



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, VISRAM, & SICHALE, J.J.A)**

**CRIMINAL APPEAL NO. 6 OF 2015**

**BETWEEN**

**J K K ..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Achode, J.) dated 25<sup>th</sup> June, 2014*

*in*

***H.C.C.R.A NO. 443 OF 2010)***

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**JUDGMENT OF THE COURT**

1. **J K K**, the appellant, was charged with the offence of defilement contrary to **Section 8(1)** as read together with **Section 8 (2)** of the

**Sexual Offences Act No. 3 of 2006** and alternative count of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** in the Chief Magistrate's Court at Kiambu. The particulars of the offence of defilement contained in the charge sheet were that on 25<sup>th</sup> September, 2009 in Kiambu District within Central Province, the appellant intentionally committed an act which caused penetration with his genital organ into the genital organ of **J N Victoria** a girl aged 8 years at the time. The particulars of the alternative charge were that on the above mentioned place and date, the appellant unlawfully and indecently assaulted **J N V** a girl aged 8 years, by touching her private parts.

2. The appellant pleaded not guilty to both the main and the alternative count. The prosecution called a total of six witnesses. It was the prosecution's case that on 25<sup>th</sup> September, 2009 at around 4:00 p.m. **J N V (PW1)** was at home when her cousin **C N (PW3)** told her to go to their house to play. They played and she decided to sleep there. In the evening the appellant, who is the father to **PW3**, and grandfather to **PW1**, got into bed with them. He started by touching **PW1**'s private parts and then he removed her panties. **PW1** left the room and moved to another bedroom but the appellant followed her and continued the ignoble activity. He inserted his private part in hers and cautioned her not to tell anyone. He promised her some niceties.

3. PW3 became aware of what was taking place; came to PW1's room and asked the appellant what he was doing to PW1; and then took PW1 to her room. The following day, the appellant forbade PW1 from going home and later in the evening he attempted, yet again, to defile her but this time PW1 resisted. When they returned to PW1's home, PW3 told her sister who is PW1's mother, what had happened. PW 1 also narrated the events to her mother. Her mother (PW2) checked her genitals and found a yellowish discharge; she reported the incident at Muchatha Police Post and took her to hospital for treatment.

4. Richard Munene (PW4), the Clinical Officer, produced the medical report prepared by Dr. Maina, who had examined PW1 and testified that the complainant (PW1) was 8 years old at the time of the incident, and upon examination was found to have bruises on the vulva and her hymen was broken; and that she also had a foul smelling discharge although she was HIV negative. The doctor concluded that the complainant was sexually assaulted based on clinical findings, bruising of the genitalia, perforated hymen with foul discharge and that there was penetration.

5. Albert Kathuri Mwaniki (PW5), the Government Analyst testified that he analysed the blood sample of both PW1 and the appellant, as well as the appellant's under pant, and although he found no blood stain or seminal stain on the under pant, he found that the blood group of both matched.

6. Lucy Kanyoro (PW6), the Investigating Officer, received the complaint, investigated the same, recorded statements and had the appellant arrested. He forwarded the blood samples and the under pant of the appellant to the Government Analyst accompanied with an exhibit memo. At the trial, he produced as exhibit PW1's birth certificate.

7. In his defence, the appellant denied the charge and also denied that he knew PW1. He referred to PW1 as "a strange girl". He gave details of how PW1 and PW3 attended church with him on Sunday and attended school the following Monday and Tuesday. He said he was confronted by PW2 and two other women demanding Kshs. 1,500/= from him, for PW1's treatment and accusing him of defiling her. He was later arrested by Administration Police who took him to the police post.

8. The trial court was convinced that the prosecution had proved its case against the appellant to the required standard. Consequently, the appellant was convicted of the offence of defilement and sentenced to life imprisonment. Aggrieved with the said decision, the appellant appealed against both the conviction and sentence in the High Court. The High Court (Achode, J.) vide a judgment dated 25<sup>th</sup> June, 2014 dismissed the appeal. The appellant has filed this second appeal and the home made memorandum of appeal raises three grounds of appeal which were drafted in a rather unconventional way. The same may be summarized as hereunder:

- ***That, the High Court made an error in law by dismissing my appeal whereas the charge sheet was defective in nature in that the facts of the case was (sic) in support of a charge on incest contrary to Section 20 (1) of the Sexual Offence Act 3 of 2006.***
- ***That, the High Court made an error in law by failing to observe that the case for the prosecution was not proved beyond all reasonable doubts. (Sic)***
- ***That, my rights to affair (sic) trial was violated as PW5 testified in English language, yet the services of an interpreter was not accorded to me the appellant hence this violated article 50 (m) of the Constitution".***

The appellant filed supplementary grounds of appeal and stated:

- ***That, the High Court Judge made an error in law and misdirected herself by failing to solve the issue of being charged with wrong section whereas at the same time admitting that the appropriate charge ought to have been a charge of incest by male contrary to section 20 (1) of the Sexual Offences Act 3 of 2006.***
- ***That, the High Court Judge made an error in law and misdirected herself by dismissing my argument of being prejudiced and un able to defend myself properly due to the confusion of being charged with the wrong section of the Sexual Offences Act.***
- ***That, the High Court Judge made an error in law by failing to observe that the victim was***

*examined five (5) days after the alleged commission of the offence.*

*· That, the mode of the delivery of the trial court judgment contravened Sec. 169 (1) of Criminal Procedure Code and was incurable under Section 382 of the Criminal Procedure Code more so having the same not signed.*

9. The appeal was heard on the **20<sup>th</sup> July, 2015** and the appellant appeared in person whereas the State was represented by **B.L Kivihya**, State Counsel.

10. The appellant relied entirely on his Supplementary Grounds of Appeal together with his written submissions filed before this Court on 20<sup>th</sup> July, 2015.

11. Mr. Kivihya, in opposing the appeal, submitted that the appellant was convicted of defilement on sound evidence; that the doctor had examined the complainant and confirmed that she was 8 year old; that PW1's birth certificate was also exhibited in court; the complainant positively identified the appellant; and that the corroborative evidence from PW2 and PW3, confirmed that PW1 had been defiled; and finally , that the appellant's complaints that he did not understand the language of trial has no basis as he had cross-examined every witness.

12. In his reply, the appellant stated that the complainant indeed went to school the following day, and was taken to hospital five days later, raising a doubt whether she had been defiled.

13. This being a second appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611. In Kaingo -vs- R, (1982) KLR 213 at p. 219 this Court said:-

*“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”.*

14. In view of the aforementioned, the issues arising for the Court's determination are:-

*· Was the appellant charged with a wrong section; and if so what is the effect of the same on the appellant's case?*

*· Did the examination of the victim after five (5) days of the alleged commission of the offence affect the appellant's case?*

*· Was section 169 (1) of the Criminal Procedure Code contravened by the alleged failure to sign the judgment and if so, was the error incurable under section 382 of the Criminal Procedure Code?*

*· Was the appellant properly convicted?*

**Was the appellant charged with the wrong offence?**

The appellant contended that he was wrongfully charged for the offence of defilement admitting that the appropriate charge ought to have been a charge of incest by male contrary to **Section 20 (1) of the Sexual Offences Act**. The section referred to above provides as follows:

*“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years. Provided that, if it is alleged in the information or charge and proved*

***that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person”.*** (Emphasis added).

We concur and reiterate the High Court’s finding that from the reading of the section above it is evident that whereas the appellant could have been charged under **Section 20(1) of the Sexual Offences Act**, there was nothing to preclude him from being charged under **Section 8 (1) and (2) of the Sexual Offences Act** as he was. The ingredients of both offences are similar save that in the offence of incest, the victim is a relative of the suspect. Therefore, the fact that the appellant was charged with defilement and not incest did not render the trial defective, neither did it prejudice him or occasion any failure of justice.

#### **Issue of Medical Examination after Five days**

The appellant argued that the High Court judge failed to observe that the victim was examined five days after the alleged commission of the offence. From the evidence on record, the complainant (PW1) testified that when the appellant defiled her, he told her not to go home the following day. PW3 also testified that after the appellant defiled the complainant, the appellant told the complainant not to go home and it was not until the following Monday that PW3 escorted PW1 home and she told PW2 what had transpired at her home. When the mother took PW1 to hospital and she was examined, the doctor concluded that indeed PW1 was defiled. In our considered view, if the complainant was allowed to go home immediately after the incident, she would have reported the incident immediately upon her return home. Also the number of days before a child is examined by a doctor is really not decisive, what matters most is that the child was examined by a doctor and the findings of the doctor revealed that indeed the child was sexually assaulted based on the clinical findings, bruising of the genitalia, perforated hymen with foul smelling discharge.

#### **Issue of trial court failure to sign the judgment**

We concur with the findings of the High Court and reiterate that the trial magistrate signed the proceedings and it was therefore safe to find that the judgment was signed too. The typed judgment has been certified as a true copy of the original. We have perused the handwritten record of the trial magistrate. The last page of the judgment is there and it is signed by the trial magistrate. In any case, the court has the power to send the file back to the trial magistrate to sign it since the evidence on record was credible and sufficient to sustain a conviction.

The Court of Appeal was faced with a similar question in the case of ***WILLY John vs REGINAM***, Cr. App. No. 536 of (1956) 23 EACA and stated at page 509.

***“The failure to date and sign the judgment is a mere irregularity which can be cured by the application of Section 304 of the Criminal Procedure Code since the whole of the record of the proceedings is in hand of the trial Judge and there was no prejudice to the appellant”.***

The applicable **Section** now is **382** of the **Criminal Procedure Code**.

15. Having considered evidence, we find that the two lower courts did consider and evaluate the evidence and appellant's defence and made correct concurrent findings of fact. The appellant was, indeed, properly convicted.

16. The upshot of the foregoing is that we find that this appeal has no merit and is dismissed.

***Dated and delivered at Nairobi this 16<sup>th</sup> day of October, 2015.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***ALNASHIR VISRAM***

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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.

**DEPUTY REGISTRAR**