REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.141 OF 2013

BETWEEN

DNN..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against conviction and sentence of the SRM's Court at Ogembo in Criminal

case No. 1704 of 2009 delivered on 11th December, 2013 – Hon. Naomi Wairimu, Ag. PM)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No.3 of 2006** the particulars of which were that on 13th November 2009 in Gucha District within Nyanza Province intentionally caused his penis to penetrate the vagina of DK a child aged seven (7) years.

2. He faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of **Sexual Offences Act No.3 of 2006** the particulars of which was that on 12th day of November 2009 in Gucha District within Nyanza Province intentionally touched the vagina of DK a child aged 7 years with his penis.

3. On second count he faced a charge of defilement contrary to **Section 8 (1) (2)** of **Sexual offences Act No.3 of 2006** the particulars of which were that on 13th day of November 2009 in Gucha District within Nyanza Province intentionally caused his penis to penetrate the vagina of DM a child aged 7 years and an alternative charge of committing an indecent act with the same.

4. He pleaded not guilty to the charges, was tried, convicted on both alternative charges and sentenced to life imprisonment. Being aggrieved by the said conviction and sentence he filed the present appeal through the law firm of Mburu Okara & Co. Advocates and raised the following grounds of appeal:-

1) That the learned trial magistrate erred in law and fact in convicting and sentencing the appellant for a life sentence without giving adequate consideration to the accused's defence.

*2) That the learned trial magistrate misdirected on the essential ingredients of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No.3 of 2006**.*

3) That the learned trial magistrate erred in law and fact by failing to independently analyze and/or evaluate the defence evidence before drawing a conclusion as by law required.

4) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without due regard to his mitigating factors.

5) That the learned trial magistrate erred in law and fact by failing to evaluate that the prosecution failed to call essential witnesses to corroborate the evidence of the eye witnesses.

6) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without due regard and consideration of the appellant's evidence in his defence.

7) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without allowing proper legal representation especially during defence hearing and sentencing given the fact that the appellant is a first offender.

8) That in the whole, the conviction was against the weight of the evidence as the prosecution did not prove their case beyond reasonable doubt and the trial magistrate sentenced the appellant on flawed procedure.

9) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant by imposing a very harsh, improper and/or excessive sentence in the circumstances.

SUBMISSIONS

1. At the hearing herein Mr. Okara appeared for the appellant while Mr. Majale appeared for the State. It was submitted by Mr. Okara that the appellant was charged with two counts of defilement and alternative charge of indecent act and that though the appellant was acquitted on the charge of defilement, since the P3 form was not produced before the court and that the investigating officer never offered any evidence, it was submitted that the appellant was sentenced on the alternative charge on the basis of the evidence of the minors and their mothers only.

2. It was submitted that the alternative charge does not carry the mandatory life sentence and therefore by using the word mandatory and imposing life sentence the trial court fell into error resulting into a miscarriage of justice.

3. Mr. Majale for the state submitted that the appeal seems to be on sentence only and that the offence carries a maximum of ten (10) years and therefore submitted that the conviction be upheld but the sentence be set aside and an appropriate one given.

4. In convicting the appellant the trial court had this to say:-

"On the issue of whether PW2 and PW3 were defiled on 13th November 2009, I would make finding that in the absence of the evidence of the clinical, there is insufficient evidence to conclusively arrive at a decision that indeed PW2 and PW3 were defiled.

On the issue of whether PW2 and PW3 had an indecent act committed against them both the complainants were very clear and consistent as to what transpired on the date in question, the time and place of the incident, the only inconsistency being whether PW2 was given a sugar cane or oranges by the accused. PW2 was categorical that the accused went for her from the path and took her to where PW3 was lying on the ground after which he removed her panty and also removed his. Then proceeded to insert his "thing" into her. PW3 also stated that the accused scratched PW2 the same way he had scratched her after he removed her clothes...."

5. There are therefore only two issues for determination this appeal.

a) Whether the appellant was safely convicted of the charge of indecent act with a child.

b) Whether the sentence given was lawful.

1. PW1's evidence was that she on 17th November 2009 found DW2 sleeping to which when asked why she replied that she was unwell. When told to take drugs she noticed that PW2 was not walking properly and at further questioning she stated that the appellant her uncle called **"P"** had on Friday took her to the sugar plantation, removed her clothes and defiled her.

2. PW2's evidence was that on 13th November 2009 together with PW3 met the appellant whom PW3 asked for an orange. He told them to walk downwards towards the sugar plantation but she did not enter while PW3 entered the sugar cane plantation. She found PW3 in the sugar plantation sleeping on the ground whereupon the appellant slept on her **"top and removed his thing and inserted inside me."**

3. PW2's evidence was corroborated by that of PW3 who testified that they met the appellant whom they requested to give them oranges but gave them sugar cane and told them to enter into the sugar cane plantation. He removed her panty and used her uniform to cover her head. She stated that he spit saliva into her vagina and scratched there using his penis. She stated that when he left her he went to PW2 whom he also scratched using his penis. He thereafter gave them sugar cane and warned them not to tell anybody otherwise he would strangle them.

4. PW4 confirmed that when they asked PW2 and 3 together with PW1 the children told them what had happened causing them to take them to the clinic for examination.

5. The evidence of PW2 and PW3 were very consistent and taking into account their ages I find that the conviction of the appellant on the offence of indecent act with a child was proved beyond reasonable doubt and his conviction was therefore safe and would therefore dismiss the appeal on conviction.

6. On the issue of sentence under **Section 11(1)** of the **Sexual Offences Act** any person who commits an indecent act with a child is liable upon conviction to imprisonment for a term of not less than ten years and therefore in holding that the offence carries a mandatory sentence of life imprisonment the trial magistrate fell into error and therefore the sentence given to the appellant was unlawful and liable to be set aside.

7. I would therefore allow the appeal on sentence, set aside the sentence of life imprisonment and substitute the same with imprisonment for a term of ten (10) years on each alternative count to run concurrently from the date of judgment of the trial court.

8. It is so ordered.

Signed and dated on this 4th day of February, 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Mr. Majale for the State

N/A for Okara for Appellant