REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 25 OF 2019

JADIEL KIUNGA KITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki CM Sexual Offence Case No 1 of 2018 – W J Gichimu, PM)

J U D G M E N T

1. The Appellant herein, **JADIEL KIUNGA KITHINJI**, was convicted after trial of ***defilement of a child*** contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006***. It was alleged in the particulars of the offence that on 26/12/2017 at [Particulars Withheld] area in Kieni-East Sub-County within Nyeri County, he intentionally and unlawfully caused his penis to penetrate the vagina of one RWM, a child aged 14 years.

2. On 11/01/2019 the Appellant was sentenced to twenty (20) years imprisonment. He has appealed against both conviction and sentence upon the following grounds as they appear in his petition of appeal –

(i) That there was no independent evidence of the alleged offence.

(ii) That the prosecution evidence was inconsistent and uncorroborated.

(iii) That the trial court erred in law and fact by failing to note that there was a grudge between the mother of the complainant and the Appellant.

(iv) That the trial court erred in law and fact in rejecting the Appellant's defence *"without any cogent reason."*

(v) That the charge was not proved beyond reasonable doubt.

3. In amended grounds of appeal subsequently filed, the Appellant also complained –

(vi) That penetration and the perpetrator's identity were not proved beyond reasonable doubt.

(vii) That the trial court erred in law and fact in failing to conduct a *voire dire* examination of the complainant before she was permitted to testify under oath.

The Appellant filed written submission which I have read and considered.

4. Learned counsel for the Respondent supported the conviction, submitting that all the ingredients of the offence were proved beyond reasonable doubt.

5. This being a first appeal, it is the duty of this court to appraise all the evidence tendered and arrive at its own conclusions regarding the same. I have however given due allowance for the fact that I neither saw nor heard the witnesses testify.

6. The complainant testified under oath as PW1. She was **not** a child of tender years. Her age of 14 years was proved by her birth certificate that was produced in evidence by the investigating officer (PW4). She was in secondary school. It was thus not necessary for the trial court to conduct any *voire dire* examination of her before she could testify under oath.

7. The complainant's brother who testified as PW2 on the other hand, was indeed a child of tender years at the age of ten (10). The trial curt

conducted a *voire dire* examination of him before it allowed him to give sworn evidence. So, it is not as if the trial court was not aware of the need to take necessary precautions in the case of a witness of tender years.

8. PW1 testified how the Appellant lured her into his potato store within the compound where she lived under the guise of assisting him to fill up a sack of potatoes. He then pushed her to the flour, removed her underwear, his own trouser and proceeded to insert his penis into her vagina while covering her mouth with a handkerchief so that she could not scream.

9. PW2, who said he was a friend of the Appellant, came upon the two while in the act; he had come to inform the Appellant that he was going off to play football as they used to play together. PW2 thereafter telephoned PW3 (who was their mother) who was away and told her what he had found PW1 and the Appellant doing. When PW3 came home in the evening she asked PW1 about it, and PW1 told her what had happened. PW3 then took PW1 to the police to report the matter and later to hospital.

10. PW5 (a doctor) examined PW1, and from her observations she formed the opinion that she had been penetrated. She produced in evidence PW1's medical report.

11. The Appellant gave sworn evidence in his own defence. He denied the offence. He also put forth the defence of alibi. He stated that he was not at the scene of the crime on the material date as he had gone to buy potatoes. He also alleged that there was a grudge between him and PW3. It is apparent that he never cross-examined PW3 about the alleged grudge; nor did he put to any of the prosecution witnesses the alleged alibi which he raised only in his defence.

12. The Appellant was well-known to both PW1 and PW2. The offence took place in broad daylight within the home-compound of PW1 and PW2, and in a store in the compound where the Appellant stored his potatoes. PW2 described the Appellant as his friend with whom he used to play football on Sundays.

13. Upon the evidence on record, there cannot be any doubt at all about the identity of the perpetrator of the defilement of PW1. That perpetrator was the Appellant. The testimonies of PW1 and PW2 placed him squarely at the scene of the crime. PW2 found the Appellant and PW1 in a compromising situation. The penetration that PW1 testified to was corroborated by the medical evidence of PW5.

14. Upon my own evaluation of the evidence placed before the trial court, I am satisfied beyond reasonable doubt that the Appellant lured PW1 to his store and there had sexual intercourse with her. PW2 came upon the two in the act. An examination by PW5 corroborated the penetration. The trial court properly rejected the Appellant's defence, which was clearly an afterthought. He was convicted upon good and sound evidence, and the conviction is safe. There is no merit in the appeal against conviction.

15. As for sentence, once the trial court decided to award a custodial sentence, it sentenced the Appellant to the mandatory minimum term of imprisonment permitted by law. The sentence is lawful and cannot be disturbed.

16. In the event this appeal lacks merit in its entirety and is hereby dismissed. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 28TH DAY OF JULY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 29TH DAY OF JULY 2021