IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GATEMBU, MURGOR & SICHALE, J.JA)

CRIMINAL APPEAL NO. 60 OF 2018

BETWEEN

PETER NGUI NYAMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction, Judgment, decree, order, or as the case may be of the High Court of Kenya at Garissa (Dulu, J) dated 27th July 2015 in High Court Criminal Case No. 16 of 2015)

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JUDGMENT OF THE COURT

Peter Ngui Nyamu, ***the appellant***, was charged with the offence of defilement contrary to ***Section 8(1)*** as read with ***section 8(2)*** of the ***Sexual Offences Act*** No. 3 of 2006. The particulars of the offence are that on the 24th October 2012 at [particulars withheld] Sub Location, Migwani District, Kitui County, he intentionally and unlawfully caused penetration of his genital organ namely penis into the genital organ namely vagina of the complainant ***MM, PW 1*** a girl child aged 6 years.

The alternative charge was that he committed an indecent act with a child contrary to ***Section 11(1)*** of the same Act. The particulars of which are that on the same day, he intentionally and unlawfully committed an indecent act with MM a girl child aged 6 years by touching her private part namely, her vagina.

In his defence, the appellant denied committing the offence. The trial magistrate convicted and sentenced the appellant to life imprisonment upon finding that the offence was proved to the required standard. The appellant was dissatisfied with the decision, and appealed to the High Court (Dulu, J.), which upheld the conviction and sentence. The appellant was aggrieved by the conviction and sentence, and appealed to this Court against that decision on the grounds that the medical evidence relied on by the trial court was insufficient to sustain a conviction; that the High Court wrongly concluded that the prosecution had proved its case beyond reasonable doubt; that ***section 169*** of the ***Criminal Procedure Code*** was not complied with; and that the High Court failed to take into account the inconsistencies and contradictions in the evidence.

Appearing virtually in person from Garissa Prison owing to the COVID-19 pandemic, the appellant submitted, that, ***Lawrence Ikuku, PW2*** the assistant chief, Thaana Nzau location took him to his office where the complainant identified him; that the child was coached on the state of the clothes he was wearing on that day. The appellant further stated that the doctor who examined him was not the same doctor who testified in court. The appellant concluded by stating that he had been framed.

Responding to the appellant's submissions, ***Ms. Ngalyuka***, learned counsel for the State opposed the appeal and submitted that the complainant was a child, of 6 years and that the conviction was based on the evidence of PW1, Chief Ikuku and MM. Counsel submitted that all the ingredients for the offence were proved, in that there was evidence of penetration, and the medical report indicated that she had been involved in a sexual assault; that the appellant was properly identified, which was a concurrent finding of the two courts below; that after she was defiled, the child reported to her mother, and identified the appellant as the person who had defiled her. The description she gave was that the appellant wore torn trousers; that his teeth were brown, and he smelled of tobacco; that she was able to identify him when he passed by.

Furthermore, Chief Ikuku stated that the description given by the child fitted that of the appellant, which was why he was arrested; that the child had stated that the appellant was known to her and that the offence had occurred in broad daylight when she was able to see him; that there was consistency in the witness evidence as to his description, and that though no identification parade was conducted, the identification evidence was corroborated by the witnesses.

In a brief reply, the appellant stated that an identification parade should have been conducted, and that he should not have been identified in Chief Ikuku's office.

This is a second appeal which, by the provisions of ***section 361(1)*** of the ***Criminal Procedure Code*** ought to present only issues of law. Where the two courts below have made concurrent findings of fact, the Court would respect those findings, unless the conclusions upon which they are premised are not supported by the evidence or are based on a misapplication of the evidence. See: ***M'Riungu vs Republic, (1983) KLR 455***.

Having regard to these principles, we consider that the issues for consideration are whether the High Court wrongly concluded that the prosecution had proved its case beyond reasonable doubt having failed to take into account the inconsistencies and contradictions in the evidence; whether the medical evidence relied on by the trial court was insufficient to sustain a conviction, and whether ***section 169 (1)*** of the ***Criminal Procedure Code*** was not complied with.

To address the question of whether the prosecution proved its case beyond reasonable doubt, it is necessary to set out the evidence that was before the trial court, which was that, as MM a girl child age 6 years was walking home from school at about 1.00 p.m on 24th October 2012, she met with the appellant, who grabbed hold of her, put her on his shoulders and carried her off into a thick bush. There, he removed her underpants, lay on top of her and defiled her. After ordering her not to tell anyone what had happened, he left her and disappeared into the bush. MM says she bled, but dressed, and went home. Much later, she informed her mother of what had transpired. She also described the person who had defiled her as a man who was wearing a black trouser that was torn at the knees; that his mouth and teeth were black and dirty, and he had a short beard.

MM's mother, PW1 was at home on 24th October 2012, when MM arrived home at about 2.00 pm, but MM did not tell her about her ordeal. On 26th as she was bathing her, MM complained that her genitalia was painful, and when her mother enquired further, she finally disclosed that she was defiled by the appellant while on her way back from school. PW 1 stated that MM had given her a description of the assailant which, fitted the appellant whom she immediately named whilst reporting the incident to Chief Ikuku.

When the appellant was arrested on 18th November 2012, MM positively identified him as he was wearing the same torn trousers. PW1 stated that the appellant was known to her as his home is about 1 km away from where she lived. She stated that there was no grudge between her family and the appellant's, and she described him as a moderate drinker, who smoked cigarettes and chewed miraa. She confirmed having visited the location of the incident which was thickly forested.

Assistant Chief Ikuku, confirmed that he had received a report of MM's defilement from PW1. He also confirmed that the assailant had been described as wearing torn black trousers and a white shirt. His teeth were discoloured because he chewed miraa, and he kept a beard. After the appellant was arrested, Chief Ikuku found that the description given by MM fitted the appellant. His torn trousers were exactly as described, he wore kala sandals and was chewing miraa, and just as the child stated, his mouth was dirty. ***Cpl Purity Katui, (PW4)*** reiterated the details of the report made by PW1 and the manner of the appellant's arrest.

Dr. Oketta examined MM, but owing to his transfer to Kijabe Hospital, ***Dr. Indumwa PW5*** who was familiar with his hand writing and his signature testified on his behalf. The doctor reported that an examination of MM's genital area showed that the hymen was broken, but there were no lacerations. The report also observed that she had a foul smelling discharge. It was concluded that she had been defiled.

In his defence the appellant stated that, PW1 had complained to his parents that he was growing miraa, and had demanded that he uproot it; that when he refused, she had set out to frame him; that on 18th November 2012, he was arrested and taken to the assistant chief's office where he denied defiling the child. He claimed that when the assistant chief asked the child if the appellant had defiled her, she cried, and that the assistant chief had given her a mandazi, whereupon she told him that the appellant had defiled her.

Based on this evidence, we return to the question of whether the prosecution proved the offence of defilement. To ascertain this, it is of necessity that we determine whether the ingredients of age, identification and penetration were established.

As concerns MM's age, PW1, her mother produced a Ministry of Health Child Health Card that indicated that she was born on 5th September 2006 which would infer that on the date the offence was committed, MM would have been 6 years old.

On the question of identification, it is apparent that this was the crux of this appeal, particularly as the appellant complained that he was identified by the complainant when he was in the assistant chief Ikuku's office; that an identification parade should have been conducted in order to properly identify him. On the question of his identification, the High Court stated that;

> ***"The evidence on the record with regard to the identity of the appellant, is that of the complainant PW3, a child of six years… The description given by the complainant of the culprit was that he wore a torn trouser, had a dirty mouth and had a beard. He did not have a beard in court. However, the chief PW2 and the mother of the complainant PW1 confirmed in evidence that the description given by the complainant fitted the appellant and no other person in the local neighbourhood. I observe that the learned magistrate in the judgment appears to have somewhat shifted the burden of proof to the appellant and even gone on to say why the appellant did not have a beard, which there is no evidence to that effect. In my view that was a mistake.***
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> ***Having said so, is the description by the complainant sufficient to identify the culprit as the appellant? Is the evidence of the minor child believable? One has to take in mind that the appellant gave a strong sworn defence alleging the existence of a grudge between himself and the complainant's mother.***

In my view with the evidence if the chief PW2 who was an independent witnesses (sic), supporting the description as fitting the appellant, I have no doubt in finding that the appellant was indeed the culprit. The alleged identification of the appellant at the chief's office by the complainant was not of any evidential value. No identification parade was held and therefore that cannot be taken to be identification of the appellant. However, the appellant had already been arrested because of a description given by the complainant, so in my view that mistake of purported identification of the appellant at the chief's office did not prejudice the appellant."

We would begin by observing that in reevaluating the evidence, the High Court did not rely on the identification of the appellant in the chief's office as claimed. Instead, both courts below relied on the description MM gave of her assailant to reach a finding that the appellant was properly identified.

In the case of ***Simiyu & Anor. vs Republic [2005] KLR 192*** it was emphasized that;

"In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and terms of the description are matters of the highest importance…"

As to whether MM's description satisfactorily identified the appellant, she stated that;

"I used to see that person before that date. I didn't know their home. I didn't know his name. I gave my mother his description. He was wearing a black trousers. It was torn on the knees. The mouth was black/dirty. I saw the teeth. They were black and dirty. He had beard. It was short."

Whereupon, it was PW1's evidence that;

"After the child explained to me the person who had defiled her, I quickly identified him. It was Peter Ngui, the accused. The description fit the accused. The accused is the one before the court. When he was arrested he had visibly slight big beard. He has now shaved.."

Regarding the trousers, he wore PW1 stated that, *"I informed the police officers that the accused was wearing a torn trousers on the knee."* And when cross examined by the appellant she stated, *"It is possible to have other people wearing torn trousers but nobody else fits your description. The child saw your teeth and blackish colours. You have shaved your beards."*

Also relying on MM's description Chief Ikuku stated, that;

"The description fitted him. The pair of trousers was exactly the same. It was torn. He was wearing kala sandals. He was chewing miraa as described by the child. The child said his mouth was dirty".

And on being cross examined by the appellant he had this to say, *"I followed the child's description in arresting you…Your teeth were dirty since you were chewing miraa. Even on the date of arrest you were chewing miraa."*

No doubt, MM provided a clear and definitive description of the appellant that aided in his identification and arrest. Of particular significance was the description of his torn black trousers and his black and dirty teeth and mouth. Chief Ikuku testified that at the time of his arrest he was wearing a torn pair of trousers and his teeth were black and dirty from the miraa that he was chewing, just as the child described. So that when the different elements of the description MM gave are considered together, they clearly pointed to him and no one else as the person who defiled her.

It is not also lost on us that the appellant was someone who was known to the child. We say so because, MM stated with certainty that she knew him as someone who lived in their locality. This evidence was corroborated by PW1, and the appellant himself did not deny that the family was known to him. In the case of ***Peter Musau vs Republic [2008] eKLR*** the requisites of identification through recognition were emphasized thus;

"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for some time is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question."

The appellant having been a person known to MM meant that she was able to recognize him, and when all evidence is considered, as were the courts below, we too are satisfied that the appellant was well and truly identified as the person who defiled MM on the day in question.

On the ingredient pertaining to whether there was penetration, PW1 testified that after MM reported to her that she had been defiled, she checked and found that MM's private parts were torn and injured. According to Dr. Indumwa who testified on behalf of Dr. Oketto, a genital area examination showed that the hymen was broken. There were however no lacerations, but she had a foul smelling discharge. He concluded that she had been defiled. The two courts below having concurrently found that there was penetration, we too have no reason to depart from that finding.

In sum, when the evidence is considered in its totality, there can be no doubt that MM was defiled, and that it was the appellant who defiled her. We are satisfied that both the trial court and the High Court rightly concluded that the prosecution proved its case beyond doubt. Again, contrary to the contention that there were inconsistencies in the witnesses' evidence, we find that if there were any, they were not material enough to negate or diminish the prosecution's case.

With respect to the final complaint that the judgment of the High Court did not adhere to the dictates of ***section 169 (1)*** of the ***Criminal Procedure Code***, as there was no elaboration provided, we are unable to ascertain the basis upon which the complaint is made and we therefore consider it to be unsubstantiated and lacking in merit.

As a consequence, we have come to the conclusion that the appeal is unmerited and is hereby dismissed.

It is so ordered

Dated and Delivered at Nairobi this 23rd day of October, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR