REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 11 OF 2016

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 696 of 2013 the Principal Magistrate's Court at Kapenguria)

I E.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein, one I E was charged, tried, convicted and sentenced on four counts. The two main counts were of **defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act number 3 of 2006.** To each of them there was a preferred alternative count of **Indecent Act with a child, contrary to section II (i) of the Sexual Offences Act number 3 of 2006.**

The particulars of the offence in the first main count are that on the night of 10th day of July, 2013 at Aramaget sub-location, within West Pokot County, the appellant caused his penis to penetrate the vagina of R E, a child aged 3 years old. Particulars of it alternative count are that on the night of 10th day of July, 2013 at Aramaget sub-location within West Pokot County, the appellant intentionally touched the buttocks and breasts of R E, a child aged 3 years old.

The particulars of the offence in the second main count are that on the 3rd day of July, 2013 and the 6th day of July, 2013 at Aramaget sub-location within West Pokot County, the appellant caused his penis to penetrate the vagina of A C, a child aged 7 years. Particulars of its alternative charge are that on the 3rd day of July, 2013 and the 6th day of July, 2013 at Aramaget sub-location within West Pokot County, the appellant intentionally touched the buttocks and breasts of A C, a child aged 7 years old.

The prosecution called 5 witnesses. The first was the clinical officer who examined the two girls and filled their P-3 forms, Post Rape Care Forms and did age assessment. The second witness was the complainant in the first count, while the 3rd witness was the complainant in the second count. Fourth witness was their neighbour and the fifth witness the investigating officer.

The prosecution case is that the appellant herein is the father to the complainants. He disagreed with their mother who left leaving behind three children. On unspecified date by PW-3, the appellant did bad manners to her twice. He removed her clothes, his too and put his thing into hers. She felt pain. On cross examination she said, **"You did bad manners to me twice, you slept with me, baba."** She was then aged 7 years. Her sister the PW-2 in this case also stated on unspecified date, the appellant who is

her father, did bad manners to her. She pointed at her private part saying, "**huku huku baba alidu"** She pointed at the appellant in court as the one who did it.

PW-4 the neighbour says on unspecified date she was going to church. She was called by a young girl who was limping. She indicated to her that she wanted to go to hospital. She alleged in Swahili that, "**Baba alinifanyia tabia mbaya huku chini"** in English this means, "**My father did to me bad things down here**." PW-4 examined her. She was full of dirt. She called a Kenya Police Reservist. She was taken to Kapenguria Police Station. PW-5 says on 10th July, 2013 she was at the police station. It was reported PW-2 and PW-3 were defiled by their own father. She booked the report. Together with PW-4 they took the two girls to the hospital. They were examined and admitted. They visited the scene and arrested the Appellant. Her investigation indicated that the Appellant defiled PW-3 twice. When she escaped he defiled PW-1, the younger girl.

PW-1 examined PW-2 at Kapenguria District Hospital. He noted that her labia majora was swollen. The hymen was intact. External genitalia was soiled with feaces and urine. The child told her **"baba dudu, baba ali dudu**." She later said, "**baba alisema ni mimi leo kwa sababu ule dada yangu alitoroka, A C" "Baba ali dudu….."** PW3 was also examined. Her hymen was perforated. She had a small lateral tear on the right. The clinical officer concluded that both of them were defiled. The Appellant was placed on his defence and he had the following to say:-

> "**I am I E. I used to live in Kaibosi. I used to do business. I am innocent. They are my children. That is all."**

The trial magistrate found the Appellant guilty on all the counts, convicted him and sentenced him as follows:-

- Count 1 – Life imprisonment
- Alternative count – 10 years in prison
- Count 2 – Life imprisonment
- Alternative count – 10 years in prison

Sentences were to run concurrently.

The appellant was not contented with the finding and appealed to this court on 16.9.2016. His grounds of appeal are that:-

> 1. He was charged with the wrong offences of defilement rather than incest given that the two complainants were his children.
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> 2. The trial magistrate failed to consider that his estranged wife, who wanted custody of the children, master minded the offences.
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> 3. The case was hurried and he was not allowed time to prepare.
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> 4. The *voir dire* was not correctly done to ascertain eligibility of the children to offer evidence.
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> 5. The offences were not proved beyond reasonable doubt and the sentences passed were harsh.

The state opposed the appeal in relation to the main counts, but conceded on the alternative counts.

As regard the first ground, **defilement** is defined under section 8(1) of the Sexual Offences Act as follows:-

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

The wording does not exclude penetration by a father to his child. **Incest** by male person is defined under section 20(1) as follows:-

> "***Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment of not less than ten years.***
>
> ***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

The wording of what constitutes this offence also agrees well with the facts of the prosecution case as they do for the offence of defilement. When such is the situation it is for the prosecution to determine which offence to prefer against the suspect. The suspect has no right whatsoever to choose the offence to be charged with. The prosecution had a right in law to go for either offence. They offended no provision of law by charging him with defilement rather than incest. The ground is therefore dismissed.

In ground two he raises new strange evidence that it is his estranged wife who needed custody of the children who fixed him. This can't be true as it never featured anywhere in evidence. She was not in the scenario at all. There is even no evidence that after arrest of the appellant she went for the children. This ground is an afterthought and has no place for consideration on appeal. It is dismissed.

The third ground is that the trial was hurried and he was not allowed time to prepare. My finding is that he was allowed his space within the provisions of Criminal Procedure Code. He never complained before the trial court that he needed time, and refused. He can't do so now. He is time barred. I therefore as well dismiss this ground.

Fourth ground is about the way the *voir dire* was done. Here I do agree with the appellant that the *voir dire to* PW-2 and PW-3 was not done sufficiently and in accordance to the law. The aim of a *voir dire* is to establish:-

1. Whether the child is intelligent enough to offer evidence

2. Whether the child understands the nature and meaning of oath

The questions put to the child by the court should be sufficient to enable the court make informed finding on the two issues stated above. Such questions need be asked one at a time and the child given a chance to answer each to avoid confusion. They should be recorded as asked and as answered. This kind of procedure was well pronounced in the case of ***Johnson Mwiruri versus Republic (1983) KLR 447.*** It was reiterated in the ***CMR of Kivevelo Mboloi versus Republic, Criminal Appeal number 34 of 2013.*** *Voir dire* is a crucial procedure and the court should take its time to take it meticulously.

In this case the questions were asked together and the answers given together. The questions part was not sufficient. Both children were ruled not to understand the meaning of oath. No finding was made as to whether they were intelligent enough to offer evidence. They were affirmed and both gave some vital evidence. The proceedings indicates that both were intelligent enough to offer evidence given what they informed the court. The wrong *voir dire* procedure did not therefore prejudice the accused's position in the matter in anyway. On this ground I do find that the procedural defects in taking the *voir dire* are curable.

I now move to the last ground on whether the case against the appellant was proved by the prosecution beyond reasonable doubt. The two young girls gave evidence against their own father. Their evidence shows they were honest, free of grudge and had respect of their father. They did not appear coached at all. Pw-3 is the one who ran away and informed PW-4, a neighbour about it. The investigation was

therefore triggered by the children themselves. They did not escape together which shows that the said escape was not planned or arranged. The clinical officer's evidence shows both had been penetrated as they claimed. Though the hymen of PW-2 was intact, the swelling of *labia majora* when considered in line with her evidence leaves no doubt that there was penetration. The slightest penetration would suffice for the offence.

The appellant's defence was of mere denial. The children had no cause to fix him. The court rightly dismissed his defence, and convicted him on the two main counts. He was consequently handed a sentence of which the law demands for the offences. I accordingly dismiss his appeal on convictions and sentences on the main counts.

The trial magistrate having found him guilty of the offences in the main count should not have made a finding in respect of the alternative counts. Alternative counts stands in only when the main count fails. He therefore erred in law in doing so. I accordingly quash the convictions and sentences given on the alternative counts. The appellant will serve life imprisonment for the offences in the main counts. This court so finds and orders.

Judgment read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 10th day of November, 2016.

S. M. GITHINJI

JUDGE

10.11.2016