REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 87 OF 2019

(Appeal arising out of conviction and sentence of Hon. Kesse C.M. Senior Resident Magistrate)

in Kitale Chief Magistrate's Court Criminal Case No. 137 of 2018 delivered on 31st July 2019)

ISAAC BUYELA WANYONYI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Isaac Buyela Wanyonyi, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 1st August 2018 and 13th August 2018 within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of DC1, a child aged thirteen (13) years. In the alternative, the Appellant was 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 diverse dates between 1st August 2018 and 13th August 2018 within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely the penis and the genital organ namely the vagina of DC1, a child aged thirteen (13) years. On arraignment before the trial magistrate's court, the Appellant pleaded not guilty to the two charges. After full trial, the Appellant was convicted as charged and sentenced to serve **seven (7) years imprisonment**.

The Appellant is aggrieved by the respective conviction and sentence hence this Petition of Appeal. The grounds in support of the Petition are that his defence was not taken into consideration, he wasn't examined by the doctor, the investigating officer failed to forward DNA samples that would have placed him at the crime scene, and he was held illegally in custody for a period of more than 24 hours. He further faulted the court for relying on vitiated evidence to convict him. In the premises therefore, the Appellant urged the court to allow his Appeal, quash his conviction and set aside the sentence imposed on him.

During the hearing of the appeal, the Appellant pleaded for a non-custodial sentence on account of the fact that he has suffered loss of vision. He cannot participate in any prison activities. He attached a copy of a letter from the ministry of medical services. It was indicated that the subject had suffered loss of vision and is therefore eligible to be registered as a person with disability. He stated that he was not appealing against the conviction. He simply pleaded for a non-custodial sentence given the fact that he is visually impaired. He further stated that he would receive better treatment if he is medically attended to while outside prison. The Appellant further submitted that he has been rehabilitated having become a Christian while in prison. He urged the court to favourably consider his request for reduction of custodial sentence.

Mr. Nderitu for the State opposed the appeal. He relied on his written submissions. He stated that the prosecution had proved that the complainant was a minor having produced the age assessment report showing that the complainant was of fourteen (14) years at the time of the incident. Further the court was satisfied that she was below the age of eighteen (18) years having seen her at trial. On penetration, the prosecution submitted that bearing in mind the principle of absolute penetration, it had proven that indeed there same was answered in the affirmative. This is because the complainant testified that the Appellant called her to his house, removed her pant and forcefully had sexual intercourse with her. The intercourse happened more than once. PW1, John Koima, the clinical officer who medically examined the complainant observed a torn old looking hymen and further found pus and epithelial cells. On identification, the prosecution relied on the complainant's testimony that she has known the Appellant as their neighbour and had spent time together with him in close proximity. The Appellant thus was sufficiently recognized and identified.

The Learned Prosecutor further submitted the Appellant's defence was weak and anything raised in the appeal was an afterthought. There was no need to conduct a DNA test as all elements of the offence had been proved the absence of DNA sampling notwithstanding. On being held in custody for more than 24 hours, Mr. Nderitu submitted that this was a non-issue as the same was never raised at trial. Be that as it may, his recourse is to compensatory damages in a civil court. Finally, the defence raised was not persuasive. The court had reached the correct verdict. He was of the view that the sentence meted on the Appellant was proper and urged the court to dismiss the appeal and uphold the conviction and sentence.

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.** In the present appeal, the issue for determination by this court is whether the prosecution established the charge levelled against the Appellant to the required standards of proof beyond any reasonable doubt.

The prosecution called a total of seven (7) witnesses in a bid to establish the charges brought against the Appellant. PW1, the clinical officer testified that the complainant was seen in August 2018 at Kitale County Referral Hospital. She stated that she was sexually assaulted on 13th August 2018 at 3.00 p.m. by someone known to her. He lured her with fruits and sexually assaulted her in his house. The sexual assault occurred on several occasions. The hymen was torn and old looking. There was erosion around the genitalia. Bacterial cells, epithelial cells and pus cells were seen in the urine. She sustained a urinary tract infection. She was treated for this infection. He produced the P3 form PExh 1 and the treatment notes PExh 2. There was no presence of spermatozoa. He pointed out that the presence of bacterial cells could also be attributed to lack of hygiene. There were no bruises in the labia. He was however of the firm view that the infection was due to the sexual assault.

PW2, DC2, the complainant's sister stated that she was eleven (11) years. She was a pupil at [Particulars withheld]. She stated that on the material day they were going for a walk with her siblings, including the complainant. At 3.00 p.m., the Appellant came to where they were and lured the complainant with an avocado. He was their neighbour. The complainant did not come back to where they were playing. she proceeded to the Appellant's house and found the Appellant and the complainant having sexual intercourse on the bed in the bedroom. She acted like she hadn't seen them and waited outside. The Appellant then informed her that the complainant had gone to look for change. The complainant then emerged from the house. PW2 informed the village elder of the incident. She knew the Appellant very well and had spent considerable time with the wife before.

PW3, the complainant, informed court that she was fourteen (14) years at the time she testified in court. She has four siblings including PW2. On 13th August 2018, she was at home with PW2 when she was called by the Appellant. The Appellant is their neighbour. She was asked to wash his utensils. When she finished the task, he called her to his bed. It was just the two of them. He removed her pant and his trouser. He then had sexual intercourse with her. She felt pain. On another occasion, she was at the school compound playing with PW2. He lured her to his house with avocado. He closed the door when she brought the fruit to him and sexually assaulted her. PW2 found them in the act. PW2 then informed the village elder. Their mother was informed. She was taken to hospital to receive treatment. She then recorded a statement.

PW4, Lydia Chelimo, the village elder, testified that on 13th August 2018, PW2 informed her that the Appellant had locked the complainant inside his house. She knew the Appellant. He was their neighbour. She went to the Appellant's house with PW2 and found the door locked. She did not see them. The following day, the complainant's mother called her. They interrogated the complainant. She stated that she had been sexually assaulted by the Appellant. That was the second time. The Appellant confessed to have done so.

PW5, Phanice Silali, a clinician at Kitale County Hospital dental department, produced the complainant's age assessment report. An x-ray was done. It showed permanent details of the complainant's teeth with 1st molar having complete root formation with upper molar formation of 3rd molars being completely formed assessed the complainant age's at fourteen (14) years. The age assessment report produced as PExh 3.

PW6, SN, the complainant's mother, testified that the complainant was born in 2005. On 14th August 2018, neighbours called and informed her that the Appellant had defiled the complainant. She made further inquiries from PW4. The Appellant is her neighbor. She took the complainant to the hospital and recorded a statement at the Police Station. She physically examined that her daughter and found that she had sustained injuries.

PW7, PC Linnet Anamba, the investigating officer, testified that she took over the file from her predecessor who had been transferred on medical grounds. The report was made on 14th August 2018. The following day, the complainant and her mother recorded a statement. The sexual assault was alleged to have occurred on 13th August 2018. The Appellant lured the complainant with an avocado. She brought him the same to his house. He then locked the door, took her to his bedroom where he sexually assaulted her. The sister followed them and found them having sexual intercourse. The complainant had been also defiled on another day when the Appellant requested her to wash his utensils. The village elder was informed. The Appellant admitted to having had sexual intercourse with the complainant.

In his unsworn defence testimony, the Appellant testified that on 10th August 2018, he attended a function. When he came home, a neighbour asked for a chicken. He was arrested at 5.00 p.m. and falsely accused of committing the offence by his neighbours. He denies committing the offence.

For the prosecution to sustain a conviction on a charge of defilement, it must establish the following three ingredients to the required standard of proof beyond reasonable doubt:

1. Age of the complainant

2. Penetration

3. Identification of the perpetrator

This court has aptly summarized the evidence of the trial court. On the complainant's age, PW3, who was the complainant testified that she was a class 4 pupil. She was fourteen (14) years at the time of the offence. This evidence was corroborated by that of PW6, the mother of the complainant who stated that she was born in 2005. PW5, a clinician, further produced a medical age assessment report which estimated the complainant's age at fourteen (14) years. This court is satisfied that the complainant was indeed a child aged fourteen (14) years at the time of the sexual assault.

The next issue is penetration. Section **2 (1) of the Sexual Offences Act No. 3 of 2006** defines **"penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

PW3's testimony gave an account of the sexual encounter she had with the Appellant. She testified that she had sexual intercourse with the Appellant on two occasions. One on incident, she was lured with fruits. This was confirmed by PW2 who caught them red handed having sexual intercourse. On another incident, after the Appellant requested her to wash his utensils, he sexually assaulted her. PW1 examined PW3. It was observed that the hymen was torn and old looking. Bacterial cells, epithelial cells and pus cells were seen in the urine. She sustained a urinary tract infection and was treated. The infection was as a result of sexual assault. This court finds that there was evidence of penetration on account of the testimony of the three witnesses. The Appellant challenged the evidence. He stated that no semen samples were collected thereby vitiating the prosecution's case. This court is not persuaded by the Appellant's assertion. There is overwhelming evidence based on the testimony of the prosecution witnesses that there was sexual intercourse which proves penetration. The complainant's testimony was sufficiently corroborated. This court therefore holds that the prosecution established penetration to the required standard of proof beyond reasonable doubt.

The next issue is the identification of the perpetrator. PW3 testified that she knew the Appellant long before the incident. He was her neigbhour. PW2 placed the Appellant at the crime scene having caught him having sexual intercourse with the complainant. Identification was further confirmed by PW4 and PW6. According to PW3, they spent considerable amount of time together. PW2 knew the wife of the Appellant and had previously spent time with her. This Court is satisfied that the Appellant was properly identified as the perpetrator. It was apparent from the evidence that there was an element of "consent" from the complainant to the sexual intercourse. However, being a child of less that eighteen (18) years, she lacked capacity to consent.

The principle ingredients to prove a charge of defilement were established and the prosecution proved his case beyond reasonable doubt. Having reevaluated the evidence adduced before the trial court, this court for the above reasons holds that the Appellant's appeal against conviction in respect lacks merit.

This court has analyzed the Appellant's defence in light of the grounds of appeal put forward by Appellant and the submissions articulated in his appeal. The Appellant appears to have abandoned all grounds in support of his appeal. He stated that he does not wish to disturb the findings of the trial court on conviction. The Appellant was under **the Sexual Offences Act** given a custodial sentence of 7 years. **Section 8 (3)** of the said statute provides as follows:

> **"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

The trial court held:

> **"I have considered the offence and mitigation of the accused person. I consider the demeanour of the accused person throughout the trial and the fact that he is a first offender. I consider the case as provided for under the Sexual Offences Act and the principles enumerated in the Muruatetu case which declared that the minimum sentences were unlawful and unconstitutional. I believe the accused person should benefit from the least sentence further in any criminal case. The accused shall serve 7 years imprisonment."**

The appellant seeks to serve a non-custodial sentence for the remainder of his sentence. The respondent made no response to these submissions. What then should a court consider when such an application is presented before it? The Judiciary's Sentencing Policy Guidelines speaks of non-custodial sentences. Under clause 7.18;

> **"Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending."**

It in that regard, the court shall take into account in the gravity of the offence, criminal history of the offender, character of the offender, protection of the community and the offender's responsibility to third parties. Furthermore, courts are guided by the parameters of **Section 39** of the **Sexual Offences Act.** This section governs the post release supervision of a dangerous sexual offender. The Appellant under this section is classified as a dangerous sexual offender. Consequently, his release for whatever reason must be accompanied by a supervisory order. **Section 39** provides thus:

> ***"(1) a court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has:***
>
> ***(a) More than one conviction for a sexual offence;***
>
> ***(b) Been convicted of a sexual offence which was accompanied by violence or threats of violence; or***
>
> ***(c) Been convicted of a sexual offence against a child.***

***(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine,* the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an**

appropriate person for the remainder of the sentence. (Emphasis added)

(3) For purposes of subsection (2), long term supervision means supervision of a rehabilitative nature for a period of not less than five years.

(4) A court may not make an order referred to in subsection (2) unless the court* has had regard to a report by a probation officer, *social worker, or other persons designated by the court for the purposes of this section as such, which report shall contain an exposition of—

(a) the suitability of the offender to undergo a long-term supervision order;

(b) the possible benefits of the imposition of a long-term supervision order on the offender;

(c) a proposed rehabilitative programme for the offender;

(d) information on the family and social background of the offender;

(e) recommendations regarding any conditions to be imposed upon the granting of a long-term supervision order; and

(f) any other matter directed by the court."

This court notes the referral letter in support of the Appellant's assertion that he is visually impaired. He appears to have atoned for the offence that he committed. He has been rehabilitated. This court further notes that the provisions of **Section 39** of the **Sexual Offences Act** is couched in mandatory terms; more particularly that a probation report must be presented before it for consideration of a non-custodial sentence. However, this court notes that the sentence that was imposed on the Appellant was extremely lenient in the circumstances. To disturb it would set the wrong message to the society that one can get away with having sexual intercourse with a child no matter the circumstances. The Appellant should ride his luck because if it were another court, he would have been sentenced to serve a more severe custodial sentence. The Appeal against the sentence therefore lacks merit. It is hereby dismissed. The Appellant shall continue to serve the sentence imposed by the trial court.

It is so ordered.

DATED AT KITALE THIS 26TH DAY OF JULY 2021

L KIMARU

JUDGE