IN THE COURT OF APPEAL

AT MALINDI

(CORAM: W. KARANJA, GATEMBU & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 10 OF 2019

BETWEEN

MWAROME MUNGA JANJI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Njoki Mwangi, J.) delivered on 3rd July, 2018

in

Malindi H.C.CR. Appeal No. 46 of 2016)

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JUDGMENT OF THE COURT

1. In this appeal, the appellant, Mwarome Munga Janji, is challenging his conviction for the offence of defilement on the first count, and attempted defilement, on a second count in respect of which he is serving consecutive jail terms of 20 years and 10 years respectively. He was charged under the Sexual Offences Act with two counts of defilement with alternative charges of indecent act before the Resident Magistrates' Court at Kilifi. On the first count, the particulars were that on 13th February 2014 at [Particulars Withheld] village within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of MCK, a girl aged 12 years, while under the second count, the particulars were that on the same date he intentionally and unlawfully caused his penis to penetrate the vagina of CPK, a girl aged 9 years.

2. The trial court found him guilty on both counts, convicted him, sentenced him to 20 years on the first count and life imprisonment on the second count. However, on appeal, the High Court confirmed the conviction and sentence on the first count but set aside the conviction and sentence on the second count, and convicted him for the offence of attempted defilement *in lieu* and substituted the sentence with a 10-year imprisonment term. The two sentences to run consecutively.

3. The facts as brought out by the five prosecution witnesses who testified before the trial court are that the appellant is well known to the family of the complainants, the victims of the offences. RK, the father of MCK and CPK who testified as PW3 stated that on 13th February 2015 (should be 2014) at 9.00 p.m., the appellant visited their home and requested him to allow his children (MCK and CPK) to go and stay overnight at the appellant's house with the appellant's two younger children aged 5 and 2 years as he (the appellant) needed to travel to a place known as [Particulars Withheld]. Upon consultation with his wife, RK allowed their daughters, MCK and CPK aged 13 and 10 years respectively at the time of the trial, to go with the appellant to his house on the understanding that the appellant would return the children in the morning in order for them to go to school. And so, the children went off with the appellant.

4. MCK and CPK, testified as PW1 and PW2 respectively. Their testimony was that at the appellant's house, the appellant's wife offered them food which they politely declined and went to sleep where the appellant's children were sleeping. They stated further that the appellant gave them a porch with money and asked them to count and that he (the appellant) went off to take a shower; that they were sleeping in the same bed with the appellant's children when the appellant came and told MCK to remove her pants, but she refused. CPK suggested that they should go back home but the appellant *"refused as it was midnight"* and told them to sleep; that the appellant held MCK's mouth, shone a torch light to their faces and began to caress her breasts; that he then inserted his fingers in her vagina "*and then inserted his penis in her vagina*"; that they were crying and the appellant said he would give them money; that after defiling them, he left at 4.00 a.m.; that in the morning they walked home slowly and narrated to their parents what had happened.

5. CPK's testimony echoed that of her sister MPK. In her words:

> ***"We went to sleep. T and his other child were with us. We were sleeping in the same bed with my sister. He then started putting hand in our ears and shone a torch light in our eyes. He then gave us money to count. It was Kshs.1,050/-. My sister is the one who counted money. We slept and (he) inserted fingers in my vagina. I had taken a shower and a lesso only. I did not have a panty. When I told him to stop he just laughed. He squeezed my breast and told us we should not report him as he will give us money. He also inserted his penis in me. We went home in the morning."***

6. Their father, RK, confirmed that when the children got home at 6.00 a.m. that morning, he got shocked when they told him that the appellant had defiled them; that he called the appellant who said he had gone to pick fish, but he never came; that he then went to the area sub chief and thence to Kilifi Police Station and reported; that he was then sent to the hospital, Kilifi District Hospital, where the children were examined.

7. At the hospital, the children were examined by Dr. Busra whose medical reports in respect of the complainants were produced at the trial by Dr. Hashim Suleiman (PW4) confirming that both children had been defiled.

8. The investigating officer was Corporal Zainab Zaro (PW5) of Kilifi Police Station. She was at the Police Station on 18th February 2014 when the children, accompanied by their parents, reported that on 13th February 2014, they had at the request of the appellant gone to his house to take care of his children; that at the appellant's house, they were shown where to sleep, and that the appellant defiled them; that the appellant was later arrested and charged with the offences.

9. In his sworn testimony in defence, the appellant stated that on Monday 21st July 2014, he heard two people knocking on his door and on opening found two police officers in plain clothes who asked him to accompany them to the D.O's office as a complaint had been made regarding children; that he thought the complaint was in relation to an incident where he had chased children from church in 2013; that on getting to the D.O's office, he realized it was a police case; that he was then taken to Kilifi Police Station before being charged with offences he did not commit. He maintained that "*all I know is that I chased the children from my compound*." Under cross examination, the appellant stated that there was *'bad blood'* between him and the complainants' family because he sold church land.

10. The trial magistrate was satisfied that the prosecution had established its case to the required standard and convicted the appellant on the two main counts, and sentenced him, as already stated, to 20 years imprisonment on count 1 and life imprisonment on count II. As indicated, the High Court did on first appeal set aside the conviction on count II and in its place convicted him for the offence of attempted defilement for which he is to serve 10 years imprisonment after completing his sentence on count I.

11. As this is a second Appeal, under Section 361(1)(a) of the Criminal Procedure Code only matters of law may be raised. See ***Njoroge vs. Republic [1982] KLR 388.*** In that regard the appellant complains that the medical evidence adduced before the trial court was *"shody and inconsistent";* that the High Court did not consider that there were contradictions and variances in the evidence; and that the Judge did not consider his mitigation.

12. In relation to the medical report, the appellant submitted that there was inconsistency regarding the date when the offence was committed and the day the complainants were taken to hospital; that whilst the offence was allegedly committed on 13th February 2014 and the P3 form filed on 27th February 2014, under cross examination, the doctor stated that the complainants were taken to hospital on 18th February 2014; that no reason was given why the children were not taken to hospital within 24 hours, and consequently the doctor's evidence was worthless; that the variance in the dates indicated by the doctor pointed to the fact that the charges against him were framed. Furthermore, the appellant urged, the medical report did not show when the victims lost virginity. He urged the Court to allow the appeal on account of the gaps in the medical evidence.

13. The appellant submitted further that there were other inconsistencies and variances in the prosecution evidence in that the doctor, PW4, stated that the Post Rape Care (PRC) form indicated that the perpetrator's estimated age was 60 years when in fact his age at the time of the alleged offence was 40 years; that it was incumbent upon the prosecution to prove his age by producing "*cogent and valid proof of the age of the appellant*"; that there were discrepancies as well regarding the date when the victims were taken to hospital; and that his constitutional rights were violated as the victims were not examined within 24 hours.

14. Finally, the appellant complained that the time he spent in remand during the trial was not taken into account when he was sentenced to life imprisonment; that had the two years he was in remand been taken into account, a less severe punishment would have been meted out. Reference was made to Section 333(2) of the Criminal Procedure Code and the High Court decision in ***John Kathia M'tobi vs. Republic [2018] eKLR***. On the substituted offence of attempted defilement, he urged that the sentence should run concurrently.

15. Opposing the appeal, learned prosecution counsel ***Mr. Jami*** in his short reply submitted that the appeal is devoid of merit; that with the exception of count II, the two courts below arrived at concurrent findings, that all the ingredients of the offences were established to the required standard; that the High Court was justified in substituting the offence under the second count as the victim's hymen was intact based on the medical evidence of PW4; and that the appellant's defence was fully considered and his claim of an existent grudge with the family of the victims properly rejected.

16. Regarding the sentences, counsel submitted that the court was justified in ordering the sentences to run consecutively as there were two minor victims who deserve protection and the court gave reasons for so ordering, namely that the appellant abused trust bestowed on him and turned predator, and that each victim deserves to be treated individually.

17. We have considered the appeal and the submissions. The appellant's grievance is that the offences for which he was convicted were not proved to the required standard. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration

and proof that the appellant was the perpetrator of the offence. The question is whether those ingredients were established to the required standard.

18. As regards age, the appellant's grievance appears to be with the mix up in his own age. He does not appear to appreciate that it was the age of the victims, as opposed to his age as the accused person, that was critical for the prosecution to establish, given that it was never suggested that the appellant was not an adult.

Although the appellant's apparent age was indicated in the post rape report as approximately 60 years whilst he claimed to be 40 years old, that variance is in our view not material as he was undoubtedly an adult at the time the offence was committed. What was material for the prosecution to establish was the age of the victims. In ***Hadson Ali Mwachongo vs. Republic [2016] eKLR***, for instance, this Court stated that:

> ***"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim"*** [Emphasis]

19. Similarly, in ***Eliud Waweru Wambui vs. Republic [2019] eKLR***, the Court reiterated that:

> ***"There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt***." [Emphasis]

20. In that regard, both courts below were satisfied and found that the ages of the victims were established to the required standard. Based on the evidence, we are in agreement with the learned Judge when she expressed that there was no basis for doubting the testimony of the father of the victims regarding the age of his children. See (***Francis Omuroni vs. Uganda Criminal Appeal No.2 of 2000***.)

21. With regard to penetration, we have already alluded to the testimony of the victims. MCK was clear that the appellant "*inserted his fingers in her vagina. He then inserted his penis in her vagina*." CPK stated that the appellant squeezed her breasts and that "*he also inserted his penis in me*." The medical report by Dr. Busra produced by PW4 indicated that the MCK's hymen was not intact whilst that of CPK was intact. Although, under the proviso to Section 124 of the Evidence Act, the evidence of the victims was sufficient, without corroboration, to sustain the charges if the court was satisfied, for reasons to be recorded in the proceedings, that the victims were telling the truth, the High Court on the first appeal gave the appellant the benefit of doubt on the second count by expressing that since the medical report indicated that CPK's hymen was intact, "*this therefore shows that the appellant did not complete the act of defilement*". The view expressed by the learned Judge in that regard is, with respect, incorrect bearing in mind that under Section 2 of the Sexual Offence Act, penetration is defined to mean, ***"the partial or complete insertion of the genital organs of a person into the genital organ of another person"***. As stated by this Court in the case of ***Erick Onyango Ondeng vs. Republic (2014) eKLR*:**

> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."*** *[Emphasis]*

22. See also ***Mark Oiruri Mose vs. R [2013] eKLR*** where this Court stated thus:

> ***"Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ"*** *[Emphasis]*

23. The respondent has not however challenged the decision of the High Court in that regard, and we cannot therefore interfere with the decision of the learned Judge to substitute, with regard to count II, the offence of defilement with that of attempted defilement. We are satisfied that the ingredient of penetration was proved to the required standard.

24. With regard to the identity of the defiler, the appellant was a person who was well known to the victims' family. The appellant himself confirmed he knew the victims' family though asserting that there was a grudge on account of church land he had sold. The claim that his defence was not considered is not supported by the record. In rejecting his defence, the trial court stated:

> ***"On the evidence by the accused I note the accused seemed to blame the case herein on an alleged dispute between him and the complainants where he alleges that he chased them from church for making noise hence they falsified the claims herein. I find this allegation to be baseless and untruthful. In my view and having observed the demeanour of the complainants I do not think that being chased away from church would make the victims come up with such serious allegations like this one."***

25. There is no merit in his complaint that his defence was not considered.

26. All in all, we conclude that all the ingredients of the offences for which the appellant was convicted and sentenced were proved to the required standard. We have no basis for interfering with the same.

27. With regard to sentence, the main complaint by the appellant is with regard to the order by the High Court that the sentences shall run consecutively. Section 12 of Criminal Procedure Code provides that any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass. Section 14 of that Code provides for circumstances in which the court may direct sentences to run

concurrently or consecutively. The long-standing practice is that concurrent sentences are imposed where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances. See the decision of the then Court of Appeal for Eastern Africa in the case of ***Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97***.

28. More recently in ***Peter Mbugua Kabui vs. Republic [2016] eKLR***, this Court expressed that:

> ***"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."***

29. In effect, where two or more offences are committed in the course of a single transaction the sentencing court should consider an order for concurrent instead of consecutive sentences. As to what constitutes same transaction, in ***Nathan vs. Republic [1965] EA 777*** this Court stated that:

> ***"If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."***

30. See also ***Republic vs. Saidi Nsabuga s/o Juma & another [1941] EACA***. In the present case although the learned Judge rightly considered the gravity of the offence and the fact that the appellant took advantage of the trust the victims' parents bestowed on him by letting him go with the children to his home overnight but turned around and became predator, she does not appear to have taken into account that the offences were committed in the same transaction. Had the learned Judge done so, she would have ordered the sentences to run concurrently. To that extent only, we are minded to interfere with the decision of the High Court, which we hereby do, by setting aside the order that the sentences shall run consecutively and substituting therefor an order that the sentences shall run concurrently.

31. The appeal otherwise fails and is hereby dismissed.

Dated and delivered at Nairobi this 16th day of April, 2021.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR