REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 58 OF 2016.

PETER RIMUI...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an Appeal from judgment of the Senior Resident Magistrate Hon. J.N.

Nthuku delivered on 31st of March 2016 in NAKURU Cr. Case No. 295 of 2014)

JUDGMENT

1. The Appellant was charged with 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 on the 27th of December 2014 at Tangi- Tano village in Gilgil District within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of JW, a child aged 14 years.

2. The Appellant also faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 27th of December 2014 at Tanga – Tano Village, Gilgil District within Nakuru County intentionally and unlawfully committed an indecent act with JW a girl aged 14 years by touching her private parts namely (vagina) with a male genital organ (Penis).

3. The case proceeded for full trial after the Appellant pleaded not guilty. The Prosecution called seven witnesses in support of its case while the Appellant gave sworn defence and did not call any witness. By the judgment delivered on 4th April 2016 the Lower Court found the Appellant guilty and convicted him of the offence of defilement. He was sentenced to serve 20 years in prison – the statutory minimum.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, he filed this appeal through a Petition of appeal dated 7th April 2016 and challenged the conviction and sentence on 6 grounds, which, reproduced *verbatim* are:

> *i. The Learned Magistrate erred in law and facts by failing to take notice that the appellant was tried, convicted and sentenced on a defective charge sheet.*
>
> *ii. The Learned Trial Magistrate erred in law and in facts by failing to notice of the defective charge sheet yet PW 1 post rape care form (PRC) indicates nature of the alleged offence as incest contrary to the charge sheet.*
>
> *iii. The Learned Trial Magistrate erred in law and in fact further by entertaining conflicting dates of events while investigation officer testified took the appellant and the complainant to PGH for examination on 28th December 2014 as doctor indicated in his statement where he examined one Peter Wanjiru Joyce but not Joyce Wanjuru the complainant in this case.*
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> *iv. The Learned Trial Magistrate erred in law and in facts by failing to note that evidential grounds were un-collaborated from the prosecution witnesses yet my submission overwhelmingly dismissed inexplicitly contrary to Section 169 of the Criminal Procedure Code.*
>
> *v. The Learned Trial Magistrate further erred in law and in facts in her judgment as her verdict was emotional, inconsistent and discriminatory and finally sounded coercive.*
>
> vi. *For a genuine reason that I cannot remember all that traversed during trial I pray to be supplied with a certified copy of the court proceedings to enable lodge more grounds of appeal.*

5. The appeal is opposed by the prosecution. On 10th April 2018 the court gave directions the appellant to file written submissions and the matter proceeded for hearing on the 25th March 2019.

6. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see ***Okeno v Republic* [1972] EA 32**).

7. The evidence that emerged at the trial was as follows.

8. The Complainant, JW, testified as PW1. She testified that on 27/12/14, she was sent by her mother to get some maize from the Appellant. The Appellant, it turned out, was the Complainant's mother's lover. JW went accompanied by her younger sister, AN (who testified as PW6). The Appellant's place was a little far from the Complainant's home and it took them some time to get there. When they did, they found the Appellant in the *shamba* and he asked them to wait. This took until around 7:00pm. They then walked to the Appellant's home. The Appellant cooked dinner as the two girls played in his house. After they ate, he spread a mat on the floor and they went to sleep.

9. At night, while AN was asleep, JW says that the Appellant turned to her and defiled her. She told the Court that the Appellant went on top of her and as she started crying, he told to shut up. He then did "tabia mbaya" to her. She said she felt pain but did not scream. They then slept until the following morning. When they woke up, the Appellant was not in the one-roomed house but outside. Then, JW's uncle (F M – who testified as PW3) came). He confronted the Appellant and eventually, they all were taken to the Police where the Appellant was arrested and charged.

10. JW told the Court that this was not the first time the Appellant had defiled her: that he had done so at least three other times. Indeed, she told the Court that she was afraid of attracting the neighbours' attention because she knew that the Appellant would chase her out of his house at night as he had done previously. She also said that the Appellant had bought her some clothes and shoes to buy her silence over previous defilements.

11. AN, who testified as PW6, corroborated the Complainant's narrative in material terms but said that she fell deeply asleep and heard nothing in the night. However, before she slept she heard the Appellant tell JW that the "weed which stings will sting her" at night.

12. It was AM, a neighbour to the Appellant, who alerted the Complainant's uncle about the incident. AM had seen the Appellant come with JW in his house and spend the night with her on two previous occasions. She was uncomfortable with the situation and thought that it was inappropriate. She decided to inform the Uncle, F M. She testified as much.

13. F M, as PW3, confirmed to receiving information from AM that her nieces had spent the night at the Appellant's house. He told the Court that he immediately went to the house and arrested the Appellant and took him to Tangi Tano Police Post where JW confirmed that the Appellant had defiled her.

14. The mother of JW and AN, TW, testified as PW7. She told the Court that on the material day, 27/12/14, she sent her children at 2:00pm to get maize from the Appellant, who was her lover. Indeed, she said they have a child together (who was an infant at the time of the trial). She said that she had expected them to come back but did not panic when they did not because she thought they had gone to their grandmother's place. The following morning, however, she learnt that the Appellant had defiled her daughter, JW.

15. At the Tangi Tano Police Post in the morning of 28/12/14, F Mand the Complainant and Appellant found PC Kiddon. He testified as PW4. He said that he received the group of four: JW, AN, F M and the Appellant. Upon interrogation, JW said that the Appellant had defiled her the previous night and that he had done it on previous occasions as well. PC Kiddon took them to Elementaita Police Station and visited the house of the Appellant where he saw the mat on the floor where the three apparently spent the night.

16. At Elementaita Police Station, James Mugo took over the investigations. He issued a P3 Form and processed the case ultimately recommending the charging of the Appellant. He also visited the home of the Appellant and saw the mat where the three had slept. PC Mugo also took JW to Provincial General Hospital, Nakuru for an age assessment. He produced the age assessment report. The report approximated the age of JW to be 14-15 years old. PC Mugo testified as PW8.

17. After the report to the Police had been met, JW was escorted to PGH Nakuru for medical examination. The P3 Form was filled out by Dr. Thomas Matara who testified as PW5. He examined JW on 29/12/2014. He recorded that JW appeared to be psychologically disturbed during the examination. He found bruises on her labia majora and a freshly torn hymen. She had whitish discharge on her vagina. The approximate age of injury was 2 days old and the probably weapon was a blunt one. Dr. Matara concluded that JW had been defiled.

18. Given these evidence, the Learned Trial Magistrate placed the Appellant on his defence. He gave a sworn statement and did not call any witnesses. In his testimony, the Appellant conceded that the two girls went to his *shamba*, then house on the material day. However, he denied defiling JW. He said that as they were walking to his house, JW had complained that she was "burning in her thighs". He said that he cooked for them and after they all ate, he spread a mat for them and then slept. He said that he drew the curtain and then slept on his bed away from them. He denied defiling the Complainant and suggested that he was charged because F M was not aware that he (the Appellant) was M's sister's lover. He also blamed his neighbour, AM, for the misunderstanding.

19. The Learned Trial Magistrate identified the three elements of the offence of defilement as:

a. The age of the Complainant;

b. Penetration; and

c. Proof that the penetration was caused by the Accused Person.

20. The Learned Trial Magistrate was persuaded that all three elements were proved beyond reasonable doubt and convicted the Appellant.

21. On review of the evidence, there appears little controversy that the Complainant was approximately 14-15 years old. There is a definitive age assessment report tendered in evidence to that effect and the issue is not seriously contested.

22. The Appellant contests the finding of penetration on two main grounds. First, he says that the evidence of the Complainant was inconsistent and not worthy of belief. Second, he impugns the medical evidence on two grounds: that the P3 Form bears the name "P W J" which, he says, is not the correct name of the Complainant and that the P3 form does not have a Police seal and has different date (29/12/2014) from the date in the OB (28/12/2014).

23. I have carefully looked at the testimony of the Complainant. I am unable to find the material inconsistencies the Appellant complains about.

24. I have also had occasion to keenly review the complaints by the Appellant that the P3 Form produced was for "P W J". That complaint is unfounded. In fact, Dr. Matara, PW6, produced two P3 Forms: One for P R (which was marked as Exhibit 2) and another for JW(which was marked as Exhibit 3). The handwritten proceedings of the Learned Trial Magistrate state: "*I have a P3 Forms for P & W J, a 13 years old* (sic)". I note that the typed proceedings omit the "&" possibly giving the Appellant a ray of hope based on a scrivener's error. That is not to be.

25. What about the complaint that the P3 Form is fabricated because it does not bear a Police seal of Elementaita Police Station and its date varies from the date in the OB? Again, nothing comes out of this complaint. There is no requirement that only a Police seal authenticates a P3 Form. In this case, the Investigating Officer who issued the P3 Form and accompanied the Complainant to the Hospital appeared in Court and testified as to its authenticity. The doctor who filled it also was present in Court to produce it. Nothing really comes out of this complaint.

26. In my view, there was sufficient evidence to establish penetration beyond reasonable doubt. Apart from the testimony of the Complainant (which is conceded by the Appellant), the medical evidence by Dr. Matara put the issue beyond doubt.

27. On the identity of the person who caused penetration, all fingers point at the Appellant. First, we have the unequivocal and straightforward testimony of the Complainant which went unchallenged on cross examination. Second, we have the testimony of the Complainant's sister (AM) which not only corroborates the evidence of JW – but also has the gem in the form of the ominous words by the Appellant: "the weed that stings will sting you." Third, further evidence of opportunity is provided by AM, F M and even the Appellant himself. Finally, the Appellant stated in his defence that he slept in a bed – and not on the mat with the Complainant and her sister. This was factually disproved by the testimonies of JW, AM and the two Police Officers who visited the scene. None of them saw a bed or curtains in the Appellant's one-roomed house. There was only a mat.

28. Given this analysis, it is my finding that the Prosecution proved any reasonable doubt that the Appellant committed rape against the Complainant. The Trial Court was correct in dismissing the Appellant's defence as implausible given the weight of the Prosecution case and the credibility the Court assigned to the Prosecution witnesses.

29. Turning to the sentence imposed, I note that the Appellant was sentenced to twenty years in prison which is the statutory minimum. I note that our Courts have now held that in appropriate circumstances the Court can go below the statutory minimum. (See the Court of Appeal decision in in ***Dismas Wafula Kilwake v R [2018] eKLR***). There is no reason to do so here. The evidence shows that the Appellant had defiled the Complainant at least three other times before. It shows that he was also, at least once, cruel to her – sending her away in the middle of the night. He was also quite intentional about it: he bought her clothes to try to buy her silence. Finally, he was in a position of trust since he was in a romantic relationship with the mother of the Complainant. I find the sentence imposed to be proportional to the offence here given the circumstances.

30. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. **For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.**

b. **The sentence imposed by the Trial Court of imprisonment for twenty years is affirmed**.

31. Orders accordingly

Dated and delivered at Nakuru this 30th day of January, 2020

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JOEL M. NGUGI

JUDGE