REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. E013 OF 2021

(From Original Conviction and Sentence of Hon. K. Kibelion in Criminal Case S.O.

Number. 35 of 2020 by the Principal Magistrate's Court at Bomet)

DENNIS KIPROTICH BYEGON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant, Dennis Kiprotich Byegon, was charged and convicted of the offence of Defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006. The particulars of the offence were that on 30th day of November 2019 at [particulars withheld] village in Chesoen location within Bomet County, intentionally and unlawfully caused his penis to penetrate the vagina of V.C., a child aged 8 years old.

2. An alternative count of Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act was also brought against him. Particulars are that on 30th day of November 2019 at [particulars withheld] village in Chesoen location within Bomet County, intentionally touched the vagina of V. C., a child aged 8 years old with his penis.

3. The Appellant denied the charge and the matter proceeded to full trial in which the prosecution the prosecution called five (5) witnesses. At the close of the prosecution's case, the court found that the Appellant had a case to answer and put him on his defense under section 210 of the Criminal Procedure Code. Section 211 of the Criminal Procedure Code was read and explained to the Appellant in the language he understood. He opted to give an unsworn statement and called no witnesses. By Judgment delivered on 1st April 2021, the Appellant was convicted on the main charge and sentenced to serve life imprisonment.

4. Being dissatisfied with the conviction and the sentence, the Appellant lodged the present Appeal. He raised 7 grounds reproduced verbation as follows:-

(a) That learned trial magistrate erred in both law and fact by sentencing him to life imprisonment while basing his conviction on witnesses who were 'uncredible'.

(b)That the learned trial magistrate misled himself in law and fact by convicting him to life imprisonment basing his conviction on uncorroborated, contradictory and tainted evidence.

(c) That the learned trial magistrate failed to establish that sentencing the appellant to life imprisonment was not only excessive but was *ultra vires* and a misdirection of law.

(d) That the learned trial magistrate erred in both law and fact by rejecting his concrete defense thus shifting the burden of proof to the defense side.

(e) That the learned trial magistrate misdirected himself further both in law and in fact by not considering the touchable(sic!) and compelling mitigation.

(f) That he prayed for the former court proceedings to be availed as his defense witness during the hearing and disposal of the present appeal as per section 22(1) of the Constitution.

(g) That he prayed to be present in order seek the court's indulgence on imposing a sentence that was proportionate to the offence based on the court's discretion.

5. The Appellant later filed amended grounds of appeal as follows:

(a) That the learned trial magistrate erred in law in awarding a mandatory sentence but failed to evaluate the circumstances of the accused person and the provisions of Article 50(2) (p) (q) of the Constitution of Kenya.

(b) That the learned trial magistrate erred in law and fact by holding that the offence of defilement was proved without proof of the ingredients of the offence.

(c) That the learned trial magistrate erred in law by failing to appreciate the appellant's defence of alibi and did not give it an objective and open minded analysis.

6. The Appeal was canvassed through written submissions.

The Appellant's Submissions

7. The Appellant submitted on three issues. Firstly, that the mandatory sentence imposed on him did not consider the circumstances of his case and constitutional provisions. He submitted that a pre-sentence report was never prepared and that this worked to his detriment because the court was unable to appreciate his existing responsibilities, means of livelihood and his attitude towards the offence. He submitted that the life sentence was indeterminate in law and would only mean the natural life of a convict. Thus, it was contrary to his right to dignity as per Article 28 and freedom from psychological torture, cruel, degrading and inhuman treatment as per Article 29 (d), (f). Lastly on this issue, he submitted that his right to the least severe form of punishment was guaranteed by Article 50 (2) (p) of the Constitution and that the court should exercise its discretion to impose a sentence that would benefit him if not acquit him.

8. The Appellant submitted that the charge of defilement was not proved. Firstly, that the age of the victim was not ascertained by the court as no evidence was given to this effect. He relied on **Nyongesa vs. Republic (2010) eKLR and Omar Nache Ische vs. Republic (2015) eKLR.** Secondly, on the issue of penetration, the Appellant stated that the victim's evidence did not demonstrate that he removed his clothes and removed hers before committing the act. It was his view that he could not have penetrated the victim with his clothes on and that the victim must have been coached. He also stated that the medical report did not make mention of the state of the hymen and submitted further that since a broken hymen did not necessarily amount to penetration, then findings of bruises and swelling of the labia majora as was in the present case did not confirm penetration.To the, it was his submission that the offence was not therefore proven. He cited the cases of **Mark Oiruri Mose vs. R. (2013) eKLR; Messegue and Jabardo vs. Spain (1988) 11 eHRR, 360; and PKW vs. R. (2012) eKLR.**

9. Finally, the Appellant submitted that his alibi defence was not considered by the Act. That the burden of proving the falsity of alibi evidence by an accused lay on the prosecution once it was raised in accordance with section 309 of the Criminal Procedure Code. He also submitted that the case was based on a personal vendetta against him by PW2 who was his former wife and and an

aunt to the victim, together with PW3 who was the victim's mother. That failure by the police and the trial court to look into these claims raised a reasonable doubt and was a miscarriage of justice against him since he was unrepresented in the trial. The Appellant submitted that the trial magistrate became a contestor in the trial when he chose to dismiss his evidence of the vendetta. (sic!) To this end, he cited the case of Ndegwa vs. Republic (1985) in respect of the sanctity of the rules of a fair trial in protecting the rights of an accused. He also relied on Victor Mwendwa Mulinge vs. Republic (2014) eKLR and Adedeji vs. The State (1971) 1 All N.L.R.

The Respondent's Submissions

10. The Respondent submitted on two main issues being whether the conviction was safe and whether the sentence was justitious. The Respondent outlined the ingredients of the offence of defilement and submitted that the medical report demonstrated penetration coupled with the victim's cogent account of the events. Secondly, the age of the victim was not in contention because the immunization card was produced and it indicated that she was born on 18th March 2011, thus was 8 years at the time of the incident. On identification the Respondent submitted that the Appellant was the victim's neighbour and was therefore well known to her, a fact that remained uncontroverted by the Appellant. Thus, the offence was proven to the required threshold.

11. On sentencing, the Respondent submitted that the court's hands were tied in that they were bound to impose the sentence stipulated in law. That the prosecution had asked the court to impose a deterrent sentence on him because of the trauma suffered by the victim. That the sentence was justitious and legal and the appeal should be dismissed for lack of merit.

Issues for Determination

12. Upon consideration of the facts of this case, the grounds of appeal and the parties' submissions, the following issues are pertinent for determination:

(i) Whether the offence of defilement was proven to the required legal standard.

(ii) Whether the sentence imposed was appropriate under the circumstances.

Whether the offence of defilement was proven to the required legal standard

13. The mandate of the first appellate court was aptly stated by Sir Clement in the case of **Selle and Another versus Associated Motor Boat Company Limited and others [1968] EA 123** as follows:

*"**This court must consider the evidence, evaluate itself and draw its own conclusions. Though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of, if the impression bases as the demeanor of a witness, is inconsistent with the evidence in the case generally."***

(See also **Abdul Hamond Sarif vs. Ali Mohamed Solan [1955] 22 EACA 270**).

14. The Sexual Offences Act No. 3 of 2006 It provides as follows:-

"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

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

(See ***George Opondo Olunga vs. Republic [2016] eKLR.)***

16. Each of the three ingredients must be proven to the required legal standard. The age of a victim can be established in different ways, either by adducing records or documents that will prove their age, the evidence of the victim or from the evidence of the minor's mother or guardian, observation or a medical assessment report or other cogent evidence. See **Joseph Kieti Seet vs. Republic [2014].**

17. In the **Ugandan Court of Appeal case o f Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000** it was held that:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

18. The Appellant stated that PW4 who was the clinical officer never conducted an age assessment on the minor to ascertain her age. He also argued that the aspect of age was so important in proving the charge of defilement and in its absence, then the charge should not stand. I agree his submission on the importance of proving age. The Court of Appeal in the case of **Hadson Ali Mwachongo vs. Republic (2016) eKLR,** emphasised this principle as follows:

"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim...."

19. In the present case, the victim PW1 stated that she did not know her age or when she was born. PW2 who is her aunt and PW3 who is her mother however testified that she was born on 18 March 2011. PW3 produced the victim's clinic card marked as PMFI-1 (PEXB3) that confirmed the date of birth to be 8th March 2011. This means that at the time of the offence, the victim was eight (8) years old.

20. From the Record and as already discussed above, the victim's mother produced her clinical card as evidence of her age. In **JOA vs. Republic (2019) eKLR**, the court held that

'It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim.'

21. It is my finding therefore that the the victim's age was 8 years as proven by her medical card coupled and her mother's oral testimony.

22. The second ingredient of the offence is penetration. Section 2 of the Act defines penetration as *"the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

23. In his submissions, the Appellant dismissed the evidence adduced in this regard by firstly stating that it was contradictory. He stated that the victim testified on the one hand that the Appellant had his clothes on while on the other hand she stated that he put his thing in her. He argued that he could not have defiled her with his clothes on. He also stated that the medical report was contradictory as PW4 testified that the victim had no visible injuries and on the other hand testified that she had bruises and swelling. He argued that the fact that the report did not address whether the hymen had been raptured or not meant that the evidence in support of penetration could not be fully relied upon.

24. The above highlighted points are mere discrepancies in and not material contradictions in any way. The Court of Appeal of

Nigeria gave a clear contrast between what is considered contradictory evidence and what constitutes discrepancies. The learned bench: *Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA* in the case of **David Ojeabuo vs. Federal Republic of Nigeria (2014) LPELR-22555(CA**), stated thus:-

"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

25. I will now consider whether the medical evidence was sufficient to prove penetration. From the evidence of PW4 the Clinical Officer testimony and the P3 Form, I observe the following:-

(i) On the victim's state of clothing, there were no physical tears but there were dry blood stains on the victim's black underpants.

(ii) On general appearance, the victim presented general body weakness, could not clearly explain herself or explain what had happened to her.

(iii) On the state of injuries to the victim's genitalia, the report indicated that she had bruises on her labia minora with swelling which revealed that there was penetration and presence of brown discharge which was foul smelling and later confirmed by lab tests to be pus cells.

(iv) The clinician confirmed that the type of weapon used to inflict the injuries was a blunt object and the approximate age of the injury was two days. He concluded that the victim had been penetrated.

26. The Appellant submitted that the evidence of PW4 did not state that the hymen was missing or broken. This submission however lacks merit as the absence of a hymen is not the only proof of penetration. There can be penetration which does not result in breaking of the hymen. In **George Owiti Raya vs. Republic [2013]** the court stated thus :-

"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane…It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."

27. From the above and the evidence on record, it is evident that there was penetration and the victim in this case confirms this in her testimony when she stated as follows: *"He had a knife, he dragged me to the store and did bad manners to me.....In doing bad manners, he inserted his thing into me. The place he inserted his thing is the one I use to urinate. He inserted his thing into me once. I felt pain when he inserted his thing."*

28. The victim further testified that her sister Tetio checked her private parts the next morning because she was in pain. Her aunt, PW2 also testified that the next day, she noticed that the victim was walking with difficulty . She also had blood stains on her black panty and that the previous day, she came home and went straight to sleep. All these circumstances go to demonstrate that something unusual had happened to PW1.

29. A a voire dire examination was conducted on PW1 and the trial magistrate was satisfied that she was intelligent enough to understand and explain what had happened to her. I am inclined to believe her testimony. The same is cemented by the medical report on Record together with her guardian PW2's testimony of the aftermath of the incident. It remains and is clear to me that the victim had been penetrated and that as a result, she had suffered physical injury as demonstrated by the medical report. (Pexhibit 1) I find the fact of penetration adequately proven.

30. The third ingredient is identification. The evidence on record shows that the Appellant was well known to the victim and her family members because he was their neighbour. In fact, during his cross examination of PW3, the victim's mother, he brings to light the fact that he had previously been married to PW2 who was the victim's aunt. PW1 explained in her testimony that the Appellant had put a handkerchief in her mouth so that she was unable to scream and that he held a knife at her. He only covered her

mouth and not her eyes, which means she was able to properly see her assailant. The incident is also said to have occurred at 6.00 p.m. when there was still sufficient light for her to see the face of her assailant. It follows then that when the victim pointed towards the Appellant in court, she was not only identifying him but was also recognizing him as a familiar face and as the person who had committed the act. This third ingredient is therefore also proven. I find no posibity of mistakn identity as the Appellant was well known to the complainant .

31. I now turn to the issue of alibi and vendetta as raised by the Appellant. Alibi is a plea or mode of defense under which a person on trial for a crime proves or attempts to prove being in another place when the alleged act was committed. An accused person claiming this must provide evidence to prove the alibi so that it is clear to the court that it was physically impossible for him or her to have committed the crime in question. (*See* ***Black's Law Dictionary, Sixth Edition – "Alibi"*** *and the case of* ***Commonwealth v. Warrington, 326 A.2d 427 [1974])***. Vendetta according to the Cambridge dictionary means a long and violent argument between people or families, in which one group tries to harm the other in order to punish them for things that happened in the past. (Cambridge Advanced Learner's Dictionary & Thesaurus, referenced from the Cambridge University Press 2022 at dictionary.cambridge.org/dictionary/)

32. When an accused person raises the issue of an alibi, he ought to do so at the earliest opportunity in the trial. This will enable the court and particularly the prosecution to look into the veracity of such claim. This was the guidance by the former Eastern Africa Court of Appeal case of **Republic vs. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA, 145** where it was held as follows:-

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

33. There is no evidence on Record that the Appellant told the trial court that he was never present on the alleged date or that he was with someone else. And even so, he never brought as his witness any person to confirm his whereabouts on the material date. In law however, once the accused raises an alibi the court must consider whether the same displaces the prosecution evidence. In this case, I have re-evaluated the prosecution evidence. It is not displaced in any way by the defence so as to give any credence to the alibi suggested by the Appellant. The defense of alibi therefore cannot stand.

34. Further, the Appellant argued that PW2 and PW3 had a grudge against him because of the broken marriage between him and PW2 and that as a result, they had coached the victim to implicate him in the offence. He further stated in his submissions that the trial magistrate was wrong to have dismissed his claim of a vendetta as this appeared like he was a contestor on the matter yet he was supposed to be a neutral umpire.

35. The record shows that the Appellant only asked the court to consider his defense during the trial. He did not ask the court to look into the aspect of hatred between him and the two prosecution witnesses. In his cross examination of PW2 who is his former wife, he does not raise the issue of a vendetta at all yet this ought to be the person with whom he was feuding. He only stated that the victim's mother is the one who hated him and hence framed him.

36. I find the submission above to be a far fetched connection between the offence in question and the supposed vendetta. PW3 gave evidence that was only useful to the extent of proving the victim's age. Everything else she stated was what she was told by the victim or PW2 as she was away in Nairobi for work. From my analysis of the evidence, I find that the trial court was justified in dismissing the Appellant's allegation. He has failed to demonstrate why there could have been bad blood between him and the victim's mother.

37. Based on the foregoing and having analysed the entire evidence on Record, I find that the offence of defilement was proven to the required threshold. I uphold the conviction.

(ii). Whether the sentence imposed was appropriate

38. The offence in this present Appeal is one that attracts a mandatory minimum sentence. The Judiciary Sentencing Policy Guidelines at section 7.17 which provides guidance as follows:

"Where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed...."

39. The trial court therefore correctly imposed the mandatory sentence of life imprisonment.

40. The Appellant however submitted that the indeterminate nature of the life imprisonment sentence was against the rules of natural justice and violated his rights under Articles 28,29,25 and 27 of the Constitution. In particular, the Appellant submitted that the Indeterminate nature of a sentence of life imprisonment was unconstitutional.

41. Faced with a similar argument the court in **Jackson Maina Wangui & Another vs. Republic, Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui),** held at paragraph 72 and 76 that:—

"As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.

76. …. As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

42. I agree with the holding above that the definition of life sentence is lacking in our statutory law and also that Parliament ought to enact a law brings certainity ot the period.

43. The Appellant faulted the trial court for not calling for a pre-sentence report. He submitted that the omission unduly prejudiced him as the pre-sentence report would have enabled the trial court to give a different verdict.

44. A pre-sentence report is a product of a social inquiry or investigation *'is a process of generating data and information on a specific subject matter or an offender for the purpose of documenting and understanding the attendant causes of behaviour and events*. (See the Probation and After Care Guidelines for Social Investigations and Pre-sentence Reports-The Guidelines).

It is meant to give the court an overall picture and clear understanding on the suitability of any sentence including any sentence the offender is already serving. It will also bring to light the feelings of the victim, the victim's family together with the community, towards the Accused person and the alleged offence. The report will also establish the accused's social standing in society and whether he has people who depended on him alongside other factors such as what could have led him to commite the crime. It should be noted however that such a report is only pursuasive and the court is not bound to adopt any recommendations that it may contain. Therefore, its production or lack thereof is incapable of occassioning any prejudice to an accused person. It is also doubtful that the report would have allowd the trial magistrate do depart from the mandatory sentence. I therefore find no prejudice occassioned to the Appellant in this regard.

45. In the final analysis, I have come to the conclusion that the charge against the Appellant was proved to the required legal standard. In the end, I uphold both conviction and sentence. The appeal is thus dismissed.

46. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 31ST DAY OF JANUARY, 2022.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Mr. Mureithi for the Respondent, and Kiprotich (Court Assistant).