REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 192 OF 2014

JOEL WAWERU GATHONI.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Senior Resident Magistrate Hon. E. Tanui delivered on 7th December, 2011 in NAKURU CM Adult Criminal Case Number 72 of 2011 Joel Waweru v Republic)

J U D G M E N T

1. The appellant Joel Waweru was charged with the offence of **Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act**. The particulars are;

> "On the 3rd day of May 2011 at [Particulars withheld] Farm Solai in Rongai District within Rift Valley Province, unlawfully and intentionally committed an act causing penetration by inserting his male genital organ (penis) into the female genital organ (vagina) of SC a child aged 10 years which caused penetration."

In the alternative he was charged with **Indecent Act with a Child Contrary to Section 11(1) of the Same Act.** The particulars are;

> "On the 3rd day of May 2011 at [Particulars withheld] Farm Solai in Rongai District within Rift Valley Province, unlawfully and intentionally did an indecent act to SC a girl aged 10 years by touching her private parts (vagina).

2. On 7th December 2011, the trial magistrate found him guilty of the main charge, convicted him and sentenced him to life imprisonment.

3. He filed amended Grounds of Appeal on 29th October, 2019 challenging the conviction and sentence ;

> 1. THAT the trial Magistrate erred in law and fact in considering that AGE was proved.
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> 2. THAT the learned trial Magistrate erred in law and fact in failure to consider that I was not served with prosecution's witness statements.
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> 3. THAT the learned trial Magistrate erred in law and fact in failing to consider that there was no corroboration.
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> 4. THAT the learned trial Magistrate erred in law and fact in not considering that penetration was not proved to required standards.
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> 5. THAT the trial Magistrate erred in law and fact in terming that I was positively identified as perpetrator.
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> 6. THAT the learned trial Magistrate erred in law and fact in relying on insufficient and contradicting evidence to found conviction.

The same were accompanied by his written submissions.

4. The appeal was argued orally, the appellant was unrepresented. The respondent was represented by Ms Nyakira prosecuting counsel.

5. The case for the prosecution was well summarized by the trial court thus:

"The accused entered a plea of not guilty. The prosecution called a total of seven (7) witnesses in its bid to prove the offence herein against the accused. The accused was placed on his defence. He gave sworn evidence. The brief facts underlying the prosecution case are that the complainant who testified as PW1 was born in the year 2001. This was indicated by the complainant's mother who testified as PW3.

On 3.5.11 the complainant (PW1) and her mother (PW3) went to herd their cows at [Particulars withheld] Farm. At about 1.00 p.m., PW2 excused herself to go back home and prepare lunch. She left the complainant herding the cows. It was the complainant's evidence that she went to borrow drinking water from a group of people who were digging trenches. They gave her the water to drink. The complainant testified that she saw the accused person lying next to the trenches. He was not sleeping. When she went back to where the cows were, she found them having followed other cows. PW1 then went to return back their cows and while so returning the cows, she was grabbed from behind and she screamed. When she returned to look at who was grabbing her she saw the accused.

The accused asked her why she was screaming. He made her fall down by kicking her feet. He then removed her skirt, petticoat and pant. He removed his own trousers and then took his penis and inserted the same into her vagina.

It was PW1's evidence that they were in a bush area and that she continued screaming. The accused closed her mouth. She started bleeding from her vagina. The accused then left her and went away. The complainant rushed to the people who had earlier given her water to drink. She explained the incident to them. One of them who testified as PW2 went to look for the accused. When the accused saw him, he attempted running away but PW2 managed to get hold of him. He took him to where PW1 was and he was identified as the culprit.

PW3, came back looking for the complainant. She had not found her herding the cows. When she met her she was crying and down cast. She explained to her what had happened. The complainant then left her to where the accused was. They escorted the accused to the Solai Police Station.

PW4 corroborated the evidence of PW2. PW5 re-arrested the accused person from the members of the public. The complainant was then taken to Solai Health Centre. She was referred to the Nakuru Provincial General Hospital for examination. Her P3 form and post rape care forms were produced herein as prosecution exhibits no 1(a) and 1(b) respectively, by PW6. The doctor found out as a fact that the complainant's introitus was inflamed. PW7 was the investigating officer. He charged the accused person with the offences herein.

In his defence, the accused person denied committing the offence. It was his evidence that the complainant's evidence contradicted that of her mother.

It was also his evidence that the complainant's mother hated him because though he had previously worked for her, she had refused to pay him his charges.

It was his further evidence that he was incapable of having defiled the complainant. This is because had he done it she would according to him be *dead, since he is generously endowed in his genitals."*

6. In arriving at the determination of guilt the trial magistrate found that;

- The age of the complainant was proved
- There was evidence of penetration
- The accused was identified as the culprit.

7. The appellant in his submissions both oral and written, argued that the age of the complainant had not been proved. There was no corroboration, he was not positively identified and that the evidence was not only insufficient but contradictory. He raised a further ground that he had not been supplied with witness statements. He relied on **Moses Ndau Mwarimbo v Republic [2012] eKLR** and **Hillary Nyongesa v Republic HC (Eldoret) Criminal Appeal Number 123 of 2009.** In both cases the courts were categorical that in sexual offences the age of the victim is so crucial it must be proved conclusively and this can be done by way of certificate of both, school records, vaccination cards et cetera. He argued further that the failure by the prosecution to prove the age of the complainant went to the root of his sentence. That there was no basis for the life imprisonment sentence meted on him.

8. He argued that the medical evidence did not prove penetration. That the Doctor PW6 testified that the child's hymen was intact, and that all the other examinations were negative. That the P3 and the Post Rape Care form were inconsistent. That the Post Rape Care form said the hymen was newly broken, yet the P3 indicated that the introitus was inflamed with inward ballooning, but that it was intact. He pointed out that the child testified that she bled as a result of the defilement but there was no evidence of the same. That the panty was not examined to confirm it was blood stained. More importantly that there were no treatment records from Solai Health Centre, and that the inflamed introitus and ballooned hymen was caused by personnel at Solai Health Centre. He urged the court to find that there was no evidence that the inflammation was caused by a penis. On identification, the appellant argued that there was not enough evidence to support a conclusive identification. He relied on **Gabriel Kamau Njoroge v Republic [1982 – 1988] KLR pg. 134**, that there was the possibility of mistaken identity, that the complainant testified she had seen him sleeping on the ground, and the next time she was grabbed by someone from behind who defiled her.

9. In response, the prosecution submitted that the child testified how she was defiled, that the doctor testified that the hymen was intact but that the introitus was inflamed, sufficient evidence that there was defilement.

10. The respondent argued that the age of the complainant was proved by the testimony of the mother who said that she was born in 2001. Regarding penetration she argued that the child told the court that he had inserted his penis in her vagina and the medical evidence proved this because her introitus was inflamed. On that the offence happened in day light and hence the issue of identification could not arise.

11. This is a first appeal and the duty of the court is well set out In **Okeno vs Republic [1972] EA 323** the court said;

> **"This is the evidence that was presented before the trial court. We are enjoined as the first appellate court to analyse it afresh and come to our own conclusion. It is the appellant's right as much as our obligation to undertake this task. As always we must bear in mind that the trial court had the benefit of hearing and seeing the witnesses and was therefore better placed to assess the witness's demeanor and disposition."**

Or in other words as was said by the same court in **Kiilu &Another Vs. R (2005) 1 KLR 174;**

> **"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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."**

12. On the issue of age, the charge sheet indicated that the complainant's age was ten (10) years as on 3rd May, 2011. In her own testimony on 30th June, 2011 she told the court she was nine (9) years old and was in class five (5) at Jamhuri Primary School. Her mother testified that she gave birth to the child in 2001, that she was nine (9) years old and was in class five (5) at [Particulars withheld] Primary School. The P3 indicated she was ten (10) years old, the Post Rape Care indicated year of birth as 2002.

13. It is evident that there was no documentary proof of the age of the complainant. It is also evidence that though it was available to the trial court to go through an age assessment hearing to determine the age of the complainant what was not done, but does that undermine her finding that age was proved?

14. It is not in dispute that in **Sexual Offences Act** cases the age of the victim is critical because is central to the determination of the length of sentence. But the court takes judicial notice of the fact that not every child will have a certificate of birth, due to the bureaucracy involved in obtaining one. The mother however testified to her child's age, the victim knew her age, and both medical records placed her age within the same age bracket, of nine (9) to ten (10) years.

15. The **Children Act** defines age, where actual age is not known as "apparent age". The **Sexual Offences Act** defines child, to have the same meaning as assigned in the **Children Act Cap 141 Laws of Kenya.** Hence it can be presumed that apparent age applicable in the **Children Act,** may be applicable in the **Sexual Offences Act.** That may even explain the grouping of the ages of child victims, below eleven (11) years, between twelve (12) – fifteen (15) years, between sixteen (16) – seventeen (17) years. The trial magistrate observed the child while testifying and together with the other evidence that available, was convinced that the child was aged ten (10) years at the time of the offence. Going by **Okeno v Republic** on the caution to be exercised on appeal with regard to evidence I have no reason not to accept that reasoning. I am satisfied that the age of the complainant was established.

16. Was there penetration? Was it caused by the accused? The child's evidence is that she had seen the accused when she went to ask for a drink of water from the men who had been working on the water trenches. From her evidence and that of her mother, they had been herding cattle with the accused and even from his defence, he was not a stranger to the child, having stated that he had worked for her mother and she owed him his pay. The incident happened at around 1:00pm . It is this person she saw when someone grabbed her from behind, made her fall by kicking her legs. The same person who proceeded to remove her clothes, then his trouser and proceeded to defile her. When he took off she immediately went and told the persons who were working on the trenches and the accused was found immediately she identified him. This was supported by the evidence of PW2. Hence on identity, I find that there was sufficient evidence.

17. On penetration it is true the record shows that no treatment chits were produced from Solai Health Centre. The only evidence that the child was attended at any medical facility was the Post Rape Care form which indicated that she had been seen at Upper Solai Health Centre. The doctor who filled the P3 did not see treatment card but only saw the Post Rape Care form, according to the P3.

It is also true that the Post Rape Care and the P3 gave conflicting information Two handwritings in the Post Rape Care are;

> **"…inflamed hymen with inward ballooned hymen intact"**

The other;

> **"…broken hymen new"**

17. The nursing officer who filled the Post Rape Care examined her on 4th May, 2011. He formed the opinion that the hymen was newly broken. He saw a dirty under pant that appeared to be stained with blood, he was of the view there was penetration. The doctor also examined her on 4th May, 2011, saw no under pant, found the hymen intact but, ***"marked inflamed introitus"*** with ballooned hymen.

18. According to the appellant, the inflamed introitus and ballooned hymen was as a result of the examination at Solai Health Centre, because he had not defiled the child. However the question is how grave is this conflict in the evidence? What is clear is that the child

described how the defilement took place. That the defiler placed his penis in her vagina but she was screaming all the time, and he left her go. Whether the hymen was broken or not, what is clearly evident is that there was evidence of penetration. The allegation that it was caused by the health workers at Solai Health Centre is merely an allegation which ought to have been put to the doctor. The conclusion of the examination in the P3, was that both the physical examination and history clearly indicated that the child had been defiled. The evidence of the child and that of the medical records as produced clearly corroborate each other. Hence the evidence of penetration was sufficient.

19. On the issue of witness statements, the appellant did not raise that issue in the lower court. There is no evidence that the same was denied to him to warrant consideration at this stage. This is an afterthought that must be ignored.

20. In the upshot I find that there was sufficient evidence to support the conviction.

21. The final submissions were the sentence. The appellant's plea was that he had been in prison for long, he is sickly and that the court should consider that the period was sufficient sentence. In the case of **Dismas Wasike v Republic**. The **Court of Appeal** held that the sentences set out by the **Sexual Offences Act** were not mandatory sentences but that the court has discretion to determine the sentence according to the circumstances of the case and Sentencing Policy Guidelines. The appellant was sentenced to life imprisonment. I have noted that he began to serve sentence in 2011. He has been in prison for nine (9) years. He is sickly and on the strength of the **Dismas Wasike** case, the court can review his sentence.

22. Before I reconsider sentence, I direct that pre-sentence report be availed to the court by the Director, County Probation and Aftercare Services, Nakuru on or before the 9th March 2020. The Deputy Registrar to ensure the order is served promptly.

23. Mention on 9th March 2020. Accused to remain in custody.

Dated, delivered and signed at Nakuru this 24th day of February, 2020.

Mumbua T. Matheka

Judge

In the presence of

Edna C/A

Ms Wambui for state

Appellant present