REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 11 OF 2019

PATRICK WAINAINA KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the decision of A. Mwangi, Senior Resident Magistrate,

in Criminal Case No. 1811 of 2015 at Kigumo dated 11th April 2018]

JUDGMENT

1. The appellant was convicted for *defilement* contrary to section 8 (1)(4) of the **Sexual Offences Act**. He was imprisoned for *fifteen* years.

2. The particulars in the charge sheet were that on 18th October 2015 at *[particulars withheld]* within Murang'a County, he intentionally caused his penis to penetrate the vagina of EWN *[particulars withheld]* a child aged fifteen years.

3. The petition of appeal is dated 6th March 2019. There are six grounds but which can be compressed into three. Firstly, that the conviction was based on contradictory and uncorroborated evidence of the minor; secondly, that the appellant's defence was not taken into consideration; and, thirdly, that the sentence was draconian.

4. In a synopsis, the appellant contends that the key elements of the charge were not proved beyond reasonable doubt.

5. The appeal is opposed by the respondent.

6. Learned counsel for the appellant filed detailed submissions on 15th June 2020 with a list of authorities. The respondent's submissions were filed on 26th October 2020 with annexed precedents.

7. On 1st February 2022, I heard further arguments from counsel for the appellant and the respondent.

8. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E. A. 32.

9. From the birth certificate (exhibit 4) I am satisfied that the complainant (PW1) was born on 24th February 1999. She was thus about 16 years at the time of the offence. Although the trial court conducted a detailed *voir dire* examination, it was superfluous as the complainant was *not* a child of tender years. Perhaps it did so out of an abundance of caution because the minor was attending a special school. Owing to her condition, she was declared a vulnerable witness.

10. The material part of her sworn evidence is as follows: She knew the appellant as he had ferried her mother home on his motorbike on previous occasions. The complainant referred to him a "Pati". This was evidence of *recognition*; far more reliable than simple identification. ***Wamunga v Republic*** [1989] KLR 424, ***Maitanyi v Republic*** [1986] KLR 198 at 201.

11. On the material day, the complainant was going to the *posho* mill in the company of her grandfather and her younger brother (PW2). The appellant offered to give the two children a ride on his motorbike.

12. When he reached the shopping area, he asked the complainant to take him to buy *mandazi*. It was a ruse. He pulled her into a bush,

removed her clothes, inserted a finger in her vagina, and then his penis. He then gave her some money and asked her not to disclose it to her grandfather.

13. I thus find that the appellant had a clear *opportunity* to commit the offence and was *positively identified* by the complainant. She did not waver under cross examination even when she was recalled to the stand on 20th December 2016. On my re-evaluation of her evidence, I am satisfied she was *truthful* and did not stand to gain from framing the appellant.

14. When the grandfather (PW3) finally reached the *posho* mill, he met PW2 who informed him that the appellant had led the complainant towards the bushes. He got alarmed and reported the matter to the Itaaga Administration Police Post. As he and the police headed back, they saw the appellant ferrying another passenger and arrested him.

15. PW2 claimed he saw the appellant removing the complainant's clothes. I have kept in mind that PW2 was aged about 9 at the time of the incident and 11 at the time he gave evidence. After the *voir dire* examination, he gave sworn evidence. He informed his grandfather that the appellant had led the complainant towards the thicket. Again, PW2 weathered cross examination when he first testified and on his recall for further cross examination. He was emphatic that he saw the appellant undressing the complainant.

16. I am alive that when the learned trial magistrate visited the scene on 28th February 2018, the bushes and grass had been cleared. But she observed on the record, that the *"place can possibly be discreet as the lower part of the farm is a distance from the nearest house"*.

17. PW4 was Police Corporal Gitau. His evidence did not cast much light. He was the arresting officer. He said that he got a call from Itaaga AP Post that they had detained the appellant. He went there and re-arrested the suspect.

18. The examination by the clinical officer (PW5) the following day revealed no tear or laceration. The hymen *"was broken, it was old and not fresh"*. There was also no evidence of spermatozoa. That is why the appellant submitted that there was no corroboration.

19. I have then juxtaposed that evidence against the defence. The appellant's case in the lower court is that he had a grudge with PW3 dating back to 2015. He said that PW3 framed him up. He cast doubt on the evidence on a number of fronts: Firstly, that the complainant's father did not testify; secondly that the key witnesses were family members who colluded to bring false charges; and, thirdly, that the offence was not proved.

20. I note that the details of the grudge were not given even under cross examination. I am also at a loss why two children (PW1 and PW2) would frame the appellant. Furthermore, the appellant conceded that he ferried the complainant and her brother to the *posho* mill and left their grandfather behind. He was thus placed squarely at the *locus in quo*.

21. It is true that PW1, PW2 and PW3 were close family members. However, under section 143 of the **Evidence Act**, no particular number of witnesses is required to prove any particular fact.

22. Lastly, the trial court in its judgment dealt with the appellant's defence and submissions and reached the conclusion that the defence was a sham. I concur in that finding. It is thus *not* true that the appellant's evidence or submissions were disregarded.

23. 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 organs of another person"*.

24. I find from PW1's evidence that the appellant *penetrated* her. True, it was evidence of a child and was not corroborated by medical evidence. But under the proviso to section 124 of the **Evidence Act**, where the victim of a sexual offence is the complainant, corroboration is *not* mandatory if the court is satisfied that the witness was truthful. As I stated at paragraph 13, I am satisfied that the complainant was *truthful*.

25. I am unable to say that the evidence of PW1, PW2 and PW3 was contradictory. There were minor and immaterial discrepancies which are bound to arise in any trial. See ***Joseph Maina Mwangi v Republic***, Court of Appeal, Criminal Appeal No. 73 of 1993, ***Richard Munene v Republic***, Court of Appeal, Nyeri, Criminal Appeal No. 74 of 2016 [2018] eKLR.

26. I thus find that the conviction for defilement was *safe*. The appeal against conviction is accordingly *dismissed*.

27. I will now turn to the sentence. Section 354 (3) of **Criminal Procedure Code** empowers this court to *review* the sentence. The complainant was about 16 at the time of the offence. The trial court correctly found that section 8 (4) of the Act provided for a *mandatory* sentence of 15 years. However, the Court of Appeal has given fresh guidance on *minimum sentences* under the **Sexual Offences Act**.

28. In ***Jared Koita Injiri v Republic*** [2019] Court of Appeal, Kisumu, Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

> *In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by* ***section 8 (1)*** *of the* ***Sexual Offences Act****, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.*
>
> *The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.*

> *Needless to say, pursuant to the Supreme Court decision in* ***Francis Karioko Muruatetu & Another vs Republic*** ***(supra)****, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.* [Emphasis added]

29. I accordingly *set aside* the sentence. I have considered that the appellant is a first offender. The appellant shall now serve a term of *seven (7) years imprisonment*. For the avoidance of doubt, the new sentence shall run from 11th April 2018, the date of the original conviction

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 24TH DAY OF FEBRUARY 2022.

KANYI KIMONDO

JUDGE

JUDGMENT READ IN OPEN COURT IN THE PRESENCE OF-

THE APPELLANT.

MS. NJUGUNA HOLDING BRIEF FOR MR. WAWERU FOR THE APPELLANT INSTRUCTED BY WAWERU NYAMBURA & CO. ADVOCATES.

MS. A. GAKUMU FOR THE RESPONDENT INSTRUCTED BY THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.

MS. SUSAN WAIGANJO, COURT ASSISTANT.