 was to the effect that she was outside the house with her grandmother and her other child while the Appellant went into their house with PW2. The evidence of PW3 as to the scene of crime was entirely different. He stated that the act occurred in the house of his uncle where the child had apparently been left with his aunt S.C. as his wife (PW1) took their other child to hospital.

33. From the evidence of PW1 and PW3 we are talking about two entirely different scenes populated by a set of different characters. From the evidence of PW1, those present were herself, her grandmother and her two children. The evidence of PW3 as to the people present was different. He talked of his aunt before adjusting his evidence to say that the people who were at the house of his uncle were PW1, PW2, his aunt and the Appellant.

34. There was contradiction as to where the Appellant actually lived. PW1 insisted that the Appellant lived with them in their single room house. PW3 stated that the Appellant had moved to live with his uncle after he was employed. He stated that his uncle's house was more spacious.

35. There were also glaring contradictions as to the dates and time of the alleged defilement. The child talked of the incident occurring at night before stating that it happened during daytime. The contradictions in the evidence of the child can be excused because of her tender age. However, the contradictions in the evidence of PW1, PW3, PW5 and PW6 cannot be explained. PW1 did not state the time of the alleged incident but her evidence was that it happened on 22nd July, 2016. PW3 testified that he left home on 22nd July, 2016 at 6.00 p.m. He then says he received a call from his wife during the day. In fact during cross-examination he specified that he received the call at midday. The charge states that the incident occurred at 11.00 a.m. However, PW6 stated that the child was examined on 22nd July, 2016 at 9.00 a.m. A perusal of the Post Rape Care (PRC) form shows the date of issuance as 25th July, 2016. It was signed by a clinical officer by the name John Mwarana on 29th July, 2016 and apparently released to a police officer called Beatrice Kinga a day earlier on 27th July, 2016.

Apparently no treatment notes were produced. The notes would have guided the court in determining the actual date the complainant was seen.

36. On top of all the cited contradictions, PW5 talked of receiving the report on 13th July, 2017 informing her of the incident having occurred on 12th July, 2017. The statement of the year as 2017 instead of 2016 is excusable as the evidence adduced by the other witnesses shows the incident as having occurred in 2016. However, no explanation is found on record as to why PW5 talked of the incident occurring on 12th July and not 22nd July. The evidence of PW5 introduces a contradiction as to the date of the alleged offence.

37. The impression given by the prosecution witnesses is that the child was seen immediately after the sexual assault. No injuries were noted and there is no mention of any spermatozoa being seen despite a high vaginal swab being conducted.

38. Although it is possible that PW1 could have indeed mistakenly thrown away the child's panties, the evidence adduced leads to the impression that the failure to avail the panties to the police officer was not innocent.

39. A perusal of the evidence that was adduced creates doubts in my mind as to the occurrence of the defilement. The doubts become acute when it is considered that no reason was advanced by the prosecution as to why the grandmother of PW1 and the aunt of PW3 who were alleged to have been present during the incident were not availed as witnesses.

40. The offence with which the Appellant was charged stored him away for life. Even without considering his defence, it is apparent that the prosecution failed to prove to the required standard that PW2 was indeed defiled and if so, that the Appellant was the defiler.

41. Having reached the conclusion that there was no sufficient proof of the charge, I do not find it necessary to consider the other grounds of appeal raised by the Appellant. He ought to have been given the benefit of doubt. His appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant is thus set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 22nd day of November, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT