REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E124 OF 2024

ABDALLA MAE…….

….APPELLANT

VERSUS

REPUBLIC…….

…….RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. G. Mokua, Resident Magistrate, in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E022 of 2024 delivered on 5/11/2024)

JUDGMENT

1. The Appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 11th May 2024 at around 1700 hours at (name withheld) area in Kaloleni sub county within Kilifi county he intentionally and unlawfully caused his male genital organ penis to penetrate into the female genital organ namely vagina of D.L.K. (herein referred to as the complainant/victim), a child aged 4 years.
2. The Appellant was sentenced to serve 30 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds

of appeal as per his undated amended grounds of appeal are that:

1) That the learned trial magistrate erred in law and fact for not appreciating that the issue of visual identification under recognition was confirmed on a fix as established by PW3 the minor.
2) That the learned trial magistrate erred in law and fact for not considering that the process which was employed in proving the age of the victim was not conclusive.
3) That the learned trial magistrate erred in law and fact for failing to consider the issue of penetration was proved but the prosecution investigations failed to establish who was behind the alleged act.
4) That the learned trial magistrate erred in law and fact for not observing that the single witness evidence which had an allowance of acceptance under section 124 of the evidence act Cap 80 was more best-sketching to gain any credibility.
5) That the learned trial magistrate erred in law and fact for not considering that the prosecution case was not proved beyond reasonable doubt due to prosecution's poor investigations.
6) That the learned trial magistrate failed to notice that the conviction was against the evidence in record.
7) That the learned trial magistrate failed to consider that the sentence imposed on the Appellant was harsh and excessive.

8) That the learned trial magistrate failed to consider the Appellant's defence evidence.

Case for prosecution

3. The case for the prosecution was that the complainant was at the material time aged 4 years. She was living with her mother PW2 in the same homestead with the Appellant who was her cousin. Elizabeth, PW1 who was then aged 12 years was also living in the same homestead with them and is a niece to the complainant.
4. It was the evidence of Elizabeth PW1 that on 11/5/2024 she was playing with the complainant and other children at the home when she was called by a girl called Rachel for them to go somewhere. They wanted to go with the complainant but the Appellant asked them to leave her behind. They left the complainant at the home and they went away. When they came back they found the complainant crying. They asked her why she was crying and she told them that the Appellant had defiled her. Her mother was away on that day. The appellant was questioned and denied but later admitted. His father was called and he was informed.
5. The mother to the complainant PW2 testified that the Appellant is her nephew. That on 12/5/2024 she was attending a funeral at Chonyi and returned home on the following day. The complainant reported to her that the

appellant had defiled her on the previous day inside the house of Victor. She sent for the Appellant and questioned the complainant in the presence of some other girls. She repeated that the Appellant had defiled her inside the house of Victor. The Appellant`s father was called and the complainant repeated the same thing. The Appellant admitted in the presence of his father to have done so. The victim said that the Appellant had defiled her severally before. On the following Wednesday, PW2 took her to Rabai dispensary and defilement was confirmed. She then made a report to the police and took her to Mariakani sub county hospital where defilement was again confirmed. PW2 reported to her local chief. The appellant was arrested and handed over to the police.

6. A clinical officer at Mariakani sub county hospital PW5 testified that the complainant was taken to their hospital on 16/5/2024 having been seen at Rabai clinic on 15/5/2024. That on examination he found her with redness in her vagina that was painful. He confirmed that the minor had been defiled. He completed her P3 form.
7. The case was investigated by PC Kadzo PW4 of Rabai police station. It was her evidence that the report was made by the mother to the complainant on 16/5/2024. He escorted the girl to Mariakani sub county hospital where she was examined and defilement confirmed. She recorded statements of witnesses. The appellant was thereafter arrested and charged.

8. During the hearing of the case in court, the complainant`s mother produced the complainant`s birth certificate as exhibit, P.xh.1. It indicated that she was born on 30/10/2019. The clinical officer PW5 produced the P3 form, the treatment notes, the Post Rape Care form and the Gender Based Violence form as exhibits, P.Exh. 2 - 6 respectively.

Defence case

9. When placed to his defence the appellant stated in a sworn statement that the complainant is the daughter to his uncle. That they were living in the same homestead. That on 10/5/2024 he left the home and went to work for a person called Josphat Wanje. He stayed there for 2 days and returned home on 12/5/2024. Her aunt PW2 called him and told him that the complainant had said that he had defiled her. He denied it.
10. It was further evidence of the Appellant that there was a land dispute between his father and the father to the complainant. That his uncle left the home. His aunt threatened him. He said that the charges were not true and that the complainant was couched to lie against him.
11. The appellant called one witness, his father DW2. It was the evidence of the witness that on 11/5/2024 he returned home at 8pm. That the mother to the complainant told him that the appellant had defiled the complainant. She asked him to give her Ksh.3,000/= but

he did not give her. After 2 weeks he was summoned to the chief`s office. He went there with the appellant. The police then went there and arrested the Appellant.

12. It was further evidence of DW2 that the appellant was at home at the time he was accused of defiling the complainant. That he was questioned and he denied committing the offence. He stated that the Appellant had not travelled anywhere days before the incident. He further said that there was a land dispute between him and the father to the complainant.

Submissions

13. The Appellant submitted that the ingredients of defilement were not proved. That the age of the complainant was not proved. That the mother to the complainant though producing the birth certificate did not tell the court where the document originated from neither did she show that it was genuine. That the doctrine of presumption under section 77(2) of the Evidence Act was not applicable as the authenticity of the document was not proved.

14. On penetration, the appellant submitted that it was not possible for a child of such an age to be penetrated without leaving behind injuries such as tears, bruises and lacerations on the labia majora or minora.

15. The Appellant submitted that the victim did not identify him. That the minor referred to him as Didi, a name not used in the charge sheet or used by any of the other prosecution witnesses. That she also told the trial

court that, “auntie (prosecutor) told me what to speak”. The appellant submitted that the minor was couched to lie against him.

16. The Appellant submitted that the evidence of the minor was so discordant that it could not be relied on to support a safe conviction. That PW2 stated in her evidence that the minor told them that it was the first time for the appellant to defile her but PW2 at the same time stated that the victim told them that there was another occasion the appellant defiled her when she requested for roast maize from him. It was submitted that these two versions showed that the victim was not a straightforward witness. That the evidence of the victim did not meet the standard set under section 124 of the Evidence Act and therefore the evidence could not be used to convict the Appellant.

17. The respondent on the other hand submitted that the age of the complainant was proved by the birth certificate. That the trial court also saw the minor when she testified and confirmed that she was indeed a minor. That the evidence was not contradicted by the defence.

18. It was submitted that the minor testified that the appellant inserted his penis into her vagina which evidence was corroborated by the findings of the clinical officer PW5.

19. It was submitted that the appellant was a person well known to the minor and as such there was no mistake on identification of the appellant. That the victim`s niece PW1 placed the Appellant at the scene as she left the

minor with the appellant and when she went back she found the minor crying and she told them that she had been defiled by the appellant. The respondent urged the court to uphold the conviction.

Analysis and determination

20. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."**

21. The ingredients of the offence of defilement are: proof of the age of the victim, proof of penetration and proper identification of the perpetrator, see **George Opondo Olunga vs. Republic [2016] eKLR.**

22. The age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in **Edwin Nyambogo Onsongo vs. Republic (2016) eKLR** that:

"... the question of proof of age has finally been settled by recent decisions of this court to the

effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

23. In this case, the mother to the complainant PW2 produced the birth certificate of the victim that showed that she was born on 30/10/2019 which placed her age at 4 ½ years when the offence was committed in May 2024. The age of the complainant was satisfactorily proved at 4 years at the time the offence was committed.

24. On the element of penetration, Section 2 of the Sexual Offences Act defines the same as:

"the partial or complete insertion of the genital organs of a person into the genital organs of another person."

25. The prosecution has a duty to establish that the complainant was partially or fully sexually penetrated by the Appellant.

26. The clinical officer who examined the complainant PW5 found the complainant with redness and pain in her vagina. The trial magistrate in his judgment stated that

the clinical officer confirmed that the complainant was defiled due to the redness and pain noted in the vagina.

27. I have examined the P3 form filled by the clinical officer PW5. P.xh.2. It indicated that the hymen was missing, However, the treatment notes from Rabai dispensary that the witness produced indicated that the hymen was “not intact”. The question then is whether the hymen was completely missing or it was there but not intact.

28. The complainant was seen by PW5 at Mariakani sub county hospital 6 days after the alleged incident. She was seen at Rabai health centre 5 days after the incident. If the complainant still had her hymen on but not intact, what caused the redness and pain in her genitalia that was discernible 5 days after the incident?

29. The minor in her evidence in court stated that the appellant inserted his penis into her vagina. She even told her mother that he had done it on another date before that day. The investigating officer PW 4 said that when she interrogated the girl she told her that the Appellant inserted his penis into her vagina and that the penis produced some milk like substance. This would suggest that there was ejaculation by the Appellant. Can it be true that the Appellant inserted his penis into the vagina of the complainant yet the finding by the examining officer at Rabai was that the victim still had her hymen on though not intact? If there was no perforation of the hymen why would there have been pain and redness in the genitalia 5

days later? In view of these discrepancies I do not find sufficient medical evidence to support the defilement on the complainant.

30. That leaves the evidence of the complainant that the appellant defiled her. The trial court in convicting the appellant of the offence said that he found the evidence of the complainant believable while the Appellant`s defence was an afterthought.

31. Section 124 of the Evidence Act allows a court in sexual offence cases involving children to convict on the sole evidence of the child victim if the court is satisfied that the child is telling the truth and gives reasons for so finding. Was the finding correct in face of the finding by the examining officer at Rabai that the complainant still had her hymen on?

32. The complainant was a child of 4 years. She appeared in court to testify on 3 occasions. On the first day the child was stood down after voir dire examination was conducted after she went silent. On the second occasion the court conducted voir dire examination on her and ordered that she gives sworn testimony. She started to testify and stated that she was playing at home on a Saturday when the accused (Diid) did bad manners to her in the house belonging to (Vii) (not clear). The child then went silent and the court was forced to adjourn the hearing.

33. On the third occasion, the child started by telling the court that the accused (now appellant) did bad manners to

her. That he inserted his “dudu” he uses for urinating (penis) into her organ she uses for urinating (vagina). That he gave her sweets after doing so. She put on her clothes and left the room. She did not tell anyone about it but she later told her mother. When she was cross-examined by the Appellant she stated that, ”auntie (prosecutor) told me what to speak”.

34. It is clear from the trial court`s record that the court had difficulty in taking the evidence of the complainant. It cannot be known whether the hesitancy to testify was due to her tender age or it is because she was not speaking the truth. The court would not know what to make of her statement that the prosecutor told her what to speak. The statement suggests that she was couched by the prosecutor on what to tell the court but no re-examination was done on her to clarify what she meant by that statement.

35. I have noted from the *voir* dire examination that the court only asked the child whether she understood the duty of speaking the truth. There was no question put to the child to find our whether she understood the meaning and importance of taking an oath. The court thus allowed the child to give sworn testimony without being satisfied that she understood the meaning and nature of an oath. The importance of doing so was explained by the Court of Appeal in **Johnson Muiruri vs Republic [1983] KLR 445** as follows**:**

1. “Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

36. It is clear that voir dire examination was not properly conducted in this case. The court in a proper case may convict where voir dire examination is not properly conducted where there is independent evidence to sustain the charge. In my consideration it was not safe in the circumstances of this case to convict on the sole evidence of the complainant who was a 4-year old child. There was no independent evidence to support the charge.

37. The upshot is therefore that this court finds that there was no sufficient evidence to prove that the Appellant penetrated the complainant victim into her vagina. The appeal is found to be merited. Consequently, the conviction entered by the trial court is quashed and the sentence thereof set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at GARSEN this 5th day of March, 2026

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch holding brief for Miss Ochola for Applicant

Appellant present at Shimo la Tewa Maximum Prison

Court Assistant - Rahma