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Advocates:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 41 OF 2020

(From original conviction and Sentence In Criminal Sexual Offence No. 229 of 2019 of the Chief Magistrate's

Court at Kitale delivered by Hon. M.N. Osoro - RM)

JAFRED SIMIYU TALAI ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

JUDGMENT

The appellant, **Jafred Simiyu Talai**, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that **on diverse dates between 30th September and 1st October 2019** at **[Particulars Withheld] village**, **Trans-Nzoia County**, the appellant intentionally caused his penis to penetrate into the anus of **KMM** a child aged seven (7) years. When the appellant was arraigned before the trial Magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve life imprisonment. Aggrieved by his conviction and sentence, the appellant has filed an appeal to this court.

In his petition of appeal, the appellant has raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for relying on medical evidence which in his view was questionable and insufficient to corroborate the evidence of the complainant. He was aggrieved that the trial court had found that there was penetration yet the evidence adduced by the prosecution did not establish such finding. In his view, the element of penetration was not conclusively established to the required standard of proof.

The appellant faulted he trial court for relying on prosecution's evidence that do not meet the threshold of establishing his guilt to the required standard of proof beyond any reasonable doubt. He was aggrieved that his credible and truthful defence was not considered before the trial court reached the impugned decision. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that that was imposed on him.

During the hearing of the appeal, both the appellant (who was acting in person) and the prosecution presented to court written submissions in support of their respective opposing positions. This court has carefully considered the said submission. It shall revert to them after briefly setting out the facts of the case as presented to the trial court by the prosecution;

KMM, the complainant in this case testified as PW1. He was a boy aged 7 years at the time of the alleged incident. He was born on 6th August 2012 according to the birth certificate which was produced in court as prosecution's exhibit No. 3. According to the complainant, on the nights of 30th September and 1st October 2019, while he was studying in the appellant's house, the appellant told him to lie on his bed. He refused. The appellant picked up a stick and threatened to beat him. He obeyed what the appellant told him to do. He told the court that the appellant took his penis and inserted it in his anus. After the act, he went back to their house. The complainant used to stay with his mother. He did not tell her what had had transpired when she returned home because, according to him, he was threatened by the appellant that he would circumcise him if he did so. The complainant told the court that he was injured in his buttocks during the incident.

PW2 BA, the mother of the complainant testified that on 30th September 2019, she arrived home at about 8.00 pm. She found the appellant and the complainant watching television. PW2 had at the material time employed the appellant to herd the cows and take care of her compound. According to the appellant, PW2 was her supervisor. His actual employer was working overseas. He had

worked for his employer for a period of five (5) years. On the following day, i.e 1st October 2019, she sacked the appellant due to what she told the court was petty stealing. She stated that she found cash missing from her house. On 2nd October 2019, the complainant gained confidence to tell her what had transpired upon learning the appellant was no longer around.

PW2 immediately rushed the complainant to the hospital and later reported the incident to the police. PW2 testified that she told the appellant's mother what had transpired. She was attacked on 2nd October 2019. From the evidence, it is not clear by who. She denied that she ever left the complainant to stay overnight with the appellant. She denied the suggestion by the appellant that she had undressed herself in front of the appellant. She reiterated that the incident indeed occurred but in secret since there was no other witness other than the complainant.

The complainant was examined by **PW4 Alex Masake**, a clinical officer based at Kitale County hospital. This was on 3rd October 2019 when the complainant was taken to the hospital by PW2 on allegations that he had been "sexually molested". This is what PW4 said:

"On examination, his penis was okay save for anal area, there were injuries (healing). All laboratory tests were negative. I made the medical conclusion that he had been sodomized. The anal area had been penetrated".

On cross-examination, he said:

"The survivor was okay health wise. The history said had occurred severally the last incident was 1/10/2019 and I saw him on 3/10/2019. Physical examination revealed anal area had injuries, healing, its possible since the history and physical examination tallied with the act of sodomy. Does not matter penis size of perpetrator …... I didn't mention. Had changed clothes and had showered".

PW4 produced the initial medical treatment papers and the duly filled P3 form as prosecution exhibits No. 1 and 2 respectively.

The case was investigated by **PW3 Corporal Christine Atori** attached to

Kitale Police station. She testified that the complainant had, according to her investigations, been defiled between 30th September and 1st October 2019 at 6.00 pm. This information was obtained from the complainant. Upon concluding her investigations, she charged the appellant with the offence that he was convicted. She confirmed the appellant had been employed as a herdboy by the family of the complainant.

When he was put on his defence, the appellant denied the charge. He stated that he had been employed by an employer who lived overseas for a period of five (5) years. PW2 was the supervisor. He complained that prior to the material date he was relieved from employment, he had not been paid his wages for six (6) months. He was relieved from employment when he demanded to be paid his outstanding wages. It was then that PW2 falsely accused him of stealing money from her. On being terminated from employment, he went home. PW2 followed him home. The appellant's mother screamed. People gathered at the scene. PW2 was assaulted. She made a report to Namanjalala Police Station. The appellant's mother and brother were arrested. The appellant was warned. When he went to the police station, he was arrested on allegation that he had stolen PW2's properties. He was shocked when he was charged with the present offence. He denied the allegation that he had committed the offence.

This being a first appeal, it is the duty of the court to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the appellant's conviction. In doing so, this court must always be alive of the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that respect **(Kiilu & Another – Vs_ Republic [2005] 1 KLR 174).** The issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the appellant on the charge to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish the charge of defilement, there are three elements that must be established; the age of the complainant, penetration and the identity of the perpetrator. In respect of the age of the complainant, PW2 the mother of the complainant stated that complainant was born on 6th August 2012. A birth certificate was produced into evidence by the prosecution. The appellant did not dispute the complainant's age. This court therefore holds that the prosecution did established to

the required standard of proof that the complainant was seven (7) years of age at the time of the alleged incident. He was therefore a child within the meaning ascribed to the term under **Section 2** of the **Children Act.**

As regards penetration, it was the complainant's testimony that he was sexually assaulted by the appellant, a worker at their home, on the night of 30th September and 1st October 2019. The complainant testified that the appellant sexually assaulted him when he was in his (Appellant's) house. The complainant at the time was studying in the said house. The complainant testified that the appellant forcefully inserted his penis into his buttocks (anus). After the deed, the complainant testified that the appellant threatened him not to disclose what had transpired to anyone. The complainant testified that she came home from work on 30th September 2019 at about 8.00 pm. She found the complainant and the appellant in her house watching television. On 2nd October 2019, she dismissed the appellant from employment after accusing him of stealing her money. It was the same day in the evening that the complainant told her that he had been sodomized by the appellant. She took the complainant to see the doctor the following day i.e on 3rd October, 2019. She denied that she ever left the complainant in the custody of the appellant for any night. She was always at home all the nights. The complainant testified that the incident in which the appellant sexually assaulted him happened only once.

When the complainant was examined by the doctor on the 3rd October 2019, he noted that the complainant had injuries in his anal region. The injuries were healing. He did not however state how old the injuries were and whether it could have been caused at the contemporaneous time the complainant alleged that he was sexually assaulted. Further, it was evident that the doctor arrived at the conclusion that the complainant was sodomized from the injuries and the history that was narrated to him by PW2, the mother of the complainant. Crucially, he stated that the injuries were consistent with someone who had been severally sexually assaulted. This bit of evidence contradicts both the testimony of complainant and PW2 who testified that the incident happened once. It was clear to the court that the doctor's evidence did not independently corroborate the complainant's testimony that he was sodomized. If the doctor had independently considered the injuries suffered by the complainant without taking into account the history that he was given by PW2, complainant's mother, maybe he could have reached a different finding.

On further re-evaluation of the entire evidence, this court finds the following:-

1) There was contradiction between the complainant's and PW2 testimony in regard to when the alleged sexual assault took place. From the complainant's testimony, it was evident that the incident may have taken place on 29th September 2019. The complainant's demeanour when PW2 arrived home that night did not indicate that he was in distress. Indeed PW2 testified that she found the appellant and the complainant sitting together watching television. This discounts the possibility that the alleged assault could have taken place that night.

2) The appellant was sacked from employment on 2nd October 2019. The incident could not have taken place on 1st October 2019 because both the complainant and PW2 did not indicate in their evidence that it occurred on that day.

3) The assertion by the appellant that he was sacked from employment when he demanded to be paid the wage arrears that he was owed by the complainant was not discounted by the prosecution. This could have been a motive for the charge to be laid against the appellant so as to enable PW2 escape liability.

4) PW2 testified that she was attacked on 2nd October 2019. She did not disclose by who. But according to the appellant, PW2 was attacked by members of the public when she went to the appellant's home and accused him of theft. This resulted in a brawl that led to the arrest of the appellant's mother and brother. Why didn't the prosecution adduce evidence to discount this angle as motive for the lodging of the complaint against the appellant with the police"

5) Is it peculiar that PW2 lodged the complaint about the alleged sexual assault after sacking the appellant" Was the allegation that the appellant stole from PW2 a cover up for the later complaint that the appellant had sodomized the complainant" This court will not be able to know. What is without doubt is that reasonable doubt has been raised.

In **Bassita V Uganda S.C. Criminal Appeal No. 35 of 1995**, the Ugandan Supreme Court held thus:

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually sexual intercourse is proved by the victim's own evidence or other evidence. Though desirable, it is not hard and fast rule that victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or

penetration. Whatsoever 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.

For evidence to be capable of being corroborated it must:

a) Be relevant and admissible …

b) Be credible ….

c) Be independent that is emanating from a source other than the witness requiring to be corroborated ….

d) Implicate the accused."

In the present appeal, it was clear to the court that the evidence of the complainant, being that of a child of tender years, cannot be discounted from influence from his mother noting that there existed reasons for the mother to frame up the appellant. Matters were not helped by discrepancy in the dates that the alleged offence is said to have occurred and the contradictory and misleading nature of the medical evidence that clearly caused more confusion than light.

In the final analysis, the ground of appeal put forward by the appellant that the evidence of penetration could not sustain legal scrutiny has merit. Furthermore, this court holds that the facts of the case raise reasonable doubt that the appellant committed the offence. That doubt, must, of necessity be resolved in the appellant's favour.

The upshot of the above reasons is that the appellant's appeal is hereby allowed. The conviction is quashed and the custodial sentence imposed upon him is set aside. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

DATED AT KITALE THIS 16TH DAY OF DECEMBER 2021.

L. KIMARU

JUDGE

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