REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. E003 OF 2020

WITNICK AROGO ONGORO.....APPELLANT

-VRS-

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. W. C. Waswa (Mr.) – RM

Nyamira dated and delivered on the 29th day of September 2020 in the original Nyamira

Chief Magistrate's Court Sexual Offence No. 48 of 2020}

JUDGEMENT

The appellant was charged with, tried, found guilty and convicted for the offence of **defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act**. He was subsequently sentenced to life imprisonment.

The particulars of the offence were that on 28th June 2020 at [Particulars withheld] Sub-location in Nyamira South Sub-county within Nyamira County the appellant intentionally and unlawfully caused his genital organ to penetrate the genital organ of RBN a child aged three years.

In his petition of appeal filed herein on 13th October 2020 the appellant has raised the following ten grounds: -

> **"1. That my lord the learned trial magistrate erred in both law and facts to erroneously convicted and sentence accused out of pre brutal allegation emanated out of employment grudge.**
>
> **2. That your lordship, the learned trial magistrate faulted in both law and points to have passed life imprisonment on unproved case since police investigation was perfidious that could not give credible evidence to warrant such embrassing (sic) life sentence.**
>
> **3. That your lordship the trial learned magistrate equally failed in both law and facts to passed life imprisonment without warning himself that my fundamental rights were grossly violated for I did case minus witnesses statements to enable me prepare my defence.**
>
> **4. That my lord the learned trial subordinate further faulted in both law and facts, to relied on treacherous allegation without realizing that there was no any forensic test or DNA conducted to link accused to this case.**
>
> **5. That my lord, the subordinate court failed in both and facts to have relied on conspiracy frame ups there made by only family member in order to cover my salary I was demanding.**
>
> **6. That my lord, the learned trial magistrate convicted and sentenced accused assuming his strong grudge of salary between the mother of the accused stated that she was 3 years.**
>
> **7. That my lord the learned trial magistrate only took advantage of me not having advocate to defend me on this rebuttal allegation.**

8. The court your lordship to discover that the evidence before court was out of family coaching to gain false LIFE imprisonment.

9. That my lord, lite imprisonment is not only embarrassing, but equally degrading for a propaganda made to cover ray salary from the complainant mother.

10. That it is my fervent clamor for my appeal be admit, for me to heard once me in order conviction set aside, life sentence, be quashed for me to be set free."

The appeal which is vehemently opposed was canvassed by way of written submissions.

In summary the appellant submitted that he was framed so as to silence him and to stop him from demanding a debt owed to him by the complainant's family for brewing chang'aa for them. He contended that the complainant was coached to fabricate evidence against him and stated that his conviction was not safe. The appellant further submitted that the evidence of the prosecution witnesses was contradictory and inconsistent and pointed out as an example the evidence of the clinical officer Joel Ongaro (Pw1). He contended that whereas this witness alleged to have admitted the complainant on 26th June 2020 he then alleged to have examined her on 29th June 2020. The appellant contended that this creates doubt on the credibility and qualifications of the witness and described his testimony as cooked up and misleading. He urged this court to treat Joel Ongaro (Pw1) as an untrue witness and dismiss his evidence. The appellant also alleged that he was compelled to carry on with the case without being given witness statements as is his right. He contended that his rights guaranteed under **Article 50 (2) (c) (j) (k) (3)** and **(4)** of the **Constitution** were violated by not being given enough time and facilities to prepare for the trial and stated that he complained to the prosecutor but his request was denied. The appellant further submitted that the trial Magistrate did not record all his statements and questions as he did for the prosecution and stated that for that reason he did not trust the judgement. The appellant pointed out that the evidence of the complainant's mother (Pw2) was that she was not at home when the offence was committed and hence did not know who the perpetrator was. He pointed out contradiction between the evidence of the complainant's mother (Pw2) who stated that she took the child to hospital at around 5pm on 28th June 2020 and the clinical officer. The appellant wondered why he was not arrested until 30th June if indeed Pw2 had seen him cutting timber in a nearby house. He contended that this was so as to confuse the relevant authorities from carrying out dependable and transparent investigations. Regarding the testimony of the investigating officer (Pw6) the appellant stated that she only relied on witness statements but did not carry out independent investigations or even visit the scene. He contended that the investigation was shoddy, baseless and of no value. He contended that the prosecution's case was full of doubts which doubt ought to go to him. He cited the case of **Peter Kunguus v Republic Nyeri Criminal Appeal No. 66 of 2006** (citation not given). He urged this court to analyze and evaluate the evidence to test if it was credible and consistent.

Regarding the sentence, the appellant submitted that the same was manifestly oppressive and extra expensive (sic). He submitted that it was inhuman given that he did not commit the crime. He stated that he still maintains his innocence and contended that this was a well-organized frame up by the complainant's family to evade paying his debt. He urged this court to allow the appeal, quash the conviction, set the sentence aside and set him at liberty.

In opposing the appeal, Senior Prosecution Counsel Majale submitted that the key elements of the offence of defilement were proved beyond reasonable doubt and that the conviction was safe and the sentence just. He submitted that the appellant's contention of a pending employment grudge was not raised at the trial and the same is an afterthought. Counsel further submitted that the appellant confirmed he was supplied with witness statements and the trial was not therefore an ambush. He urged this court to find that the evidence of the victim was well corroborated. He submitted that the appellant was not a stranger to the complainant but was well known to her. Counsel drew the attention of this court to **Section 124 of the Evidence Act** which allows the court to convict on the evidence of the victim alone in offences of this nature. Counsel submitted that the appellant's defence did not shake the cogent case put forth by the prosecution witnesses and that the said defence was a mere denial which does not create any doubt on the prosecution's case and hence the appeal should be dismissed.

I have considered the rival submissions carefully. As the first appellate court my duty is to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses – ***(See the case of Okeno v Republic [1972] EA 32).***

The key elements of the offence of defilement are: -

1. That the victim is a child and her age as the sentence to be imposed depends on the age of the victim.

2. Proof of penetration.

3. The identification of the accused person as the perpetrator.

A child health monitoring card which was produced as proof of age establishes that the complainant was born on 24th November 2016. She was therefore only three years and some months when the offence was committed and she was a child as defined in the Constitution and the Children Act.

Penetration was also proved beyond reasonable doubt both by the witnesses called by the prosecution and by documentary evidence. The child's mother (Pw2), aunt (Pw3), sister (Pw4) and the child herself testified that she was penetrated in her genital organ and anus. She was bleeding when her sister (Pw4) also a child found her in their house. Pw4 took her to their aunt (Pw3) as their mother (Pw2) was away. Pw3 corroborated Pw4's evidence that the child was bleeding in the genitalia. So did Pw2 who stated that she arrived home as Pw3 was preparing to take the child to hospital. This was further corroborated by the medical evidence adduced by the clinical officer (Pw1) who stated that the child had lacerations on the labias and bruises on the anal region. He concluded that the child was defiled and sodomised. The P3 Form, the discharge summary and outpatient card which were produced as Exhibit P1, P2 and P4 all attest to this. I am therefore satisfied that penetration was proved beyond reasonable doubt. I note from the evidence that the clinical officer (Pw1) contradicted himself by stating that

he admitted the child on 26th June 2020 yet all the other evidence points to the child having been defiled on 28th June 2020. My finding however is that this must have been an error on the part of the clinical officer since it is clear from the evidence that the child was first taken to the hospital on 28th June 2020. This fact is confirmed by the outpatient card (Exhibit P2). The date on the P3 form is the date on which the child was taken back for purposes of completing the P3 form. Pw1 may have been misled by the date of admission in the discharge summary. I am however of the view that the same was a typographical error which is not fatal as it is curable under **Section 214 (2) of the Criminal Procedure Code**. Having found that penetration was proved beyond reasonable doubt the next issue for determination is whether the appellant was positively identified as the perpetrator.

The complainant was alone when she was defiled. Her sister Pw4 had left her sleeping and gone to their grandmother's house. It was after Pw4 returned that she found her in the bed crying. Pw4 told the court that the complainant told her that Saisi (meaning the appellant) had inserted his penis into her vagina and anus. At the hearing the child pointed to her vagina and anus as the place where Saisi inserted his "dog" meaning penis. Rose (Pw3) confirmed Pw4's evidence that she took the complainant to her and was preparing to take her to hospital when their mother (Pw2) arrived and took over from her. Both Pw2 and Pw3 confirmed that the child told them that it was Saisi that did that to her. They all identified the appellant as the person known as Saisi. They confirmed that the appellant was well known to the child as he used to go to their home often. The appellant himself admitted that he used to frequent that home. I am satisfied that the offence having been committed at 5.30pm and hence in broad daylight the circumstances favoured a positive identification of the appellant by the child and that the child was therefore speaking the truth. Whereas **Section 124 of the Evidence Act** removed the need for corroboration in sexual offences the child's evidence found corroboration in her aunt's (Pw3) testimony that at around the material time the appellant went to her house for drinking water and she saw he had blood in his hands. The child's evidence was also corroborated by the evidence of her mother that she had left the appellant cutting trees in the vicinity of their home. It is also my finding that the consistency of the child's evidence coupled with the testimonies of all the other witnesses goes to show that the complainant was a truthful witness.

The appellant's defence that he was framed for demanding payment for brewing chang'aa for the complainant's aunt (Pw3) was not put to the witnesses during cross examination. I agree with the submission of Senior Prosecution Counsel Majale that it was an afterthought. The record also reflects that before the trial the appellant was supplied with all the witness statements and that he did not raise any objection to the trial starting when it did. I am not therefore persuaded that his right to a fair trial was violated or compromised in any way.

As for the allegation that his questions were not recorded **Section 197 (1) (b) of the Criminal Procedure Code** which deals with the manner of recording evidence before a Magistrate states: -

> **"(b) Such evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative:**
>
> **Provided that the magistrate may take down or cause to be taken down any particular question and answer."**

There was therefore no error on the part of the trial Magistrate. Moreover, it is apparent from the record that the only time the trial Magistrate recorded the questions asked was when he conducted the *voire dire* in respect to the complainant and her sister (Pw4) who are children. In the upshot **I find that the charge against the appellant was proved beyond reasonable doubt and the appeal against conviction has no merit.**

The sentence of life imprisonment is the minimum provided for by the law in the case of a victim who is under 11 years. I am alive to the jurisprudence concerning minimum sentences ***(see the cases of Francis Karioko Muruatetu & another v Republic [2017] eKLR, Evans Wanjala Wanyonyi v Republic [2019] eKLR*** and ***Jared Koita Injiri v Republic [2019] eKLR).*** Before sentencing the appellant, the trial court requested for and considered a presentence report and also considered the mitigation put forth by the appellant. The court also took into consideration the principles of sentencing. I agree with the trial Magistrate that given the nature and circumstances of the offence as well as the age of the victim and I dare to say the attitude of the appellant to the offence, the sentence meted out was fair and just and I see nothing to warrant this court to interfere with the sentence. Accordingly, the appeal is dismissed in its entirety. It is so ordered.

SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NYAMIRA THIS 25TH DAY OF MARCH 2021.

E. N. MAINA

JUDGE