REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CRIMINAL APPEAL NO 92 OF 2018

TITUS FRANK OLOO..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[*Being an appeal against both the conviction and the sentence of Hon. Liz Gicheha [SPM]*

delivered on 31st of October 2018 in Nakuru Chief Magistrate's Court

*Criminal Case No. 43 of 2018.***]**

JUDGMENT

1. The Appellant, Titus Frank Oloo, was arraigned before the Nakuru Chief Magistrate's Court charged with a single 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 contained in the charge sheet were that on the 8th day of March, 2016 in Nakuru South Sub-County within Nakuru County, the Appellant unlawfully inserted his genital organ, namely penis, into the genital organ of EA, a girl aged 10 years.

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the place, time and victim are the same as that in the main charge.

3. The Appellant pleaded not guilty and the cases proceeded to a full trial. The Prosecution called four witnesses and closed its case.

The Learned Trial Magistrate ruled that the Appellant had a case to answer and placed him on his defence. He gave a sworn statement. At the conclusion of the trial, the Learned Trial Magistrate was persuaded that a case had been made out beyond reasonable doubt on the main charge and convicted the Appellant. The Learned Magistrate, however, noted that the evidence had shown that the Complainant was thirteen (13) years old. She, therefore, substituted section 8(2) with section 8(3) of the Sexual Offences Act and convicted the Appellant under that section noting that no injustice or prejudice would be suffered by the Appellant by the substitution. She then proceeded to sentence the Appellant to twenty-one (21) years imprisonment after considering her mitigation.

4. The Appellant is dissatisfied by both the conviction and sentence and has appealed to this Court. He has listed the following grounds of appeal quoted verbatim from his Petition of Appeal:

5. The Appellant filed his amended grounds of appeal undated and filed on the 7th of October 2019. Therein the Appellant raises the following grounds of Appeal;

> *a. The Learned Trial Magistrate erred in law and in fact when he convicted me in the present case by relying and acting on a fatally defective charge sheet contrary to section 214 of the Criminal Procedure Code*
>
> *b. The Learned Trial Magistrate erred in law and fact when he convicted me in the present case by relying on exhibits that have not normally identified and whose production was in breach of section 77 (2) of the Evidence Act CAP 80 laws of Kenya of the evidence act opt so laws of Kenya.*
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> *c. The Pundit Trial Magistrate erred in law and fact when he convicted me in the present case yet failed to find that crucial witness did not testify contrary to section 150 of the Criminal Procedure Code.*
>
> *d. The Pundit Trial Magistrate erred in law and fact when he acted on highly suspicious and contradicted evidence adduced by the prosecution witnesses*
>
> *e. The Learned Trial Magistrate erred in law and fact when he shifted the burden of proof shifted against me.*

6. The following evidence emerged before the trial Court. The Complainant testified as PW1. She testified that she knew the Appellant; and that the Appellant went to their house where she was with her younger brother, F and asked them to pick up stones. The Appellant was a neighbour. At the conclusion of the task, the Complainant testified that the Appellant offered to go give her Kshs. 20/- to go buy mandazi. He suggested that she accompanies him to his house. However, then they got to his house, the Complainant testified that the Appellant removed her panties and skirt, covered her mouth with his hands; and then "put his thing for urinating in to [her] place for urinating." The Complainant said that the Appellant had removed his trousers; and that the Complainant's mother came in and found them in that state. The Complainant's mother then took her home; locked her in the house and went to call the Police.

7. The Complainant's mother, SA, testified as PW2. She corroborated the Complainant's story about where she found her and the Appellant; and the state she found them. She told the Court that on 03/03/2016, she left the Complainant and her younger brother at home as she went to the shop to look for food. She did not come home until around 7:00pm. To her surprise, she did not find the Complainant home. Upon inquiry, the Complainant's younger brother, F, told her that the Complainant had gone off with the Appellant. The Complainant's mother, then proceeded to the Appellant's house. She found the door closed but not locked. She opened it and went inside. She was shocked to find her daughter, the Complainant, without her panties which she was holding in her hands. The Appellant appeared drunk to her and was also half-naked – with the trousers literally down to his knees. The Complainant's mother testified that she locked the Appellant's door from the outside and went to report to the Police. She returned with two Police Officers who arrested the Appellant. Later on, she took the Complainant for medical examination.

8. The Complainant was taken to Nakuru PGH Hospital where she was examined and a PRC Form filled. Later on, Dr. Karanja filled out the P3 Form using the filled out PRC Form. Dr. Karanja testified as PW4. He produced both documents in evidence. The documents should that the Complainant was examined on 08/03/2018. The P3 Form produced showed that the Complainant had bruises on her vagina; and had pus cells. The doctor concluded that she had been defiled.

9. The Investigating Officer, PC Janet Cheche, testified as PW3. She narrated about her investigations; and produced an age assessment report. The age assessment was done pursuant to Court orders made on 10/07/2018. The age assessment report showed that the Complainant was thirteen (13) years old.

10. In his defence, the Appellant said that on 08/03/2018, he went to work and came back home; that the Complainant's mother went to ask him for money and he slapped her. She then went to report him to the

Police. The Police came and arrested him and took him to Kongo Police Station. He said that he was shocked to learn that he was being charged with defilement.

11. 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***.

12. The evidence given in the Trial Court was forthright and candid testimony. The testimony of both the Complainant and her mother remained unshaken in cross-examination. The Learned Trial Magistrate who heard and saw the witness believed both of them to be telling the truth. Their testimonies were consistent and mutually reinforcing.

13. The Prosecution was required to establish three elements beyond reasonable doubt:

i. Penetration as defined in the Sexual Offences Act;

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

iii. Age of the Complainant.

14. The oral testimony by the Complainant as well as the medical evidence adduced were categorical that there was penetration. The Complainant described how the Appellant removed her panties and skirt; then removed his trousers and inserted his penis in her vagina. The medical evidence corroborated this by revealing that the Complainant had bruises in her vagina.

15. The age of the Complainant was established by scientific evidence in the form of an Age Assessment Report. It was categorical that the Complainant was thirteen years old. In her testimony, the Complainant had said that she is ten years old while the mother said that she was born on 07/08/2007 which made her about twelve years old.

16. On appeal, the Appellant protests that the Age Assessment Report was produced without calling the maker. His protests are unavailing at this stage for two reasons. First, if he contested the contents of the Age Assessment Report, the Appellant could have asked for him to be called for cross-examination. He did not. Second, the Report was accepted as an official document pursuant to section 77 of the Evidence Act. It was unnecessary to call the maker to produce it unless the Appellant wished to cross examine the maker on its contents.

17. In any event, there was other evidence that established the age of the Complainant in this case. This included the oral testimony of the mother as well as the P3 Form.

18. Was it proved beyond reasonable doubt that it was the Appellant who caused penetration? There can be no reasonable doubt on the evidence adduced that he was. In addition to the straightforward and compelling evidence of the Complainant, in this case, there was evidence of the Complainant's mother who found the Appellant almost in the action. I say almost because the mother found the Appellant with his trousers down to his ankles and the Complainant holding her panties. This was hugely suggestive that the Appellant had just defiled the Complainant. Seen together with the testimony of the Complainant, there is little room for any reasonable doubt in the case. There is no doubt at all that the person who defiled the Complainant is the Appellant as he was caught "red-handed" by the Complainant's mother.

19. The Appellant complains that there were inconsistencies in the case that should warrant an acquittal. In particular, he says that the Complainant's mother testified, as per the Court records, that the date of the incident was 03/03/2018 while the charge sheet stated 08/03/2018. He says this is a fatal variance between the evidence and the charge sheet which should entitle him to an acquittal. He is wrong. Not every inconsistency however infinitesimal introduces reasonable doubt to the Prosecution case. The

Kenyan Court of Appeal held in ***Erick Onyango Ondeng' v Republic [2014]*** **eKLR** ***Criminal Appeal NO. 5 OF 2013*** that:

> *With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case*.

20. Having looked at the trial Court record in its entirety and in context, I have come to the conclusion that the so-called inconsistency in question in this case is not material at all; it can be ignored as it has no bearing on the veracity of the material evidence tending to demonstrate the guilt of the Appellant. It does not relate to factors verging on the incredulity of the witnesses. In fact, it is quite likely that this was no inconsistency at all but a scrivener's error when recording the Court proceedings by hand.

This seems even more likely since the date recorded is "03/03/2016" while in fact the relevant date is "08/03/2018."

21. Finally, the defence theory that all the evidence was fabricated to frame the Appellant because he had refused to give the Complainant's mother is too fantastical and implausible as to have no inherent possibility that it could be true. It raises no reasonable doubts at all to displace the compelling evidence in favour of the Prosecution case. In short, there was ample evidence to convict.

22. In her judgment, the Learned Trial Magistrate indicated that although the Appellant had been charged under Section 8(2) of the Sexual Offences Act, evidence adduced had shown that the Complainant was thirteen (13) years old at the time of the defilement and that therefore the correct sub-section to convict was section 8(3) of the Sexual Offences Act. This section makes the Appellant amenable to lesser sentence. The Learned Magistrate, therefore, observed that no prejudice or injustice was occasioned to the Appellant. The Learned Magistrate was eminently right. I, therefore, find the sentence imposed – twenty years imprisonment – also to be lawful and proportionate in the circumstances of the case.

23. .**The upshot is that the appeal herein is dismissed in its entirety. Both the conviction and the sentence are hereby affirmed.**

24. 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.