



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANGA**

**CRIMINAL APPEAL NO 50 OF 2019**

**FRANCIS MAINA NGATIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and sentence in Kandara Senior Principal Magistrate**

**SO No 50 of 2017 R vs Francis Maina Ngatia)**

**JUDGEMENT**

1. The appellant was charged, tried and convicted of the offence of defilement contrary to section 8(1) of the Sexual Offences Act No 3 of 2006, the particulars of which were that on 31<sup>st</sup> day of December 2016 to August 2017 at [Particulars Withheld] shopping centre in Kandara sub county within Muranga county, intentionally caused his penis to penetrate the vagina of TWN a child aged 17 years.

2. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal:

- a) the trial magistrate erred in law and fact by his failure to consider, evaluate and make a finding on his defence
- b) his identification was not proper
- c) the trial court shifted the burden of proof to the appellant
- d) vital evidence was withheld by the prosecution, the benefit of which should have been accorded to him
- e) the prosecution was not proved to the required degree.

3. When this Appeal came up for hearing, the appellant who was unrepresented filed in written submissions which he relied upon, while the State through Ms Otieno opposed the appeal and made oral submissions thereon.

**SUBMISSIONS**

4. It was the appellants contention, that the age of the complainant was not proved through the production of the birth certificate, which according to the appellant was fatal to the prosecution and that the document produced had no probative value and could not be relied upon to sustain a conviction, in support of which the case of ELIUD WAWERU WAMBUI v REPUBLIC [2019] e KLR was relied upon, wherein the Court of Appeal stated that in offences of this nature the age of the complainant must be proved to the required standard, beyond reasonable doubt.

5. It was contended that whereas the pregnancy of the victim was not disputed, it was for the prosecution to prove that the pregnancy was due to the appellant defiling the complainant so as to corroborate the evidence of the complainant's father, grandmother and the Doctor.

6. It was submitted that his identification or recognition was compromised and therefore the provision of section 26 of the sexual offences Act should have been utilized by the court in ordering for DNA test which would have linked him to the offence. It was contended that this was not a case where the complainant's sole evidence could have been relied upon as provided for under section 124 of the Evidence Act since she had given a different name to the police, in support of which the case of PETER MUTIRIA MITAMBO vs REPUBLIC [2016] e KLR where the court stated that.... "it is clear from the proviso that when corroboration is not required in sexual offences is when the only

available evidence is that of the alleged victim.

In my view, the use of the words only evidence means that if there is other evidence that is available, such evidence must be tendered to corroborate the evidence of the victim of a sexual offence just like in all other criminal cases”.

7. He finally submitted that the court should alter the nature of his sentence from being custodial to non-custodial for the remainder period since he had exhibited good conduct while serving sentence and had gained vocational skills and therefore the objective of the sentence should be rehabilitation.

8. On behalf of the prosecution Ms Otieno submitted that the age of the victim was proved through the production of her birth certificate to be 17 years old and that the pregnancy was proof of penetration which was corroborated by the evidence of PW5 through the production of P3 form and that the appellant was positively identified through an identification paraded which was conducted upon the arrest of the appellant. It was therefore submitted that the prosecution case was proved beyond reasonable doubt.

## **PROCEEDINGS**

9. This being a first appeal, the court is under a duty to re-evaluate the evidence tendered before the trial court and to come to its own conclusion, thereon while taking into account the fact that unlike the trial court, it did not have the advantage of seeing and hearing witnesses See OKENO V REPUBLIC.

10. PW1 TWN a minor aged 17 testified on oath that on 31/12 / 2016 at 6.30 pm she met the appellant who was then a Boda Boda operator as she was leaving church and he offered to give her a ride home which she accepted. The following Sunday he again picked her up but this time took her to [Particulars Withheld] Guest House where he removed her clothes and defiled her. He then took her near home and gave her Ksh 200.

This then became their Sunday activities until 13<sup>th</sup> October 2017 she told one of teachers that she was pregnant, who then gave the information to her sister.

11. She then told her father that she had been impregnated by a Boda Boda guy since at that time she didn't know the appellants name. In cross examination, she stated that the Glory Guest house was about 200 meters from where the appellant used to operate and he would leave his motor bike at the stage then walk into the guest house.

12. PW2 TWN, the grandmother of the victim testified that sometimes in the month of September 2017, the same said she would not go to school since she was sick. She was then referred to the hospital where it was confirmed that she was pregnant, she then took her to the stage where she pointed out the appellant, who thereafter offered ksh 30000 as compensation which she declined to accept. She stated that the victim gave birth on 21/5/2018. In cross examination, she stated that the appellant was known as Wamasaa and that he offered to buy clothes for the child which he didn't.

13. PW3 PNN, the victim's father stated that she was born on 16/6/ 2000 and upon the victim being v=confirmed to be pregnant, he went to the stage where he requested him to ferry him to the D Cs officer where he was arrested. In cross examination he stated that he did not know the appellant and that the appellant had gone to his home with another man where he offered to pay compensation.

14. PW4 PC MARY WANGARI received the report at the station on 30/10/2017 and recorded the statements. She referred the victim to hospital where p3 form was filed and that the victim told her that the appellant was a rider opposite the DCs officer from where he was identified and arrested

15. PW5 MARTIN KSARIUKI MWANGI a clinical officer produced the P3 Form and treatments notes on behalf of Dr Kimani which confirmed that the complainant was pregnant.

16. When put on his defence, the appellant gave unsworn statement and stated that on 14<sup>th</sup> July 2017 a customer requested him to ferry him to the DC s office, where he refused to pay the fare and stated that he had defiled his daughter and that the victim stated that he was not the person who had defiled her and that he later found the person and went with him to the victim's home where he gave them clothes

## **DETERMINATION**

17. From the proceedings herein and the submissions, the following issues have been identified for determination

- A. Whether the appellant was positively identified as the perpetrator ‘.
- B. Whether the prosecution case was proved to the required degree
- C. Was the sentence lawful
- D. What order should the court issue

18. The appellant from the evidence on record had formed the habit of picking the victim every Sunday on her way from church and taking her to the guest house where he repeatedly defiled her until she become pregnant. Whereas there was dispute as to what his name was, the fact that he became known to the victim was not disputed, as confirmed by the fact that she was able to pick him out at the stage when she

took PW2 to the stage.

19. The appellant identification was s\urther corroborated through the evidence of PW2 whose evidence was that the same went to her home where he attempted to negotiate a settlement in the company of one Stephen, which evidence the appellant corroborated in his defence.

20. It therefore follows that the appellant was properly identified and his identification was free from error and find no fault with trial courts determination thereon.

21. On proof of the prosecution case, the fact that the victim became pregnant was adequate proof of penetration and the fact that DNA was not conducted to prove paternity of the child, was not fatal to the prosecution case the appellant having been positively identified and the age of the victim proved through the production of her birth certificate. I therefore find and hold that whereas this was sexual offence which requires no corroboration, the victims evidence was adequately corroborated through the evidence of the prosecution witnesses and therefore the appellant's submission on lack of corroboration, has no merit and is dismissed.

22. On sentence, whereas the appellant submitted that he is entitled to non –custodial sentence under the provision of the Community Serve Order, having been charge with an offence under sexual offences Act, which is excluded from the provision of the Act, it logically follows that the sentence passed herein was lawful and will not interfere with the same.

23. In the final analysis, I find no merit on the appeal herein both on conviction and sentence which I hereby dismiss and affirm the judgement of the trial court.

**DATED, SIGNED and DELIVERED AT MURANGA THIS 21<sup>st</sup> DAY OF APRIL 20022**

**J. WAKIAGA**

**JUDGE**

In the presence of:-