**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. E003 OF 2020**

**SAMUEL WAWERU GITAHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the conviction and judgment of the Chief magistrate Court at Nyeri by**

**Honourable J. Macharia, in Nyeri Sexual Offence Case No. 48 of 2018 on 23rd September 2020).**

**JUDGEMENT**

**Brief Facts**

1. The appellant, was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.** The particulars of the charge are that on the 20th November 2018 in Kieni Sub County within Nyeri County intentionally and unlawfully caused his penis to penetrate the vagina of MWG [full name withheld], a child of 10 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act. He was convicted on count 1 under Section 215 of the Criminal Procedure Code** and sentenced to fifteen (15 years) imprisonment.

3. Being aggrieved by the entire judgement, the appellant lodged the instant appeal citing grounds of appeal that:-

a) The learned trial magistrate erred in fact and in law by failing to consider that the appellant could not recall what transpired during the trial process as he is of unsound mind; and

b) The learned trial magistrate erred in law and in fact by finding that the prosecution discharged its burden of proof.

**4.** The parties herein agreed to dispose of the appeal by way of written submissions. However, the respondent did not file any written submissions.

**The Appellant's Submissions**

5. The appellant said he was born with an intellectual disability and mental retardation which was discovered at an early age. As such, during the trial, it was hard for him to comprehend the proceedings and the charges he faced. He adds that due to his condition he has attended a special school and has never lived a normal life. The appellant invites the court to scrutinize the appellant's cross-examination at the trial which indicates that he did not understand the trial process or the gravity of the charge he was facing.

6. The appellant submits that his right to a fair hearing as envisaged in Article 50(2) of the Constitution has been infringed. He contends that he went through the motions of the trial without understanding the charge or the proceedings in the trial court, which is unconstitutional as per section 167 of the Criminal Procedure code. It is the appellant's submission that he falls into the category of persons who qualify for legal representation at the state's expense owing to his condition. He relies on the case of **David Macharia Njoroge vs Republic [2011] eKLR** to buttress his point.

7. The appellant further submits that pursuant to the case of **Okeno vs Republic [1972] EA 32,** the court ought to re-evaluate the evidence and in particular, to note the inconsistencies with the evidence presented at the trial court. According to the appellant, the evidence presented against him was contradictory, inconsistent and untruthful. As such, it did not meet the threshold of beyond reasonable doubt and thus he ought not to have been convicted. He submitted that the testimony of the victim and that of PW4 is contradictory because the victim stated that the appellant defiled PW4 while she went outside to play whereas PW4 claims that the appellant did not do anything to her. Further the

two witnesses' testimonies differ as PW1 states that on the material day when the offence was committed, they did not go to school but went to collect firewood but PW4 stated that they went home from school.

8. The appellant further urges the court ought to re-evaluate the evidence of PW2 who stated that they found the appellant sleeping with PW4 as husband and wife but the appellant states that he was not charged with the said offence of defiling PW4. Further, PW4 stated in her evidence that the appellant did not sleep with her. As such, the prosecution evidence raises a lot of inconsistencies, which in turn raises doubt, aimed at framing the appellant.

9. The appellant further submits that the evidence of PW5, the doctor raised doubt because he stated, "penetration may have occurred". According to the appellant, the fact that he used the word "may" gives a notion that penetration did or did not occur. This statement ought to have been affirmed. As such, based on the foregoing reasons, the appellant prays that the appeal be allowed.

**Respondent's Submissions**

10. Notably, the respondent filed submissions, although their submissions touch on the application for bail pending appeal, which was filed on 18th January 2021. However, by consent of the parties, it was agreed that the application be abandoned and the appeal be heard.

11. The respondent submitted that it was proved beyond reasonable doubt that the appellant committed the offence since all the requisite ingredients of defilement were established. PW1 gave a consistent account of how the appellant defiled her and her evidence was corroborated by that of PW4. The prosecution further adduced medical evidence, which indicated that PW1 was defiled as she had injuries in her genitalia which were consistent with defilement.

12. On the issue of identification the prosecution submitted that the appellant was properly identified by PW1 and PW4 by his name "Waweru" and as the person who used to take care of goats within the area. As such, the prosecution argued that this was not a case of mistaken identity.

13. As for proof of age PW1 produced her birth certificate in court showing that she was 10 years old at the time of the offence. Further, the appellant cross-examined all the prosecution witnesses therefore the evidence was fully tested.

14. The respondent submits that it is highly suspicious that the appellant was of unsound mind during the trial but had the mental capacity to swear his affidavit dated 18th January 2021 in support to his application for bail pending appeal. Further, the appellant annexed a Mental Assessment Report by Dr. Boniface Chituyi dated 9th November 2020, of Kenyatta National Hospital which was two(2) months after he was convicted. Notably, no referral note for mental treatment was attached y any doctor from King'ong'o Maximum Prison where the appellant is currently serving sentence. The appellant has also attached a letter dated 28th September 2020, by Jane Ndeto the area Chief of Sirima Location in Laikipia County. It sounds suspicious that the offence was committed in Labura sub Location, Kieni sub County within Nyeri County and the letter was authoured five(5) days after the appellant was convicted and sentenced.

15. Notably, the appellant cross-examined the witness at the trial court and he put in his sworn defence and at no point did he raise the defence that he was suffering from a mental condition as alleged. The appellant has also not annexed any document to prove that he had any mental condition or that he was seeking treatment for any mental condition prior to the trial.

**16.** The respondent also submits that the record shows that the appellant was living alone and working as a herder within Labura Area in Nyeri County. The appellant's family now seeks to have him placed under the care of a person who best understands his condition. These facts were sworn by Alice Njeri Gitahi who in her affidavit on 22nd December 2020 shows that she lives in Naromoru. This confirms that the deponent was not living with the appellant prior to the commission of the offence.

**Issue for determination**

17. I have identified the issues for determination as two fold:-

a) Whether the appellant was accorded a fair trial.

b) Whether the prosecution proved its case beyond reasonable doubt.

**Duty of the court**

18. This being a first appeal, this court is guided by the principles set out in the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the Court of Appeal stated:-

> **"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.**

19. Similarly in the case of **Okeno vs Republic [1972] EA 32** where the Court of Appeal set out the duties of the appellate court as follows:-

**"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (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 finding and 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 vs Sunday Post [1958]EA 424."** This was also set out in the case of **Kiilu & Another vs Republic [2005] KLR 174.**

**Whether the appellant was properly tried in accordance with the prescribed procedure.**

20. According to the appellant, he is mentally retarded and could not understand the trial proceedings. He relied on section 167 of the Criminal Procedure Code and submits that his right to a fair trial under Article 50(2) of the Constitution was infringed. **Section 167 of the Criminal Procedure Code** provides:-

**(1) If the accused though not insane, cannot be made to understand the proceedings**

a) **In cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court;**

b) **In cases tried by the High Court, the court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President's pleasure.**

21. In the Court of Appeal, case of **Leonard Mwangemi Munyasia vs Republic [2015] eKLR** the court discussed the defence of insanity and the duty of the trial court where such defence is raised, or where there is evidence suggestive of insanity on the part of the accused. It held:-

**"It is the duty of the trial court where the defence of insanity is raised or where it becomes apparent from the accused's history and antecedent, to inquire specifically into the question and that the trial court cannot ignore evidence on record suggestive of the appellant's insanity merely because the defence has not specially raised it."**

22. On perusal of the lower court record, it is apparent that at no time did the appellant raise the issue of mental retardation or insanity to the court. In fact, he cross-examined all the prosecution witnesses and gave a sworn testimony of defence. The court did not indicate anything on record to suggest that he was mentally unsound. Documents attached to the bail application were made after the conviction of the appellant. He claims that he was suffering from mental illness since he was a young boy but failed to adduce any evidence to support the said claim. The appellant in my view ought to have been attending treatment for his alleged condition before and during the trial. As such, he ought to have attached medical records in support of his claim which he failed to do.

**23.** Further, it is suspect that he claims to be of unsound mind but he swears an affidavit in support of his application of bail pending appeal. In his defence, the appellant said he used to live alone at Labura Sub-Location where the offence occurred and used to herd animals. Therefore to claim that he was mentally unstable is a fallacy. He was employed as a herdsman and carried out his duties well without any assistance. In his defence, the appellant raises doubt in his story, he claims all along that he was framed for the offence. The appellant has failed to establish that he suffers from any mental condition during the time the offence was committed and during the pendency of the trial.

24. From the ongoing analysis, I am of the considered view that the appellant's claim of being mentally retarded or insane is an afterthought designed to get him out of the hook in this appeal.

25. I find that the accused during the trial was mentally fit to stand trial and that he was accorded a proper and fair trial under Article 50 of the Constitution.

**Whether the prosecution proved its case beyond reasonable doubt.**

26. On the issue of whether the prosecution proved its case beyond reasonable doubt, I wish to first address the following two sub headings:-

a) Whether there was conclusive evidence of penetration;

b) Whether the prosecution evidence was riddled with contradictions and inconsistencies.

I. **Whether there was conclusive evidence of penetration.**

27. **Section 8(1) of the Sexual Offences Act, 2006** provides as follows:-

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

28. **Section 2(1) of the Sexual Offences Act** defines penetration as:

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

29. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the perpetrator. In the case of **Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013** it was stated that:- **"The critical ingredients forming the offence of defilement are; proof of age of the complainant, proof of penetration and of positive identification of the assailant."**

30. In the instant case, the issues of the age of the complainant and identification of the assailant have not been challenged on appeal. The bone of contention is that the prosecution did not prove the act of penetration. The appellant claimed that the testimony of PW5 the doctor indicated that "it is possible there was penetration", there is a likelihood that penetration did not occur. In this regard, the appellant submitted that he ought to have been given the benefit of doubt.

31. PW5, Dr. William Muriuki testified on behalf of Dr. Wambugu who had examined the victim and produced the P3 Form and PRC Form. PW5 testified that on examination, PW1 had injuries on her genitalia her hymen was broken. He stated that it was possible there was penetration. On scrutiny of the P3 Form and the PRC Form, both indicate that the PW1's genitalia had injuries and her hymen was broken.

32. The key evidence relied on by the courts in a defilement case to prove penetration is the complainant's testimony, which is usually corroborated by the medical report presented by the medical officer. According to the complainant, she testified in court that the appellant lay on top of her by which time he had already removed his trousers and had removed her trousers as well. She further testified that the appellant inserted his penis into her vagina. PW4 corroborated that testimony when she said that the appellant did "tabia mbaya" to PW1 on her place that she used to urinate using his thing. PW4 further testified that PW1 had no clothes and that she saw the appellant lying on top of PW1.

33. The evidence of PW1 was very clear that the appellant inserted his penis into her vagina. This was corroborated by PW4 whereas the medical evidence by PW5 was that PW1 had a broken hymen and wounds on her genitalia.

**34.** I have analysed PW4's evidence which corroborates PW1's evidence and consistent with the medical evidence that there was penetration of the genital organ of PW1 by the appellant.

II. **Whether the prosecution evidence was riddled with contradictions and inconsistencies.**

35. In **Philip Nzaka Watu vs Republic [2016] eKLR** the Court of Appeal held that:

**"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported witness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."**

36. Similarly in the **Court of Appeal Tanzania in the case of Dickson Elia Nsamba Shapwata & Another vs The Republic Cr App. No. 92 of 2007,** addressed the issue of discrepancies in evidence and concluded as follows:-

**"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."**

37. The appellant submitted that the evidence of the prosecution was inconsistent, untruthful and contradictory which created doubt as to whether he committed the offence. It was also alleged that it was not clear from the evidence of PW1, PW2 and PW4 as to who was defiled and by who.

38. I have perused the evidence on record. PW1 the complainant aged ten(10) years, testified that she knew the appellant who worked as a herdsman of an old man in the area and he used to live alone there. Further that on the date of the offence, PW1 was accompanied by her friend N, (PW4) as they went to collect firewood. Then they felt tired and rested in the bed of N's mother where accused found them during daytime. When PW1 saw him, the appellant had already removed her trouser and also his own trouser. She tried to kick him and he went to lie on top of N. By that time, the appellant had already inserted his penis in PW1's vagina.

39. The evidence of PW1 was corroborated by that of PW4 who witnessed the incident. PW3 did not witness the incident but produced the necessary documents in court including the birth certificate. It is clear from the evidence that PW1 who knew the accused well was defiled in presence of her friend PW4 and that the appellant also attempted to defile PW4. PW4 also knew the accused well.

40. In my considered view the evidence of PW1 and PW4 was credible and clear that it was the appellant who defiled PW1, a minor in presence of another minor whom he also attempted to defile. Why the appellant was not charged with any offence against PW4 is not material to this case. It is my considered view that no material inconsistencies or contradictions existed in this case. The accused was

properly identified by the two eye witnesses PW1 and PW4. The evidence of the two witnesses was corroborated by PW5 the doctor who examined the complainant.

**Conclusion**

41. Having evaluated all the evidence on record as against the grounds of appeal, I reach a finding that the appellant has not established any of the grounds.

42. It is my finding that this appeal has no merit.

43. The conviction and sentence are hereby upheld.

44. The appeal stands dismissed.

45. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 29TH DAY OF JULY, 2021.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 29TH DAY OF JULY, 2021.**