REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. E002 OF 2021

FRANCIS KAGONGO.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

JUDGEMENT

BACKGROUND:

1. The Appellant was vide a charge sheet dated 13th August, 2019 arraigned in court and was charged with the offence of ***Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.***

2. Particulars are that Francis Kangogo on 9th August, 2019 at [Particulars withheld] Village in Mochongoi Division, Marigat Sub-County of Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of MC a child aged 4 years and a subsequent alternative charge of ***Committing and Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.***

3. The particulars are that Francis Kangogo on 9th August, 2019 at [Particulars withheld] Village in Mochongoi Division, Marigat Sub-County in Baringo County intentionally and unlawfully touched the vagina of MC a child aged 4 years.

4. The Appellant pleaded not guilty to the charges. The prosecution called a total of four witnesses and the Appellant gave an unsworn defence. Vide a judgment delivered on 10th December, 2020, the Appellant was sentenced to life imprisonment.

5. Being aggrieved by the judgment, the Appellant appeal to this Honorable Court vide a petition of appeal dated 4th February, 2021 which raises 11 grounds on both conviction and sentence.

GROUNDS OF APPEAL:

i. That the learned trial Magistrate erred in law and in fact in finding that the Complainant's age was proved beyond reasonable doubt.

ii. That the learned trial Magistrate erred in law and in fact in finding that penetration was proved beyond reasonable doubt.

iii. That the learned trial Magistrate erred in law and in fact in failing to find that failure to call clinical officer Leah Wangui Maina and to produce the PRC form was fatal to the prosecution's case.

iv. That the learned trial Magistrate erred in law and in fact in relying on the evidence of Harrison Karuri Macharia (PW4) and the P3 form which evidence was secondary and based on hearsay.

v. That the learned trial Magistrate erred in law and in fact in relying on the evidence of PW2 the Complainant which evidence did not support on the evidence of PW2 the Complainant which evidence did not support the particulars of the charge sheet that the Appellant caused his penis to penetrate the vagina of the Complainant.

vi. That the learned trial Magistrate erred in law and in fact in failing to conduct a voire dire on the Complainant (PW2).

vii. That the learned trial Magistrate erred in law and in fact in finding that the Appellant has positively identified as the perpetrator.

viii. That the learned trial Magistrate erred in law and in fact in failing to find that the evidence on record was insufficient and unreliable to sustain a conviction and in proceeding to convict the Appellant.

ix. That the learned trial Magistrate erred in law and in fact in sentencing the Appellant on a provision of the law that he was not charged of.

x. That the learned trial Magistrate erred in law and in fact in convicting the Appellant on uncorroborated evidence of the complainant and in failing to warn herself as per the law required.

xi. That the learned trial Magistrate erred in law and in fact in applying the wrong principles and the law while sentencing the Appellant and in passing an excessive sentence.

6. The court directed that the appeal be canvassed via submissions. Only Appellant's side filed the same.

APPELLANT'S CASE AND SUBMISSIONS:

7. Appellant submitted that, in the judgment, the learned trial Magistrate failed in finding that the Complainant's age was proved beyond reasonable doubt. The Complainant's mother (PW1) testified that the Complainant was 4 years old though she did not have her birth certificate.

8. In determining the Complainant's age, it is imperative that the prosecution establishes the age of the Complainant with the best possible evidence which is a birth certificate, birth notification, an immunization card or in some instances a baptismal card issued shortly after the birth of the child. He cites the case of ***Eliud Waweru Wambui v Republic [2019] eKLR. Which held that*** Proof of age was important noting that the Appellant was charged under ***Section 8(1) as read with Section 8(3)*** which provides for victims aged 12 and 15 years old.

9. He submitted that, the trial Magistrate erred in finding that penetration was proved beyond reasonable doubt. He cites the case of ***Mohamud Omar Mohamed v Republic [2020] eKLR.***

10. The learned trial Magistrate faulted in failing to find that failure to call clinical officer Leah Wangui Maina and to produce the PRC form was fatal to the prosecution case. PW4 in his cross – examination by the appellant stated that his colleague whom he referred to as Leah Wangui Maina examined the Complainant and filled the PRC form since she was the doctor on duty the day the Complainant was taken to the hospital.

11. The PRC form and the author of the same are a critical part of this trial, the failure of the prosecution to adduce such evidence is fatal to the prosecution's case.

12. The learned trial Magistrate erred in relying on the evidence of Harrison Karuri Macharia (PW4) and the P3 form which evidence was secondary and based on hearsay. PW4 in his statement stated that he relied on the PRC form to fill the P3 form, adding that the PRC form was filled by Leah Wangui Maina.

13. Furthermore, the evidence was mere hearsay evidence which in law is not admissible. He cites the cases of ***LK v Republic [2020] eKLR*** and ***Kinyatti v Republic Cr. Appeal No. 60 of 1983 (CA)*** and ***Article 50(4) of the Constitution*** states that:

"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of the evidence would render the trial unfair, or would otherwise be detrimental to the admiration of justice."

14. The learned trial Magistrate erred in relying on the evidence of PW2 the Complainant which evidence did not support the particulars of the charge sheet that the Appellant caused his penis to penetrate the vagina of the Complainant. All the Complainant said was that the Appellant beat her private parts and nothing more.

15. She did not mention the Appellant removing her clothes and his clothes and that the Appellant used his penis to penetrate her vagina and the court thus relied on assumption in arriving at the conclusion that she was defiled.

16. The learned trial Magistrate erred in failing to conduct a voire dire on the Complainant (PW2). He cites the cases of ***Peter Wahome v Republic [2018] eKLR*** and ***Johnson Muiruri v Republic [1983] KLR 445***.

17. The learned trial Magistrate erred in finding that the Appellant had positively identified as the perpetrator. He cites the case of ***Nicholas Kipngetich Mutai v Republic [2020] eKLR.***

18. The learned trial Magistrate erred in failing to find the evidence on record was insufficient and unreliable to sustain a conviction and in proceeding to convict the Appellant.

19. The learned trial Magistrate erred in convicting the Appellant on uncorroborated evidence of the Complainant and failing to warn herself as per the law.

20. Trial Magistrate erred in law and in fact by meting excessive sentence in the circumstances. If the Appeal on conviction should fall, then we urge the court to set aside the life sentence issued against the Appellant. The distinguished Judge in determining whether the substitute the life sentence of the Petitioner with a less excessive punishment quoted the case of ***Morris Mukhebi Muhanya v Repubic [2020] eKLR.***

ISSUES, ANALYSIS AND DETERMINATION:

21. 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."***

22. 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.

23. After going through the evidence and the submissions on record, I find the issues are;

> ***(a) whether the ingredients of offence charged were proved beyond reasonable doubt?***
>
> ***(b) And Whether the sentence awarded was excessive?***

On the age of the Complainant:

24. The Complainant PW2, did not know her age at the time she testified on 9th March, 2020. Her mother, PW1, however, testified that the Complainant was 4 years old though she did not have her birth certificate.

25. It ought to be noted that in determining the age of the Complainant, it is imperative that the prosecution establishes the age of the Complainant with the best possible evidence which is a birth certificate, birth notification, an immunization card or in some instances a baptismal card issued shortly after the birth of the child.

26. However, where the best evidence is not available, the prosecution can rely on other documentary evidence such as medical report and the P3 form (see ***Rule 4 of the Sexual Offences Act (Rules of Court) 2014).*** As noted by the Court of Appeal in the case of ***Dennis Abuya v Republic, Cr. Appeal No. 164 of 2009,*** frowns upon such estimates as conclusive proof of one's ages; the rationale appears to be that considering the severity of the sentences prescribed for offences under ***Section 8(1) of the Act,*** there must be some substantial proof that would leave no doubt in the mind of the court of the victim's age.

27. The trial court held

> ***"I have seen the Complainant's P3 form (P-Exhibit 2) which was filled by H.K. Macharia on 22nd August, 2019 at page 3 where he estimates the age of the complainant to be 4 years at the time of the alleged offence of defilement. It is therefore the finding of this court that on the foregone evidence, the age of Complainant at the alleged time of the commission of the heinous act on her was 4 years old."***

28. This court agrees with trial court as it was also the court which saw the child itself. The holding was justified.

On the issue of penetration of the Complainant's private parts:

29. ***Section 2 of the Sexual Offences Act*** defines penetration as:

> ***"The partial or complete insertion of the genital organs of a person into the genital organ of another person."***

30. This position was fortified in the case of ***Mark Oiruri Mose v Republic [2013] eKLR*** which the Court of Appeal stated that:

> ***"……Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need to be deep inside the girl's organ….."***

31. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long as there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated. In demonstrating this particular ingredient of the offence the complainant had the following to say:

> ***"……..I know the appellant person sitting there as Kangogo. He comes to visit us at our home many times. Kangogo told me to remove my trouser and then he beat me up and told me not to tell Mum. I cried when he beat me up and I screamed. We were in the farm when he beat me up. He did beat me up here (points at the front part of her private part). I do not know what he***

used to beat me up with. He then took me to the farm. He did not take me back home for I went there alone. No one else has ever beaten me there, only him. I told Mum who had beaten me there was Kangogo……"

32. The Complainant's mother (PW1) testified that on 9th August, 2019 she sent the Complainant to the neighbor's home to stay with the children there as she went to collect firewood but the complainant returned immediately and informed her that there were no children there.

33. It was then she sent her to her mother-in-law's house but then the Complainant returned while crying saying her grandmother was not there. She hid from her as she walked with other children as the appellant remained behind but after a short distance she heard the Complainant screaming. She further testified that she asked the children to go back home and soon thereafter the Complainant stopped screaming and she thought that she had stopped following them.

34. She returned home with the firewood, cooked food and when she went to call the Complainant, she still found her crying so much but she thought it was because she had left her behind. After they ate, the Complainant told her she had pain in her private parts but again, she never paid much attention to her. When she went to bathe the complainant, she noticed sperms in her panty and also a crack in her private parts.

35. This caused her to ask the Complainant what was going on and it was then she told her the appellant had removed her trouser in the farm. In the company of her in-law, they went to confront the appellant, they all boarded a motorbike as they went to the health centre for examination but they were referred to Karandi.

36. It was her mother and her husband who took her to Karandi for examination and she was given medication. At the station, she went to record a statement and took the Complainant's dirty panty. PW4, the clinical officer, testified that he was the one who filled the Complainant's P3 form and added that she was 4 years old and who was said to have been defiled by someone well known to her.

37. That she had stained clothes which had been left with the police and upon examination of her genitalia, it was swollen and tender, a dry discharge of the vulva and the hymen had been broken thus indicating penetration. He added that he relied on the PRC form which had been filled by his colleague to fill the P3 form and which was never produced in court as an exhibit for the one who filled it never came to court to testify and the prosecution opted to close its case without production of PRC form.

38. In his cross – examination, he stated that he did not examine the Complainant and the appellant's name was never recorded in the medical documents that he was the one who had defiled the Complainant.

39. However, the medical documents he had so produced and in one of which he had been involved in filling it indicated that the Complainant had been defiled.

40. The trial court took into consideration of the evidence on this issue in totality and found that there was proof that the Complainant had been defiled as evidenced by the sentiments and also the notes in the P3 form hence penetration was proved.

41. Thus penetration was proved beyond reasonable doubt.

On whether the Appellant person was the perpetrator:

42. The offence was allegedly committed during the day on 9th August, 2019 and so the issue of lighting was not disputed as the Complainant further identified the Complainant not only at the dock but also at the time of the offence and at the time she told her mother about the one who defiled her as the appellant person herein and further called him out by his name Kangogo. As quoted above the Complainant had testified as to how the appellant person was able to defile her in the farm near their home.

43. It is well settled that evidence on identification as well as recognition ought to be carefully tested so as to be free from error and that in the event any reasonable doubt is cast, the appellant person, or in this case, the appellant person must benefit there from. See the Court of Appeal case of ***Wamunga v Republic [1989] KLR 426.***

44. The evidence adduced by both the Complainant and her mother as to the identification of the appellant person was that they knew him prior to the alleged incident as a friend and also their neighbor.

45. The appellant person in his defence stated that he was a standard 8 student, something he had alleged on 19th August, 2019 when this court ordered for the age assessment to be conducted. On 23rd August, 2019 there was an age assessment report which proved that the appellant person was 18 years old thus he was treated as an adult.

46. He went further to state that on the 8th day of August, 2019 he went to pick milk at PW1's home and it was then he gave her his Itel mobile phone to charge for him and which he was to pick at 10am.

47. When he arrived back at his home, he took breakfast then went to the farm to weed but when it was 10am, he went to pick his phone and PW1 told him to return at 4pm as the same had not been fully charged. At 4pm he went back, was welcomed to eat food and when he finished eating and asked for his phone, two (2) men arrived and alleged that he had defiled a child. He was taken to Muchongoi Police Station where he was interrogated on defiling that child.

48. Whereas a court of law is always called upon to make decisions or inferences on some set of circumstances, such a court should endeavor to make such decisions or inferences on the basis of the available evidence as adduced before it and it ought to be slow in making assumptions not supported by facts as tendered before court.

49. The trial court took judicial notice that the Complainant, though a minor at the material time, gave conclusive events of what happened on the material day and although the appellant person herein denied being the assailant, they were not strangers to each other as the Complainant testified of how the appellant person used to visit their home and which was confirmed by the appellant person in his defence.

50. The totality of evidence establishes that the trial court did not err in convicting appellant with offence charged.

51. On sentence the provisions under which appellant was charged provides for sentence of 25 years where the child is between 12 and 15 years but in this case the child was 4 years where section 8(2) of the same Act provides for a sentence of life imprisonment as a mandatory sentence.

52. ***Section 382 of the Criminal Procedure Code*** provides that unless an error in the judgment has occasioned a failure of justice, the order or sentence of a court shall not be reversed. I hereby invoke the provisions of that section. The Section provides as follows:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

53. **The error being non-substantive in all respects it can be corrected without any effect on the defendant.** I so find.

54. The decision of Supreme court in ***Muruatetu Pet no 15 and 16 of 2015 on 6/7/2021*** court stated in guidelines that

> ***"these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;"***

55. Thus unless and until the provisions of section 8(2) of sexual offences Act are declared unconstitutional this court has no mandate to change same sentence.

56. Thus court makes the following orders;

> ***i. The appeal on both conviction and sentence fails and the lower court decision is upheld.***

DATED AND SIGNED AT NYAHURURU THIS 27TH DAY OF JANUARY, 2022.

.....

CHARLES KARIUKI

JUDGE