REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 188 OF 2012

(*From original conviction and sentence Cr. Case No.S.0 17 of 2011 of the Senior Resident Magistrate's Court at Baricho).*

STEPHEN MUGO GITHAKA..... APPELLANT

V E R S U S

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to ***Section 8(1) and (2) of the Sexual Offences Act No. 3/2006*** before the Senior Resident Magistrate&rsquos Court at Baricho Criminal Case No. (S.O) 17/2011. It was alleged that on 7/11/2011 at [Particulars Withheld] village in Kirinyaga South District within Central Province, he intentionally cause his penis to penetrate the vigina of AWM a child aged Six (6) years.

2. The appellant denied the charge and after a full trial, he was found guilty and sentenced to life imprisonment.

3. The appellant was dissatisfied with the conviction and sentence and filed an appeal which was heard by Justice B. N. Olao. The Judge dismissed the appeal and upheld the sentence vide his judgment delivered on 22/10/2013.

4. The appellant exercised his right and appealed to the Court of Appeal in Criminal Appeal No. 110/2016. The appeal was heard and vide a judgment delivered on 13/2/2019 the judgment of Justice Olao was nullified for want of jurisdiction and the court ordered that the appellants first appeal be remitted to the High Court at Embu for hearing before a Judge of that court. The Judge at Embu then transferred the matter to this court.

5. The appellant opted to proceed with the appeal by way of written submission. In his submissions, the appellant has sought to amend his submissions and has raised the following issues:

1. Failure of the low (sic) court to evaluate the evidence.

2. The conviction was based on an inadmissible evidence and the case was not proved beyond reasonable doubts.

3. Failure to call essential witnesses.

6. For the State, submissions were filed by F. S. Ashimosi, Assistant Director of Public Prosecutions. He submits that the appellant was found guilty as charged and the trial Magistrate lawfully sentenced the appellant. He prays that the appeal be dismissed with costs.

7. This is a first appeal and this court has a duty to re-consider the evidence and re-evaluate it and come up with its own independent finding but bearing in mind that unlike the trial Magistrate I had no opportunity to see the witnesses when they testified and leave room for that. This was so held in the case of **Okeno &ndashv- R (1972) E.A 31**.

8. The evidence which was tendered before the trial Magistrate was that the complainant was at the time of this incident aged Six years. This fact was proved by Hezron Macharia, (PW-6) a Clinical Officer at Kerugoya District Hospital. He testified that the complainant was Six years old at the time of the incident.

9. The complainant stated that she was on her way to school when the appellant who was well known to her called her and told her she was being called by her father. The appellant then led her to a sorghum plantation and while there he removed her bikers and penetrated her. The complainant went and informed her cousin, DWK (PW-2-) what had happened. (PW-2-) had heard screams and found the appellant trying to wipe out some dirt on the complainants soiled dress. According to PW-2- the complainant was hysterical and could not walk. She was also vomiting. She also had no pants. PW-2- took the complainant to PW-3- Mercy Wanja and Zipporah Muthoni (PW-7). They examined her

and realized that she was defiled. She was handed over to her father EM (PW-5-) who took her to hospital.

10. The matter was reported at Sagana Police Station where the complainant was issued with a P3 form. She was examined by (PW-6-) the Clinical Officer who found that the vigina was bruised and swollen. Her hymen was torn. The vigina was bleeding and she had a discharge from her genitalia. The high virginal swab shows pus and numerous red blood cells. PW-6- concluded that the complainant was involved in penetrative sexual inter course. She filled a P3 form which she produced as exhibit 3 and treatment notes, exhibit 4 and laboratory results exhibit 4. Later the appellant was arrested and charged. The police were handed over a torn biker which the complainant was wearing on the material day and a school uniform (dress) which was soiled exhibit 1 & 2.

11. The appellant gave unsworn defence and denied that he defiled the complainant. He alleged that he had grudges with the witness over boundary disputes.

12. The appellant has stated that the trial court did not evaluate the evidence. He submits that no report was made as the OB read 0/9/1/2011 when the offence was committed on 7/1/2011 and was not reported on 7/1/2011. The submissions on the OB are without merits. The P3 form shows that the report was made on 7/1/2011 at 2.30 Hours. The OB No. 10/9/1/2011 represent date of arrest and date of apprehension report in court. The appellant allegation that the P3 form was backdated is not supported by any evidence. The appellant refers to page 41 which is none existent as the record is upto page 30. The ground is a sham and based on unsubstantiated allegations that PW-6- was given money to backdate the P3 form. This was not put to PW-6- when she testified. In any case the treatment notes, Page 26 of the record show that the complainant was treated on 7/1/2011 and samples for examination in the lab were collected on 7/1/11. The ground is without merits.

13. The appellant submits that crucial witnesses were not called. Throughout the entire submissions the appellant did not state the names of the witnesses who were not called. All he has stated is that the police Constable who testified was not of the rank of Inspector (sic) in Kenya as required by the law. The said law was not cited. The case of **Collins Omuse Obure &ndashv- R** cited has no relevance. In the case, the conviction was upheld based on the fact that the appellant was recognized. It has nothing to do with the rank of the Police witness. It is trite law that no particular number of witnesses is required to prove a fact. **Section 143 of the Evidence Act** provides:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

14. In this case the prosecution called a total of Eight witnesses who adduced evidence. This is an offence of defilement of minor where the court as provided under **Section 124 of the Evidence Act** can convict on the evidence of the victim if for reasons to be recorded the court is satisfied that the victim is telling the truth. It states:-

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth"***

15. In this case the evidence of the complainant was corroborated by the testimony of PW-2- who heard her screaming and when she went to find out she found her with the appellant who was trying to wipe out dirt from her dress. Her torn biker was also there. The appellant was blocking the complainant from telling her what happened. Later PW-2- examined the complainant with PW-3- and realized that she was defiled. The prosecution adduced overwhelming evidence to support the charge.

16. The trial Magistrate considered the defence of the appellant. At Page 22 Line 11-16 of the record, trial Magistrate stated:-

> ***"Though the accused said he was only implicated following grudges with complainant&rsquos family, there was no evidence of existence of such grudges which washed off good relationship between the two families and as would make the witness herein act in concert to make up a case against the accused person***.
>
> ***The alibi raised by the accused person had no basis and sounded more of web of lies. The circumstances obtaining in this case point to the accused person as the one who had canal knowledge of the complainant."***

17. I find that the grounds are without merits. Having analysed the evidence, and evaluated it, I find that trial Magistrate arrived at the inevitable conclusion, that of guilty of the appellant. There was no dispute that the appellant was well known to the complainant. The appellant himself admitted that the complainant was his neighbor. The testimony of the complainant as to who defiled her was based on recognition in broad daylight in circumstances which favoured a positive identification and recognition. Her testimony was corroborated by an eye witness PW-2- she met appellant at the scene, and medical evidence adduced by PW-6- who confirmed that there was penetration in the genitalia of the complainant.

18. I agree with the submissions by the State that the key ingredients of the charge namely:-

- Age of the complainant (victim).

- Penetration.

- Identification of the perpetrator, were proved beyond any

reasonable doubt. The absence of spermatozoa does not rule out the offence of defilement. The court of Appeal in the case of **Oirori Moses &ndashv- R(2013) eKLR** stated that:-

> ***"Many times, the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there is penetration whether on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl organ."***

In this case penetration was proved, despite the absence of spermatozoa. The Sexual Offences Act defines penetration as partial or complete insertion of the genital organs. In this case there was penetrative insertion.

19. With respect to alleged inconsistencies, contradiction and discrepancies in **Willis Ochieng Odero versus Republic (2006) eKLR** the Court of Appeal held ***&ldquoas for the contradictions in prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated in the P3 form as the date of the offence is difference. But that per se is not a ground for quashing the conviction in view of Section 382 of Criminal Procedure Code.&rdquo***

It is submitted that the prosecution proved its case beyond reasonable doubt and the conviction on count 1 was in accordance with the law.

20. In any case as I have stated earlier, the submissions on the OB report was a sham.

21. In his submissions, the appellant has not challenged the sentence. The appellant was charged under **Section 8(1)(2) of the Sexual Offences Act** provides: -

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

The trial Magistrate considered the mitigation and passed the sentence which is provided under the law. The sentence has not been challenged. However, the mandatory nature of the sentence has since been declared unconstitutional by the Supreme Court in the case of **Gideon Kioko Muruatetu & Another &ndashv- R and others**. I will therefore interfere with the sentence.

22. In Conclusion:-

> **1. I find that the appeal is without merits and is dismissed.**
>
> **2. The sentence of life imprisonment is set aside and substituted with a sentence of imprisonment for Twenty-Five (25) years to be computed from the date he was remanded in custody by the trial court that is 10/1/2011.**

Dated at Kerugoya this 12th Day of March 2020.

L. W. GITARI

JUDGE