REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 63 OF 2020

DAVID WANYOIKE MUNGAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the Chief Magistrate's Court at Thika, ***N.M. Kyanya Nyamori, RM*** *in Sexual Offences Case No. 95 of 2017 dated 14th August, 2019)*

JUDGMENT

1. ***DAVID WANYOIKE MUNGAI*** was convicted before Kikuyu Principal Magistrate's Court for the offence of defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2016**. On conviction, he was sentenced to serve life imprisonment. Being aggrieved by that conviction and sentence, he has filed this appeal.

2. This is the first appellate court. I am therefore required to reconsider and re-evaluate the evidence of the trial court to ensure I arrive at my own independent conclusion, while bearing in mind I did not hear or see the witnesses who testified: See the case of ***DAVID NJUGUNA WAIRIMU VS. REPUBLIC (2010) eKLR.***

3. GN testified, following *voir dire* examination, that she was 10 years old. She stated that she lived with her grandmother *(Cucu)* and her mum. She narrated how in December, 2017 she was playing with her brothers at their home, when the appellant, their neighbour sent her to purchase for him cigarettes. On purchasing the said cigarettes and on her return, she said:-

> ***"He (appellant) rolled the Kitambaa (a cloth) and covered my mouth and ties*** *(sic)* ***at the back of her head."***

4. GN said that the appellant took her to his house, placed her on his bed, removed his trousers and her clothes and did '*tabia mbaya'* (bad manners) to her. GN said that the appellant's body during the time he did "bad manners" had contact with the part of her body through which she urinates. That is how she described the offence. She said, afterwards appellant warned her not to tell anyone what he had done and if she did he said he would kill her and her mother. When the appellant untied her and allowed her to go home GN said:-

> ***"I dint tell anyone. He (appellant) had told me if I tell anyone he would kill me and my mother. So I didn't say."***

5. GN said that she thereafter experienced pain when she walked. She further said:-

> "***He did*** *tabia mbaya* ***again. I don't remember when it was. He came and got me from our home…***
>
> ***He came and took hold of me and took me to his house…he followed me and said if I shout he would beat me."***

6. GN gave details on the second occasion appellant did *'tabia mbaya'* to her. It was the following day, after this second occasion, that her *cucu* asked her why she was walking with her legs apart. GN at first refused to disclose what was making her walk the way she was walking but later did disclose. When asked in court the name of the person who did that to her, GN said ***DAVID WANYOIKE MUNGAI.***

7. From the evidence of GN's grandmother, it became clear that the grandmother was the one responsible for taking care of the children, her grandchildren. This is because the mother of the children was not responsible and was abusing narcotics (bhang). It was therefore not surprising that GN eventually confided to the grandmother about what the appellant did to her. It was that grandmother who took GN to the police station to report and later to the hospital.

8. The doctor from Thika Level 5 hospital confirmed GN was examined at that hospital after she reported she was defiled. On examining her, it was found that her vagina was reddish with whitish discharge. The P3 Form produced in evidence showed that the doctor stated the physical findings was consistent with penile vaginal penetration.

9. The Investigating Officer produced an age assessment of GN which showed that GN's age, after radiological examination, was approximately 11 years to 12 years. That age examination is dated 19th March, 2019.

10. Appellant gave unsworn defence. His defence was that GN was washing the children with cold water and when he saw this and reprimanded her saying that the cold water could cause the children to get sick, GN abused him calling him a dog and when he chastised her, GN told him he would regret what he did. That shortly afterwards, neighbours went to him accusing him of defiling GN. That those people carried out citizen's arrest and took him to the police station. The appellant denied the offence.

11. Appellant in his written submissions stated that GN did not state in her evidence that the offence occurred on 15th December, 2017. He therefore posited that there was no proof of defilement as stated in the charge.

12. Appellant was charged with the offence of defilement contrary to **Section 8(1(2)** of the Sexual Offences Act. The particulars of the offence were stated in the charge, thus:-

> ***"David Wayoike Mungai on 15th day of December, 2017 at Jamhuri in Thika Township of Kiambu County intentionally caused his penis to penetrate the vagina of*** *GN* ***a child aged 10 years."***

13. It is the stated date of 15th December, 2017, that the appellant argued was not supported by the evidence of GN.

14. GN in her evidence said that the offence occurred in December, 2017. The doctor stated that the report he produced in court indicated the defilement occurred on 15th December, 2017 but that it was reported on 18th December, 2017.

15. It should be recalled that GN's evidence was that the appellant defiled her on two separate occasions. Her evidence indicates that the second defilement affected her walk. She said she was walking with her legs apart.

16. The appellant did not cross-examine the doctor on his testimony that the defilement occurred on 15th December, 2017. Appellant also in his defence did not state where he was, if not at the homestead, on 15th December, 2017.

17. My finding is that the prosecution proved on the required criminal standard that the defilement occurred on 15th December, 2017.

18. Appellant erred to submit that there was no medical evidence of penile penetration. As stated before, the medical report showed the medical examination of GN revealed the findings thereof were consistent with defilement. **Section 2** of the **Sexual Offences Act** defines penetration. That Section was discussed in the case ***IRENE ATIENO OCHIENG V. REPUBLIC (2017) eKLR*** as follows:-

> ***"'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'***
>
> ***This position was fortified in the case of MARK OIRURI MOSE VS R (2013) eKLR when the Court of Appeal stated thus:***
>
> ***'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...' (emphasis added).***
>
> ***Later the Court of Appeal, then differently constituted, in the case of ERICK ONYANGO ONDENG V. REPUBLIC (2014) eKLR held as such on the aspect of penetration:-***
>
> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.""***

19. GN, contrary to submissions of the appellant, explained why she feared to reveal appellant had defiled her. GN in evidence stated that appellant threatened to kill her and her mother if she revealed what he did. That fear sufficiently explains the delay in reporting the defilement.

20. Appellant also submitted that GN was 12 years old and that therefore the offence contrary to **Section 8(1)(2)** was not proved. That Section provides:-

> **"Section 8 :**
>
> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to***

imprisonment of life."

21. The Court of Appeal in the case ***HASHON BUNDI GITONGA VS. REPUBLIC (2016) eKLR*** discussed how the two **subsections (1) and (2)** of **Section 8** of **Sexual Offences Act** function. This is what that court stated:-

> ***"We reiterate however this lack of proof of the proper age does not impugn a conviction. It only determines the sentence as the Sexual Offences Act provides for different sentences for different age bands.***
>
> ***This Court discussed this issue in the case of STEPHEN NGULI MULILI V R, Criminal Appeal 90 of 2013 [2014] eKLR and most recently in EVANS WAMALWA SIMIYU V REPUBLIC, Criminal Appeal No. 118 of 2013 [2016] eKLR. In TUMAINI MAASAI MWANYA V R, Msa Criminal appeal No. 356 of 2010 (unreported), this Court pronounced itself as follows:-***
>
> ***"…proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age***."
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> ***This statement was further expounded by the Court in EVANS WAMALWA SIMIYU (supra) which we quote in extensor for its relevance in the present case.***
>
> ***'Thus in relation to the appellant's case proof of age was relevant at two levels. First, to establish that the complainant was under the age of 18 years and therefore a child; and, secondly, to establish that the complainant was between the age of 12 and 15 years such as to bring the sentence of the appellant, if convicted, within the minimum provided under section 8(3) of the Sexual offences Act.'"***

22. There is no doubt from the evidence presented at the trial court that GN was a child. That proof therefore satisfies subsection (1). Since prosecution proved by medical evidence that GN was defiled and there was evidence that GN was a child, (after all why else would *voir dire* examination be conducted) and subsection (1) was therefore proved.

23. Prosecution provided age assessment report of GN. It showed in the year 2019 GN was between 11 and 12 years old. It follows therefore in the year 2017, when the offence occurred, GN was within the provisions of subsection (2) of Section 8 of the Sexual Offences Act. She was less than eleven years old.

24. It follows therefore from the above discussion that the appellant's appeal on conviction has no merit. There being no substance to the appeal on conviction, I uphold the trial court's conviction. The defence offered by the appellant failed to challenge the prosecution's evidence.

25. On sentence of the appellant, in view of the decision of ***FRANCIS KARIOKO MURUATETU & ANOTHER VS. REPUBLIC (2017) eKLR***, where the Supreme Court held that mandatory life sentence was unconstitutional, this Court will interfere with the trial court's sentence which sentenced the appellant to mandatory term of life imprisonment. This Court will therefore interfere with trial court's sentence.

CONCLUSION

26. The judgment of this Court is:-

(a) There being no merit in the appeal against conviction, the same is hereby dismissed.

(b) The trial court's sentence is hereby set aside, ***DAVID WANYOIKE MUNGAI*** is hereby sentenced to serve 20 years imprisonment and such sentence shall commence from 19th December, 2017.

JUDGMENT DATED and DELIVERED at KIAMBU this 20th day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant Ndege

Appellant: ……...

Respondent: ……...……

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE