IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 141 OF 2019

BETWEEN

ALEX WAMBANI JOSEPH......................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi,

(Ngenye-Macharia, J.) dated 5th November, 2015 in HCCR. NO. 136 OF 2014)

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JUDGMENT OF THE COURT

Background

[1] The appellant, **Alex Wambani Joseph,** was charged and convicted of defilement of a boy aged 7 years contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act** and sentenced to life imprisonment. His first appeal to the High Court was unsuccessful, hence this second appeal.

[2] The jurisdiction of this Court on a second appeal is well settled.

In ***Njoroge v Republic*** **[1982] KLR 388** this Court held that:

> ***"On this second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."***

[3] It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re- evaluated by the High Court in reaching the impugned judgment, to place the instant appeal in context.

[4] The particulars of the offence of defilement were that on 7th and 8th September, 2013 at [Particulars withheld] Village in Kiambu County the appellant unlawfully and intentionally caused his penis to penetrate the anus of **DKW** (name withheld), a boy aged 7 years.

[5] The prosecution called four (4) witnesses including the minor complainant. In summary, the complainant testified that he was 7 years old and that the appellant was employed as a farmhand at their home and lived in a room behind their house. On the night of 7th September, 2013, the complainant took some food to the appellant. The appellant asked him to stay with him and wait for his mother and grandmother to get home from work.

[6] The complainant further testified that the appellant put the complainant to sleep in his bed and that when he slept, he had his pants on but when he woke up the following day, he was in the bed naked and had some pain in his anus. The appellant was beside him, also naked. He told the appellant that he wanted to leave, then dressed and went back to the main house.

[7] When the complainant arrived at the main house, his mother, **SWW** had left for work. Later, on at about 4:00pm, his mother arrived and he informed her that the appellant had defiled him. His exact words were: "***Alex** amenifanyia tabia mbaya*".

[8] S testified that the complainant was 8 years old and produced a clinic card indicating that the complainant was born on 13th August, 2006. It was her account that at about 1.00 pm on 9th September, 2013, the complainant was sent home from the school he attended, [Particular withheld] Primary School. He asked her to accompany him to school which she did the following day, 10th September 2013. She met the complainant's teacher, one **Mrs. Muchina,** who informed her that she had heard some of the pupils saying that the complainant had passed stool on himself.

[9] The following day, 11th September, 2013, **S** took the complainant to Gachie Sub District Hospital where he was examined. The complainant informed the doctor that he could not hold stool whereupon the doctor examined him and informed **his mother** that the complainant had been defiled and advised her to report the matter to the police. When asked by the doctor who had defiled him, the complainant stated that **Alex** had defiled him when he took him some food and that he had threatened to beat him if he informed anybody what had transpired.

[10] Thereafter, the complainant's mother made a formal police report. **PC Moses Tinkoi (PC Tinkoi)** stationed at Karuri Police Station gave her a P3 form and advised her to take the complainant to Karuri Sub District Hospital. On 12th September, 2013, **Richard Munene (Munene)**, a clinical officer based at Karuri Sub- District Hospital examined him. He filled and produced a P3 form and a Post Rape Care form. His findings were that the complainant's anus was tender, slightly dilated and had lacerations around the orifice showing evidence of anal penetration. In his opinion, the complainant had been defiled with a blunt penetrating object. **The complainant's mother** took back the filled P3 form to **PC Tinkoi** who accompanied her and the complainant to their home where he arrested the appellant.

[11] When placed on his defence, the appellant denied the offence and gave an unsworn statement and did not call any witnesses. He stated that the complainant's grandmother had promised to him Kshs 2,000/- out of the Kshs 12,000/- that she had conned him out of. The appellant further stated that he heard a knock on his door and when he opened, some men entered and beat him up. He was then arrested and taken to Ndenderu Police Post then to Karuri Sub District Hospital. He further stated that the charges preferred against him were precipitated by the complainant's mother who had threatened to take adverse action against him for declining her advances.

[12] The High Court (Ngenye-Macharia, J.) was satisfied that based on the evidence on record, the appellant's conviction and sentence were well founded and dismissed the first appeal as earlier stated.

[13] In his second appeal, the appellant who was unrepresented contends that the learned Judge erred in the following respects: failing to consider his defence; failing to observe that the case for the prosecution was not proved beyond reasonable doubt; and failing to sufficiently consider the entire evidence afresh as the 1st appellate court.

Submissions

[14] At the hearing of the appeal, the appellant relied on his written submissions in which he contended that the charge sheet was defective for lack of conformity with the evidence; that there was no proof of penetration and identification in that it was not proved beyond reasonable doubt that it was the appellant who committed the offence to the exclusion of anybody else; that the complainant did not offer a vivid description of what was done to him; that there was contradictory evidence by the complainant and his mother regarding when she was informed of the alleged defilement and with respect to the number of times the offence was committed; that the prosecution failed to call the complainant's brother, **O,** grandmother and cousin to support its case; and that the High Court failed to consider the entire evidence afresh.

[15] In opposing the appeal, **Ms. Wang'ele** for the State submitted that the prosecution evidence was in tandem with the charge sheet that the offence was committed on the night of 7th and 8th September 2013 and that the evidence was also clear that the charge was in relation to one incident occurring on the said dates. She also submitted that all the elements of the offence of defilement were proved beyond reasonable doubt.

[16] Ms. Wang'ele dismissed the contention that there were inconsistencies in evidence, positing that the date and time when the complainant's mother was informed was not an issue for determination and was therefore not a material contradiction. Counsel further argued that per **Section 143 of the Evidence Act**, there is no requirement for a particular number of witnesses to be called to prove a fact. Counsel posited that it was therefore not necessary for the prosecution to call **O**, the complainant' grandmother and cousin as additional witnesses in the case.

Lastly, counsel urged us to dismiss the appeal as the High Court properly re-evaluated the evidence on record and arrived at its own independent findings.

Determination

[17] We have carefully considered the appeal, the submissions, the authorities cited and the law.

> ***Sections 8(1) and 8(2) of the Sexual Offences Act*** provide
>
> that:-
>
> ***"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

[18] To prove the offence of defilement, the prosecution had to establish that there was penetration of the victim's organs, that the victim was

aged 11 years or less and that the appellant defiled the complainant.

[19] In our evaluation, the issues arising for our determination in this appeal are whether the elements of penetration and identification were proved to the required standard; whether there were material contradictions in the evidence that ought to have been resolved in favour of the appellant; and whether it is in the interests of justice for this Court to interfere with the sentence meted on the appellant.

[20] On the question of proof of penetration, it is clear from the record that the complainant's testimony was corroborated by medical evidence. It was confirmed by the Clinical Officer, **Munene,** that the complainant's anus was tender, slightly dilated and had deep cuts and that the nature of the offence was defilement. **Munene** testified that from the diagnosis carried out, there was evidence of penetration. The two courts below cannot therefore be faulted for relying on the medical evidence that was adduced to conclude that there was penetration.

[21] Regarding identification, the complainant identified the appellant as the person who defiled him. It was a case of identification by recognition. The appellant was a person who was well known to him as he was working as their farmhand. This fact was confirmed by the complainant's mother. The trial court believed and accepted the complainant's testimony as truthful. The 1st appellate court found that the complainant's identification of the appellant as the perpetrator was proper.

[22] The proviso to **Section 124 of the Evidence Act** provides as follows:

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

In the circumstances, we are satisfied with the concurrent findings of the two courts below regarding the appellant's positive identification and are not inclined to interfere.

[23] On the question of the age of the complainant, we find that the same was proved by the production of the Clinic Card by the complainant's mother. The Clinic Card indicated that the complainant was born on 13th August, 2006 and he was therefore 7 years at the time of defilement. The Clinical Officer, Munene, indicated on the P3 Form that the complainant was aged 7 years.

[24] On the question whether there were material contradictions in the evidence that ought to have been resolved in favour of the appellant, the appellant challenges the prosecution evidence with respect to the time when the complainant allegedly informed his mother that the appellant had defiled him. Like the 1st appellate court, we find that this inconsistency is not material and does not have a bearing on the proof of the offence.

[25] In ***<u>Phillip Nzaka Watu v Republic</u> [2016] eKLR, Criminal Appeal 29 of 2015*** this Court observed that:-

> ***"…when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.***

[26] We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence. We therefore find that the appellant's contentions that his defence was not considered and that the 1st appellate court did not reconsider the evidence are without merit.

[27] We note that the appellant raised the additional grounds that the charge sheet was defective for lack of conformity with the evidence and that the prosecution failed to call additional witnesses. However, we are disinclined to address these contentions as they have been raised for the first time on a second appeal. In ***Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009***, this Court found that because:-

> ***"….the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."***

[28] From the foregoing, we are satisfied that in light of the overwhelming evidence adduced against the appellant, his defence denying having committed the offence was properly rejected. His conviction was therefore sound.

[29] As regards the propriety of the sentence meted on the appellant by the trial court and confirmed by the 1st appellate court, we note that in sentencing the appellant, the trial court considered the appellant's mitigation that he is an orphan and that he lived with his cousin. However, the trial court observed:-

> ***"The court has noted the mitigating factors carefully. However the offence is very serious and prevalent. The accused person abused the kindness of his host family by defiling the child who had taken food to him. The complainant child is forever severed. His anus cannot retain stool. He may have to undergo surgery. The child will be traumatized forever. The offence is not forgivable. I'd (sic) therefore sentence the accused person to life imprisonment."***

[30] The 1st appellate court found no fault with the sentence which was in accordance with **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act**. As a second appellate court, we find no justification to interfere.

[31] In ***Wanjema v Republic*** ***[1971] EA 493***, the predecessor of this Court stated that:-

> ***"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

[32] In the result, we find no merit in this appeal and do therefore dismiss it in its entirety.

Dated and delivered at Nairobi this 20th day of November, 2020

D. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU (FCIArb)

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR