



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 119 OF 2019

BETWEEN

JACKSON NJENGA NGUNYA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Nairobi, (Kimaru, J.) dated 31st October, 2015*

in

HCCR. A. NO. 131 OF 2014)

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JUDGMENT OF THE COURT

### Background

[1] Jackson Njenga Ngunya (the appellant), was charged and convicted of the offence of defilement of a boy aged 10 years contrary to *Section 8(1)* as read with *Section 8(2) of the Sexual Offences Act*.

[2] The particulars of the offence were that on 26th and 27th May 2010 in Githunguri District within the then Central Province within Kiambu County, the appellant unlawfully caused his penis to penetrate the anus of JM (name withheld) a boy aged 10 years.

[3] The trial court convicted the appellant and sentenced him to life imprisonment. Aggrieved by the said conviction and sentence, the appellant preferred an appeal to the High Court. The High Court (Kimaru, J.) dismissed the appeal and upheld the conviction and sentence.

[4] Undeterred, the appellant preferred a second appeal to this Court. In his supplementary grounds of appeal, the appellant who was unrepresented, impugned the judgment of the first appellate court on the grounds that the learned Judge erred in: failing to observe that the case proceeded without plea taking contrary to *Section 207 of the Criminal Procedure Code*; failing to find that the allegations raised by the prosecution were not established contrary to *Section 107 of the Evidence Act*; failing to recall the complainant; and in failing to consider his defence that showed that there was bad blood between him and his neighbour, JWR (J).

[5] This being a second appeal, the Court is restricted to matters of law only. *Section 361 of the Criminal Procedure Code* provides that:

*“361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –*

*(a) on a matter of fact, and severity of sentence is a matter of fact; or*

*(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”*

[6] Further, *Njoroge v Republic* (1982) KLR 388, this Court stated as follows:-

*“..On this second appeal, we are only concerned with the 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..” See also Karingo v Republic [1982] KLR 213.*

[7] Bearing this jurisdictional remit in mind, we shall therefore briefly revisit the record of appeal to determine whether there are any issues of law that warrant our interference with the impugned judgment of the first appellate court.

[8] In brief, the facts of the prosecution case were that while residing at [particulars withheld] Children’s Home (the Home) managed by **BWN (B)**, the complainant, an orphan, got to know the appellant who lived nearby. The appellant had invited children from the Home who included the complainant to his house once during Christmas season. Thereafter, the complainant visited the appellant’s house on numerous occasions to assist him with various chores. It was the complainant’s testimony that in the year 2009, he and other children from the Home had gone to the appellant’s house to repair some wooden structure. That subsequently the complainant informed the appellant that he needed to go to the toilet whereupon the appellant took him to the toilet and asked him to remove his pants, gave him some Kshs 5/- and defiled him. The complainant described the defilement by detailing how the appellant’s penis penetrated his anus. The appellant asked him not to report what had transpired between them to anyone.

[9] The complainant testified that the appellant had informed him that if he faced any challenge at the Home, he could seek refuge at his house. It was the complainant’s further testimony that in May, 2010, he went to the appellant’s house after it was discovered that he had stolen Kshs. 50/- from a teacher at the Home. The complainant testified that he spent the night at the appellant’s house and that the appellant carried him from where he was sleeping to a table and defiled him; that when he woke up the following day, the table that he had laid on and the pair of shorts that he was wearing were bloodstained; that the appellant cleaned the table, washed the complainant’s clothes, bathed him and told him to go to school and return to his house after school.

[10] The complainant further testified that when he returned to the appellant’s house, the appellant gave him some tablets to take when he informed him that he felt pain on his anus; that the appellant gave him Kshs. 10/- and promised to take him to Nairobi; that he accompanied the appellant to Ikinu where he bought him a pair of slippers, gave him some groceries to take back to the appellant’s house; and that when he arrived at the appellant’s house, he saw the appellant’s neighbour, **J**.

[11] It was **J**’s testimony that she enquired from the complainant what he was doing at the appellant’s house, and the complainant informed her that he was staying with the appellant as he had got into trouble at the Home. **J** then telephoned **B** to inform her of the complainant’s whereabouts whereupon **B** requested **J** to ask the complainant to go back to the Home. That evening, the complainant did not return to the Home whereupon **B** called **J** and confirmed that the complainant was at the appellant’s house. **B** then sent some workers from the Home with instructions to collect the complainant from the appellant’s house and return him to the Home.

[12] **B** testified that when she interrogated the complainant, he informed her that he had been staying at the appellant’s house and that the appellant had sexually assaulted him. **PN**, who also resided at the Home; reported the matter at Githunguri Police Station and took the complainant to Githunguri Health Center. **Regina Muthoni Kimaru (Regina)**, a clinical officer, examined the complainant, filled a P3 form and produced it in court. Her findings were that the complainant’s anus had bruises and was tender. She also assessed the complainant’s age to be between 6 and 12 and produced an age assessment report.

[13] In his defence, the appellant gave sworn evidence and did not call any witnesses. It was his testimony that on the material night he was at a bar when the complainant came to ask him whether he could spend the night at his house as he had been caught stealing Kshs. 50/- from his teacher; that since it was raining, he took the complainant to his house where the complainant slept on the sofa and he slept in another room; that the following day the complainant went to school and returned to his house; and that he was framed due to an existing grudge between him and **J**.

### Submissions

[14] This appeal was heard virtually due to the risks associated with the novel COVID -19 pandemic as per the Practice Directions issued by the Chief Justice on 20th March 2020 in

[15] The appellant who was unrepresented, relied on his written submissions and contended that he was not availed all the records; that his request to recall the complainant was erroneously disallowed; and that there was a grudge between him and some prosecution witnesses including **J** arising from a family land dispute.

[16] In opposing the appeal, the learned Senior Assistant Director of Public Prosecution (SADPP), **Ms Ngalyuka**, for the State, submitted that the ingredients for the offence of defilement were proved to the required standard. Counsel pointed out that to prove that there was

penetration, the Clinical Officer, Regina who examined the complainant confirmed that the injuries sustained by the complainant were consistent with defilement. Her evidence therefore corroborated that of the complainant regarding penetration. The learned SADPP further submitted that the age assessment report produced by the clinical officer was sufficient to prove that the complainant's age was between 6 to 12 years and **Section 8 (2) of the Sexual Offences Act** was therefore applicable.

[17] On the issue of identification of the appellant as the perpetrator, the learned SADPP submitted that the appellant was well known to the complainant by name as the complainant had visited him previously; that there was corroboration of the complainant's evidence by **J** who stated that she saw the complainant near the appellant's house; that the complainant informed her that he had spent the night in the appellant's house; and that the complainant was carrying items such as slippers which he informed her had been bought for him by the appellant.

[18] On the appellant's defence, the learned SADPP submitted that there was no evidence that the appellant had been framed. Counsel contended that although the appellant claimed that he was not supplied with the record, it was clear from the record that the appellant confirmed that he was ready to proceed.

[19] On the issue of the appellant's request to recall the complainant, the learned SADPP submitted that the trial court considered the fact that the complainant was a child and that it was not in his best interests to recall him. She further indicated that the trial court considered that the appellant did not give a plausible explanation why he wanted to recall the complainant.

[20] Finally, the learned SADPP urged this Court to dismiss the appeal as there were concurrent findings of fact by the two courts below that the ingredients of the offence of defilement were established.

#### **Determination**

[21] We have carefully considered the record of appeal, the submissions, the authorities cited and the law. The issues for our determination in this appeal are whether the prosecution proved the charge of defilement beyond reasonable doubt; whether there was non-compliance with the requirements of plea taking as provided under **Section 207 of the Criminal Procedure Code** and the consequences thereof; and whether this Court ought to interfere with the sentence meted on the appellant in that it was manifestly harsh and excessive in the circumstances.

[22] We shall first consider whether the prosecution proved the charge of defilement beyond reasonable doubt. As earlier stated, this Court cannot interfere with the concurrent findings of facts unless they are shown to be based on no evidence. The appellant has assailed the evidence adduced by the prosecution regarding the proof of age of the complainant; the defence that he was framed for the charges due to a grudge between him and **J**; and the dismissal of his application to recall the complainant.

[23] **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.”*

[24] To prove the charge of defilement, the prosecution was required to establish that there was the penetration; that the appellant was positively identified as the perpetrator; and that the complainant was a child aged eleven years or less.

[25] We are satisfied with the findings of the two courts below regarding proof of penetration. The two courts below were both satisfied that the complainant was telling the truth about the fact of penetration. Secondly, there was corroboration of the complainant's evidence through the medical evidence produced by **Regina**, the clinical officer which confirmed that there were injuries in the complainant's anus and that he had been defiled.

[26] In the instant appeal, the appellant was identified by the complainant through recognition. Both courts below were satisfied that the complainant was telling the truth and relied on the complainant's evidence of identification. We find that there is no basis for our interference with these findings.

[27] On the question of the proof that the age of the complainant was 11 years or less, we find that there was sufficient evidence tendered by the prosecution. **B**, the complainant's guardian, testified that the complainant was 10 years old at the time of the commission of the offence. Her evidence was corroborated by the evidence of **Regina**, the clinical officer, who produced an age assessment report which indicated that the complainant was between the ages of 6 and 12 years. We are therefore satisfied with the findings of the two courts below on the

complainant's age. We therefore find that all the ingredients of the offence of defilement were present and proved by the prosecution to the required standard.

[28] On the appellant's complaint that he was not medically examined and tested to confirm his identity as the perpetrator of the defilement we find that the same cannot hold. This Court has numerously held that medical evidence of the perpetrator is not mandatory to prove defilement. In George Kioji v Republic, Nyeri Criminal Appeal No. 270 of 2012 cited with approval in Williamson Sowa Mbwanga v Republic [2016] eKLR, Mombasa Criminal Appeal No. 109 of 2014, this Court stated that:-

*“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”*

[29] Further, we are not persuaded by the contention that the dismissal of the appellant's application to recall the complainant minor for further cross examination was erroneous. The appellant has not demonstrated that in declining to recall the complainant, the trial court overlooked matters that should have been taken into account or failed to take into account matters that it should have.

[30] On our part, we are satisfied that the appellant was properly convicted by the trial court and the first appellate court carefully analysed the evidence and arrived at a well - founded decision. We therefore find no merit in this appeal and dismiss it in its entirety.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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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**