REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 119 of 2019

REPUBLIC.....APPLICANT

VERSUS

IBRAHIM AHMED.....ACCUSED

JUDGMENT

(Being an appeal from the decision of; Hon. A. Kitagwa, Senior Resident Magistrate (SPM), delivered on 16th May, 2019 vide Chief Magistrate Criminal Case Number S. O. NO 10 of 2017 at Kibera).

1. The appellant was arrested on 11th February 2017, and arraigned in court on 13th February 2017, charged with the offence of; defilement contrary section 8(2) of the Sexual Offences Act, No. 3 of 2006, (herein "the Act"), and an alternative count count of; committing an indecent act with a child contrary to section 11(1) of Act.

2. He pleaded not guilty and the case proceeded to full hearing. The prosecution called a total of five (5) witnesses. The prosecution case in a nutshell is that, on 10th of February 2017, "SK" (herein "the complainant") aged 6 years, was playing with other children within their residence, when the appellant called her to a house within.

3. That, he removed the clothes she was wearing; a trouser, sweater and T-shirt and placed her on the chair. He then removed his trouser and underwear and defiled her. After defiling her, he wiped her private parts and warned her not to tell anyone about the incident. That, he promised to buy her a soda and released her to go home.

4. In the meantime, the other children had returned to their respective houses and PW2 PK, the complainant's mother went out to look for her. She met the complainant at the door way and noticed that, she was carrying her trouser and under pant in her hands.

5. The mother inquired as to what had happened and the complainant informed her that, a boy who was in the house situated at the corner of the plot, had sent her to get groundnuts and milk, and when she took the items to him, he removed her clothes, and poured water on her. That, she was feeling pain in her private parts.

6. That, the complainant's mother checked her private parts, and noticed sperms. She went to the suspect's house but did not find the owner. However, she noticed there was a visitor. She left but locked the door from outside. She screamed for help and the neighbors got attracted to her screams.

7. Upon learning of what had happened, they went to the suspect's house but did not manage to arrest him as he escaped through the window. The complainant was taken to Nairobi Women's hospital, where she was and discharged.

8. However, on 12th February 2017, she became more sick allegedly as a result of the defilement, and was admitted in hospital for one week and three days. On 11th February 2017, the suspect was arrested by a member of the public and was identified by the

complainant's mother. He was then charged after the investigations.

9. At the close, the appellant was put on his defence. He testified that, he visited a friend by the name of; Aberi at his house at Kibera, allegedly to attend the child's birthday. He found Aberi and the wife, but the child was not there. However, Aberi left him and his wife in the house and went to Karanja an area within Kibera promising to return soon.

10. That at about 4.00 pm a lady confronted him in the house and inquired as to what he had done to the daughter. He denied knowledge of anything, and informed her that, he was a visitor. That, she locked the door from outside screaming that her daughter was raped. That members of the public gathered and broke the door. That a lady had assaulted him and he was unconscious. He was taken from the house to Youth Darajini Office and later to Kilimani Police Station and later charged.

11. At the conclusion of the entire case, the learned trial Magistrate evaluated the evidence and held that, the prosecution had adduced adequate evidence and proved the offence of defilement. The appellant was consequently convicted under section 215 of the Criminal Procedure Code, (cap 75) Laws of Kenya, vide judgment dated; 16th May, 2019 and sentenced to serve life imprisonment.

12. However, the appellant is aggrieved and has filed a petition of appeal dated; 29th May 2019, on the following grounds: -

a) That the learned trial Magistrate erred in law and facts in failing to consider material inconsistence and gaps left by the prosecution case in identification of the appellant;

b) That the learned trial Magistrate erred in law and facts in finding that, there was evidence to support the charge of defilement as set out in the charge sheet;

c) That the learned Magistrate erred in law and fact by finding that the charge of defilement contained in the charge sheet was proved beyond reasonable doubt;

d) That the learned Magistrate erred in law and fact by finding that the testimonies of the prosecution witness were contradictory but, nonetheless, proceeded to rely on the same evidence to convict the appellant;

e) That, the learned trial Magistrate erred in law and facts by failing to draw adverse inference in the inconsistency of the prosecution exhibits;

f) That, the learned Magistrate erred in law and fact by accepting the prosecution case without taking into consideration the defence case;

g) That, the learned Magistrate erred in law and fact by ignoring the legal principles governing circumstantial evidence and when to convict on the basis of such evidence;

h) That the learned Magistrate erred in law in subjecting the prosecution case to a standard of proof below the usual "beyond reasonable doubt" standard as the conviction was against weight of the evidence adduced.

13. Apparently, the Respondent did not file any response to the appeal. Be that as it were, the appeal was disposed of by filing of submissions which I have considered herein. However, I note that, as held by the Court of Appeal in the case of; ***Okeno vs. Republic (1972) EA 32,*** the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses. The court thus observed: -

"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 function 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".

14. Having considered the grounds of appeal, I note that, the main issues raised are; inconsistence and/or contradictions in the prosecution case, the identification of the perpetrator, failure to consider the defence case and relying on circumstantial evidence. That, in a nutshell, the case was not proved beyond reasonable doubt.

15. Be that as it were, the appellant was convicted of the offence of; defilement, created under section 8(1) of the Act, as follows: -

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

16. In deed the ingredients of the offence are settled. These ingredients were considered in the case of; *Agaya Roberts vs. Uganda, Criminal no. 18 of 2002,* where the Court of Appeal stated that, in order to constitute the offence of defilement the following must be proved: (i) sexual intercourse (ii) victims age below 18 years (iii) the accused is the culprit.

17. Similarly, in *Bassita Hussein vs. Uganda Crimial Appeal No. 35 of 1995,* the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

18. In the instant case, the complaint testified that, she was six years old at the time of the offence. Her birth certificate was produced in court showing that, she was born on; 26th June, 2011. The incident allegedly occurred on 10th February, 2017, therefore the complainant was about six years old as stated. A child is defined under the Children Act, 2001. That, a "child" means any human being under the age of eighteen years". As such, it was proved that, the complainant was a child at the time of the alleged offence.

19. As regard the issue of penetration, I note the child narrated how she was lured into the suspects house and defiled. She testified that, the perpetrator, "did bad manners to her". She further stated "he put his urine on me", and that she felt pain in her private parts.

20. The complainant's mother on her part, testified that, the child returned home carrying her trouser and pant in her hands. That, she placed her on the bed and checked her private parts and saw that she had sperms. Further, she was discharging "whitish foul" smelling substance.

21. Further I note that, the complainant was examined at the Nairobi Women Hospital on the same day and the PRC Form filled by Dr, Mutisya. The doctor did not testify as he was stated to have gone for further studies but the report was produced by Dr Ngatia Warui, on his behalf.

22. I have carefully examined the content in the report and note that, the examination revealed; there was no laceration on the complainant's vagina but the hymen was broken, "with old tear or scar, not fresh". Additionally, a report from Gene Violence Recovery Centre (GVRC) indicated that, "there was vaginal penetration".

23. Dr. Maundu also testified to the effect that, he examined the complainant on 12th February 2017 and established that, the hymen was not intact. However, the complainant had no discharge from her private parts. Apparently Dr Maundu did not indicate whether the hymen was freshly broken or was an old scar.

24. Having evaluated the aforesaid evidence, and in particular, the medical evidence, it clearly reveals that, indeed the complainant's hymen was found to have been broken and/or not intact. Indeed, according to the finding in the report from; Gene Violence Recovery Centre (GVRC), the same was consistent with penal penetration.

25. However, tear on the hymen is stated to be an "old tear". The question is; when is a tear "an old tear, as opposed to a fresh tear".

Upon evaluating the evidence on this issue the learned trial Magistrate stated as follows:

'PW3 stated that PW1 was examined and it was found that her hymen was broken and that, the features were suggestive of penal vagina penetration. PW4 also stated that, he examined her and found that, her hymen was not intact. PW3 in cross examination stated that the hymen had an old scar and he went on to explain that, an old scar is noted where the penetration has occurred more than an hour after and that is described as an old tag where examination is carried after some days have passed.

The evidence on record is that PW1 was defiled. If her hymen is missing, then, it was caused by an act of sexual intercourse. The hymen not being intact, also means that the sexual intercourse was penetrative and not partial.

26. I have carefully evaluated the events in this matter and the find that, the description of the broken hymen as "an old scar" is puzzling. This is because the mother of the child testified that, she took the child for examination immediately after the incident that occurred at around 6.40 pm. The PRC Form indicates the child was examined at; 2220 pm. According to the evidence of; Dr. Ngatia, "if the act happens now and you present the child immediately, it is fresh tear. If the child is presented (sic) after a few hours, it is an older tear", but unfortunately what constitute "the few hours" is not specifically explained in evidence.

27. Furthermore, although the mother of the child testified that, she examined the complainant physically and noted that she had "sperms", the same was not noted in the examination by doctor who first attended to the child and neither did the doctor note the "whitish foul smelling discharge", but, even more disturbing, is the evidence of; the complainant mother's (PW2), that, the complainant was admitted for "one week and three days" as a result of the incident, yet that evidence was not produced at all.

28. In the same vein, the appellant was not even taken for medical examination and the reason for the same was not offered at all. In cross examination, the investigating officer testified that, the appellant was brought to the station on the same date with the complainant, but did not take him for examination. Additionally, although the investigating officer testified that, the members of the public who arrested the appellant refused to testify, no request for summons was made to the court.

29. All in all, I find that, based on the aforesaid analysis of the evidence, it is possible the child's hymen may have been broken earlier than the material date and taking into account the fact that, a hymen may be broken due to other factors beyond penal penetration, the evidence herein cast doubt, to the benefit of the appellant. The doctors' evidence of older tear was not supportive of the prosecution case.

30. The other issue raised concerns the perpetrator. This issue is critical taking into account the fact that, the only direct evidence of the incident is by the child victim. In addressing the issue, the learned trial Magistrate stated as follows:

"PW1 testified that she was defiled by the accused. She identified the accused in court by pointing at him. The accused was also seen by PW2. According to the evidence tendered, PW2 saw the accused in Aberi's house and she asked him if she had done anything to his daughter. This was soon after PW1 had arrived carrying her clothes in her hands and soon after PW1 had narrated to PW2 what had happened. PW2 was categorical that she saw the accused. The accused in his own testimony told this court that PW1 went to Aberi's house, and she asked him what he had done to her daughter. The accused also stated that PW2 locked the door from outside and that she screamed attracting a crowd. Notably, PW2's testimony was that, she locked the door from outside. She also stated that she screamed and neighbours came.

31. Having evaluated the evidence adduced afresh, I find that, the child testified that she was assaulted sexually in a house, situated in the same compound where she was staying. Therefore, she was familiar with the environment where the offence took place. Furthermore, the complainant's mother, told the trial court that, her child came from school at around 6 00 pm. She bathed her and allowed her to go and pray with the others along the corridor. She returned with her clothes in her hands. Upon inquiry the child told her "the boy in Aberi's house" had poured water on her. The mother went to that house and found a "visitor". The owner was not there.

32. It suffices to note that, the appellant testified that, indeed on the material date, he was in the house of Aberi. He was visiting and at the alleged time of the incident he was alone in that house. Therefore, the appellants evidence, corroborates the evidence of the complainant's mother that he was within the vicinity of the offence. He doesn't rebut the evidence that he escaped through the window when confronted. There is no evidence of bad blood between the parties.

33. The appellant has attacked the prosecution case as having been based inter alia on; circumstantial evidence and/or the evidence of PW I per se. That is not factually correct. There were other witnesses who testified including the mother of the complainant who

saw her immediately after the incident and the Doctors, who examined her.

34. Be that as it were, the evidence of the single witness in sexual offences can sustain a conviction as stated under section 124 of the evidence Act, as here below reproduced: -

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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"

35. The learned trial Magistrate had the benefit of seeing the complainant and conducted a voire dire examination and observed that the child was "intelligent". Therefore, the learned trial Magistrate was in a better position to ascertain the veracity of her evidence. I therefore concur with the findings of the learned trial Magistrate that the appellant was positively identified as the perpetrator of the offence.

36. The upshot of the aforesaid is that, the evidence of the doctor that, the broken hymen, was an old scar, that there was no laceration on the genitalia, and lack of scientific proof of sperms or the failure to produce hospitalization records of the child and/or the appellant's P3 Form cast doubt on the proof of penetration.

37. However, it is clear from the facts that, the child returned home carrying her trouser and under pant in her hands and pointed out the appellant as the one who undressed her and did "tabia mbaya" to her and further, that the appellant immediately escaped when confronted by the mother of the complainant, supports the fact that he indecently assaulted the complainant. I therefore find the evidence adduced sustains the charges on the alternative count.

38. I therefore, set aside the conviction on the main count of defilement and substitute it with conviction on the offence of; committing indecent act, as charged on the alternative count. The resultant thereof is that; the sentence of life imprisonment is substituted with the sentence of; ten (10) years imprisonment and having considered the circumstances of the case, I order that, the custodial sentence shall run from the date of sentence in the lower court, being the 16th May 2019.

39. However, before I fully down my tool of trade, I must express the court's disappointment in the manner in which the Respondent treated the appeal casually, pro-active in the interest of justice. It was treated casually by not filing a response thereto. As a public entity representing the rights of victims, the Respondent must be more pro-active.

It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS, 14TH DAY OF MARCH, 2022

GRACE L NZIOKA

JUDGE

IN THE PRESENCE OF;

MR ANGAYA FOR THE APPELLANT

MS ODOUR FOR THE RESPONDENT

EDWIN OMBUNA - COURT ASSISTANT