**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 34 OF 2019**

**JAMES NGIGE KURIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal on sentence from the judgment and/or decree of Honourable E. Kelly (P.M) dated at Nakuru Chief Magistrates Court Criminal Case No.94 of 2016 on 4th April 2019)**

**JUDGMENT**

1. The appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on the 5th and 6th May 2016 at Umoja II Estate in Lanet within Nakuru County, intentionally and unlawfully committed an act by inserting his male genital organ namely penis into the genital organ namely vagina of **XY** a child aged 16 which caused penetration.

2. The alternative charge is of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on the on the 5th and 6th May 2016 at Umoja II Estate in Lanet within Nakuru County, intentionally and unlawfully committed an indecent act with **XY** a girl aged 16 years by touching the vagina with his penis.

3. The appellant denied the charges and the case proceeded for full trial. The prosecution called 6 witnesses in support of their case and accused also availed 6 witnesses. By the judgment delivered on 31st October 2017, the lower Court found the appellant guilty of the main charge, convicted and sentenced him to 15 years' imprisonment.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, he filed this appeal through a Petition of Appeal dated 13th of November 2017 and challenged the conviction and sentence on the following grounds: -

> *i. The learned trial magistrate erred both in law and in fact by failing to consider the conflicting and contradictory nature of prosecution evidence.*
>
> *ii. The learned trial magistrate erred both in law and in fact by failing to consider that the prosecution failed to prove that penetration was by the appellant.*
>
> *iii. The learned trial magistrate erred both in law and in facts by failing to note that the medical evidence adduced did not corroborate the complainant's evidence.*
>
> *iv. The learned trial magistrate erred in law and in fact when she overlooked and dismissed the appellant's defence without offering any cogent reasons yet the same was remarkably comprehensive in casting considerable doubts to the strength of the prosecution's case;*

5. The appellant also filed supplementary grounds of appeal as follows: -

> *i.That the learned trial magistrate erred in law and in fact in convicting the appellant irrespective of having wrongly interpreting or applying the principles applicable to the defence of alibi led to the conviction of the appellant thus occasioning a miscarriage of justice.*
>
> *ii.That the learned trial magistrate erred in law and in fact in convicting the appellant irrespective of the prosecution not having failed to objectively applying the provisions of* ***Section 169(1) of the Criminal Procedure Code, Cap 75 Laws of Kenya.***

*iii.That the learned trial magistrate erred in law and in fact in failing to note that the testimony and narration of the events leading to the alleged defilement by the complainant was doubtful that if viewed objectively and keenly leads to a revelation that such an event or offence could not have taken place in the manner portrayed by the complainant.*

*iv.That the learned trial magistrate erred in law and in fact in failing to note that investigations had not been sufficiently carried out as to pinpoint that it was the appellant with or without the involvement of other persons that defiled the complainant.*

6. The state opposed the appeal both on conviction and sentence. The defence counsel filed written submissions while the state counsel opted to make oral submissions.

**APPELLANT'S SUBMISSIONS**

7. The appellant submitted that he was not at the scene where the complainant was defiled; that he never met nor defiled the complainant. The appellant submitted that the trial Court wrongly made a finding. The accused had brought defence of *alibi* after the prosecution's case was closed and cited the case of **Kimotho Kiarie Vs Republic (Nbi Criminal Appeal No.93 of 1983)** where the Court of Appeal held that it is a grave omission to reject the defence of *alibi* for unrevealed reasons.

8. The appellant further submitted that it is trite law that it is the prosecution that has the burden of disproving the defence of *alibi* and secondly, the Court did not rely on disapproval by prosecution of the defence of *alibi* raised by the appellant and that the Court wrongly rejected defence of *alibi* by stating that it was raised during defence; and basing the reasoning that there was no proof that water pumps had been purchased and DW3 was the wife of the appellant.

9. The appellant submitted that the fact that DW3 was the wife of the appellant is revealed by PW2 during examination in chief where she stated that she and the complainant were in the appellant's house and they held conversation with the appellant's wife. That PW1, PW2 and PW3 had knowledge that the appellant had a wife and that it was the evidence of DW3 that on the nights of 5th, 6th and 7th the appellant was in his house and allegations that he defiled the complainant during the period are wild allegations.

10. The appellant further submitted that he produced records showing that he purchased water pumps as he was engaged in repair of pumps and household services.

11. Further that **Section 309 of the Criminal Procedure Code** provide that if the accused raises defence of *alibi* at the defence stage, the Court may allow the prosecution to adduce evidence in reply to rebut it.

12. The appellant cited the case of **Victor Mwenda Mulinge Vs Republic** where the Court of Appeal restated the holding in the case of **Karanja Vs Republic [1983] KLR 502** where the Court held that the burden of proving falsity of defence of *alibi* lies on the prosecution and that if accused adduces evidence in his defence introducing new matter which the Advocate for the prosecution could not have foreseen, the Court may allow the Advocate for the prosecution to adduce in reply to rebut it. The Court found the conviction unsafe.

13. The appellant submitted that following the above, the prosecution is inclined to call tenants of neighbouring houses where the alleged defilement took place; call evidence to disapprove that DW3 was not a wife to the appellant and summon the author of receipt produced as exhibit; and without doing that, the Court was on its volition to disregard the defence evidence. The appellant urged the Court to find that the defence of *alibi* was improperly rejected.

14. The appellant further submitted that the provisions of **Section 169(1)** were violated by omitting objective analysis of points for determination; that the defence of *alibi* was not considered.

15. The appellant argued that the trial Court failed to take note of the fact that the prosecution case was marred with doubtful testimony and clear revelation that the appellant was being fixed either for something that did not occur and if it occurred it was done by someone else and picked on some statements of PW1. The appellant submitted that the two girls whom the complainant stated that they allegedly took her to a party which turned out to be a one roomed house where accused was, was not arrested and prosecuted neither was one called **Sammy** a cousin to accused was arrested and prosecuted. The appellant submitted that it is not clear whether the 2 girls who allegedly organised the crime acted on instructions of the accused but they played a big role by taking the complainant to the room and parting the complainant's legs to allow the accused defile her; that if the two girls and the said Sammy were arrested; they would have given information which would have tilted the prosecution case. The appellant cited that case of **Cliff Macharia Njeri Vs Republic Nbi HCCR. Appeal No 67 of 2012** where the Court held that failure to avail certain evidence means if the evidence were availed would have been fatal to prosecution case. The appellant submitted that the trial Court was required to established the truth; whether the complainant met the two girls and whether, they took her to a house where she was defiled.

16. The appellant further submitted that the controversy over the appellant's name cannot be wished away; that the complainant said she knew accused as **Peter Mwangi** while PW3 knew him as **Karanja** and the girl's mother said accused told her he was **Paul Mwangi** but she heard people call him Karanja.

17. The appellant further submitted that the first report made did not tally with evidence adduced in Court by PW1; that the names of the 2 girls were not mentioned in the report, that the party was not mentioned; that Sammy who is alleged to have defiled the other 2 girls is not mentioned and how long the incident took place; when the girl returned home.

18. The appellant finally submitted that no incident took place; from visit to the scene by PW4, she learnt from the landlord that the occupant of the room shifted 2 weeks before the visit and the accused having been arrested on 9th June 2016, the visit to the room could have been around that time which is 3 days from the date of the incident. The appellant urged this Court to allow this appeal and quash the conviction.

**SUBMISSIONS BY RESPONDENT**

19. The state counsel **Ms. Rotich** submitted that the age of the complainant was proved as the evidence of the complainant was corroborated by her mother's evidence and health card produced in Court.

20. On the issue of identification, she submitted that PW1 stated that she knew the accused having seen him severally and gave his name as **James Ngigi**; that she had seen him on her way to school and also clearly saw him at the time of the incident as she met him at 6.20 pm; further that the incident occurred at accused's house where light had been put on. Further that on the material day PW3 saw accused carrying the complainant with a motor bike.

21. On penetration she submitted that the complainant testified that the accused defiled her first in the vagina and later the anus and that he did the same severally; and complainant was treated at Nakuru provincial general hospital where the doctor confirmed that she was defiled and emergency contraceptives for pregnancy were given to her. She further stated that the doctor noted presence of spermatozoa. She submitted that P3, PRC and laboratory request were produced in Court as exhibits.

22. In a rejoinder **Mr. Maragia** for the appellant submitted that the complainant went to the police station after 3 days; that she was with the mother when the incident was reported but nowhere was the accused mentioned; that it is not true that she reported the next day. He submitted that from OB 9/9/206, the neighbours and landlord were interrogated and they never identified the accused and further that there had not been any one in the house for 3 weeks and if the lights were on as the complainant said, the neighbours would have known that there was someone in the house; that the complainant chose the accused as scapegoat; and on evidence that PW2 identified the accused, he questioned why she never mentioned his name to police when she went to report with complainant on 14th. He submitted that the accused may have been mistaken and that the Court rejected his *alibi* saying it was not proved; further that if Court say DW3 was not accused's wife it should be based on reasons. He submitted that it was for the prosecution to disapprove the *alibi*. He urged Court to re-evaluate evidence adduced.

**ANALYSIS AND DETERMINATION**

23. This being the first Appellate Court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first Appellate Court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"The first Appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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.)"**

24. In view of the above, I have perused proceedings before the trial court and also considered submissions by the parties herein. There is no doubt that the complainant was defiled. This was confirmed by the medical report filed. There is also no doubt the complainant was aged 16 years old. The health card produced confirmed her age. The authenticity of the document was not challenged and it being an official government document, the age of the complainant was therefore proved beyond reasonable doubt. I consider the following to be in issue: -

> **i. Whether the appellant was positively identified and whether appellant's evidence of *alibi* was properly rejected.**
>
> **ii. Whether sentence imposed was harsh and excessive.**

**i. Whether the accused was positively identified & Whether appellants evidence of alibi was properly rejected.**

25. The two issues above are interconnected as the accused's argument is that he was not at the scene and never defiled the complainant while the complainant's evidence is she identified him as the person who defiled her and was therefore at the scene. If the Court were to find that the accused was not positively identified, then properly he was nowhere near the scene.

26. The complainant in her testimony stated that she knew the appellant as **James Ngige** and that he used to time her on the way from school and had made attempts to seduce her; the assertions by complainant were corroborated by her cousin PW3. She further stated that two girls invited her to go with them for a party at around midday as she came from church; she joined the girls who led her to a house and called some boys who included the accused.

27. The complainant further stated that while in the house the two girls held her legs apart as the accused inserted his penis into her vagina after wearing a condom. She mentioned the time as 6. 20p.m. there is no doubt that at 6.30 p.m. There is still exist natural light which can enable a person see and identify another. Further to that, the complainant said she remained in the house up to the next day.

28. From her evidence, she remained in the house with the accused. This therefore gave her sufficient time to identify the accused. She said the 2 girls had lied to her that there was a party. She mentioned the names of the 2 girls to the investigating officer however indicated that it proved difficult to trace the two girls. Evidence show that the two girls were accessories before the act and in my view the fact that they were not arrested and prosecuted do not absolve the appellant from the offence.

29. On the issue of giving police accused's name at the time of reporting, the complainant explained that the accused had lied to her about his name first by saying he is **Peter Mwangi**.

30. In respect to defence of *alibi*, the accused said that he was called by PW2 to chase bats which were troubling her in her roof. PW2 however testified that appellant left her house at 5 pm. The complainant said the accused went to the house where he defiled her at around 6.20pm. His whereabouts after leaving PW2's house is not properly explained. The wife DW3 never explained accused's whereabouts after 5 pm but stated what happened the next day in the evening; she said accused went to the shopping centre the next day to fix water pumps and came back in the evening. She never explained what time the accused went to the shopping centre.

31. PW5 said he was not with accused on 5th but was with him for one hour on 6th June 2016. From evidence adduced by accused and his witnesses, the evidence of accused's whereabouts were sufficient to lead to a finding that remove the accused completely from the scene of the crime.

32. From the evidence adduced there is no doubt that the complainant had sufficient time to know the person who defiled her. Even if the names varied, she physically had enough time with the accused and at the age of 16 years there is no doubt that after that length of time with accused he identified him. From the foregoing I find that the appellant was positively identified as the person who defiled the complainant.

**ii. Whether sentence imposed was harsh and excessive.**

33. **Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006** under which the appellant has been charged provide for a minimum sentence of 15 years. He was sentenced to the minimum 15 years' imprisonment.

34. The Supreme Court in case of **Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR**, declared unconstitutional the mandatory nature of sentence as it takes away the discretion of judicial officer in imposing sentence and renders mitigating factors of specific cases superfluous. I note that the appellant in mitigation prayed for leniency and stated that he is relied on by his widowed mother and family. Pre-bail bail report that the trial magistrate called for before sentencing did not reveal any negative information concerning the appellant. The report indicated his mother is elderly and sickly and that he has a sickly child.

35. In view of the above I find it appropriate to set aside the minimum sentence imposed and sentence the appellant to 5 years' imprisonment.

36. **FINAL ORDERS**

1. **Appeal against conviction is dismissed.**

2. **Appeal against sentence is allowed**

3. **Sentence reduced to 5 years' imprisonment to run from the date it was imposed by the trial court.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 24TH DAY OF FEBRUARY 2021**

**……**

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola/Jeniffer - Court Assistant

Appellant Present

Rita Rotich for state