Case Number:	Criminal Appeal 37 of 2020
Date Delivered:	17 Mar 2022
Case Class:	Criminal
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	Hilary Kiplagat Chemitei
Citation:	Joseph Mwangi v Republic [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. E. Soita - RM
County:	Nakuru
Docket Number:	-
History Docket Number:	Criminal Case No. 6 of 2019
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 37 OF 2020

JOSEPH MWANGI ALIAS BOI NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgement of Hon. E. Soita (RM)

dated 13th August 2020 in Criminal Case No. 6 of 2019 at Molo.)

JUDGEMENT.

1. The appellant was charged with the offence of Defilement contrary to Section 8(1), (2) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 21st day of June 2019 in Molo sub-county within Nakuru County, intentionally caused his penis to penetrate the vagina of JA a child aged 6 years.

2. The alternative count was Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 21st day of June 2019 in Molo sub-county within Nakuru county, intentionally caused his penis to penetrate the vagina of JA a child aged 6 years.

3. The appellant was convicted and sentence to life imprisonment hence this appeal. The appellant has raised the following grounds of appeal challenging the judgement: -

a) That, the learned trial magistrate erred in law and fact by failing to note that the charge of defilement was not proved against the appellant to the required standard (proof beyond reasonable doubt).

b) That, the learned trial magistrate erred in law and in fact by failing to note that, the prosecution evidence was marred with contradictions which greatly vitiated the credibility of the prosecution evidence.

c) That, the learned trial magistrate erred in law by failing to appreciate that, the arrest of the appellant was not connected to this offence and that failure to avail those who arrested the appellant was a grievous mistake.

d) That, the learned trial magistrate erred in law by conducting a trial which was prejudicial to the appellant which was not in accordance to Article 50(1)(2)9c) (k) and Article 25(c) of the constitution.

4. Before looking at the merits or otherwise of the appeal it shall be worthwhile to summarize the evidence as presented during trial.

5. **PW1** the complainant testified in her unsworn evidence that on the fateful day she was done bad manners by a male and that she did not know his name. She said that the appellant removed her inner wear and began defiling her and she felt a lot of pain. That as he defiled her he smoked bhang and directed the smoke towards her. The appellant then gave her Kshs. 20 which she still had. He also warned her not to tell anyone.

6. That she told **PW2** and she was taken to hospital but she could not remember its name and they went to Elburgon police station.

She positively identified the accused in the courtroom and stated that she was in top class and that she was 6 years old.

7. On cross examination she stated that her father was in jail due to bad manners. She told her mum what had happened and that the appellant gave her Kshs. 20. That it was the first time the appellant did that to her.

8. **PW2 MS** testified that she resided with PW1 who was her sister in law's child. That on 21st June 2019, she left to take one of her child to the clinic and she left the other children with **PW1.** She testified further that when she returned she did not find **PW1** and she was told that she had been called by the appellant to pick greens. **PW2** later met **PW1** at the road, she looked worried, she stated that she had been called by the appellant to pick greens and was given ugali and tea and told to sweep the house and was taken to the bedroom.

9. **PW2** went on to testify that she checked **PW1** and she saw something that looked like mucus in her vagina and she took her to Elburgon hospital and later to Elburgon police station where they wrote statements. She positively identified the appellant as the person who defiled PW1.

10. On cross examination, she stated that **PW1** said that it was the appellant who touched her. She added that there was no grudge between her and the appellant.

11. **PW3 EDWARD CHELULE** a clinical officer testified that he was the one who filed the P3 form, that PW1 was examined by a doctor/clinical officer at night and that PW1 visited their facility on 24th June 2019. He testified further that he had been given PW1 treatment notes which showed that her hymen was not intact, the inner vagina was red and there was discharge. He produced the P3 form, the lab report and treatment notes and age assessment form where the age of PW1 was around 5-6 years.

12. On cross examination he stated that they did not witness the incident and that they also did not examine the appellant but only PW1. He stated that they confirmed that there was penetration and that she was telling the truth.

13. **PW4 101111 PC VERONICAH CHEPNGENO** the investigation officer, testified that on 26th June 2019 she was given a case of defilement involving PW1 who was aged 6years old and the appellant who had defiled her. That the members of public brought PW1 and the appellant to the police station. She testified that PW1 was taken to the hospital where she was examined and age assessment done. She produced the age assessment as PEXB 3 and she positively identified the accused in court.

14. On cross examination she stated that the appellant was not examined in the hospital and that the PW1 was examined by the doctor who received the P3 form.

15. When placed on his defence the appellant denied the charges and gave unsworn evidence and called one witness. He stated that he was arrested on 22nd June 2019 and taken to the police station for touching a child. That it was not the first time PW2 is bringing a case of defilement and that there was another person in custody too. The appellant stated further that PW2 had called him at welfare and stated that she wanted to withdraw the case. He urged the court to look at both sides and that there was grudge between him and PW2 because of work. That he used to stay at her house till midnight and he was therefore not sure if she wanted to be good friends with him.

16. **DW2 NICHOLAS NDAMBWA** gave sworn evidence and testified that he was with the appellant from 9.00 am at the shamba until 1500hrs. That he left and went back to his place of work and at 1900hrs the appellant came to his place and they stayed together, had dinner and he left at 2100hrs**.** He testified further that the next day a young guy came and stated that the accused was arrested and that he found PW2 who stated that PW1 had been taken to the clinic and that the appellant had touched her. That PW2 stated that she was not sure if the same was true or not.

17. On cross examination he stated that the appellant was his relative and that by the time he was arrested he was residing near them. He stated further that he was not sure of the date he was with the appellant and if it was the date when the incident occurred.

18. The court directed that the matter be disposed by way of written submissions which the parties have complied.

Appellant's Submissions

19. The accused submitted that penetration was not proved by the prosecution. He urged the court to critically analyze the evidence of PW1 on the same as she was minor and that no one else saw her being defiled. He submitted further that PW1's father was sent to prison because of PW1 and thus she was used to adducing false evidence. That PW1 did not tell PW2 that she was defiled as PW2 in her evidence to the court stated that she had been called by the appellant to pick greens and was given tea and ugali and told to sweep the house and was taken to the bedroom.

20. He went on to submit that PW2 testified that PW1 stated that the appellant was the one who touched her and thus the evidence of the two witnesses was not corroborating. Further, the clinical officer testimony that the hymen was not intact was not proof of penetration according to the emerging jurisprudence. The appellant submitted that PW1 was not a credible witness as she had issues with identification. That in her evidence she did not remember the name of her biological mother, the date when the offence was committed and the name of the perpetrator.

21. He went on to submit that none of the witness explained the exact time the offence was committed. PW4 who was the investigating officer did not visit the scene of crime thus it remained a fallacy whether PW1 was defiled or not. He went on to submit that there were contradictions which were fatal as they related to material facts and were substantial to the case at hand. He draws the court's attention to the cases of **Kamau v Republic [1975] EA 139 and Roria Republic [1967] EA 583.**

22. In conclusion, he submitted that the failure to call a member of public who effected the arrest of the appellant meant that the chain of events from the defilement to the arrest was broken and therefore doubt was created as to whether it was the appellant who defiled the PW1. He added that the trial court ordered that matter proceeds even though he had told the court that he was unwell. He urged the court to allow his appeal and quash the conviction, the sentence set aside and he be set at liberty.

Respondents Submissions

23. The learned state counsel on the other hand opposed the appeal and submitted that for the offence of defilement to be successful, three ingredients had to be proved namely; identity of the perpetrator, age of the minor and penetration by the accused. He submitted that it was not in doubt the appellant knew the victim and that from PW1 testimony she was confident that the appellant had done bad manners to her. That there was no grudge noted between PW1, PW2 and the appellant.

24. The learned state counsel went on submit that the arrest of the appellant was due to defilement of a girl who was 6 years. He submitted further that the prosecution could avail any number of witness and the appellant cannot dictate as to who should be called. He cited **Section 24 of the Evidence Act** which provides that the court was entitled to rely on the evidence of the complainant if it was satisfied that the child was telling the truth. He added that no contradictions had been noted and that the evidence adduced by PW4 confirmed that PW1 had been defiled.

25. He concluded by submitting that the prosecution had proved it case beyond reasonable double and further that all the ingredients for the offence of defilement had been established. He urged the court not to interfere with the conviction and sentence.

Analysis and Determination

26. Having perused the entire record herein, the proceedings and the parties' submissions, the duty of this court was clearly spelt out in the case of **OKENO V.REP 1972 E.A. 32**. The Court of Appeal 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 [1957] EA 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] EA 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, see Peters v Sunday Post [1958] EA 424."

27. The key ingredients that ought to be satisfied for sexual offences to be proved are as follows; the age of the victim, the identity of the perpetrator as well as penetration. This was established in the case of **DOMINIC KIBET MWARENG VS. REPUBLIC**

[2013] eKLR where the court reinforced the same when it stated that -

'The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.'

28. In the instant suit the age of the complainant was established by the production of the age assessment form and the same indicates that at the time of the incident she was 5 to 6 years old. That report though produced by the investigating officer as PEXB 3 was not challenged by the appellant.

29. As to the identity of the perpetrator, although PW1 testified that she did not know the appellant's name, she was able to positively identify him in court as the person who did bad manners to her. PW2 in her testimony stated that PW1 siblings had informed her that the PW1 had been called by Boi (the appellant) to pick greens. Further, the accused in his unsworn statement stated that he had been hosted by PW2 in her house on several occasions and therefore this means he was no stranger to the complainant or her family.

30. As to whether there was penetration, PW1 testified that the appellant removed ***her inner wear, he removed his clothes, he told her to open her thing for urinating and he put his thing for urinating to her vagina for a longtime.*** That she felt a lot of pain and he looked at vagina to see if she was bleeding and he smoked bhang and blew it on her. In addition, PW3 in his testimony stated that upon examination of PW1 by the doctor/clinical officer, the hymen was not intact and the inner vagina was red and there was discharge. He went on to produce the P3 form and the same was marked as PEXH 2. In view of the foregoing, it is my finding that PW1 testimony was corroborated by PW3 testimony that the complainant had been defiled by the appellant.

31. The appellant in his defence called one witness who testified that he was with the appellant from 9.00 am at the shamba until 1500hrs. That he left and went back to his place of work and at 1900hrs the appellant came to his place and they stayed together and had dinner and he left at 2100hrs. From the said testimony it is clear that DW2 was not with the appellant the whole day. The appellant did not provide his *alibi* for the time between 1500hrs to 1900hrs and thus the testimony by DW2 did not aid the appellant's case. Further, the witness whom he alleges was left out would not have altered the circumstances of the case even if he/she was called to testify.

32. The provisions of **Section 124 of the Evidence Act** in my view are clear on such a matter. The same states as hereunder.

"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, 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."

33. The court finds the testimony of the minor though unsworn truthful and believable. She was able to recognize the assailant as he was someone known to her. Although the issue of whether what the appellant smoked was bhang or not, the same does not lessen the question of identity and the commission of the offence.

34. **The appeal is otherwise dismissed.**

35. On the issue of sentencing, the trial court was right in sentencing the appellant for life imprisonment. This was right and as is the case it is discretional. The trend nevertheless and based on the several directions by this court and other superior courts is to make the period definite.

36. **In the premises, the sentence of life imprisonment is hereby set aside and substituted with a custodial sentence of 25 years from the date of his arraignment in court that is 27th June 2019.**

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 17TH MARCH 2022

H K CHEMITEI

JUDGE