REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 3 OF 2019.

WESLEY NGETICH..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal from the conviction and sentence of the Senior Resident Magistrate

Hon. R. Amwayi delivered on 14th of January 2019 in Molo Cr. Case No. 1455 of 2016.)

JUDGMENT

1. The appellant was charged with one count and alternative charge. The main charge is the offence of **defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 13th of May 2016 at [particulars Withheld] area in Kuresoi District within Nakuru County intentionally caused his penis to penetrate the vagina of **DC** a child aged 13 years.

2. The alternative charge is the offence of committing **an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on the 13th of May 2016 at [particulars withheld] area in Kuresoi District within Nakuru County intentionally touched the vagina of **DC** a child aged 13 years with his penis.

3. The appellant denied the charges and the case proceeded for full trial, the prosecution called 6 witnesses in support of their case while the appellant gave unsworn defence and called no witness. By the judgment delivered on 14th of January 2019, the lower court found the appellant guilty of the main charge of defilement and convicted him. He was sentenced to serve 20 years' imprisonment.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence filed this appeal through on the following grounds:-

> *i. That the learned trial magistrate erred in law by imposing the statutory minimum sentence of 20 years but failed to note that since the Supreme Court decision in* ***Francis Karioko Muruatetu Vs Republic (2017)*** *the courts are no longer bound by statutory minimum sentences.*
>
> *ii. That the learned trial magistrate erred both in law and fact by convicting the appellant when the case against him had not been proved beyond reasonable doubts.*
>
> *iii. That the learned trial magistrate erred both in law and facts by holding that the offence of defilement was proved when there was no evidence to prove that the act of defilement penetration was committed by the appellant.*
>
> *iv. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the evidence on record was uncorroborated was full of assumptions, presumptions not supported by evidence.*
>
> *v. That the trial magistrate erred in law and fact by failing to give the appellant defence a fair objective and open minded analysis and erred grievously by placing the burden of prove to the appellant by evidence.*

5. The appeal proceeded for hearing on 19th of January 2020. The appellant relied on submissions filed and amended grounds of appeal and the counsel for the prosecution gave his oral submissions.

APPELLANT'S CASE

6. On ground one, the appellant submitted that the sentence was harsh and excessive, that the courts should have a leeway in imposing a sentence it deems proportionate to the offence. The trial court was required to assess the sentence to be imposed in the ordinary way. If it found that the sentence is less than the minimum, the minimum sentence must be imposed. He cited the case **Kibirgeny Vs Republic (1985) EA 250.**

7. On grounds two, three and four, the appellant submitted that penetration was not proved by the prosecution. The charge of defilement that he was convicted was not proved against him though he was convicted and sentenced to 20 years' imprisonment on the strength of evidence of PW1 whom the court referred to as an eye witnesses. That PW1 contradicted PW2 in his evidence as she never witnessed the incident save for the fact that they rode on the same motor bike. That she said she alighted at the gate and proceed to the house and could not see anything because it was dark.

8. He further submitted that the evidence of the two minors was not corroborated as it was full of assumptions not supported by any evidence. The exhibit 1(a) produced being the panty belonging to the complainant, PW2 testified to have been bluish in colour while PW1 stated to have been purplish in colour. Appellant argued that the prosecution case was marred with contradictions and inconsistencies which make the prosecution not to prove their case of defilement against the appellant though the court went ahead to convict and sentence him.

9. As to whether his defence was considered, the appellant submitted that he raised defence of *alibi* in his unsworn statement when he stated that he was not at the crime scene and told the court he had travelled to Thika for a graduation ceremony. He submitted that the trial magistrate erred by concluding that he failed to prove that he travelled to attend a graduation ceremony neither did he call any witness to confirm that indeed he had travelled as alleged. He relied on the case of **Karanja Vs Republic (2005) eKLR**

PROSECUTION'S CASE

10. The state counsel submitted that according to medical evidence by PW6, the complainant's hymen was broken, in fragmentation to the labia majora and minor bruises to the vagina. The doctor confirmed that genital organ was penetrated. He further indicated it was forceful entry. The child had injuries at the back of the head. The child was severally traumatised.

11. The trial court conducted *voire dire* examination before hearing the evidence of the complainant and found the complainant to be cooperative and someone who can tell the truth. The court found that she was able to identify the appellant and her evidence was corroborated by other witnesses during the hearing.

12. The state counsel submitted that the sentence imposed on the appellant was right and within the law as the prosecution proved their case beyond reasonable doubt on the ingredients of defilement.

13. Further that the appellant was put on his defence where he stated on the said date he had travelled to Thika for his graduation but he failed to adduce documentary evidence to show that the Appellant had enrolled to the said university.

DETERMINATION AND ANALYSIS

14. This being the first appellate court I have a duty to revaluate evidence adduced in the trial court and arrive to an independent determination. I am however minded of the fact that unlike the trial court I never had the opportunity to take evidence first hand and observe demeanour of witnesses. For this I give due allowance. The principles that are on the role of trial court were set out in the case of **Okemo Vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose Vs. R (2013) eKLR** which held as follows:-

> **"the first Appellant Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."**

9. Further in **Pandya -Vs- Republic [1957] EA 336** the court held as follows: -

"On a first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or Magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or Magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

10. I have perused and considered the lower court's proceedings and find the following as issues for determination: -

i. Whether the ingredients of defilement were proved beyond reasonable doubt.

ii. Whether the appellant sentence was harsh and unreasonable.

(i)Whether the ingredients of defilement were proved.

11. I wish to reevaluate evidence in the lower court to determine whether the ingredients of the offence of defilement were proved beyond reasonable doubt and if not, whether the alternative charge of committing an indecent act with a child, were proved beyond any reasonable doubt.

12. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the appellant was identified as the perpetrator.

(a) Age

13. In respect to age, importance of prove of age of complainant was stated in the case of ***Hadson Ali Mwachongo Vs. Republic [2016] eKLR,*** the Mombasa Court held that;

> **"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim…"**

14. Record shows that the complainant testified that she was 13 years of age. The prosecution produced the complainant's immunization card which shows she was born on 6th of June 2003; P3 form produced in the trial court also indicated that the complainant was 13 years of age at the time of the alleged defilement. The trial court which had an opportunity to see and interact with the complainant established that the complainant was a child of tender age and there was need to conduct *voire dire* examination to determine if she was fit to testify and take oath. Evidence to establish age of a child can either be a birth certificate, birth notification, age assessment report, clinic card or baptism card. In view of the fact that the immunisation card was availed to court, there was no doubt on the complainant's age was proved beyond reasonable doubt.

(b)Penetration

15. On penetration, PW 2 in her evidence stated that on 13th May 2016, PW1 testified that together with her sister PW2 boarded the Appellant's motor bike to go home, and after reaching home at the gate, the appellant dragged PW2 into a ground near their home, he pulled her, removed her panty and lay her on the ground; he then unzipped his trouser, removed his penis and inserted it into PW2's vagina; she said she bled on being defiled by the appellant.

16. PW1 in her testimony stated she saw the Appellant pull PW2 into the field and started having carnal knowledge of her which called "*tabia mbaya*" to her. She saw PW2 lying on her back and the Appellant lay on top of PW 2.

17. PW6, **Julius Koech** a clinical officer at Olenguruone Sub - County Hospital, testified that PW2 was examined on 16th May 2016. Her panty was torn and had dry blood stains, her dress had blood stains. She had some pain at the back of the head approximately 2 days old. She was emotional. Urine had moderate pus cells. On examination of her genitalia the labia majora and minora had some bruises; there were also bruises on the inner and outer walls of her vagina and whitish discharge. Bruises were caused by way of forceful entry. The Hymen was broken due to penetration by way of sexual intercourse. Evidence of penetration was corroborated by the medical evidence adduced in court by PW6 who examined PW2 and produced P3 form in court.

18. However, Under **Section 124 of the Evidence Act** the court can still convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth.

19. **On evidence of spermatozoa, in the case of Mark Oiruri Mose Vs R (2013) eKLR** the Court of Appeal stated as follows:-

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

Further the Court of Appeal in the case of **<u>Erick Onyango Ondeng Vs. Republic (2014) eKLR</u>** held as such on the aspect of penetration:

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."**

20. From the analysis above it is my finding that PW2 did not have any reason to frame the appellant, penetration was proved beyond reasonable doubt and medical documents produced to support the same.

(c) Identification

21. Identification of the perpetrator PW2 testified to have known the Appellant as he is a client to their mother. Both PW2 and PW1 were pillion passengers on appellant's motor bike; they were known to him. This was corroborated by PW4 the complainant's mother who stated that the appellant was his customer and she used to ride on his motor bike together with her children when going to church. The incident also happened at about 7.00 pm a time when darkness had not fully set in and the complainant was able to see and identify the appellant. There is therefore no doubt that the appellant was positively identified as the person who defiled the complainant PW2.

(iv) Whether Appellants defence was considered

22. On defence of *alibi*, the trial court rightfully found that the appellant never adduced evidence to the effect that he was not at the vicinity at the material time. No documents were produced by appellant that he had gone to attend graduation ceremony.

23. From the totality of evidence adduced, I do not see any frame up of the accused. Evidence was adduced beyond doubt to prove all the ingredients of the offence defilement against the appellant herein. I therefore see no reason to interfere with sentence imposed by the trial court. Appeal on conviction is dismissed.

(iii) Whether the appellant sentence was harsh and unreasonable.

24. The appellant was charged for **Defilement contrary to Section 8(1) as read with Section 8 (1) of the Sexual Offences Act No. 3 of 2006** which provides as follows: -

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

> While **Section 8 (3) of the Sexual Offences Act No. 3 of 2006** provide as follows: -

> "**A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**"

25. Appellant was convicted for the offence of defilement and sentenced to a jail term of 20 years. The provision of law under which he was charged provides a minimum punishment of 20 years. It is evident that the trial magistrate imposed the minimum sentence provided for by the law.

26. I am however alive to decision in the case of **Muruatetu** where the Supreme Court found that by statute providing minimum sentence, it takes away the discretion of the court as it renders mitigating factors advanced by the accused person superfluous since the court's hands are tied to impose minimum sentence. In view of decision in **Muruatetu** case I note that the appellant was given a chance to mitigate. I have considered his mitigation. I also note that the child defiled was 13 years. I find 15 years' imprisonment as reasonable sentence in the circumstance.

27. <u>**FINAL ORDERS**</u>

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is allowed.
3. Sentence is hereby reduced to 15 years' imprisonment
4. Sentence to run from the date the appellant was sentenced in the lower court.

Judgment dated, signed and delivered via zoom at Nakuru

This 28th day of May, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Appellant in person

Rita for State