REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 47 OF 2015

(Being an Appeal arising out of the conviction and sentence of Hon. Nangea CM delivered on 1st April 2015 in Kitale CM Cr. Case No.2068 of

2014)

GEOFREY WANGILA SIMIYU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **Geofrey Wangila Simiyu**, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that **on the night of 25th May 2014,** within **Trans-Nzoia County**, the Appellant intentionally caused his penis to penetrate into the vagina of ACM, a child aged 14 years. The Appellant was in the alternative, charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars were that on the night of **25th May 2014**, within **Trans-Nzoia County**, the Appellant intentionally caused the contact between his genital organs namely the penis and genital organs namely the vagina of **ACM,** a child aged 14 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the two counts. After full trial, the Appellant was convicted of the 1st count as charged and sentenced to serve **twenty (20) years imprisonment**.

The Appellant is aggrieved by the decision of the trial court hence his Petition of Appeal. The Appellant raised several grounds of appeal challenging his conviction and sentence. He states that the prosecution failed to meet the standard of proof threshold to support a conviction. He faulted the trial magistrate for relying on fabricated and unreliable evidence marred with inconsistencies; particularly the medical evidence. He took issue with the evidence of the witnesses in the proceedings as not being cogent. He lamented that the trial Court failed to consider his defence. He faulted the trial Court for relying on a single identification witness to justify a conviction yet there was a hindrance in visual identification. He found fault in the trial Court for convicting the Appellant on a defective charge. He was aggrieved that the trial Court failed to meet the required standard when conducting a *voir dire* on PW1, a minor. He challenged the elements of age and penetration stating that they had not been proved. He faults the trial Court for not ensuring that he had the prosecution evidence prior to the trial to enable him prepare a defence adequately. Consequently, his Constitutional rights were violated making the process unjust impeding the credibility of the trial process. He further faulted the sentencing as having failed to align with recent jurisprudential advancements. In the premises, the Appellant urged this court to allow his appeal, quash his conviction, set aside the sentence that was imposed on him and be set at liberty.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. He stated that the absence of DNA sampling rendered the medical evidence inconclusive. PW3 was not an expert witness in line with the case of **Gabriel Muchira Mwenja –Vs- R App. No. 1224 of 2000** as he failed to lay credence to his qualifications. The charges were defective as the word 'unlawful' was omitted in the charge sheet contrary to **Section 134** of the **Penal Code** and **Section 43 (1) of the Sexual Offences Act**. He further relied on the Court of Appeal case of **David Odhiambo –Vs- R Cr Appeal No. 5 of 2005** to support this assertion. The *voire dire* conducted was not conclusive as the complainant was not tasked to understand the consequences of failure to tell the truth before God. He relied on the case of **Johnson Muiruri –Vs- R (1983) KLR 445**. He therefore submitted the complainant's evidence was not credible. He cast doubt on the veracity of the Birth Certificate as it was issued on 19th May 2014; the month when the alleged offence was committed. The fact that they were found in his house did not mean that they were caught having sexual intercourse. The rupture of the hymen was old. He was not supplied with statements by the prosecution rendering a violation of his rights contrary to Articles 25, 35 (1) (a) and (b), 50 2 (g) and (h) of the Constitution. The Court failed to consider his defence. He relied on **Ouma –Vs- R [1986] eKLR**. Finally, the trial court should not have given a blanket sentence. He relied on **Wilson Kipchirchir –Vs- R [2019] eKLR.**

Mr. Omooria for the State opposed the appeal. He submitted that on 25th May 2014, at [Particulars withheld] Village, the Appellant had sexual intercourse with the complainant aged 14 years. He stated that the prosecution's case was made out having established the age by producing the complainant's birth certificate. The evidence of PW2, the father to the complainant, established that the complainant and Appellant were found in the act when he went to look for her. Upon examination by a clinical officer, the complainant was found to have a broken hymen. As a result of the act, the complainant became pregnant. Mr. Omooria further added that the complainant knew the Appellant

as they were lovers. He further stated that the Appellant at that time was aged 28, and the complainant aged 14 at the time of the offence. They could not have had a consensual sexual relationship on account of their age difference. On identification, the prosecution relied on the case of **Roria –Vs- R [1967] EA 583**. Additionally, the complainant and appellant knew each other well. The evidence of identification that was adduced was that of recognition. He urged that the Appeal be dismissed.

It is commonplace that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See **Okeno –Vs- R [1972] EA 32, Mohamed Rama Alfani & 2 others –Vs- Republic, Criminal Appeal No. 223 of 2002.** This Court assesses facts of the case as follows:

PW1, ACM, is the complainant. Since she was a minor during the trial, the Court conducted a *voir dire* before taking her evidence. The trial Court concluded that she did not comprehend the repercussions of taking evidence on oath. She could only make an unsworn statement. She stated that she was born on 27th July 2000. She was a class 7 student at [Particulars withheld] Primary School. On 25th May 2014 at around 1.00 pm, she went to obtain treatment from a Hospital at Big Tree as she was feeling unwell. She later met the Appellant at his brother's barber shop where the Appellant worked. She was in a love affair with him. She stated that she was convinced by the Appellant's friend to have a love affair with the Appellant. When she wanted to go home at about 6.00 pm, the Appellant asked her to accompany him to his brother's house. She went with him as it was too late to go home. They had sexual intercourse that night. It was in the form of penetration in her vagina with the penis. She went home the following day and later went to the Appellant's home. While sleeping with the Appellant that night, her father and a police officer came to the Appellant's house. The Appellant was arrested and taken into police custody. She was examined in Kitale District Hospital. She was not pregnant at the time of testifying. She terminated the pregnancy in June 2014. She further confirmed to having sexual intercourse with the Appellant twice on the material date.

PW2, MMM, is the father of the complainant. He stated that on 25th May 2014, his daughter, ACM, aged 14 years disappeared from home after leaving school to receive treatment given that she was feeling unwell. She was a class 7 student at [Particulars withheld] Primary School. Following her disappearance, he reported the same to the area Kenya Police Reserve. He was later informed by some members of the public that ACM was spotted at Big Tree Trading Centre in the company of a male youth. After they identified the home of the male youth, he, in the company of two police officers went there. They found the complainant and Appellant. The Appellant was arrested. ACM stated that the Appellant was her boyfriend. He further testified that she was born on 27th July 2000 and produced her birth certificate marked Pexh1. He did not know the Appellant prior to his arrest. He further stated that ACM was examined at a Health care in Big Tree area. Her clinic and baptismal cards got lost.

PW3, Linus Ligale, was during trial, a clinical officer at Kitale District Hospital. He examined ACM on 27th May 2014 at the Hospital. He stated that the complainant had previously been attended to by another medical officer following allegations of defilement on 23rd March 2014 as evidenced in the treatment records. ACM told him that she had sexual intercourse with her neighbour on several occasions. Her hymen was torn but the tear was old. She was pregnant; estimated to be 2 months old. He produced the medial report and treatment records of ACM as P-Exhibit 2 (a) and P-Exhibit 2 (b) respectively.

PW4, Fidelis Wanjiru, is the investigation officer. While on duty on 27th May 2014, the OCS instructed her to investigate this case. The Appellant was in remand at that time. The complainant told her that the Appellant had sexual intercourse with her at his house. She was examined at Kitale District Hospital and confirmed that she was defiled. She was pregnant. She was also informed the Appellant caused the pregnancy. After investigations, she charged the Appellant. She obtained the Certificate of Birth marked P-Exhibit 1. She visited the house where the defilement took place. She was also informed that ACM's parents lost her clinical and baptismal cards.

After close of the prosecution case, the trial Court found that the Appellant had a case to answer. He was put on his defence. He gave sworn evidence. He confirmed that he was 27 years old. On 27th May 2014, the Appellant informed the trial Court that he was at home sleeping. He was then arrested by strangers, hand cuffed and taken into police custody. He was produced in Court and charged with strange offences which he denied.

It cannot be gainsaid that the failure to properly re-evaluate the evidence on record would be a serious omission on the part of the first appellate court, and may warrant interference by the Court of Appeal. This was the holding in the Court of Appeal in **Joseph Njuguna Mwaura & 2 others –vs- Republic [2013] eKLR**. Consequently, this Court is tasked to determine whether on a preponderance of the evidence adduced, the charge of defilement contrary to **Section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act** as against the Appellant, was established by the prosecution beyond any reasonable doubt.

This court has re-evaluated the facts of this case. This Court has also considered the submissions on record both oral and written by the rival parties. **Section 8(1)** of the **Sexual Offences Act** provides:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

It is trite law that a conviction for defilement must establish three elements. First, the age of the complainant. Second, the proof of penetration and thirdly, proof that the Appellant was the perpetrator of the offence. On evaluating at this aspects, this Court shall consider the Appeal as follows:

1. Age of the complainant

At trial, the complainant testified that she was born on 27th July 2000 and was a standard 7 student at [Particulars withheld] Primary School. PW2, the complainant's father, corroborated the evidence. PW4 produced the complainant's birth certificate marked P-Exhibit 1. All witnesses confirmed that as at trial, the complainant was 14 years of age at the time the offence was committed. The Appellant challenged, at trial during cross examination, the age of the complainant as having not been sufficiently proven in the absence of her baptismal card which was indicated as lost. This Court finds **that the age of the complainant was sufficiently proved by production of the Birth Certificate**.

Nothing was tendered to contradict its veracity. By dint of Rule 4 of the Sexual **Offences (Rules of Court) 2014:**

> **"When determining the age of a person, the Court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

2. Proof of penetration

According to the provisions of **Section 2(1)** of the **Sexual Offences Act** penetration is defined penetration as:

> "**The partial or complete insertion of the genital organ of a person into the genital organs of another person**."

At trial, the complainant testified that she visited the Appellant at his brother's barber shop where he worked. He then asked her to accompany him to his brother's house where she spent the night there with him. She indicated that she had sexual intercourse with the Appellant. She stated that it happened twice. In describing the act, she stated that he inserted his penis into her vagina. PW3 testified that the complainant had indicated to her that she had sexual intercourse with a neighbour on several occassions. He found, on observation, that the complainant's hymen was torn albeit old. She had lacerations on her vaginal wall. This evidence is further captured in P-Exhibits 2 (a) and (b). **This Court is satisfied that the account of the complainant corroborated with the medical evidence tendered as well as the examination of the complainant's vagina where the hymen was torn but old and the vaginal walls had lacerations was sufficient proof of penetration was established beyond any reasonable doubt**.

3. Positive identification of the perpetrator

The third element the prosecution had to prove is whether the penetration was perpetrated by the Appellant. The complainant testified that the Appellant was well known to her. He was her boyfriend and they were in a love affair. She was the only witness who was to identify the Appellant by way of recognition. While making an assessment of this limb, we are alive to the authority of **Maitanyi –Vs- R (1986) eKLR** and further cited in the dicta of **Abdullah Bin Wendo –Vs- R 20 EACA 166** where the Court held:

> **"Subject to certain well-known exceptions, it is trite law that a fact maybe proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of the single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."**

During her cross examination, the complainant was tasked to explain her relationship with the Appellant. She stated that he was her friend. This, in the court's view confirms that the complainant and Appellant knew each other. Furthermore, the Appellant and complainant were found together by PW2 in the company of a police officer. In his defence, the Appellant contends that he was asleep when he was arrested. He further at the present Appeal, testified that being found together was not tantamount to having sexual intercourse. This is not sufficient to explain away the fact that the Appellant was properly identified. **This Court finds that the prosecution proved beyond any reasonable doubt that the Appellant was the perpetrator.**

Having re-evaluated the evidence and having established that the ingredients were made out, this court will now turn to the Appellant's submissions. Suffice to state that the Appellant has by and large introduced new facets that he did not raise at trial. In the circumstances of the foregoing, this Court finds that PW3 was an expert in the medical field and was therefore qualified to give evidence as he medically examined the complainant. The Court further finds that the Birth Certificate was valid legal document capable of being produced in evidence. The Appellant's assertions on the contrary are dismissed as being without foundation.

The Appellant further submits that the complainant's evidence ought not to have been considered since the *voir dire* examination was improperly conducted. According to the Appellant, the court should have asked about religion and the consequence of lying. Consequently, the complainant's evidence was incredible. What then is the threshold that a court must meet to properly conduct a *voir dire* that can allow the child to give evidence in court? This Court is guided by the Court of Appeal decision of **Johnson Muirui –vs- Republic [1983] KLR 445** which held thus:

> **"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiume we said, 'Where, in any proceedings before any court, a child of tender years is called as a witness, the Court is required to form an opinion, on a *voir dire* examination, whether the child understands the nature of an oath in which his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya, The Evidence Act, Section 124, Cap 80 Laws of Kenya)"**

The trial Court in its proceedings conducted a *voir dire* on the complainant. The trial court was satisfied on the line of questioning that the complainant did not understand the meaning of an oath and proceeded to take her unsworn evidence. This Court finds that the *voir dire* was done properly and the basic elements were met. The complainant was sufficiently questioned on the understanding of nature of an oath. Conclusively, the complainant's evidence remains undisturbed.

The Appellant submits that a DNA sampling would have conclusively proven the perpetrator of the crime. In the absence of it, there was no conclusive evidence that he was the perpetrator of the offence. DNA sampling is provided in **Section 36 (1)** of the **Sexual Offences Act**.

This provision was discussed in the Court of Appeal case of **Robert Mutungi Mumbi –vs- R Cr. App. No. 52/2014 (Malindi)** as follows:

> **"Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly the provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."**

This Court holds that the absence of DNA sampling did affect the finding reached by the trial court on the evidence of the prosecution. To the Court's mind, the Appellant's assertion on this issue must be disregarded.

The Appellant further states that the charge sheet was defective as the world "unlawful" was omitted from the charge sheet. Indeed a cursory perusal of the charge sheet reveals this state of facts. It is however curious that the Appellant is raising the same at this stage. Nonetheless, this Court is guided by **Section 382** of the **Criminal Procedure Code** which empowers a court not to disturb a finding where an omission or irregularity shall not occasion any injustice. In the case of **J. M. A –vs- Republic [2009] eKLR,** the Court of Appeal dealt with the issue at hand where the Appellant was charged with defilement. The court held:

> **"In our view, it is not all cases in which a defect detected in the charge on appeal will render a conviction invalid. Section 382 of the Criminal Procedure Code is meant to cure such irregularities where prejudice to the appellant is not discernible… the omission of the term "unlawful" from both the main and alternative counts did not in any way whatsoever prejudice him in putting forward his defence. It is our view that for a child of the age of the complainant there would be no sexual act which would be regarded as lawful."**

In this Court's view, the omission of the word "unlawful" does not vitiate the substance of the charge. The Appellant was charged with defilement and the particulars of the charge were read out to him. As rightly put by the Court of Appeal, the offence cannot in anyway whatsoever be said to be consensual to render the necessity of the use of the word "unlawful". Be that as it may, the same is curable under the provisions of **Section 382** of the **Criminal Procedure Code**. This Court therefore will not disturb the trial Court's findings on this ground.

The Appellant further states that he was not supplied with the evidence that the prosecution intended to rely on breaching his Constitutional rights and in particular Articles 35 (1) (a) and (b), 25, 50 (2) (g) and (h). According to the Appellant, the Court should have ensured that he was issued with copies of the prosecution's evidence. To the Court's understanding, the Appellant is suggesting that it is the Court's duty to ensure that he is given a chance to prepare his defence adequately. From the perusal of the proceedings at trial, the Court directed the prosecution to furnish the Appellant with copies of the statements that the prosecution intended to rely on. He never raised issue as to whether he experienced difficulties in obtaining the same. He sat on the fence and raised this issue at the Appellate stage. This is an afterthought. It is dismissed as such.

The upshot of the above reasons is that the Appellant's appeal against conviction by the trial court on the charge of defilement **contrary to Section 8(1) and Section 8(3) of the Sexual Offences Act is upheld. The Appeal against conviction is hereby dismissed.**

> **As regards the sentence, Section 8(3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. The minor in this case was 14 years at the time the offence was committed.**
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> **As rightly pointed out by the Appellant, recent jurisprudence has cushioned convicted persons not to serve mandatorily sentences as provided in statute. Courts are at liberty to exercise their discretion depending on the facts and circumstances of the case. However, the present trial was concluded way before the Muruatetu decision was decided. The trial Court cannot therefore be faulted. This Court shall however align its decision with the jurisprudential advancements.**

In his mitigation, the Appellant state that he was 27 years of age at the time and had a young wife. He is a first offender. He therefore prayed for leniency. This court also notes that the Appellant has spent seven in lawful custody since taking his plea and after his conviction. In the premises, this court sets aside the twenty (20) years imprisonment sentence meted by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve **Fifteen (15) years imprisonment** with effect from the date he was arraigned in court to take plea before the trial court i.e. 29th May 2014**. It is so ordered.**

DATED AT KITALE THIS 23RD DAY OF JUNE 2021.

L. KIMARU

JUDGE