THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL APPEAL NO. E008 OF 2020

KENNETH MUTEGI KILONZO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was convicted of the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act** in **Marimanti Principal Magistrate's Sexual Offence Act (S.O.A.) -Case No. 17 of 2018**.

2. The particulars of the offence were that in the month of November 2017 at Marimanti location, in Tharaka South sub-county within Tharaka Nithi County, the Appellant intentionally caused his penis to penetrate the vagina of JK, a child aged 14 years.

3. After a full trial, he was found to be guilty of the offence and sentenced to 20 years imprisonment.

4. Being dissatisfied with the said decision, the Appellant has now appealed against both his conviction and sentence vide a Petition of Appeal dated 2nd October 2020 which is based on grounds THAT:

> **a.** The learned trial magistrate erred in law and fact in convicting the appellant regard being had to the facts of the case and most importantly the issue of age which was not sufficiently proved that the complainant was a minor.
>
> **b.** The learned trial magistrate erred in law and fact in convicting the appellant in a charge not proved beyond reasonable doubt.
>
> **c.** The learned trial magistrate erred in law and fact in convicting the appellant when there was reason to believe the complainant was of the age of majority in view of the evidence tendered and the defence adduced.
>
> **d.** The learned trial magistrate erred in law and fact by meting out an excessive sentence regard being had to the probation report.

5. The Appellant thus prays for this honourable court to quash the conviction, set aside the sentence and set him at liberty.

6. The appeal was canvassed by way of written submissions. The Appellant and Respondent filed their written submissions on 28th September 2021 and 6th October 2021 respectively.

Appellant's Submissions

7. According to the Appellant, the complainant in the matter was known to him as an adult and the two were friends. He noted that the prosecution failed to produce an age assessment report to prove that the complainant was a minor and it was thus his submission that the prosecution's failure to prove the charges against him to the requisite standard.

8. On the issue of the sentence, the Appellant relied on the cases of **Phenellah Nanjala v Republic [2018] eKLR** and **Gitonga Kirera v Republic HCA NO. 128 OF 2018** and submitted that the sentence meted against him was excessive and prayed for it to be reviewed.

Respondent's Submissions

9. It was the Respondent's submission that it did prove that the Appellant caused his penis to penetrate the victim's vagina who was at the

time a minor. The Respondent, citing the case of **Moses Mwarimbo DAu v Republic [2018] eKLR**, thus submitted that it had proved beyond reasonable doubt all the three elements which ought to be satisfied before a conviction of the offence of defilement is secured. It thus prayed for the appeal to be dismissed and conviction and sentence upheld.

Issues for determination

10. From the respective pleadings and submissions of the parties herein, it is my view that the main issues for consideration by this court are:

a. Whether the prosecution proved its case against the Appellant to the required standard.

b. Whether the sentence meted against the Appellant was excessive in the circumstances.

Analysis

A. Whether the prosecution proved its case to the required standard

11. Grounds no. 1, 2, and 3 of the Appeal were argued under this head.

12. Being a first appellate court, this court is alive to its duty as was set down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 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 (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction 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; 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 V Sunday Post 1978) E.A. 424."**

13. Section 8(1) of the **Sexual Offences Act** provides that:

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

14. The ingredients for the offence of defilement are: penetration, age of the victim and identification of the offender. [See: **George Opondo Olunga v Republic (2016) e KLR**]

15. In his defence, the Appellant admitted to have known the complaint since birth and stated that they were neighbours and had been friends for a long time. The complaint, who was PW1, also identified the Appellant as her neighbour. Thus, the issue of identification has not been challenged in this appeal.

16. On proof of the element of penetration, the key evidence relied by courts is the testimony of the complaint which is usually corroborated by a medical report presented by a medical officer. In this case, PW1 testified that sometime in September 2017, the Appellant called for her through some herders she was with while grazing the field. She refused on the first two attempts but on the third attempt, the complaint decided to go to the Appellant's house where the two had unprotected sex. The complaint then returned home and it was later discovered that she had conceived.

17. After learning about the pregnancy, PW2 who is the complainant's father, reported the matter to the police. PW1 later gave birth sometime in June 2018. According to PW3, the investigating officer in the matter, the Appellant, PW1 and PW1's child were taken for D.N.A. testing and the results came back indicating that the Appellant was the father to PW1's child. The results were produced in court as P.Exhibit 1.

18. The P3 form produced by PW4 corroborated the testimony of PW1. According to the clinical officer who examined PW1, her hymen was broken but not freshly. In addition, she was pregnant at the time of examination, which is a sign of penetration. Definition of penetration is given under **Section 2 of the Sexual Offences Act** to mean the ***"partial or complete insertion of the genital organs of a person into the genital organ of another person."***

The fact of penetration is proved by the evidence of the complainant. A court will rely on the evidence of the complainant to convict if it has reasons to believe her. In this case, the prosecution adduced cogent evidence to corroborate the testimony of the complainant.

19. In regard to the age of the complainant, a birth certificate issued on 23rd November 2017 indicating that the victim was born on 30th November 2003 was produced in court. The complainant thus was 14 years old at the time of commission of the alleged offence. The Appellant has however disputed this fact alleging that since the birth certificate was issued on the same month as the time of the commission of the alleged offence, the same was only produced to frame him of the charges he was facing.

20. Rule 4 of the **Sexual Offences Rules**, **2014** which provides that:-

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be**

contained in a birth certificate, any school documents or in a baptismal card or similar documents."

21. The court of Appeal in the case of ***Leonard Njuguna Njoroge –v- Republic.***

22. Proof of a victim's age is a key ingredient to prove an offence of defilement given that the penalty is heavy depending on the complainant's age. In this case, a birth certificate was produced in evidence to prove PW1's age at the time of commission of the alleged offence. The authenticity of the said birth certificate was not challenged by the Appellant until the point he was put in his defence. The Appellant also never tendered any evidence to substantiate his allegation that the said birth certificate was only produced to frame him. The appellant has also urged the court to find that the complainant was an adult or that he posed as an adult. It was not enough for the appellant to allege that she was an adult, he must demonstrate the action he took to ascertain the age of the complainant.

Section 111 of the Evidence Act states;

> ***"111.Burden on accused in certain cases***
> ***(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***
> ***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***
> ***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence create a reasonable doubt as to the guilt of the accused person in respect of that offence.***
>
> ***(2)Nothing in this section shall–***
>
> ***(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or***
>
> ***(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection(1)do not exist; or(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity."***

A person charged with defilement is entitled to raise a defence that he was misled by the complainant to believe that she is an adult. Section 8(5) & 6 of the Sexual Offences Act provides:-

> ***"8(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."***

The appellant has not demonstrated the steps he took to confirm whether the complainant was an adult. His allegation was a sham. The claim that they were friends for a long time cannot hold as he never stated that she asked her age. She was a minor who could not give consent to sexual activity

In the circumstances, I thus opine that the prosecution did prove against the Appellant to requisite standard.

b. Whether the sentence was excessive in the circumstances

23. Ground no. 4 of the Appeal is addressed under this head.

24. Sentencing remains pre-eminently within the discretion of the sentencing court.

25. In the case of **Phenellah Nanjala** *(supra)* relied on by the Appellant, the court therein invoked the dictum in the celebrated **Muruatetu** decision **(Francis Karioko Muruatetu & Another -vs- Republic – Petition No. 154 of 2015) and expressed itself as follows:**

> **"Minimum sentences that are prescribed by any legislation deprive the courts of its discretion and undermines its independence in decision making upon interrogation of circumstances pertaining to the Commission of the offence, and in most cases such sentences are not consumerate and proportionate to the offences committed and the victim reports impact and therefore poses serious injustices to the offenders - See *Nyamawi Nyawa -vs- Republic (2014) e KLR."***

26. However, fresh directives in interpreting the Muruatetu's case have since been given by the Supreme Court of Kenya to the effect that the

said decision only relates to murder cases.

27. Section 8(3) of the **Sexual Offence Act** provides that:

> **"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 sentence imposed was the bare minimum provided.

28. In this case, the Appellant was a government employee working in the Tharaka Nithi County Government Department of Revenue. He was 26 years old at the time of the commission of the offence. The Appellant also indicated in his mitigation that he had a wife and two children. In my view, he ought to have known better than commit the offence in question. As such, I opine that the sentence meted out is justifiable and not excessive in the circumstances.

Conclusion

29. From the foregoing, it is my view that this appeal is not merited and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY OF DECEMBER, 2021.

L.W. GITARI

JUDGE