REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 2 OF 2020

MOHAMUD OMAR MOHAMED.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence by P.N Areri PM in Mandera SO No. 22 of 2019 dated 6//1/2020)

JUDGEMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Sub-section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. The particulars of the charge were that on 8th day of September 2019 at 1630 hrs at [particulars withheld] Garissa in Mandera North sub-county within Mandera County, the appellant intentionally caused his male genital organ to penetrate the female genital organ of MOM a child aged 8 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 OF 2006.

3. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal as per his petition of appeal filed on 9th January, 2020 are that: -

1) **That the Learned trial magistrate erred by relying on irrelevant evidence.**

2) **That the evidence adduced was contradictory and inconsistent**

3) **That the prosecution did not provide enough evidence to prove that I committed the crime.**

4) **That the prosecution at much deeper level failed to investigate the cause or rather address the root cause of the matter as regards to the offense imposed on me.**

5) **That it is against the background that the complainants anchored the alleged offence.**

6) **That I wish to be there during the hearing of this appeal.**

SUBMISSIONS

4. The matter came up for hearing on 29th July, 2020, where the appellant wholly relied on his filed written submissions filed on 28th July, 2020. It is his submission that the prosecution failed to discharge the burden of prove to the required standard. He submits that the case facing him was out of fabrication and bias towards him and out of poor investigation.

5. In addition, he challenged the testimony account of the witnesses called by the prosecution alleging that their account of the case is a fabrication and cannot be believable. For instance, he submits that PW1 evidence is that of a coached person. And that the blood spot discovered on PW1 after examination by PW4 the Clinical officer might have been as a result of monthly period.

6. The appellant in regard to the sentence meted submitted that the same was harsh and excessive and unlawful in view of the Supreme Court Decision in **Francis K. Muruatetu case**, where the court held that the court is not bound to issue a mandatory sentence as the same is unconstitutional. In this case he submits that the trial court erred by sentencing him to mandatory life imprisonment which is excessive. He relied in the case of **Evans Wanjala Wanyonyi vs Republic (2019) eKLR.**

7. Mr. Mulati for the state opposed the appellants appeal and supported the conviction but on sentence he submitted that the trial court imposed a mandatory sentence which this court can interfere with. In regard to the conviction, Counsel submitted that the ingredients of the offence of defilement facing the appellant were proved. In regard to the age of the complainant, he submitted that the same was proved to be 8 years as per the Birth Certificate tendered.

8. And that penetration was established as per the testimony of the victim and the PW4 the clinical officer who observed blood from the victim's vagina. In regard to the identity of the appellant as the one who committed the offence Counsel submitted that the testimony of the victim clearly identified the appellant as the culprit. He urged the court to dismiss the appeal on conviction.

EVIDENCE:

9. The prosecution in advancing their case against the appellant called 5 witnesses, a summary of the evidence tendered were as follows. PW1 the complainant gave a sworn testimony after a voir dire exercise, where she told the court that she was 8 years old and that on 8th September, 2019, she was sick and at home with two of her siblings when at 4.30pm the appellant came to their house, gave Kshs. 10 to her sibling to go and buy biscuits.

10. He thereafter demanded her genital organ, and since she was from bathing, she didn't have a pant, the appellant caught her legs and pulled them part and defiled her. She was a wearing a dera. After defiling her she recalled that the appellant threatened her that he would put a knife through her ears if she told anyone of what had transpired.

11. This was until the following morning when her mother woke her up and because of the pain she was feeling, she informed her mother that she had been defiled by the appellant. Thereafter the matter was reported to the police, she was taken to hospital and the appellant was apprehended. She identified the appellant as the culprit before the court. She produced her birth certificate indicating her age as 8 years old.

12. **PW2 ZSI** testified that the complainant was her daughter born on 4/3/2011 and recalled that on 8/9/2019 she had left her home with her other siblings at around 3pm, and that she was not feeling well. The following day being a Monday she woke her up for school, however the complainant informed her that she was feeling pains on her lower abdomen.

13. She took her to the toilet to urinate, where she urinated blood and on further pressing the complainant informed her that she was defiled by the appellant. She told the court that the other kids informed her that the appellant gave them Kshs. 10 for biscuits and that is when the appellant was left behind with PW1 and committed the offence. She thereafter took PW1 to a clinic and later to the police and had the appellant apprehended.

14. **PW3 OMA** told the court that PW1 was her daughter and the appellant was her neighbor. Her testimony is similar to that of PW2 the wife. P**W4 AMA** told the court that he is a clinical officer based at Rhamu Sub-County Hospital. He told the court that PW1 was brought to him complaining of vaginal bleeding and back pain. He noticed two blood spots on her dera at the front and back, and on pelvic examination there were blood stained at the underwear and also vaginal bleeding.

15. There was laceration of the upper part of the vagina, both labia majora and minora blood stained and the skin intact concluding that there was partial penetration by a blunt object. He did not see ant traces of spermatozoa as he examined her after 2 days had lapsed. He put her on pep. He produced the P3 form.

16. **PW5 No. xxxx Marvin Ayuga** testified as the Investigating Officer in the matter. He recalled that on 9/9/20191 a defilement case was reported at the station against the appellant by the complainant and her mother. Upon interrogating them he was informed that the appellant on 8/9/2019 defiled PW1 after giving Kshs. 10 to one of her siblings by the name Sudes to go buy biscuits creating a private environment where he committed the offence.

17. He accompanied the victim to hospital where it was confirmed that she had been defiled. He visited the scene where he saw two beds one wet with whitish spots which he suspected were dry sperms and thereafter proceeding to arrest the appellant.

18. When placed to his defence the appellant gave a sworn statement and did not call any witness. He told the court that he was a loader staying at Shantoley Rhamu. He stated that he was arrested on 1/9/2019 at 10.00am and l charged on 10/9/2019. He denied committing the offence and doesn't know why he was arrested and charged.

ANALYSIS AND DETERMINATION

19. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."**

20. This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of **George Opondo Olunga v Republic [2016] eKLR,** it was stated that the ingredients of an offence of defilement are*;* ***identification or recognition***

of the offender, penetration *and* ***the age of the victim****.*

21. *In this case the issue of identification has not been challenged in this appeal. The complainant evidence is that of recognition and has not been disputed.* Therefore, the two critical elements that must be proved to sustain a conviction for the offence of defilement under these provisions of the law are the act of penetration and the age of the victim.

22. In regard to the age of the complainant herein, the same is not in dispute, as a birth certificate issued on 10th September, 2018 indicating that the victim was born on 3/4/2011 was produced in court, thus the complainant at the time of commission of the alleged offence was 8 years old.

23. The next element is proving of penetration. "*Penetration*" is a term of art and is defined under Section 2 of the Act to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

24. In **John Mutua Munyoki vs. Republic [2017] eKLR**, the Court of Appeal in this regard held that:

> **"Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt…The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:**
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> **'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'**
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> **The Court proceeded and stated that:**
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> **'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'**
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> **As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the Evidence Act aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."**

25. The key evidence relied by the courts in rape cases and defilement in order to prove penetration Is the complainant own testimony which is usually corroborated by the medical report presented by the medical officer. In this case since the complainant was a minor, the evidence of the Clinical Officer is key so as to corroborate such testimonies. I have critically analyzed the evidence of PW4 the clinical officer who testified herein.

26. It was his testimony that he noticed two blood spots on her dera at the front and back, and on pelvic examination there were blood stained at the underwear and also vaginal bleeding. In addition, there was laceration of the upper part of the vagina, both labia majora and minora blood stained and the **skin intact** concluding that there was partial penetration by a blunt object. He did not see any traces of spermatozoa.

27. I have looked at the P3 Form produced in court Exhibit 5, the said Clinical Officers noted as follows:

> **"There is laceration of upper part of the vagina and both labia was blood stained. The cervix is closed and the hymen was intact. There was attempted penetration."**

28. The sum effect of the above evidence is that it raises doubt as to whether there was actual or partial penetration. It is clear from the P3 form that the hymen was intact. This opens the possibility as argued by the appellant that the blood in the victim vagina may have been due to the onset of her periods.

29. It is also noteworthy that there were no traces of spermatozoa, yet from the P3 form the same indicates that the complainant was examined after 12 hours, and that at no point did she shower. Although absence of spermatozoa cannot discount rape, it adds to speculations in this case. Even though the Investigating Officer in his testimony told the court that on vising the scene he saw some whitish spots on the

beddings, that in my view cannot be sufficient to prove penetration.

30. It is trite that the benefit of doubt should always go to the accused person. Therefore, in the circumstances it is my finding that the second element of the offence which is penetration was not proved beyond reasonable doubt.

31. The test to be applied interalia to the principles in the cited cases elsewhere in this analysis is to be found in the case of **Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995** where the Supreme Court held:

> ***"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."***
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> ***"For evidence to be capable of being corroborated it must:***
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> ***(a). Be relevant and admissible Scafriot {1978} QB 1016.***
>
> ***(b). Be credible DPP v Kilbourne {1973} AC 729***
>
> ***(c). Be independent, that is emanating from a source other than the witness requiring to be corroborated Whitehead J IKB 99***
>
> ***(d). Implicate the accused***

32. Consequently, it is my finding that penetration as an element for prove of defilement was not established beyond reasonable doubt and in the circumstances, it is my finding that the prosecution evidence in this regard is not watertight. Be as it may, I will consider whether the alternative charge herein was proved.

The alternative charge of indecent act

33. Having established that there were doubts as to whether there was actual penetration as noted above, this leads to the next question as to whether the appellant ought to be convicted of the alternative charge, which is committing an indecent act with a child. Indecent act is defined in the Sexual Offences Act as follows:

> **"indecent act" means an unlawful intentional act which causes-**
>
> **(*a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
>
> ***(b) Exposure or display of any pornographic material to any person against his or her will."***

34. The penalty for indecent act with a child under section 11(1) of the Sexual Offence Act is an imprisonment term for not less than 10 years as follows:

> ***"11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."***

35. **I also take note that the** courts are not hamstring by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful**.** This was reaffirmed in the case of **J.W.A. v Republic** [2014] eKLR, the Court of Appeal observed: -

> **"We note that the appellant was charged with a sexual offence and the proviso to <u>section 124</u> of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."**

36. **Consequently, be as it may in this case the victim is a child of tender years** and indeed, before a child of tender years is allowed to testify in court the court is required to satisfy itself that the child understands the duty of speaking the truth and whether he/she is of sufficient intelligence to allow his/her evidence being taken.

37. This is done by conducting a *voire dire* examination before the evidence is taken. In the instant case the trial magistrate indeed undertook the same on the complainant and satisfied herself that the witness evidence was tenable, which position I agree with.

38. Thus, I have no doubt as to whether the child was telling the truth on what had transpired. She was categorical that she was defiled by the appellant, a person she knew and even identified at the dock.

39. The doubts created above on whether there was penetration leads to my conclusion that the appellant based on the evidence tendered, the same is sufficient to convict the appellant for the alternative charge herein, and I therefore find him guilty of the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

Conclusion

40. The evidence on record in my view is consistent with the commissions of the alternative offence of Committing an Indecent Act with a child. As noted by the appellant the mandatory sentence provided in statutes is no longer binding on the court as was held by the Supreme Court in **Francis Muruatetu Case.** Be as it may and based on the appellant mitigation before the trial court, a 10-year sentence would suffice for the appellant in the circumstance. 41. Thus court makes the following orders;

> **i)The appeal on conviction succeeds to the extent that main charge is set aside and appellant is found guilty of the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.**
>
> **ii) On sentence same is reduced to 10 years' imprisonment from the date of conviction.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

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C. KARIUKI

JUDGE