REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 8 OF 2019

FRANCIS KARIMI KIRAGU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate

at Kerugoya in Criminal case No. 11 of 2018 delivered by Hon. Y. M. Barasa (SRM)

on 8th March, 2019)

JUDGMENT

1. The Appellant, **Francis Karimi Kiragu**, was convicted of the offence of defilement contrary to **Section 8(1)** as read **with Section 8(2)** of the **Sexual Offences Act No. 3 of 2006** and sentenced to serve twenty years imprisonment. The particulars were that on the 10th day of April 2018 within Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of **ENM**, a child aged 13 years. Aggrieved by both the conviction and sentence, he filed the instant appeal

Grounds of Appeal

2. The Appellant raised the following (10) grounds of appeal in his Petition of Appeal filed on 14th March 2019:

1. That the trial magistrate erred in law and facts by admitting doubt ridden evidence adduced by the prosecution witnesses.

2. That the trial magistrate erred in law and facts by failing to consider that penetration was not proved to the required standard.

3. That the trial magistrate erred in law and facts by failing to consider the existence of a grudge between the accused person and the complainant's Aunt.

4. That the trial magistrate erred in law and facts by failing to consider that the identity of the perpetrator was not proved to the threshold.

5. That the magistrate erred in law and facts by failing to consider that the case was shoddily investigated and unfounded.

6. That the trial magistrate erred in law and facts by failing to consider that the accused person was not medically examined to prove the participation of the offence.

7. That the trial magistrate erred in law and facts by failing to accord me affair hearing as enshrined in the constitutional.

8. That the trial magistrate erred in law and facts by shifting the burden of proof to the defence.

9. That the trial magistrate erred in law and facts by failing to consider the contradictions and inconsistencies inherent in prosecution case.

10. That the trial magistrate erred in law and facts by failing to consider my plausible defence and mitigation.

Summary of Evidence

3. This being a first appeal, it is the duty of this court to reconsider, re-evaluate and analyze the evidence adduced in the trial court so as to arrive at its own independent conclusion on the guilt or otherwise of the Appellant. In so doing however, the court must bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard - **Okeno v Republic (1972) EA 32).**

4. The prosecution's case can be summarized as follows: **PW1 ENM,** the complainant herein, gave a sworn testimony after a voir dire examination that on 10th April 2018 at about 4.00pm, she went to visit her grandmother BW who asked her to accompany her cousin CLM to the road. On her way back, she met the Appellant who was well known to her at her grandmother's gate. The Appellant asked her to accompany him somewhere. They entered a house whereupon he removed his T-shirt and used it to cover PW1's mouth. Thereafter, he removed his clothes, undressed PW1, placed her on a bed, slept on her and inserted his penis in her vagina.

5. PW1's mother **PW2, PNK** returned to her home on the same day at about 8.25pm then called her child AP and her sister MW and asked whether PW1 was with either of them but they both said no. PW2 then called her mother BW who told her that she was with PW1 but PW1 was not at home at that time. PW2 thus called her sister **PW4 RM** and asked whether PW1 was at her home but PW4 told her PW1 was not there. PW2 suspected that PW1 was at the Appellant's home and as such, she asked PW4 and their brother WM to meet her at the road and escort her to the Appellant's home. When they arrived there, they went to the backyard of the house while their brother went and knocked the Appellant's door.

6. The Appellant refused to open at first but later did then went to the sitting room and switched off the TV and went back to the bedroom where he put PW1 under the bed and gave her a sweater. PW4 who was once married to the Appellant entered his house and saw a sweater and a top on the bed. She saw PW1 hidden under the bed and asked the Appellant what he had done but he ran away. PW4 took PW1 outside then they called the Appellant's uncles, aunt, grandfather and mother and told them what had happened.

7. They went and reported the incident at Kabonge police post on the same night. **PW5, No. 67783 PC David Musa Mugenda** made this report in the Occurrence Book then referred PW1 to Kerugoya County Referral Hospital for medical checkup. PW5 also issued PW1 with a P3 form to be filled by a Clinical officer at the facility. PW1 was examined at Kerugoya General Hospital on the same night by **PW3, Hezron Macharia Maina**, a registered Clinical officer. The genitalia examination revealed a bruise on the labia minora, hymen had fresh breakage, nothing abnormal was noted on the vaginal wall surface but she had pus like discharge from her vagina. A high vaginal swab showed that there were normal red blood cells, no spermatozoa was seen but there was bacterial infection. Urinalysis showed numerous red blood cells. Both pregnancy and HIV tests were negative. PW3 concluded that that there was defilement. Further, PW1 was accorded physiological counselling and given emergency contraceptive, antibiotics and post-exposure treatment against HIV. On 11th April 2018, PW3 signed the P3 form with the aid of outpatient notes. He produced the P3 form, the outpatient treatment notes and post care rape form as exhibits 1, 2 and 3.

8. Thereafter, PW5 commenced the investigation by recording statements from witnesses then traced the Appellant with the help of Administration Police officers. The Appellant was arrested at Karaini village near a club and 12 rolls of a plant material suspected to be cannabis sativa were recovered from him by members of the public. The cannabis sativa had earlier on been recovered by PW1's uncle WM. PW5 forwarded the specimen to the government chemist Nairobi and received a report which confirmed that the plant material was indeed cannabis sativa. PW5 also visited the scene of crime which was identified to him by PW1 and PW2. He confirmed that the Appellant lived in the house and that they were relatives. PW5 produced PW1's birth certificate. In cross examination, PW5 denied the Appellant's allegation that he was framed by members of the victim's family. In re-examination, he stated that there was no grudge between the mother of the victim and the accused or between their respective families.

9. When placed on his defence, the Appellant gave a sworn testimony and called two witnesses. He testified that on the material day, he was at home working then went to his grandmother's home to take food at about 7.30pm. When he went back to his place, he found his ex-wife PW4, her brother Wilson and PW2. They claimed that PW1 was in his house and said that he would be arrested and jailed because he separated with PW4. In cross examination, he stated that PW1 used to visit PW4 when they were still staying together.

10. The Appellant's grandmother, **DWI Naomi Muthoni Nyamu** testified that she had been living with the Appellant. One evening at about 7.30pm, the Appellant went to her house, took food and went back to his place. A few minutes later, she heard people shouting and went to check. She found PW1, PW2, PW4 and a brother to the victim's mother and they told her that the Appellant must be jailed but did not tell her why. They boarded a motor cycle and went away. Later on, she heard that the Appellant had been arrested. In cross examination, she stated that PW1 used to visit PW4 when she was married to the Appellant.

11. DW2, Mary Waithera, was a casual labourer who works at the Appellant's home. She stated that on the material day, she went back to the Appellant's home in the evening to collect her money. The Appellant's grandmother told her that food was ready and served her but as she was eating, she had some noise and went to check. She found the PW4, PW1 and PW2 and asked them what was happening. They told her that the Appellant must be arrested but did not say why. They then boarded a motor cycle and left. In cross examination, she stated that she left work at 12.00pm and went to the shopping centre then went home at around 4.00pm and thus did not know what might have happened when she was away.

Analysis and Determination

12. The Appeal was dispensed with by both written and oral highlights. The Appellant filed his written submissions on 10th July 2020 and appeared in person during the oral highlighting of the same. The Respondent on the other hand was represented by the learned state counsel Mr. Ashimosi who only tendered oral submissions. In my considered view, **the issues for determination are: whether the prosecution proved its case beyond a reasonable doubt and whether the sentence can be reviewed**.

Whether the prosecution proved its case beyond a reasonable doubt

13. Section 8(1) of the **Sexual Offences Act** provides as follows regarding the offence of defilement:

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

14. In determining this offence, the court is enjoined to establish three elements namely: the age of the victim; penetration of the victim's genitalia; and identification of the perpetrator.

15. **As regards the age of the victim**, PW5 produced in evidence a birth certificate showing that PW1 was born on 26th January 2004. This proves that she was fourteen years old as at 10th April, 2018 when the offence is alleged to have been committed and was therefore a child as per **Section 2** of the **Children Act** Cap 141 of the Laws of Kenya.

16. **On the issue of penetration**, PW1's account of the alleged defilement was well corroborated by the medical evidence tendered by PW3. The genital examination by PW3 revealed that PW1 had a bruise on the labia minora, her hymen had fresh breakage which was consistent with 8 hours old and she had a pus like discharge from her vagina which made PW3 conclude that that there was defilement. I note that the Appellant contends that the medical evidence on record was a forgery and unreliable as it seems to have been prepared by two different medical officers in view of the different handwritings thereon. The Appellant did not controvert these medical evidence or object to the production of the same in the trial court. In any event, it is noteworthy that the evidence on exhibits 1, 2 and 3 is consistent and thus am persuaded that penetration was also proved.

17. **As regards the identification of the Appellant**, there is no doubt that PW1 knew and recognized him since he was once married to the complainant's aunt PW4. The Appellant has indeed confirmed this fact but claims that he did not commit the offence but was framed up by PW1's relatives as a revenge for the broken marriage between him and PW4. He argued that PW1 was couched by PW2 and PW4 to give false evidence against him in furtherance of the revenge. I am unable discern from the evidence on record, the existence of any grudge between PW1's relatives and the Appellant and/or any frame up. PW1 gave a detailed narration of the events that led to the incident and what happened after. Her testimony that her uncle knocked at the Appellant's door then the latter hid her under a bed, was consistent and corroborated by PW2 and PW3 who both stated that PW1 was found in the Appellant's house under the bed. Further, the Appellant's act of running away when PW4 asked him what he had done to PW1 is not consistent with innocence. The ground of appeal regarding an existing grudge is therefore unfounded and thus I am persuaded that the Appellant was positively identified as the perpetrator of the offence.

18. Further, **the Appellant submitted that the prosecution's case was marred with numerous contradictions and inconsistencies** which cannot be ignored. Firstly, he pointed out that PW1 testimony that he put her under the bed and gave her a sweater contradicted PW4's testimony that she saw a sweater on top of the bed when she entered the Appellant's house. Secondly, he submitted that PW3's oral evidence in court was inconsistent with the documentary evidence produced in that, PW3 stated that PW1 had already changed her original clothes at the time of examination whilst the PRC report prepared by one PM indicates that PW1 was wearing the cloth that she had on during the time of incident. Thirdly, he argued that there was contradiction between the evidence of PW2 and PW4 regarding how and what led PW2 to suspect that PW1 was at the Appellant's home. In my considered view, the inconsistencies referred to were so minor that they did not affect the main substance of the prosecution's case. Indeed, it is not uncommon for different witnesses to give different views of what they have seen even if it is the same incident. This ground therefore fails on that account.

19. Additionally, the Appellant faulted the prosecution for failing to call crucial witnesses without giving any explanation for the same. These, according to him, were PW1's uncle WMK who was among the people that went to his home on 10th April 2018 and found PW1 inside his house and PW1's grandmother BW. It is well settled that the prosecution has no obligation to call a superfluity of witnesses but only such witnesses as are sufficient to establish a charge beyond any reasonable doubt. This is a discretion which the court cannot interfere with unless the failure to call a witness is due to some oblique motive ***Mwangi v Republic [1984] eKLR*.** In the instant case, I have no doubt that the witnesses called by the prosecution were sufficient to establish the charge.

20. The Appellant further took issue with the fact that the incident is alleged to have occurred on 10th April 2018 yet from the charge sheet, it appears to have been reported over a month later as it is indicated that the charges originated from O.B/NO. 02/15/5/2018 which is the date when he was arrested. He argued that the delay was occasioned by an attempted reconciliation with PW4 to prevent him from being framed up. My perusal of the record reveals that these contentions are not factual but mere creations of the Appellant's imagination. The record clearly shows that the incident was reported on the very night that it occurred and there is also no evidence of a frame up.

21. The upshot is that the prosecution proved its case against the Appellant beyond any reasonable doubt. His conviction was therefore well founded and is accordingly upheld.

Whether the Appellant's sentence was proper?

22. The learned state counsel Mr. Ashimosi urged the court to review the Appellant's sentence to a minimum of 25 years since the victim was 13 years old. It is well settled that in defilement and all sexual offences, the age of the victim is crucial as it determines the length of the sentence to be prescribed upon conviction. In this case, it has been established that PW1 was 14 and not 13 years at the time she was defiled. **Section 8(3)** of the **Sexual Offences Act** prescribes a sentence of ***not less than twenty years imprisonment*** for a person convicted of defiling a child between the age of twelve and fifteen years. This means that the Appellant's sentence was as prescribed under Section 8(3) of the Sexual Offences Act which is the minimum that a curt may impose. To attempt to review the same downwards would be against the law, and therefore unlawful. Both the conviction and sentence are therefore upheld.

The upshot is that the Appeal lacks merit and is dismissed in its entirety.

Orders accordingly

DATED AND SIGNED THIS.....DAY OF.....2021

J. N. MULWA

JUDGE

DATED AND DELIVERED AT KERUGOYA THIS 30TH DAY OF NOVEMBER 2021

R. M. MWONGO

JUDGE