REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 31 OF 2020

FRED NYONGESA WAPANGANA...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Chief Magistrate's Court at Bungoma Criminal Case (SO) No. 3096 of 2015, Hon. J. Kingori, CM on 19th March, 2018).

REPUBLIC.....PROSECUTION

VERSUS

FRED NYONGESA WAPANGANA.....ACCUSED

JUDGEMENT

1. The appellant, **Fred Nyongesa Wapangana**, was charged before the Bungoma CM's Court in Sexual Offences Case No. 3096 of 2015 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. The particulars were that the Appellant, on 16th August, 2015 at [Particulars withheld] Village in Bungoma Central Sub-County intentionally and unlawfully caused his penis to penetrate the vagina of **NS**, a girl aged thirteen (13) years. The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 the particulars being that on 16th August, 2015 at [Particulars withheld] Village in Bungoma Central Sub-County at (Names withheld) village in Bungoma Central Sub-County within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of **NS** a girl child aged thirteen (13) years.

2. In his judgement, the learned trial magistrate found that the appellant committed the offence with which he was charged in the main charge. It was the learned trial magistrate's finding that the evidence was overwhelming against the Appellant hence the reason he offered so frail a challenge to the testimony of the prosecution's witnesses. He therefore proceeded to convict the Appellant on the main charge and sentenced him to twenty (20) years imprisonment.

3. Being dissatisfied with the conviction and sentence, the Appellant has lodged the instant appeal based on the following grounds:

1. That the trial court failed to observe that the prosecution's case was full of contradiction hence unsafe to base a conviction upon.

2. That the trial court failed to observe that nothing linked the appellant medically with the alleged offence.

3. That the trial court failed to observe that the prosecution did not prove the alleged age of the victim beyond reasonable doubt.

4. That the trial court erred in law by shifting the burden of proof on the side of the appellant whereas the same lies with the prosecution.

5. That the trial magistrate erred in law and fact by dismissing the appellant's defence evidence which was cogent enough to award him an acquittal.

6. That he seeks to be served with trial court records to enable him file more grounds.

4. In support of its case, the prosecution called 6 witnesses. After a brief **voir dire** examination, the court formed the view that the complainant was a big teenager and could therefore tender sworn evidence.

5. According to the complainant, who testified as PW1, she recalled that on 16th August,2019 at around 5.00pm, her step-mother had beaten her and thus had fled from home. On the way to the river, she met the Appellant who happened to live at her grandmother's house which is 50 metres away from her home and that her grandmother is the mother to her father. She testified that she used to see the Appellant in her grandmother's home and on meeting him he requested her to accompany him to his house to which she agreed and they proceeded to a *simba* (hut) in her grandmother's compound. She testified that it started raining and the Appellant directed her to get in bed with him to which she agreed. It was around 6.00pm, the Appellant informed her to remove her clothes to which she complied by removing her skirt and blouse leaving only a biker which the appellant removed it. She testified that they got under the blanket where she laid on her back as the Appellant asked her to raise her legs. She complied and he proceeded to remove his clothes and put his penis in her vagina. She testified that she felt pain but was willing to do it and that the Appellant did it four times that night and that he did not use any protection. She stated that she did not bleed and at 6.00 am the following morning the Appellant informed her to go hide in the maize plantation until 9.00am. The Complainant testified that, her grandmother N found her and took her to her other grandmother called L where she spent the day and night. On 18th August, 2015 her father in the company of two elders, *Mpwuan*, being one of them because they knew she had spent the night at a friend's house. She testified that she had informed N that she had had sex with the Appellant and was escorted to Chwele Police Station together with the Appellant. The Complainant testified that before going to the police station she was escorted to Chwele Hospital where she was examined and issued with a card identified as (PMF1). They returned to the police station and were issued with P3 Form, identified as (PMF2) and her age was also assessed according to (PExh3). She was also able to point out the Appellant in court.

6. On cross-examination, PW1 reiterated that she fled home and that she was not found in the house of the Appellant and that her father found her at L's and was taken to *Nyumba Kumi*.

7. On Re-examination, PW1 testified that, on 16thAugust, 2015 she met the Appellant on the way as she fled home and that the appellant informed her to go with him which she agreed and they proceeded to his house where they spent the night and that her father found her two days later at L's house. She further reiterated that it was the Appellant who asked her to hide in the maize plantation after spending the night with him.

8. According to PW2, **Bridget Nasimiyu**, a resident in Sikusi and a farmer, she recalls that on 16th August, 2015 at around 8.00 am while at home with her husband and children, PW1 walked away when she was questioned about groundnuts. She looked for her from her grandmother's house which was about 100 metres away. PW1's father joined the search and had the matter reported to the village elder and the chief. On 17th August, 2015 around evening, she received information that PW1 was at her grandmother's house and she proceeded to the place and found her there. PW2 inquired from the complainant about where she had spent the night only for her to be told that she spent the night with the Appellant. On further inquiry, the complainant informed her that they had sex throughout the night. She reported the same to her husband and left the complainant in her grandmother's house. In the morning her husband and the Appellant's father went for the complainant and then arrested the Appellant. PW2 followed them to the hospital where it was confirmed that the Complainant had been defiled.

9. On Cross examination, PW3 reiterated that the she was the one responsible for the complainant running away from home and that she started looking for her after 30 minutes. She noted that PW1 was found near the river not far from their home and that she never went to the Appellant's house because she did not suspect the complainant could be there. PW3 further testified that she was not aware that PW1 had a relationship with the Appellant.

10. PW3, **David Wamalwa Wekesa**, a resident in Sikusi village and the *nyumba kumi* chairman testified that on 18th August, 2015 at around 1.00pm while at home the Appellant, complainant and her father arrived at his house. PW1's father reported that the Appellant had defiled his daughter and that he had called the Assistant Chief Mr. Deflo, who advised him to take them to Chwele Police Station where the police took up the matter. He stated that the complainant was taken to hospital while the Appellant was locked up. On cross examination, he testified that he did record a statement with the police.

11. The complainant was recalled and was further cross examination by the Appellant, and who reiterated that there are other people who live in her grandmother's compound and that it was her father who took her to *nyumba kumi* from her grandmother's house. She testified that he was not aware of what was happening then and that she had to say she spent the night with the Appellant. She further reiterated that she met the Appellant on 16th August, 2015 as she fled home and that he informed her to go home with him. She noted that the Appellant's house was in her grandmother's compound and that there was nobody in his house. She testified that her father found her at her grandmother's house and she informed him she had spent the night of 16th August, 2015 with the Appellant in his home.

12. PW4, **Tom Barasa Juma**, a clinical officer Chwele Sub-District Hospital testified that at around 2015 he never attended to PW1 as she was attended to by **Simon Bwabi** who had since been transferred and was not available. He presented the P3 form and treatment note on his behalf. He testified that PW1 was aged 13 years and who was sent for some lab tests. On examination it was observed that her hymen was broken with no cervical laceration. However, the tests for pregnancy, VDRL and HIV turned out negative. PW1's urine analysis showed moderate pus cell, epithelial cells were also present. He produced the P3 forms and treatment notes on behalf of his colleague who had been transferred. On Cross-examination, he reiterated that PW1 was clinically stable, that no spermatozoa were seen and that no vaginal swabs were done.

13. The Clinician, **John Weremba** (Pw5), testified that he is attached at Chwele Sub-County Hospital. He stated that he was sent by the Hospital to present an age assessment form for the complainant filled on 18th August, 2015 at Chwele District Hospital by his colleague who has since left the station for Makutano Health Centre. He testified that using the dental formula of the complainant, he assessed her age at 13 years. On cross-examination, he reiterated that his colleague assessed the complainant's age and was in court to represent him as he went on transfer.

14. The Investigating officer, **PC Roba Heleka** (Pw6), testified that he is attached at Chwele Police Station. He testified that he undertook investigations of the incident and issued the complainant with a P3 form which was filled in. According to him, he received it on 18th August, 2015 at around 2.00 pm while at the office, a case had been reported by the complainant's father with the complainant that the complainant had been defiled by the appellant on 16th August, 2015. He recorded statements from witnesses and transferred the complainant for examination. He stated that the P3 form and treatment notes were returned to station and produced as exhibits in court and that the Appellant was charged with the offence. On Cross-examination, he testified that he did not witness the defilement and that he visited the scene of crime with PC Maina and that the doctor confirmed that the complainant had been defiled.

15. At the close of the prosecution's case, the Appellant was placed on his defence and tendered his sworn evidence where he stated that he is a shamba boy and while at the farm harvesting maize for his employer he saw a motorbike enter his employer's compound and upon going to investigate, he was asked whether that was the home of Biketi to which he informed them it was not. They requested he escorts them there and on getting onto the bike the rider did not stop but took them to Chwele Police Station. He was transferred to Bungoma Police Station and charged in court the following day. He further denied and still denies the charges. On being cross examined, he stated that he did not know where the complainant was residing and further denied knowing the village elders. He also stated that he was only two months old in the area at the time.

16. The Appeal was canvassed by way of written submission. Both parties have filed and exchanged their submissions.

17. The Appellant submitted that he is remorseful and very much apologetic for having engaged in such a shameful and unlawful act. It was submitted that he has embarked on the rehabilitation process for the past six (6) years and that the court considers reviewing his sentence so that he may be able to assist his young family.

18. On behalf of the Respondent, it was submitted that the appeal ought to be dismissed. It was therefore submitted that the prosecution's case was not contradictory and neither was the burden of proof shifted to the appellant at any point of the trial. It was submitted that the evidence adduced by the prosecution was sufficient to prove the offence beyond reasonable doubt.

19. This being a first appellate court and as is expected, is obliged to analyse and evaluate afresh all the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first 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 conclusion; it must make its own findings and draw its own 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] E.A 424."

20. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. 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 findings 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.**

21. Section 8 of the Sexual Offences Act provides as follows:

> 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> (3) 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.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
>
> (5) It is a defence to a charge under this section if -
>
> > (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
> >
> > (b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

22. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013**, where it was stated that:

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

23. PW4's evidence seemed to have corroborated the evidence of the complainant. They produced the P3 form, age assessment form and treatment notes. According to the clinical officer who examined the complainant and filled the P3 form, there was evidence of defilement due to a broken hymen with moderate pus cell, epithelial cells were also present. In fact, the mere fact that no spermatozoa are found does not necessarily mean that there was no penetration though its presence may well prove that there was penetration, though again that is not conclusive proof. In **Mwangi vs. Republic [1984] KLR 595 at 603**, the court rendered itself thus:

> **"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has had sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."**

24. The complainant maintained that the Appellant did insert his penis into her vagina. It is instructive from the evidence of the complainant's step-mother (Pw2) that the complainant had disappeared from home on the material day as it turned out that she had spent the night with the appellant. The complainant stated that she and the appellant had sex in his house throughout the night four times to be precise. She was categorical that the appellant inserted his penis into her vagina. The penetration was confirmed by the clinical officer (Pw4). There is no doubt that indeed there was penetration of the complainant's genital organ. The complainant was so certain that she and the appellant had sex on the night in question and that they did it four times to be precise. She had no qualms about the said sexual intercourse as she briefed her grandmother about it and pointed out that it was none other than the appellant who had sex with her. Having considered the evidence adduced herein, I have no doubt that the Respondent did prove that there was penetration of the complainant's genital organs.

25. As regards the aspect of the age of the complainant, the evidence of PW5 and the age assessment form produced as exhibit (PExh.3) indicated that the complainant was aged 13 years and hence at the time of the commission of the offence herein, she was obviously a child within the meaning of the **Children Act 2001** as she was below the age of 18 years. This ingredient was proved by the respondent beyond reasonable doubt.

26. As regards the issue of the prosecution's case being full of contradiction, it is very clear that the evidence of PW2 and Pw3 corroborated the turn of events as narrated by PW1. The general rule as regards the effect the discrepancies in the evidence of witnesses have in discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling, substantial or deliberate. See Law of Evidence (10th Ed) Vol. 1 at 46. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6**:

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi)** Tunoi, Lakha & Bosire JJA held: -

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."**

27. From the above authorities, it is quite elaborate that there was no sort of discrepancies in the case of the prosecution. In this case, even though PW1, PW2 and Pw3 gave similar names of the appellant, what emerged is that they knew him as he used to live in the compound of the complainant's grandmother. PW1 and PW2 knew him quite well and they clearly identified him in court by his name and knew where exactly he stayed hence the contradiction alleged by the Appellant has not been proved. I find the contradictions, if any, did not affect the weight of the prosecution's case as the same is curable under section 382 of the Criminal Procedure Code which provides as follows:

> **''Subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission, summons, warrant, charge, proclamation, order, judgement or other proceedings under this code, unless the error, omission, irregularity has occasioned a failure of justice.''**

28. I am satisfied by the evidence of the complainant that it was the appellant who had defiled her and not any other person. The complainant herself informed her grandmother that she had spent the night at the appellant's house and that they had sexual intercourse together four times that night. She had known the appellant quite well since the appellant worked at the home of her paternal grandmother and had been acquainted well with him. The appellant's defence claim that he did not know the complainant and that he had been framed up for the offence was properly rejected by the learned trial magistrate.

29. Therefore, the evidence of the complainant if truthful could properly be a basis upon which a conviction could be founded even if she was a child of tender years, which she was. The physical identity of the appellant as the perpetrator of the crime was not in dispute since the complainant had no difficulty whatsoever as to the identity of the person she had sex with on the material date. She had known the appellant who was an employee of her grandmother and hence the third ingredient of the offence has been met by the respondent beyond any reasonable doubt.

30. The Appellant having resided in the same compound as the complainant's grandmothers could not have been mistaken for somebody else. In any case, the complainant and her mother got the Appellant's first name ''Fred'' and as such the same did not imply that they did not know the person they were referring to. The said witnesses (PW1. PW2 and PW3) were quite certain of the identity of the appellant who worked in the area and was a neighbour. Hence, I find the Respondent's case was not in any way full of contradictions and that it had proved the third ingredient beyond any reasonable doubt.

31. The above findings lead me to the conclusion that the conviction arrived at by the trial court was sound and I see no reason to interfere with it.

32. As regards sentence, it is noted that the Appellant was sentenced to serve imprisonment for twenty years. Under section 8(3) of the Sexual Offences Act, a person found guilty of defiling a child between the age of twelve years and fifteen years shall be sentenced to serve not less than twenty years' imprisonment. The complainant herein was found to be aged 13 years old hence the sentence imposed fell within the age bracket. It is noted that the trial court duly considered the Appellant's mitigation before sentencing him. I find the sentence to be the possible minimum in law. There is no evidence that the Appellant was released on bond pending trial and hence the period spent in custody before sentence must be factored pursuant to the provisions of section 333(2) of the Criminal Procedure Code. The sentence imposed should therefore commence from the date of arrest namely 18th August, 2015 and hence the appeal against sentence partly succeeds to that extent only.

33. In the result, the appeal against conviction lacks merit. The appeal against sentence partly succeeds to the extent that the sentence of twenty years shall commence from the date of arrest namely 18th August, 2015.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF NOVEMBER, 2021

D. KEMEI

JUDGE

IN THE PRESENCE OF:

Fred Nyongesa - Appellant (virtually)

Miss Omondi for Respondent (physically)

Kizito - Court Assistant