



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.72 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.135 of 2014 by: Hon. A. Mukenga – R.M.)

J M L.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **J M L** was tried, convicted and sentenced to life imprisonment by Hon. Mukenga (R.M.), for the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act of 2006.

The particulars of the charge are that on 22/11/2013, at [particulars withheld], in Nyandarua West, unlawfully and intentionally caused his genital organ (penis) to penetrate the vagina of M.M.W., a child aged 6 years.

The appellant faced an alternative charge of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act in that he caused his genital organ to penetrate that of the complainant. No finding was made on this charge.

The appellant is dissatisfied with both the conviction and sentence and preferred this appeal. He relies on the following grounds;

- 1. The medical evidence was insufficient to support a conviction;**
- 2. That the prosecution failed to prove the age of the complainant;**
- 3. That his defence was not considered;**
- 4. That the sentence was excessive.**

He prays that the conviction be quashed, sentence set aside and he be set at liberty.

The appellant filed written submissions and also submitted that the complainant's hymen had not been interfered with and therefore penetration was not proved; that the medical officer failed to compare the spermatozoa found in the complainant's vaginal swab with those of the appellant through forensic or DNA testing. He also complained that the P3 was released to the complainant to take it to the Doctor alone without a police officer and there was a possibility of the Doctor being compromised; that the investigating officer failed in his duties when he failed to keep the exhibits in his custody. As regards the

age of the complainant, the appellant contended that no evidence was adduced to support the allegations that the complainant was born on 12/12/2007; that when the court ordered that the complainant be taken for age assessment, she was not accompanied by any police officer. He further challenged the production of the P3, age assessment report and the complainant's clothing as being of no evidential value.

The learned State Counsel **Mr. Mutembei** opposed the appeal contending that the medical evidence was concrete and the presence of spermatozoa in the complainant was evidence of penetration and the fact that the hymen was not broken does not mean there was no penetration; he also argued that the contents of the P3 form were never challenged by the appellant at the trial.

Counsel further argued that the age of the complainant was proved because a Birth Certificate is not the only mode of proof. He relied on the case of ***Mutuku v Republic (2012) KLR Zablon Onganyo Mateke v Republic Criminal Appeal No.168 of 2012*** where **Justice Sitati** cited ***Francis v Ogada C.A. CRA.App.No.2 of 2000*** where the court stated that there are various modes of proving the age of a complainant. In replying to ground 3, counsel submitted that the court considered the defence but the appellant had nothing to say in his mitigation.

This is a first appeal and it behoves this court to re-evaluate the evidence afresh, analyze it and arrive at its own determinations giving reasons for the same. I am guided by the decision of ***Okeno v Republic (1972) EA 32***.

The prosecution called a total of four witnesses. **PW1 C W M** told the court that M.M.W. is her daughter who was born on 12/12/2007; that on 24/11/2013, she left her home briefly to deliver milk at 10.00 a.m. and returned home at 11.00 a.m. she had left her children N, W, M and PW3, the complainant herein. While still on the road when returning home, N, W and M ran from the plot and informed her that M, (the appellant) had sent them to get fodder for the cow but that the complainant had been left with M. She went home but did not get the complainant. She headed for M's home which was nearby as he called out the complainant's name; that the complainant emerged from the maize plantation and PW1 noticed that PW3 had worn her shorts wrongly, with both legs in one; as they went home, PW1 noticed that PW3 was walking with difficulty with legs apart; that PW1 asked PW3 what was wrong but she did not tell her and PW1 beat her and its then PW3 informed her that M had carried her to the maize field after sending the other children for fodder, and that he had done '**tabia mbaya**' to her and threatened to beat her if she told anybody. PW1 inspected the child (PW3) in her private parts, found it to be reddish, with bruises and there was a whitish discharge on her pants and clothes. PW1 reported to Ol Jororok Police Station, was issued with a P3 form which she took to the hospital and on 29/11/2012 police informed her that M had been arrested. PW1 knew M before as he had rented a house opposite their home for about a month.

The complainant testified as PW3. After a **voire dire** examination of PW3, the court found that she did not understand the meaning of the oath and she gave an unsworn statement in her evidence. PW3 recalled that when the mother went to the market centre, M found her, N J and W at home and told N to go and collect some fodder for the cows; that M told her to remain at home with him; that M carried her to the maize farm, removed her shorts and panty, removed his trouser and lay on her and did bad manners to her (tabia mbaya) between her legs to which she pointed; that she felt pain and cried but he covered her mouth, and promised to buy her a sweet and that she should not tell anyone. She identified M in court and the clothes she had worn on that day that were handed to police as exhibits.

PW2, Peter Nginyo is a clinical officer at Olkalou District Hospital. He recalled that the complainant was taken to the hospital on 24/11/2013 about 2.00 p.m., PW3 had not showered; she had difficulty walking; he observed injuries to her private parts and her external genitalia had tenderness, bruises, lacerations and tears with a foul smell and whitish discharge from the vagina. He found pus cells which was an indicator that there was infection and spermatozoa. He came to the conclusion that there was penetration of the complainant.

PW4 PC George Nyachiro recalled that on 24/11/2013 while at Ol Jororok Police Station, he received a report from PW1 that her daughter had been defiled by J L and he issued her with a P3 form to go to Hospital at Ol Kalou District Hospital; that later [particulars withheld],.

When called upon to defend himself, M opted to give an unsworn statement in which he stated that on 29/11/2013 he was at home, worked on his farm and after 2.00 p.m. he went to [particulars withheld], Hotel where he found the complainant's father who threatened him; that after a few minutes, three officers arrested him and he was later taken to court where he was surprised to hear the charges; that on 20/4/2013 he had declined to go and work for PW3's father; that he heard a woman asking the complainant who had done that to her and that the complainant said it was N; that the woman threatened to frame N with a defilement case and she told N to be careful; that on the same evening, the woman asked M why he refused to marry her and he told her that he had a wife, that on 29th is when she said he defiled her daughter but he denied having committed the act.

The appellant was charged under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. Section 8(1) creates the offence of defilement and it reads as follows:

“Section 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

The prosecution must prove two ingredients:

“(1) that there was penetration;

(2) the age of the complainant under Section 8(2)(3) and (4)”

The age of the child determines what sentence will be imposed on an accused upon conviction under Section 8(2), (3) and (4).

After carefully analyzing the evidence adduced before the trial court, there is no doubt that the complainant (PW3) took part in a sexual act. PW1 was the first to observe PW3's private parts and found that they were injured. Her evidence was corroborated by that of PW2, the Clinical Officer who examined PW3 on the same date even before she took a bath. PW3 was found to have bruises, lacerations and whitish discharge and spermatozoa from her genitalia which was evidence of penetration. The essential element in an offence of defilement is penetration. Penetration is defined in Section 2 of the Sexual Offences Act as:

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person”

Penetration need not be complete. It can be partial. The injuries to PW3's genitalia and the spermatozoa were proof of penetration. There is no requirement that the hymen be torn as argued by the appellant.

The complainant took issue with the age of the complainant. The other ingredient necessary to prove an offence of defilement is the age of the complainant because the age determines the sentence to be meted upon conviction. Under section 8(2) of Sexual Offences Act, the age of the complainant must be proved to enable the court to know what sentence to impose. As rightly pointed out, age cannot only be established by a Birth Certificate or birth notification card. The trial court relied on the decision of Mutuku v Republic (Supra) where the court held that other modes of proof of age are available when the case is not necessarily a border line one. The court was also guided by the decision of Zablon Ongayo Matoke where Justice Sitati cited the Ugandan case of Francis v Uganda (Supra) where it was held

“Apart from medical evidence, age may also be proved by birth certificate, the victim's parent or guardian and by observation and common sense.....”

In this case, PW1 stated that her daughter PW3, was born on 12/12/2007. If that was so, then as of November, 2013, when the incident occurred, she was 6 years old. PW1 being the mother of the complainant, knew her age. Besides, when PW3 testified before the court, she was found to be in standard one and generally in Kenya, children go to standard one at the age of 6 years or there about. PW3 was not a border line case and there would have been no doubt as to what age bracket PW3 fell for

purposes of sentencing.

The only question then is whether it is the appellant who committed the offence. The offence was committed in broad daylight. The appellant was known to both PW1 and PW3. PW1 said that the appellant had rented a room near her home. The appellant admitted to that fact. In fact he talked of PW1's husband having asked him to do some work for him. They are not strangers to one another. Though PW3 gave unsworn evidence, she graphically described what happened to her and pointed at the appellant as the person who did '*tabia mbaya*' to her. '*Tabia mbaya*' is a Kiswahili word commonly used to mean sexual intercourse because it's taboo for the children to mention the actual word. The incident occurred during the day. The court believed the evidence of PW3. PW3's evidence was unshaken in cross examination and I have no reason to doubt that PW3 was truthful and it is the appellant who defiled the complainant.

The appellant complains that the hymen of the complainant was still intact and therefore he could not have defiled her. I have pointed out earlier that penetration does not need to be complete. It can be partial and penetration was confirmed by the injuries to the complainant's genitalia and presence of spermatozoa.

It was also the appellant's contention that a DNA test should have been done to establish whether he is the one who defiled the complainant. In the case of *Flappyton Mituku Ngui v Republic CRA.32 of 2013* the Court of Appeal reiterated what was held in *Ami v Republic (2012) MSA* that:

“the fact of rape or defilement is not proved by way of DNA test but by way of evidence.”

See also *Kassim Ali v Republic CRA.84 of 2005*. In this case there is ample evidence connecting the appellant to the offence.

In his submissions the appellant argued that the investigating officer should have kept the exhibits to produce them in court and he should have escorted the complainant to the hospital because complainant may have influenced the Doctor. It is not clear from the record in whose custody the P3 form was kept. The appellant had an opportunity to question PW2 and 4 about it but he didn't. The appellant's contention that the complainant may have compromised PW2 is a mere assumption. No such allegations were put to the prosecution witnesses. There is no evidence that the P3 was obtained unprocedurally. It is PW2 who examined PW3 soon after the incident and I have no reason to doubt its authenticity.

In his defence, the appellant was shifty. His defence seems to be that he was framed by the complainant's father because he refused to go and do some work for him. In the same breadth, he seems to allege that the complainant's mother had asked him to marry her but he refused and she then framed him. As properly pointed out by the trial court, the appellant had an opportunity to cross examine both PW1 and 3 but he never raised these allegations. He later raised them in the defence as afterthoughts which could not be rebutted. I find his defence to be an afterthought a sham and hence unbelievable.

Under Section 8(2) of the Sexual Offences Act, the age is a determining factor of what sentence will be imposed on an accused upon conviction. In this case, the complainant was 6 years old and any person found guilty of defilement of a child aged eleven years or less shall be sentenced to life imprisonment. The sentence is lawful and this court cannot interfere.

I find the conviction to be well founded. In the end, I find the appeal to be unmerited. It is dismissed in its entirety.

Dated and Signed at NYAHURURU this 6th day of June, 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

N/A for appellants

Soi - Court Assistant

Appellant - present