IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 63 OF 2019

BETWEEN

ALFRED MAINGI NDOLO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 24th January 2019

in Criminal Case (SO) No. 15 of 2018 at the Magistrate's Court at Thika

before Hon N. M. Kyanya Nyamori, RM)

JUDGMENT

1. The appellant, **ALFRED MAINGI NDOLO**, was charged and convicted on two counts of defilement contrary to **section 8(1)** and **(4)** of the Sexual Offence Act ("the ***Act***") it was alleged on diverse dates between March 2017 and December 2017 [Particulars Withheld] area, Thika East Sub County within Kiambu County he intentionally and unlawfully caused his penis to penetrate the vagina of CKN, a child aged 16 years and AMN, a child aged 16 years. He was sentenced to 15 years' imprisonment on each count to run concurrently.

2. The appellant now appeals against conviction and sentence on the grounds set out in his memorandum grounds of appeal and the amended grounds of appeal filed on 30th July 2019 and 12th September 2019 respectively and the written submissions. The thrust of the appellant's appeal is that the prosecution failed to prove the case beyond reasonable doubt. He contended that the complainants engaged in consensual sexual indulgence. He submitted that the medical evidence was improperly admitted and the totality of the evidence was inconsistent and contradictory and could not sustain a conviction. The appellant also contended that the sentence imposed on him was harsh and excessive.

3. The respondent supported the conviction and sentence. Counsel for the respondent submitted that the prosecution proved all elements of the offence of defilement in respect of the two counts facing the appellant. He pointed out that the testimony of the complainants was corroborated by the fact that both of them became pregnant and that the appellant was well known to the complainants. Counsel stated that the sentence was within the law and was neither harsh nor excessive.

4. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see ***Okeno v Republic*** **[1972] EA 32**, ***Kiilu and Another v Republic*** **[2005] 1 KLR 174**). In order to proceed with this task, it is necessary to outline the evidence emerging before the trial court.

5. CKN (PW 2) testified that she was 16 years old and she was staying with her grandmother. She testified that she knew the appellant as the assistant pastor of the church she was attending between 2014 to 2018. She also stated that she went to his house about two times when the appellant sexually assaulted her. She narrated what happened the first time in 2016 as follows:

> *I was going to the river to fetch water. Then I passed by his house. He would send me to the shop. I would stay there in his house. I was sitting on a seat. I don't even know I how I found myself on the bed. …… He dragged me onto the bed using my left hand. He removed my clothes by force. He did not tell me anything. I did not ask him why he was removing my clothes. …… That when he started having sex with me. Sex is tabia mbaya. He took a condom and wore it on his penis. He inserted his penis in my vagina. He had removed his clothes and remained in his vest. This was the first time we had sex. I felt pain. I cried tears. I did not scream. ... I did not tell anyone anything had happened.*

6. She further testified that on the second time she went to visit him he was not at home. She explained what happened the third time as follows:

> *We had sex. He did not wear a condom. He just had sex with me. He pulled me onto the bed. He removed my clothes he also removed his clothes. I did not tell anyone what happened.*

7. PW 2 further testified although she did not tell anyone what happened, her aunt decided to take her to hospital as people in the village suspected she was pregnant, her aunt (PW 7) took her and her cousin, AMN, to the hospital for examination where she was found to be pregnant. She told the court that the appellant was the only person who she had slept with and that he is the one who impregnated her. When cross-examined, PW 2 admitted that she had had sexual intercourse with another person.

8. AMN (PW 3) also testified on oath. She stated that she was 17 years old and was in Class 8. She told the court that she used to see the appellant in the locality and that she knew where he was staying. She narrated what happened on 1st July 2017 as follows:

> *It was around 11.00am. Raping someone is when you remove someone's clothes and doing tabia mbaya. It having sex. He removed my clothes. I was wearing my skirt and biker. I only had those. I did not have a pant. He put his penis in my vagina. It was the first time he had sex with me. I didn't scream. …… I felt bad. I hated him. I did not tell anyone. I hid the incident.*

9. CKN stated that AMN was her cousin. In her testimony, AMN stated that she had had sexual intercourse with another person. She explained that she was forced to implicate the appellant as the father of her baby when the matter was reported at the police station.

10. PW 4, a police officer from Ngoliba Police Station testified that the appellant was brought to the police station on 14th February 2018 by administration police officers together with PW 2 and her mother, PW 7, and PW 3 and her sister, PW 5. There was already a report on the incident and both girls were found to be pregnant when they were tested at the hospital. She recorded the statements of PW 2 and PW 3 in which they implicated the appellant. AMN went into labour after the incident was reported and while in hospital she took samples from the child born by her and from the appellant which she forwarded to the Government Chemist for analysis to determine whether the appellant was the father of the child.

11. PW 9, a police officer, told the court that on 13th February 2008, PW 5 and PW 7 came with CNK and AMN to the Administration Police Post to report that the complainants had been sexually molested. He testified that CNK and AMN directed them to the appellant's home where they found him sleeping and whereupon he was arrested.

12. PW 5 testified that she was the mother of AMN while CKN was her granddaughter. She produced AMN's birth certificate which showed that she was born on 7th March 2001 and CKN's baptism card showing she was born on 10th May 2002. She testified that in December 2017, she noticed the stomachs of CKN and AMN growing bigger. When she asked them what was happening, they did not tell her. She organized for them to go to the clinic where it was confirmed that they were pregnant. The girls did not tell her who the father was until the matter was reported to the police. PW 5 told the court although she did not know the appellant, she used to see him in the area.

13. PW 6 testified that AMN was her cousin while CKN was her sister's daughter. She also stated that she knew the appellant as they were working together at a local company. On 6th February 2018, she was called to the police station where she met AMN, CKN, PW 5 and PW 7. AMN and CKN narrated to them what had happened to them. On the same day, AMN went into labour and was taken to hospital. While CKN was taken to hospital where she was examined and found to be 7 ½ months pregnant. AMN's sister, PW 7, testified that the appellant was a preacher in the locality.

14. PW 1 was the doctor who produced the P3 medical form on behalf of the doctor who examined AMN. According to the P3 medical form, AMN was aged 17 years and she delivered a child on 14th February 2018 by ceaserian section. He confirmed that blood samples were taken from the child to confirm the identity of the father through DNA testing. He also confirmed that AMN had been subjected to an act of penetration stating that she knew the appellant. She also explained to her that the appellant also sexually assaulted her and she became pregnant. PW 1 also produced the P3 medical form for CNK following an examination on 9th May 2018 and her age was estimated to be 16 years. At the time she had already given birth and he concluded that she was subjected to an act of defilement.

15. A Government Analyst working with the Government Chemist, Nairobi, PW 8, recalled that on 21st February 2018 she received from PW 4, a blood sample from the appellant, a blood sample from AMN's child and a blood sample from AMN. She was requested to determine the paternity of the child. She obtained DNA profiles from each sample and confirmed that there was a 99.99% chance that the appellant was the father of the child.

16. A Government Analyst working at the Government Chemist, Nairobi, PW 10, testified that on 22nd October 2018, she received from PW 4 buccal swabs from the appellant, CNK and CNK's son with instructions to confirm the paternity of CNK's son. She obtained DNA profiles from each of the samples and confirmed that there was a 99.99% chance that the appellant was the biological father of CNK's son.

17. In his unsworn statement, the appellant denied the offences. He confirmed that he was arrested and was taken to the police station where he found the complainants whom he knew as he used to see them. He told the court that he was beaten to admit that he had sex with the complainants. He stated that he had issues with the person who reported the incident at the police station. He complained that the evidence against him was falsified and he was shocked that the DNA established that he was the father of the children.

18. The issue in this appeal is whether the prosecution proved all the elements of the offence of defilement. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

19. CNK and AMN gave detailed and graphic testimony on how the appellant had sexually molested them. The appellant was not a stranger to them and the appellant admitted in his unsworn statement that he knew the complainants and according to PW 4 and PW 7 both complainants directed them to his house where he was arrested. The trial magistrate reviewed the evidence of both CNK and AMN and found that the evidence was inconsistent and sometimes incoherent as to when the incidents of penetration took place. What comes out clearly though, is that both complainants did not tell anyone about what had taken place until their respective guardians noticed changes in their bodies.

20. Under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** the victim's testimony was sufficient to support a conviction, if the trial magistrate believed, for reasons to be recorded, that the child was stating the truth. In this case, as I have pointed out, the trial magistrate was alive to the inconsistencies in the testimony of both complainants. It was thus necessary to look whether there was corroborative evidence.

21. It was not disputed that the complainants gave birth. This was conclusive proof of penetration. The question then is whether the testimony of CNK and ANM was corroborated by other material evidence implicating the appellant. The prosecution relied on DNA evidence to connect the appellant to the felonious act. According to PW 8 and PW 10 every biological person inherits half of their DNA from their biological mother and the other half from their biological father. By examining the DNA from a person and their parents, it is possible to determine the elements of DNA gained from their biological mother and those gained from their biological father.

22. In this case, PW 4 explained she was present when samples were taken from the appellant, CNK, AMN and their respective children. In fact, the court issued an order dated 19th February 2018 and 18th October 2018 authorizing PW4 to escort the appellant to be taken to Thika Hospital for DNA samples to be taken. The samples were accompanied by exhibit memo forms delivered to the Government Chemist Laboratory by PW 4. The appellant attempted to impeach the results were doctored but I did not find any evidence to suggest that this was the position. The results were positive that the appellant was the father of both children. He is the one who committed the act of penetration.

23. The final element of the offence of defilement is the age of the complainants. The age of a child is a question of fact. In the case of ***Mwalongo Chichoro Mwajembe v Republic*** **MSA Cr. App. No. 24 of 2015 (UR)**, the Court of Appeal stated as follows concerning proof of age:

> *[T]he question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.*

24. As regards ANM, the prosecution produced a birth certificate which showed that she was born on 7th March 2001. The baptism card for CNK showed that she was born on 10th May 2002. In both cases, the evidence shows that each of the complainants was below 18 years old at the time the appellant committed the act of penetration. The offence of defilement was therefore established.

25. In sentencing the appellant, the trial court imposed the mandatory minimum sentence under **section 8(4)** of the ***Act***. Although, mandatory minimum sentences under the Act have been declared unconstitutional, the facts and circumstances of the case do not compel me to consider any other sentence. The only issue though is whether the sentences ought to be consecutive or concurrent.

26. Under **section 14** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, the court is empowered to impose concurrent or consecutive sentences:

> *(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.*

27. In ***Peter Mbugua Kabui v Republic*** **[2016] eKLR** the Court of Appeal stated as follows:

> *As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, <u>it is not illegal to mete out a consecutive term of imprisonment.</u>*

28. In that case the Court of Appeal was satisfied that although the offences were committed at different times, dates and against different complainants, the trial court and the High Court did not err in ordering consecutive terms for the two counts. On the same issue the ***Sentencing Policy Guidelines*** provide as follows:

> *7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.*
>
> *7.14 The discretion to impose concurrent or consecutive sentences lies in the court.*

29. In this case, the two counts of defilement were committed against different complainants on different dates in different circumstances. I do not find any error on the imposition of consecutive sentences in this case. I affirm the sentences.

30. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 29th day of JANUARY 2020.

J. N. ONYIEGO

JUDGE

Appellant in person.

Mr Kasyoka, instructed by the Office of the Director of Public Prosecutions for the respondent.