REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 39 OF 2018

SIMON KARANJA NDIRANGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 42 of 2018 (Hon. Ruth Kefa, Senior Resident Magistrate) on 25 September 2018)

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act, Act. No. 3 of 2006, Laws of Kenya the particulars being that on the 18th day of July 2015 in Tetu District within Nyeri County in the Republic of Kenya, he intentionally caused his penis to penetrate the vagina of CMM, a child, aged 12.

In the alternative, he was charged with the offence of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act and here the particulars were that on the 18th day of July 2015 in Tetu District within Nyeri County in the Republic of Kenya, the appellant intentionally touched the vagina of CMM a child aged 12.

He was convicted of the principal count and sentenced to 20 years imprisonment; it is this decision that is the subject of the present appeal.

The grounds of appeal as set forth in the appellant's petition of appeal are that the learned magistrate erred in law and fact in holding that the appellant had defiled the complainant when the charge of defilement had not been proved beyond any reasonable doubt; that she erred in not finding that there was sufficient doubt in the prosecution evidence which doubt ought to have been resolved in favour of the appellant; that further, she erred in law and fact in shifting the burden of proof from the state to the appellant; and, that the learned magistrate erred in law and fact in failing to consider whether the complainant's evidence was credible but instead held that the evidence was corroborated.

Other grounds were that the learned trial magistrate erred in law and fact in holding that the DNA results were of value yet no inventory was produced to show how the samples were procured and secured; that the medical personnel who procured the samples, the subject of the DNA analysis, did not testify; that she erred in law and in fact in failing to comply with the provisions of section 124 of the Evidence Act, cap. 80 ; and, finally, the sentence meted out against the appellant was manifestly harsh, excessive and against the evidence on record.

The record shows that the complainant testified on 12 October 2016 by which date she was 13 years old. It was her evidence that on 18 July 2015 the appellant enticed her into a coffee plantation and defiled her. He misled her to believe that her mother was in the plantation. She gave a graphic account of how she was sexually assaulted and how, after the ordeal, the appellant promised to buy her a loaf of bread and an exercise book, apparently to silence her.

The complainant reported to her grandmother, CW (PW3) and aunt, PN (PW2) respectively. Together they went to the police station before the complainant was taken to the hospital for examination and treatment.

She further testified that the appellant was their neighbour and thus a person she had known all along.

PN (PW2) testified that indeed the complainant reported to her on 18 July 2015 that the appellant had not only defiled her but had also threatened to harm her if she revealed it to anybody else. The incident, according to her, took place at 8.00 AM. She informed the complainant's grandmother. She noticed what she described as traces of 'some watery substances' on the complainant's pants. She also confirmed that the complainant was referred to the hospital for examination and treatment after a report had been made to the police; the appellant too was examined.

The witness confirmed that the complainant and her siblings lived with their father who, apparently had separated with his wife.

The complainant's grandmother, CWM (PW3) testified that on the material date, the complainant left in the morning to fetch firewood. She came back with firewood but left again. She later came with her aunt (PW2) who told her that the appellant had sexually assaulted the complainant. When the complaint told her that the appellant had promised her a book and a loaf of bread in return for sexual favour, she accompanied the complainant to the gate to wait for the appellant and confirm whether he would bring these items. The appellant appeared but he neither had the loaf of bread nor the exercise book. She confirmed that both the complainant and the appellant were taken for medical examination.

Dr Joseph Kagunda (PW4), a Government chemist testified that he analysed several items presented by police constable Benedict Mweleli at the Government laboratory on 27 July 2015. These items were brown underpants described as dirty; a black underwear; pubic hair; a penile swab; and a vaginal swab. Others were blood samples of both the complainant and the appellant. These latter samples were presented on 14 August 2015 by the same officer.

Upon examination of these items, Dr Kagunda established that the underpant was stained with semen and some degenerated spermatozoa but no blood stains were detected; the underwear was not stained with blood; there was neither semen nor spermatozoa detected on the outer vaginal swab or in the higher vaginal swab.

In the doctor's opinion the DNA profiles generated from seminal fraction on the underpants, the root of the pubic hair and the penile swab matched the DNA profile generated from the blood sample of the appellant. He produced a report to this effect.

In answer to questions put to him during cross-examination, the doctor confirmed that the samples were properly received and stored; he was of the firm view that they were professionally handled.

Dr. Beatrice Gatwa (PW5) produced the medical examination report or P3 form in respect of the examination of the complainant. It was her evidence that at the time of examination the complainant's injuries were three hours old and were classified as 'harm'. The hymen was perforated and there were blood stains; there was also a bloody discharge from the genitalia. A skin swab was done for examination. The high vaginal swab had pus cells which together with the complainant's pubic hair were taken for DNA analysis. The complainant was subjected to anti-biotics and put on post exposure profilaxis.

The doctor also testified that according to the post rape care form, the complainant's hymen was said to be broken with blood stains at the female genitalia. She was examined before she washed herself. The form did not, however, show whether the perpetrator of the assault was examined.

The investigations officer, police constable Benedict Mweleli (PW6) testified and confirmed that indeed on 18 July 2015 at about 11.59 AM, PN (PW2) and CW (PW3) came to Gichira police post accompanied by the complainant to make a report of the sexual assault. He reiterated what the complaint's grandmother and aunt told her the crux of which that the appellant is alleged to have sexually assaulted the complainant. The officer booked the report and arrested the appellant whom he took to hospital for examination together with the complainant. He confirmed having received body tissue samples of the appellant and the complainant and had forwarded them to the Government laboratory for examination and analysis. The tissues were extracted by the medical personnel at the Nyeri Provincial General Hospital after obtaining a court order for this purpose. Apart from the body tissues, he also forwarded other items for the same purpose; these were the complainant's pants and the appellant's underwear.

The officer also testified that he visited the crime scene; according to his investigations it was under a macadamia tree in a coffee plantation. The officer also established the age of the complainant to have been 13 years as at the date of the assault and produced the age assessment report to boot.

In his sworn statement of defence, the appellant testified and denied committing the offence with which he was charged. It was his evidence that he knew the complainant; as a matter of fact, she is a daughter to his cousin. On the material date he went to his farm at about 11 AM and as he went back home, he saw the complainant ahead, running. He arrived to find five people, apparently waiting for him; these were, the complainant, her father and grandmother, the assistant chief and the appellant's brother. Later in the day, the appellant's brother, the assistant chief and the police came and picked him from his house and took him to the police station; it is at the station that he was told that he had defiled the complainant. He was taken for examination at the hospital at his request. He confirmed that one of the nurses took his pubic hair and that blood samples from the complainant were also taken for DNA test.

The defendant complained that the investigation officer had demanded a sum of Kshs. 80,000/= in order to withdraw the case against him. It was his case that his brother and the assistant-chief had conspired to extort money from him because they were aware that he had just received dowry for his daughter who was soon to be married. He confirmed that his blood samples were taken by a doctor but against his wish.

The appellant insisted that he was framed merely because he had sidelined his brother and the complainant's grandmother from his family functions. They did not attend his daughter's wedding. The complainant's family and his family were immediate neighbours and they visited each other. As a matter of fact, he had been helping the complainant's family because her parents had separated.

The offence of defilement is defined in Section 8(1) of the Sexual Offences Act; this section reads as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

The word 'penetration' is employed in the Act as a term of art and its technical meaning is found in section 2 where it is defined as follows:

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

Subsections (2), (3) and (4) of section 8 mete out the penalties for the offence of defilement the severity of which depends on the age of the victim; the lesser the age the severer the sentence; thus according to subsection (2), where the victim is eleven years or less, the mandatory sentence is life imprisonment while under subsection (3) where the victim is aged between twelve and fifteen years, the perpetrator is liable to imprisonment for a term of not less than twenty years. And according to subsection (4) if the victim is aged between sixteen and eighteen the aggressor is liable upon conviction to imprisonment for a term of not less than fifteen years.

There was uncontroverted evidence that the complainant was aged 13 at the time of the assault and therefore, subject to proof of the appellant's guilt, he was properly charged and convicted under section 8(1)(3) of the Act.

Talking of proof, the burden was always on the prosecution to prove that there was 'partial or complete insertion of the genital organs of a person into the genital organs of another'; or to be precise, the appellant either partially or completely inserted his genital organs into the genital organs of the complainant.

In this regard, the medical evidence was crucial. According to Dr. Gatwa, there was a fresh injury to the complainant's genitals at the time of examination; in particular, the hymen was broken and there was a bloody discharge from the genitalia. The injuries were estimated to have been occasioned three hours earlier and were categorised as 'harm'. This evidence was not displaced or controverted.

By their very nature, these injuries were consistent with an insertion of some sort into the genital organs of the complainant. All that remained to be proved was whether the insertion was caused by 'the genital organs of another person' or the appellant, to be precise.

On this question the evidence of the complainant herself and that of the government chemist came in handy. According to the complainant she was lured into a coffee plantation by the appellant who misled her to believe that she would meet her estranged mother there. Instead, he turned on her, forcefully removed her underpants and proceeded to defile her.

The government chemist, on the other hand, was presented with samples of the appellant's and complainant's body tissues to determine whether there was any correlation between them. He established that the complainant's pants were stained with, among other things, semen. Based on a chemical analysis, the DNA profile generated from this semen matched the appellant's DNA profile generated from his pubic hair, the penile swab and the blood sample. This evidence provided what, in my humble view, a crucial link between the appellant and the perpetration of the crime for which he was charged.

Equally important this scientific evidence was corroborative of the complainant's evidence that the appellant sexually assaulted her for no other plausible explanation could be given for the presence of traces of the appellant's semen on the complainant's pants. The evidence of perforation of the complainant's hymen a few hours before coupled with the irrefutable fact of traces of the appellant's semen on the complainant's pants left no doubt that the complainant was not only defiled but also that she was defiled by the appellant.

This evidence is also consistent with what the complainant told her aunt, her grandmother and the investigation officer.

In the ultimate, I have to come to the conclusion that there was a deliberate act by the appellant of inserting his genital organs, and completely so, into the genital organs of the complainant; in short, I agree with the learned trial magistrate that it was proved, beyond all reasonable doubt, that the appellant defiled the complaint. Accordingly, the appellant was properly charged and convicted under section 8(1)(3) of the Sexual Offences Act.

As far as sentence is concerned, imprisonment for a term of 20 years is the minimum sentence for the sort of offence that the appellant was convicted of; the sentence is thus lawful and there is no basis upon which it can be faulted as being harsh or excessive.

I find that the appellant's appeal is without any merit and it is therefore dismissed.

Dated, signed and delivered in open court this 21st day of February, 2020

Ngaah Jairus

JUDGE