REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.212 OF 2017

(Appeal Originating from Nyahururu CM's Court Misc.Cr.No.2092 of 2015 by: Hon. A.Mukenga – S.R.M.)

ELIUD MURAYA WABUCHI.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, Eliud Muraya Wabuchi was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the charge are that between 6th – 11th August, 2015 at [particulars withheld] Village, Laikipia County, intentionally and unlawfully caused his genital organs namely penis, to penetrate the genital organs (vagina) of NWN a child aged 14 years.

In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act in that he intentionally and unlawfully caused his genital organs to come into contact with the vagina of NWN a child aged 14 years.

Upon conviction on the principal charge, the appellant was sentenced to serve 20 years imprisonment.

No finding was made on the alternative charge.

Being aggrieved by the judgment of the trial court, the appellant filed this appeal based on 10 grounds found in the petition of appeal filed by Ochweri Ngamate Advocate. They are as follows:

1. The learned trial magistrate erred in law and fact by finding that there was evidence to support the charge of defilement contrary to section 8(1) as read with 8(2) of the sexual offences act;

2. The learned trial magistrate erred in law and fact by finding that the testimonies of prosecution witnesses were contradictory but none the less proceeded to rely on the same evidence to convict the appellant;

3. The learned trial magistrate erred in law and fact by relying on the secondary evidence against the provisions of the Evidence Act;

4. The learned trial magistrate erred in law and fact by accepting the prosecution case as proved without taking into consideration the defence case;

5. The learned trial magistrate erred in law and fact by failing to consider the exhibit produced by the defence which exhibit was a treatment card;

6. The learned trial magistrate erred in law and fact by admitting a photocopy of the complainant's birth certificate;

7. The learned trial magistrate erred in law and fact by overlooking the evidence adduced by PW3 the Clinical Officer who admitted that the hymen was broken but healed and no laceration and bruises and no discharge;

8. The learned trial magistrate erred in law and fact by admitting the evidence of the prosecution yet the purported bed sheet with

blood was not produced in court;

9. The learned trial magistrate erred in law and fact by ignoring the legal principle governing the circumstantial evidence and when to convict on the basis of such evidence;

10. The conviction was against the weight of the evidence adduced.

The appellant therefore prays that the conviction and sentence be set aside.

This being a first appeal, it is the duty of this court to re-examine all the evidence tendered in the trial court afresh, analyze it and make its own findings but not forgetting that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. The court is guided by the decision of *Okeno v Republic [1973] EA 32* where the court stated as follows:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 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. (Ruwalla v Republic (1957) EA 570). It is not the function 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 Peter v Sunday Post (1958) EA 424."

The prosecution marshaled a total of seven witnesses. PW1, NWN, a minor recalled that on 6/8/2015, while on the way to school about 5.10 a.m. she met Eliud, the appellant, who told her he loved her and that she was beautiful. He grabbed her and started pulling her backwards. He forced her to board a vehicle that was nearby up to Nyahururu. He boarded a different vehicle that was ahead. He paid for it. He told her to alight at Nyahururu and they boarded another vehicle to Kinamba from where he called a motor cycle which took them to [particulars withheld] where he lives. He forced her into his house, threatened to beat her if she did not do what he wanted. He locked her in his house from 6th to 10th and only allowed her to go to the toilet at night; that he had sex with her forcefully and since she was a virgin, she bled a lot and the sheets were covered in blood. He would lock her in the house and go away; that on 11th someone knocked on the door, the appellant opened and she saw two police officers, her father and the appellant's friend. She was taken to Nditika Health Centre, was issued with a P3 form. She told the court that she was born in 2000 and was 14 ½ years then.

PW2 JN, the complainant's father recalled that the complainant was not at home on 7/8/2018. He enquired from relatives but they had not seen her. He reported to Kinamba Police Station on 9/8/2015. He enquired from her friends and found out the name and number of the man. He called the number and the person said he was in Thika but through CID, the phone was traced to Kinamba and a friend of the appellant gave him directions to the appellant's house. He found all houses in the home locked except for the appellant's sister. He did further enquiries and reported to Kinamba Police Station. On 11/8/2015 about 4.00 p.m., he went to the appellant's house and found the appellant with the complainant and both were taken to the police station.

Isaack Kiplagat, (PW3) a Clinical Officer working at Nditika Health Centre examined the complainant and found that the hymen was broken but healed but no lacerations or bruises and no blood stains. He opined that there was penile penetration.

PW4 FN recalled that on 6/8/2013, he was at his home in Kinamba when his brother called looking for his daughter but he had not seen her. On 11th he accompanied the brother and police to Karungubii where the girl was found in a man's house.

PW5 PC John Mburu recalled a complaint was received of a missing child from JN PW2. He accompanied PW2 to Karungubii where they found the appellant and PW1 in a house – PW1 was lying on the bed and both were arrested and PW1 taken for examination at the hospital.

The appellant was placed on his defence and he stated that he was in his house on 11/8/2015 when somebody knocked. He opened and found two police officers and others; that a young man said he is the one and they said a young girl was in the house but they searched and did not get her. He denied knowing why he was arrested.

In his submissions, Mr. Ngamate collapsed the grounds of appeal into four. He argued that the prosecution evidence of PW1 and PW3 was contradictory in that though PW3 examined PW1 on 11/8/2015, he did not find any bruises, contrary to PW1's averment that the appellant forcefully had sex with her; that there was no proof of penetration.

Counsel also took issue with the production of a photocopy of the birth certificate. Counsel argued that though PW1 claimed that the sheets were covered in blood, they were not produced in evidence.

In opposing the appeal, learned counsel for the state, Ms. Rugut argued that the offence was proved. As respects the birth certificate, counsel argued that the photocopy of the P3 form was only produced after it was compared with the original and original was released.

As to penetration, Ms. Rugut argued that the same was proved because PW3 found lacerations and broken hymen and concluded that there was penetration. Counsel urged the court not to interfere.

The appellant was charged with the offence of defilement. The elements that need to be proved in such an offence are:

1. Proof of penetration;

2. Proof of the victim's age;

3. Proof of the perpetrator's identity.

PW1 testified that she was born in 2000 and she identified the birth certificate PW2, who is PW1's father stated that the complainant was born in 2002. A copy of the birth certificate was produced in evidence as P.Ex.No.3. Contrary to PW2's evidence, the copy of birth certificate indicates that the complainant was born on 3/12/2000, PW3 the clinical officer was also of the view that the complainant was 14 years old at the time of this incident.

Counsel for the appellant took issue with the production of a copy of PW1's birth certificate. Although Ms. Rugut submitted that the original was seen and released, there is no evidence of that on the court record.

Age of a victim of defilement is indeed a critical component of the charge which needs to be proved because upon conviction, the sentence will be dependent on the complainant's age. However, courts have repeatedly held that proof of age is not only by way of birth certificate. In *Richard Wahome Chege v Republic CRA.Ap.61/2014* the Court of Appeal (Nyeri) held as follows:

> "On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 (the doctor) who examined the complainant and the complainant herself."

In *Flappyton Mutuku Ngui v Republic [2012] eKLR*, the court again held

> "…that conclusive proof of age in cases under the Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

Even if the birth certificate was a copy, age can be proved otherwise e.g. by birth certification or evidence of the parents or guardian. PW1 was a school going child. She was by then in Form One. She told the court that she was born in 2000 and hence was 14 years as of August, 2015. PW2, PW1's father told the court a different date, that is, 2002 though he had the copy of the birth certificate with him. This court cannot tell if it was an error in recording. The clinical officer who examined PW1 corroborated PW1's evidence as to her age. In my view, the age of the complainant was proved to be 14 years.

Whether penetration was proved:

Penetration is defined in 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 only witness to the incident is PW1. In narrating what happened between her and the appellant, PW1 told the court that *"He had sex with me forcefully. He used to put on loud music so no one could hear any of my calls for help. I was a virgin and bled a lot."*

PW1 did not tell the court exactly what transpired between him and the appellant. She did not tell the court whether the appellant ever used his genital organ to penetrate her genital organ. The word sex is used very loosely and may not necessarily refer to penile penetration. The prosecutor and the trial court should have enquired from the witness to unpack the word 'sex' and say what exactly happened to her. The definition of penetration under Section 2 envisages that there be penetration by a genital organ like the penis.

The evidence of PW3 the clinical officer did not help much. The complainant was found in the appellant's house on 11/8/2015. She had gone missing from home on 6/8/2015. It means she had been in the appellant's house for about 5 days. PW3 found that the hymen was broken but healed. He did not say whether it was an old tear or a recent one. PW3 did not find any lacerations or bruises on the complainant's genitalia to support PW1's allegations of forced sex. There would have been presence of bruises or lacerations had there been force. No discharge was found and no blood stains were found even though PW1 said she had bled a lot. One wonders whether indeed there was forceful penetration of PW1 at all. Despite PW3's findings, he then made a finding that there was penile penetration. In my view, the said finding was without any basis.

No doubt the complainant was found in the appellant's house. There is overwhelming evidence to that effect by PW1, PW2, PW4 and PW5. However, I found PW1's narration of how she got to be in the appellant's house to have been unbelievable. She must have gone to the appellant's house willingly because she had an opportunity to escape if indeed what she told the court was the truth. She said she was forced to board a different vehicle from the appellant's and she could have got off the vehicle. In addition she even had the appellant's phone, she never called her father, whose phone number she said she knew off head. PW1 was willingly in the appellant's house.

The above notwithstanding, that did not give the appellant a right to take advantage of a 14 year old child who has no capacity to consent to his sexual escapades.

Having said the above, I come to the conclusion that the prosecution did not prove the critical element of penetration in a charge of defilement and the trial court erred in concluding that it had been proved.

Having so found, I do not see the need to consider the other grounds of appeal raised by the appellant. In the end, I find that the conviction was made in error. I hereby quash the conviction, set aside the sentence and therefore, the appeal succeeds. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at *NYAHURURU* this *12th* day of *March*, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Eric – Court Assistant

Appellant – present in person