REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL CASE NO. 28 OF 2019

GIDRAF KING'ORI WANJAU...APPELLANT

-VS-

REPUBLIC...RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant was on 9th August 2019 convicted and sentenced to imprisonment for 20 years for the offence of defilement contrary to ***Section 8(1) as read with Section 8 (3) of the Sexual Offences Act, No. 3 of 2006***, the particulars of which were that the Appellant;

> **"On the 26th day of August 2016 at Ol Kalou Township within Nyandarua County, intentionally caused his penis to penetrate the vagina of EWI, a child aged 14years old.''**

2. The Appellant had also been charged with the alternative count of committing an indecent act with a child contrary to ***Section 11 (1) of the Sexual Offences Act No. 3 of 2006***, the particulars of which were that the Appellant on the 26th day of August 2018 at Olkalou township within Nyandarua County intentionally touched the vagina of EWI a child aged 14years old with his penis.

3. The Appellant denied the charges leading to a trial in which the prosecution called some five witnesses, at the end of whose testimony the trial magistrate found the Appellant had a case to answer and placed him on his defence. The Appellant gave an unsworn defence. In the ensuing judgment, the magistrate (S.N. Mwangi, SRM) found that the main charge had been proved against the Appellant and convicted him. She then sentenced him to the mandatory sentence of 20 years' imprisonment.

4. The Appellant was aggrieved by the conviction and sentence and filed the instant appeal. The grounds of appeal as per his petition of appeal filed on 21st August, 2019 are that: -

> **I. That the trial magistrate erred in law and fact by convicting the Appellant on insufficient evidence.**
>
> **II. That the learned trial magistrate erred in law and fact by convicting the Appellant despite the fact that the evidence presented by the prosecution was contradictory.**
>
> **III. That the learned trial magistrate erred in law and fact by making a finding that the complainant did not understand the meaning of telling the truth and thus allowing her to give unsworn testimony.**
>
> **IV. That the learned trial magistrate erred in law and fact by failing to warn herself about convicting on uncorroborated evidence of a minor.**
>
> **V. That the learned trial magistrate erred in law and fact by failing to consider the fact that crucial witnesses and/or evidence was not availed in court.**
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> **VI. That he learned trial magistrate erred in law and fact by finding that the age of the complainant had been proved despite there being no evidence on the complainant's age.**
>
> **VII. That the learned trial magistrate erred in law and fact by disregarding the bad character of the complainant who had stolen a mobile phone.**

VIII. That the learned trial magistrate erred in law and fact by disregarding the defence and not appreciating the evidence by the Appellant.

IX. That the learned trial magistrate erred in law by imposing a sentence that was excessive I the circumstances.

5. The court directed that the matter be canvassed via submissions of which appellant filled and served but the respondent failed to comply.

APPELLANT'S SUBMISSIONS

6. The Appellant through the written submissions dated 3rd March 2020, submitted that he was ambushed into a hearing and had not been supplied with the witness statements therefore justice was miscarried as envisioned under ***Section 50 of the Constitution of Kenya***.

7. Counsel for the Appellant submitted that it appears that PW1 was being less than candid as she indicated that someone called her friends phone and the friend just passed it to her. He submitted that it is quite telling that the accused person allegedly went to a lodging whose name has never been revealed if at all exists and the management allowed an adult and a minor to share a room. He indicated that the fact that PW1 allegedly knew the accused person would mean that it could have been a case of bad blood between PW1's mother and the accused person. Further, the Appellant submitted that the evidence of PW1 if at all can be believed demonstrates someone who did not resist the sexual advances of the accused person. He also cast doubt on PW1's allegation that she went with the keys to the lodging without the management awareness

8. The Appellant further submitted that in this era of mobile phone communications, it would have been very easy to pinpoint his location and movement during the day of the alleged offence but the prosecution did not deem it necessary to do so. Moreover, he pointed out that the evidence of No. 80908 PC Jonathan Bett proves that the prosecution failed to provide crucial evidence as he mentioned that he traced the lodging owner and talked of Safaricom data records which were never produced in court and that the only possible explanation is that the evidence could have exonerated him and moreover the prosecution failed to call crucial witnesses including the lodging's management, PW1 two friends or the PW1's sister who had sent her on the material date.

9. The Appellants submitted that there was no evidence that proved the sexual encounter between him and PW1 happened. Additionally, there were inconsistencies between PW1 and her mother as to how they knew the accused.

10. The Appellant challenged the fact that Dr. Mercy Mapeni, PW4 testified in court that PW1's hymen was freshly broken yet the same was not recorded in the P3 form. He also pointed out that PW1 was indicated as a child of a single mother and yet PW1 had indicated that she has been sent to her father of the material day. The Appellant submitted that the court made a mistake in allowing PW4 to produce documents that she had not filed denying the accused person an opportunity to cross examine the makers thereof and that most importantly PW4 admitted that she could not confirm that the accused person had committed the offence. The Appellant further indicated that the complainant was examined after 6 days and that was sufficient time for crucial evidence to have been lost.

11. Moreover, the Appellant indicated that the PRC form indicated 23rd August 2018 as the date of the initial examination and yet that was 3 days before the alleged incident demonstrating that the document was prepared with malicious intent. He pointed out that the cognitive function of the PRC firm contradicts the finding of the court that the complainant did not understand the need to give evidence under oath. He indicated that the court should have warned itself before convicting the accused person on uncorroborated evidence of PW1.

12. The Appellant also challenged the trial court's finding on the age of the accused to be 14years on a document that did not provide conclusive evidence. He relied on the case on the ***Court of Appeal Case at Nairobi Criminal Appeal No. 102 of 2016 Eliud Wambui vs Republic.***

13. The Appellant highlighted that PW1's character clearly demonstrate that she is not only a thief but also a morally depraved young lady be and that her account is a clear demonstration that it would not be beneath her to fix the accused person for a crime he did not commit and in fact that was what she did.

14. Lastly, the Appellant challenged the sentence imposed on him as excessive and asserted that the trial court should have taken judicial notice on the pronouncements of the superior courts with regards to imposition of mandatory minimum sentences in the Sexual Offences Act. He pointed out the ***Court of Appeal Case at Kisumu Criminal Appeal No. 202 of 2011 Christopher Ochieng vs. Republic.***

ANALYSIS AND DETERMINATION

15. First and foremost, the duty of this court as the first Appellate court is 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.)"**

16. Fundamentally, this court is expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis, while bearing in mind the fact that it never had the opportunity to hear the witnesses and observe their demeanor.

17. Inevitably, this court in determining this appeal ought to satisfy itself that the ingredients of the offence of defilement were proved and as so required in law; beyond any reasonable doubt. The key ingredients of the offence of defilement include the proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. Therefore, I will consider if each of them were proved.

THE AGE OF THE COMPLAINANT

18. The gravity of proving the age of the complainant in sexual offences was emphasized in ***Alfayo Gombe Okello vs. Republic (2010) eKLR*** where the Court stated that:

> **"In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)…proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."**

19. In the present case, the complainant testified that she was 14 years old when she was defiled by the Appellant. PW2, the complainant's mother reiterated that the complainant was 14 years. The PRC form marked as Exhibit 2 indicated the complainant's age as 6th December 2003 thus indicating that the age of the complainant at the time the incident happened was 14 years. It is significant to note that the medical examiner upon assessment of the complainant's age, indicated the same as approximately 14 years old in the P3 form marked as Exhibit 1.

20. In ***Chipala vs. Rep. [1993] 16 (2) MLR 498*** the Malawian High Court held at 499 that:

> **"It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person."**

21. Similarly, in the case *of*

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

28. Additionally, the Appellant submitted that though it was found that the complainant had a broken hymen, no discharge or any other injuries were noted and that has the complainant had sex in the recent past the hymen should have been described as freshly broken and it is likely she would have sustained a few injuries. However, in the case of ***GBD vs. Republic (2017 eKLR),*** the court held that:

The fact that no injuries were noted on the labia areas of PW1’s vagina does not mean that there was no defilement. It is not a legal requirement that a victim of a Sexual Offence must suffer lacerations, cuts, bruises or any other injury on the genital organs.

29. As a result, it is my finding that penetration as an element for prove of defilement was established beyond reasonable doubt.

ON WHETHER THE ACCUSED WAS THE PERPETRATOR

30. PW1 testified that she met the accused at around 7pm and that he knew him as he had been previously employed by his mum at the movie shop. The Appellant then led her to a lodging which she thought was his home and proceeded to buy chips which they ate and then the Appellant began to touch her body i.e. her private parts. She testified that he touched her boobs and also started kissing her and then removed his clothes i.e. trouser and underwear and then he removed his thing for urinating and put it in hers for urinating after removing her trouser and panty. She stated that the electric lights were on and that she lay on the bed facing up. PW1 testified that the Appellant used a condom and after he was done he told her he wanted to go somewhere else.

31. They had sex once more and he left for one hour then came back and they slept till 7am and then the Appellant left her. Further, PW1’s mother testified that when she met her daughter, she narrated how the Appellant had sex with her twice on the material day and that she then took her to the police station. She asserted that she knew the Appellant prior as he had been employed at the next shop from hers and that she used to see him at Olkalou.

32. The Appellant raised the fact that there are contradictions in PW1 and PW2’s testimony regards to how they know the accused. I associate myself with the finding of the court in ***Jackson Mwanzia Musembi v Republic [2017] eKLR*** quoting the case of Uganda Court of Appeal in ***Twehangane Alfred v Uganda - Criminal Appeal No 139 of 2001, [2003] UGCA, 6*,** a decision relied by the Appellant, the court in respect to contradictions noted that not every c contradiction warrants rejection of evidence. It stated:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

33. In the preset case, the aforesaid contradictions are minor and do not affect the main substance of the prosecution’s case or displace PW1’s account of events on the material date.

34. Most importantly, ***Section 124 of the Evidence Act*** (a proviso thereof) is clear that a trial court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. The trial magistrate in ***Page 49-50*** of her judgement stated and I quote,

“I take judicial notice that the complainant though a minor at the material time who gave conclusive events of what happened on the material night and although the accused person herein did not deny or admit to being the assailant as much as he stated in his unsworn defence of how PW2 was not responsible mother for having reported the matter to the police three days after the disappearance of her daughter, how the doctor never adduced evidence and the investigating officer never conducted his investigations as to the scene of the offence and did not avail the above stated witnesses………

I make this finding with the clarity in mind the proviso to Section 124 of the Evidence Act………”

35. In **J.W.A. v Republic** ***[2014] eKLR***, the Court of Appeal observed: -

“We note that the Appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”

36. In the instant case, the trial court satisfied itself that the minor did not seem to understand the meaning of telling oath and also that her statement was truthful and therefore tenable. The court is not bound by the requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is being truthful. From the foregoing, I am satisfied by the trial court’s finding that the accused person was the perpetrator.

37. The Appellant’s contention that PW1’s is of bad character and thus is trying to fix him does not disprove the fact that PW1 was indeed defiled, in any case, her character of her mother’s character is not on trial. I am satisfied that it is the Appellant who defiled PW1.

38. Having perused the Appellant’s unsworn defence in the trial court vis-a-vis the trial courts judgement I am satisfied that the trail court did take into account the aforesaid defence contrary to the Appellants submission that the learned trial magistrate erred in law and fact by disregarding the defence and not appreciating the evidence by the Appellant. Moreover, the Appellant alluded to the fact that there could have been a case of bad blood between PW1’s mother and him, allegations that he did not substantiate.

39. Lastly, having revaluated the evidence adduced before the trail court and the submissions made by the Appellant to this appeal, I find that the Appellant’s guilt was established to the required standard of proof beyond any reasonable doubt. The Appellant’s appeal on conviction lacks merit. The same is hereby dismissed.

SENTENCE:

40. The Appellant submitted that the mandatory sentence of 20years was excessive and that the trial court did not take judicial notice of the pronouncements of superior courts with regard to imposition of mandatory minimum sentences in the Sexual Offences Act.

41. In the case of **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by ***section 204 of the Penal Code*** was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under ***Article 25 of the Constitution.***

42. (See also Christopher Ochieng vs R [2018] eKLR and ***Jared Koita Injiri vs R [2019] eKLR as submitted by the Appellant).***

43. Based on the above authorities, the Appellant’s mitigation before the trial court, and while exercising discretion in sentencing, it is my considered view that the court ought to consider the circumstances of each case. Considering the circumstances of this case, I am of the view that there are no justifiable reasons in the circumstances to impose the maximum sentence of twenty (20) years as was imposed by the trial court. I quash the sentence of twenty years imposed on the Appellant and substitute therefore with ten years which sentence will take into account the period already served.

44. Thus court makes the following orders;

i. The appeal on conviction is dismissed and conviction affirmed.

ii. Appeal on sentence is partially successful to the extent that the sentence of 20 years’ imprisonment is set aside and substituted with a sentence of 10 years imprisonment to run from 18/8/018 date of conviction.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 26TH DAY OF MAY, 2021

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CHARLES KARIUKI

JUDGE