IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CRIMINAL APPEAL NO. 17 OF 2016

BETWEEN

MUTALI NYAMWEA alias MOGAKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Homa Bay (Majanja, J.) dated 5th November, 2015

in

H.C.CR.A. NO. 31 OF 2015)

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JUDGMENT OF THE COURT

The appellant was tried by the Senior Resident Magistrate, **Mbita (Hon. S.O. Ongeri)** for the offence of defilement contrary to ***section 8(1)*** and ***(2)*** of the **Sexual Offences Act, 2006 (SOA)**. It was alleged that on 27th July, 2014 at Mbita District of Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the genital organ, namely the vagina, of ***JA***, a child aged 9 years. He also faced an alternative charge of committing an indecent act with a child contrary to ***section 11(1)*** of SOA based on the same facts, by intentionally and unlawfully touching the vagina of ***JA*** with his penis. After hearing eight (8) witnesses put forward by the prosecution and considering the defence of the appellant, the trial court was not satisfied that the main count of defilement had been proved since there was no credible evidence of penetration, and rejected it. It found the alternative count proved and convicted the appellant before sentencing him to serve ten (10) years in prison.

The appellant was aggrieved by the conviction and sentence and sought to have both reversed on appeal to the High Court. The prosecution was also aggrieved by the dismissal of the main count and filed a cross appeal to reverse the decision. Upon re-evaluating the evidence, the High Court **(Majanja, J.)** agreed with the prosecution that the main count was rejected in error since penetration, and other elements of the main offence, were proved beyond reasonable doubt. The conviction on the alternative count was set aside and the appellant was convicted on the main offence and sentenced to serve life imprisonment. He is now before us challenging that turn of events, and pleading that we set aside the decision of the High Court.

The facts upon which the two courts below proceeded are fairly brief:

On 27th July 2014, nine-year old ***JA*** **(PW1)** was playing with other children outside her home when the appellant, whom she knew as a carpenter in the same neighbourhood, suddenly grabbed her as the other children ran away. He covered her mouth and carried her into his house. He lay her on his bed, removed her clothes, and inserted his penis into her vagina. She screamed in pain attracting some secondary school students who came knocking at the door. He refused to open at first, but when he did, the students found him half naked and rescued ***JA*** who was lying on the bed. They took her to her guardian, ***PW2***, who took her to Ogongo and Mbita Hospitals where she was examined and treated.

The secondary school students included ***PW3*** who was in Form 3, ***PW4*** in Form two, and PW5 also in Form three. They gave consistent evidence that they knew the appellant as a neighbour and that on the material evening, they heard screams of a child under distress coming from the appellant's house. They decided to find out what was happening. They knocked on the appellant's door but he would not open. When he did, he was half naked and had worn his trousers inside out. They demanded the child but he refused. ***PW5*** then walked in and took the child, who was in tears, from his bed. They took her to ***PW2*** who was her auntie and later recorded statements with the police.

It was ***PW2*** who took the child to hospital and reported the matter to the police who issued her with a P3 form. A warrant of arrest for the appellant was issued by ***PW7*** and was executed by ***PW6*** who found the appellant at the shops and arrested him the following day.

PW8, a clinical officer at Mbita Sub-County Hospital examined the child on 28th July 2014. He carried out high vaginal swab **(HVS)** which showed the presence of spermatozoa. HIV analysis was negative but the child had a greenish discharge from the urethra which, according to the witness, was a normal infection. The hymen was intact, both labia minora and majora, as well as external genitalia were normal, and in his opinion, there was no penetration or trauma to the vagina.

Put on his defence, the appellant said he was a watchman. He confirmed he knew the child but denied the allegations made against him. He testified that at 6pm on the material day, he was at Ogongo market until 8pm.He then went to his place of work and returned home at 10pm where he slept until the following morning. As he was buying potatoes that morning, he was arrested by the police and escorted to Mbita police station.

Upon considering that evidence, the trial court found as proved that the appellant was with the child on 27th July 2016 in the circumstances described by the child, ***PW3, PW4,*** and ***PW5***. It also found the age of the child proved as stated in the charge sheet. In rejecting the main charge, the trial court had this to say:

> ***"The clinical officer who examined PW1 found out that there was no penetration as the hymen was intact. I find the offence was thus not proved. The evidence of PW1 is that he inserted his penis in her vagina. PW1 told the court that she felt some pain. The intention of the accused were manifest to defile this girl but PW3 and PW4 came to her rescue. In my mind I find that PW1 did not lie in her evidence. Her evidence was not shaken in cross examination neither did the accused show that the prosecution evidence was malicious.***
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> ***As I have found defilement was not proved there is humble evidence to show that the penis of the accused touched the vagina of PW1. I find that the offence of indecent act was proved.***
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> ***I proceed therefore to convict the accused on the alternative charge of indecent act under section 11(1) of the Sexual Offences Act under section 215 CPC. He is acquitted on the main charge of defilement under section 215 CPC."***

On first appeal, the High Court made a concurrent finding that it was indeed the appellant who was found with the child on the material night by ***PW3, PW4*** and ***PW5*** and that there was no mistaken identity. The proof of age was also found to have been satisfied. The court, however, found that despite the apparent contradiction in the medical evidence, penetration was proved by the evidence of the child which the trial court believed as truthful. The finding of the trial court to the contrary was thus reversed.

The challenge mounted by the appellant on that finding is the core issue in this second appeal, which can only lie on matters of law by dint of ***section 361(1)*** of the **Criminal Procedure Code.** See also ***Richard Kaitany Chemagong vs. Republic [1984] eKLR.*** For some reason, however, the appellant's counsel, **Mr. Ben Aduol Nyanga** listed a whopping fifteen (15) grounds of appeal in the memorandum of appeal, most of which raise matters of fact. To his credit, however, in the written and oral submissions, counsel focused on the issue of penetration which is a necessary element of the offence of defilement, and that is the issue we shall proceed to examine.

Counsel referred us to two medical reports; one from ***Ogongo Health Center*** where the child was first taken for examination and treatment on 28th July 2014 at 1.30pm. The laboratory results of the HVS showed *'whitish colour, no blood stains, pus cells, and epithilial cells'* but no spermatozoa was seen. Counsel then referred us to the P3 Form completed by ***PW8*** at Mbita District Hospital 22 hours after the incident, where another HVS was conducted as well as the physical state of the child's genitalia and the following observations made:

> ***'The hymen was intact; the labia majora was normal, the labia minora was normal, presence of greenish/whitish discharge from vagina which is smelly.'***

PW8 concluded that there was *'no evidence of vaginal penetration by a blunt object'* before classifying the clinical results of the injuries as *"grievous harm"*. When he testified in open court, ***PW8*** added that he found presence of spermatozoa. But such finding was not noted in the P3 form.

On the basis of such inconsistent and contradictory evidence, ***Mr. Nyanga*** submitted, there was no proof beyond doubt that spermatozoa was found in the child's vagina, hence lack of proof of penetration. The case of ***Mwangi & Another vs. Republic (1984) KLR 595*** as well as ***section 8(1)*** of SOA were relied on.

On the other hand, learned Prosecution Counsel, ***Mr. Peter Muia***, in written submissions and oral highlights, submitted, firstly, that the standard of proof of *"beyond reasonable doubt"* which is envisaged under ***section 107*** of the **Evidence Act** is not synonymous with *"proof to the hilt"* or *"proof beyond an iota of doubt"*. The English cases of ***Woolington vs. DPP 1935 AC 462*** and ***Miller vs. Minister of Pensions 2 ALL ER 372-373*** were cited in aid of that submission. Secondly, he submitted, that in order to secure conviction, the prosecution was required to prove penetration of the male organ into the genitalia of the female; the age of the child; and positive identification of the accused as the perpetrator. According to him, all that was done through the evidence of the child alone who was found credible. He relied on ***section 124*** of the **Evidence Act** which has special provisions for victims of sexual assault, for the submission that the evidence of the child in this case was sufficient to prove the offence.

We have carefully considered the issue of law raised in the appeal.

Section 8 of SOA upon which the main charge was laid against the appellant provides as follows:

"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Clearly under the section, *'penetration'* is a major element of the offence. Under ***section 2*** of the SOA, it is defined to mean:

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

It follows that, for the offence of defilement to be proved, the prosecution evidence must show that the appellant inserted his penis into the vagina of the child. It is not sufficient that the said organs came into contact. However, partial insertion suffices for the purposes of penetration as the said insertion need not be complete. The other elements of the offence which must be proved, but are not in issue in this appeal since they were proved, are the **age of the child and positive identification of the appellant. See *Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.***

> **The bone of contention in this matter is whether the medical evidence adduced by the prosecution, which is inconsistent or contradictory in itself, was necessary to corroborate the evidence of the child; and secondly, whether the evidence of the child alone could sustain the main charge.**

The position in law as held by this Court in ***AML vs. Republic (2012) eKLR*** is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence. **See also *Kassim Ali vs. Republic, Mombasa [2006] eKLR.***

As shown above, there was medical evidence which showed in the same breath, the presence and absence of spermatozoa after conducting the HVS. The evidence also showed normal physical appearance of the genitalia but still opined that grievous harm was caused to the child. It also noted smelly greenish/whitish discharge from the vagina. The medical opinion that followed such examination was that there was no penetration.

What do we make of such evidence?

In the first place, it has been held before by this Court ***Mwangi vs. Republic [1984] KLR 595*** that:

> ***"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."***

Secondly, the finding of injuries in the child's genitalia as well as a foul smell suggested that there was partial penetration. As the court stated in the case of ***George Owiti Raya vs. Republic [2013] eKLR***:-

> ***"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane…It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."***

More importantly, however, the opinion of the clinical officer, ***PW8***, was just that, an opinion which was not binding on the court. As this Court stated about expert opinions generally in the case of ***Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko [2007] 1 EA 139***:

> "***Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so***."

The question is whether the offence was capable of proof to the required standard without medical evidence, and it clearly was, in view of ***section 124*** of the **Evidence Act** which was amended to provide as follows:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***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.*** *[Emphasis added]*.

After re-evaluating the evidence on record, the High Court concluded as follows:-

> ***"PW 1's testimony was clear and sufficiently detailed as to the fact that she was sexually assaulted by the appellant and that the appellant "inserted his penis in my vagina". Such insertion need not be complete. In view of section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya), the testimony of PW 1 did not require any corroboration if the learned magistrate believed***

that she was telling the truth. In the judgment, the learned magistrate assessed the credibility of PW 1 as follows, "In my mind I find that PW 1 did not lie in her evidence. Her evidence was [not] shaken in cross-examination neither did the accused show that the prosecution evidence was malicious." It follows then that the PW 1's testimony was complete on the issue of penetration. Any other evidence would only be corroboratory..... On the other hand the evidence of PW 8 pointed to the fact that there was no penetration.....Although PW 8's testimony was clear that there was no penetration, such testimony as I stated elsewhere in the judgment would merely corroborate the testimony of PW 1. .....In this case, the testimony of PW 1 was sufficient to establish that there was penetration. PW 1 described what occurred and there is no reason to believe she was lying. I therefore find that the learned magistrate erred in finding that penetration was not proved."

With respect, we agree with that conclusion.

It follows that this appeal is lacking in merit and we order that it be and is hereby dismissed.

Dated and delivered at Kisumu this 7th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR