REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CRIMINAL APPEAL NO 53 OF 2017

ANTHONY KIMANI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against both the conviction and the sentence of Hon. E. Kelly (RM) delivered on 6th of June 2017 in Nakuru Chief Magistrate's Court Criminal Case No. 250 of 2015.**]**

JUDGMENT

1. The Appellant, Anthony Kimani Mwangi, was charged before the Chief Magistrate Court in Nakuru with one count of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows;

> a. On the 10th day of December 2015 in Njoro Sub- County within Nakuru County unlawfully and intentionally committed an act which by inserting his male genital organ (penis) into the female genital organ (vagina) of MW, a child aged 13 years which caused penetration

2. An alternative charge of indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

> a. On the 10th *day of December 2015 in Njoro Sub- County within Nakuru County unlawfully and* intentionally committed indecent act to a child namely MW a child aged 13 years old by touching her genital organ namely vagina with his male genital organ namely penis.

3. The Appellant pleaded not guilty and the case proceeded to full hearing. At the end of the prosecution case, the Appellant was placed on his defence. He gave a sworn testimony and called no witness. The Learned Trial Magistrate after the trial found the Appellant guilty and imposed a 30 year imprisonment sentence.

4. The Appellant is aggrieved and has filed the present Appeal. The grounds of appeal are that;

> a. The Learned Trial Magistrate erred in law and in fact by failing to find that identification was not properly done
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> b. The Learned Trial Magistrate erred in law and in fact by failing to find that the medical evidence adduced was not enough to offer corroboration to the charges
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> c. The Learned Trial Magistrate erred in law and in fact by failing to find that the prosecution case was not proved to the required standards of beyond reasonable doubt
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> d. The Learned Trial Magistrate erred in law and in fact by failing to find that the Appellant was not provided with witness statement as per the provision of article 50 (2) of the Constitution of Kenya, 2010.

5. In the Court below, the trial was quite straightforward. Five Prosecution witnesses testified. The main witness was the Complainant. She testified under oath after the Trial Magistrate confirmed by voir dire that she understood the meaning of oath and could be sworn.

6. The Complainant testified that on 10/02/2015 at about 7:00pm while she was resting on a chair at her father's house, the Appellant entered the house and forcefully held her hands, stuffed a piece of mattress in her mouth, removed her clothes and proceeded to defile her.

This was after he removed his own clothes. Her words were: “He put his peeing thing into my vagina.” According to the Trial record, the Complainant pointed to both the Appellant’s crotch and hers as she uttered those words. She also said that as the Appellant told her that he was going to do to her just like her own father had done the previous day. The Complainant testified that her own father had defiled her the previous day.

7. The Complainant testified that she was traumatized by the experience and she left to go to her grandmother’s house. However, her grandmother asked her to go back to her father’s house. She refused, and instead went to the neighbour’s house. The following day, she went to her aunt’s place. It was while at her aunt’s place that the aunt noticed her discomfort eating and walking and asked what had happened. She told her aunt her ordeal – including the fact that her father had strangled her as he defiled her. Her aunt then went with her to report to the Police; and ultimately to Njoro Sub-county Hospital for examination and treatment.

8. The aunt is MWM. She testified as PW4 during the trial. She corroborated what the Complainant told the Court about her going to her house. She said that the Complainant complained of a headache and aching thighs and upon inquiry, she told her that she had been defiled by both her father and the Appellant.

The witness told the Court that she had noticed that the Complainant was walking in a strange manner and inquired what had happened. She took the Complainant to Naishi Police Station where they reported and were given a P3 Form and then went with her to the hospital for examination and treatment.

9. At Naishi Police Station, it was PC Joseph Nasese who attended to the Complainant and her aunt. He took their first report, gave them a P3 Form and escorted them to Njoro Sub-county Hospital. The Officer testified that he then accompanied the Complainant to Kilimani village where he found both the Complainant’s father and the Appellant. He arrested them. The father was charged in a separate trial. The Officer produced the Complainant’s Child Immunization Card which showed that she was thirteen years old. According to the Card, the Complainant was born on 17/08/2002.

10. The Clinical Officer who attended to the Complainant at Njoro Sub-County Hospital was Jacob Chelimo. He testified that the Complainant was taken to the hospital on 18/12/2015 with complaints of having been defiled by someone she knew. He examined her and filed out the PRC Form and the P3 Form. He produced both as evidence. He also produced the Lab Request Form and the General Outpatient Record for the Complainant. The P3 Form shows findings of laceration on the labia minora and an old perforated hymen. There was also whitish discharge from the vagina. Externally, the Clinical Officer noted some tenderness and swelling on the forehead and neck.

11. Put to his defence, the Appellant denied that he ever defiled the Complainant. He conceded that he stayed at the Complainant’s father’s house on the day the alleged defilement occurred but said that he did not defile the Complainant. Indeed, he said he does not know the Complainant. He gave a long narrative about what he was doing during the days leading to his arrest – but they have little bearing on the case.

12. Was there sufficient evidence to establish the offence of defilement beyond reasonable doubt? The Prosecution was required to establish three elements beyond reasonable doubt:

i. Penetration as defined in the Sexual Offences Act;

ii. That it was the Appellant who caused the penetration; and

iii. Age of the Complainant.

13. This being a first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

14. The evidence adduced during the trial was quite straight- forward. The Complainant gave forthright and candid testimony. Indeed, the Learned Trial Magistrate noted in Trial Notes that she was impressed with the forthrightness and bravery of the Complainant as a witness. Her testimony remained unshaken in cross-examination. This case turns on the credibility of this one witness – and she was compellingly credible.

15. The age of the Complainant was proved both by the oral testimony of the Complainant as well as the Child Immunization Form and the P3 Form. All these established her age as thirteen years old.

16. The fact of penetration was proved by three pieces of evidence. First, there was the compelling testimony of the Complainant. Second, there was the testimony of the aunt, (MMW – PW4) who saw the Complainant walking with difficulties and inquired what had happened. The Complainant answer then was consistent with the evidence she gave in Court. Third, the medical evidence given by the Clinical Officer – including the PRC and P3 Forms established that there was corroboration. The P3 Form also corroborated another aspect of the Complainant’s narrative: that she had been forcefully defiled and strangled by her father the night before the Appellant defiled her.

17. Lastly, the testimony of the Complainant on the identity of the Appellant as the perpetrator was also straightforward, unhesitant and compelling. She knew the Appellant; and the Appellant conceded that he slept in the Complainant’s father’s house on the night the defilement occurred. Further, there is little reason or motive for the Complainant to have made up a false story that it was the Appellant who defiled her. The Complainant was a compelling witness. The Trial Court believed her. There is no reason to depart from its findings. There

was no other plausible theory offered or imaginable in the circumstances capable of introducing any reasonable doubts to the Prosecution case. In short, there was ample evidence to convict.

18. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve thirty years imprisonment. The Court convicted the Appellant under Section 8(2) of the Sexual Offences Act. That section provides that:

> 8(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.

19. However, the evidence clearly showed that the Complainant was thirteen (13) years old. It was therefore improper to have convicted the Appellant under section 8(2) of the Act. Instead, the Appellant should have been convicted of the lesser offence under section 8(3) of the Sexual Offences Act. Under that section, the minimum sentence prescribed is twenty years imprisonment.

20. In the present case, the Appellant was a first offender. He also mitigated and asked for leniency. Also while the defilement was horrific given the fact that it happened in the home of the Complainant which is supposed to a safe haven, the Appellant did not use depraved force. The Appellant should, therefore, have benefitted from the minimum sentence as guided by the Legislature in the circumstances of this case. I would, therefore, revise the sentence downwards to twenty years imprisonment.

21. The upshot is that:

> ***a.*** **The appeal against conviction only succeeds to the extent that the conviction is under section 8(1) as read together with section 8(3) of the Sexual Offences Act.**
>
> ***b.*** **The appeal against sentence succeeds to the extent that the sentence imposed is reviewed downwards to imprisonment of twenty (20) years.**

22. Orders accordingly.

Dated and delivered at Nakuru this 30th day of April, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Rita Rotich, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.