REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 61 OF 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.1677 of 2015 by Hon. A. Mukenga – R.M.)

MKN….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

MKN was on 21/02/2018 convicted by Hon. Mukenga RM, for the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 06/07/2015 at [particulars withheld] village in Laikipia County, unlawfully and intentionally caused his genital organs namely penis to penetrate the vagina of JM a child aged four 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. No finding was made on the alternative charge.

Upon conviction on the main charge, the appellant was sentenced to serve life imprisonment.

The appellant is aggrieved by the said conviction and sentence and preferred an appeal through the firm of Waichungo & Co. Advocates.

The appellant has raised five grounds of appeal which are;

1. ***That the trial Magistrate erred in law and fact for imposing the wrong sentence on the appellant who was 16 years old when he was charged;***

2. ***That the trial Magistrate erred in law for not asking for a probation officer's report before sentence;***

3. ***That the trial Magistrate erred by acting on a flawed procedure in convicting and sentencing the appellant;***

4. ***That the trial Magistrate erred for disregarding the appellant's defence;***

5. ***That the trial Magistrate erred for shifting the burden of proof on the appellant.***

Based on the above grounds, the appellant prays that his appeal be allowed, conviction be quashed and sentence set aside.

Mr. Waichungo filed submissions in support of the grounds of appeal on 28/04/2020.

The appeal is opposed and Miss Rugut, learned Counsel for the State also filed her submissions on 19/05/2020.

This being a first appeal, this court has the duty to examine exhaustively the evidence that was tendered before the trial court afresh, analyze it and arrive at its own conclusions. The court will however, have to bear in mind that this court neither had the opportunity to see or hear the witnesses testifying. On the other hand the trial court had the advantage of hearing and seeing the witnesses.

I am guided by the decision in ***Kiilu & Another vs Republic (2005) eKLR 174*** where the Court of Appeal stated thus;

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and extensive examination and to the appellate court's own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

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. 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 advantage of hearing and seeing the witnesses."

The Prosecution's Case:

The prosecution in support of its case called a total of 10 witnesses PW1 JM, the complainant; PW2 LKK; PW3 HK (a minor); PW4 GMK; PW5 LK; PW6 EK; PW7 JMK; (the complainant's father); PW8 AP Simon Kipkoech; PW9 PC George Otieno and PW10 Dr. Evans Odhiambo.

The complainant, PW1, JM a minor who was by then attending baby class, gave unsworn evidence after the court examined her and ascertained that she did not understand the meaning of oath but understood the importance of telling the truth. She recalled that she was coming from school with K (PW.3) when Moses called them and promised to give them 'ngumu' (a form of mandazi) in his house. He took the two of them to his house where he did bad things to her on the bed and that he sent the boy to fetch water and she was left alone; that he did bad things to her with his 'dudu' which he inserted where she urinates. She pointed to the court her private parts. She described the appellant's house as being one roomed with motor cycle things; that the appellant later opened for her and she left and found that K (Pw3) had informed her teacher and the father took her to hospital. Though at first PW1 said that it is her mother who told her the appellant's name to be Moses Kigera, she said that the appellant lives near her home and she used to see him sitting near the motor bikes.

PW2 L, the mother of PW3 said that on 06/07/2015 about 3.00pm, she came from the farm, found her son K who informed her that when they were coming from school with the complainant, they met Kigera who told them to go to his house to eat 'ngumu' and watch TV; that when they went into his house, Kigera took the complainant inside and he heard her screaming and he ran off. PW2 who is an aunt to the complainant went to inform the complainant's mother about what she had been told by PW3.

PW3 K, who said he was 5 years old also gave unsworn evidence after the court conducted a voire dire examination and established that he knew the difference between telling the truth and lies but he did not understand the meaning of the oath. PW3 recalled that he was with the complainant when they met Kigera who asked how many Ngumu's they wanted. He said he wanted one while the complainant said two. He led them to his house, switched on the TV and took the complainant to another room. He heard the complainant crying and he ran out and went home. He told the mother what had happened and he took his mother and complainant's mother to Kigera's house.

PW4 recalled that on 06/07/2015, while at home, a lady called Mama D took the complainant to her and claimed to have found her along the road as she looked sick and that she had diarrhoead on her clothes; that PW3 came there and explained that he had left the complaint at Kigera's house. PW3 led them to Kigera's house. They informed the police, went to Kigera's house and the officer broke into the house and found some clothes which had been used to wipe the child. PW4 said that upon arrest the appellant's trouser had faeces.

PW5, the complainant's mother was at home when PW3 went to inform her that the complaint had been defiled. She went with him to PW4's house where the complainant was and together they went to Kigera's house. PW5 also said that when the appellant was arrested by police, he had faeces on his trousers and even his bed had faeces and that there were footsteps of a child in the appellant's house.

PW6 EK, a motor cycle rider in Thome recalled that on 06/07/2015 about 3.00pm he was dropping a teacher at [particulars withheld] School when he found the complainant along the road, crying and she had faeces all over her body. PW6 knew the complainant as the daughter of Joshua (PW7) who is also a motor cycle rider. On taking the child home, he found another child who claimed to have been with the complainant and they both went to report to police. They were led to Kigera's house, entered and found faeces on the bed and the corner of the house. They mounted a search for Kigera and arrested him.

PW7 the complainant's father recalled being called by a friend (PW6) who had found the complainant by the road side. He proceeded to where PW1 and 6 were and he was informed by a little boy (PW3) how Kigera had promised them and the complainant Ngumu. They went to his house but he was chased away leaving the complainant behind; that PW3 showed them Kigera's house and people in the compound confirmed it to be Kigera's but he was not at home. The complainant was treated at Catholic Mission and Rumuruti Hospital. PW7 told the court that the complainant was born on 27/12/2000 and was about 4 ½ years old. PW7 also saw faeces at the appellant's trouser on the time of arrest.

PW8 of Thome AP Post recalled that a report of defilement was made to him and he proceeded to the house of the suspect, broke the door open, found faeces on the bed and at the corner of the house where they also saw a child's foot prints. He later arrested Moses Kigera at Rumuruti whom he knew before.

PW9 of Rumuruti Police Station received a report of defilement from the complainant and her mother. He then escorted them to Rumuruti District Hospital where the complainant was examined. He produced the complainant's clinic attendance book as P-exhibit 1.

PW10 examined the complainant on 06/07/2015 at Rumuruti Sub-County Hospital. He noted bruises on the lower eyelid, pain on the lower abdomen, bruises on the vaginal wall, the hymen was broken and he formed the opinion that the injuries suggested possible forcible penetration; that the girl had defacated on herself.

When called upon to defend himself, the appellant gave an unsworn statement. He said that he is a boda boda rider and on 06/07/2015, he went to work, and at noon he met police officers who arrested him without telling him the reason why. They later charged him.

DW2 Elizabeth Waithira the appellant's mother said that on 06/07/2015 the appellant transported her from Thome to Rumuruti where they parted. Later, she learned that he had been arrested. DW2 knew the complainant as they went with the mother and grandmother to the same church.

The Appellant's Submissions:

The appellant was represented by Waichungo & Co. Advocates. Counsel submitted that the court ignored to address the issue of the appellant's age as he was 16 years at the time of taking plea; that the charge sheet reflects that he was a minor and so do the PRC forms part of P-Exhibit3; that the appellant had to be remanded at Rumuruti Police Station after plea because of his age and that he remained at the police station till he attained majority age; that on 10/03/2018 when the appellants previous records were called for in Cr. 173/2014 where he was placed on probation and that a probation report was also filed in Cr. 1809/2017 which indicated that he turned eighteen years in 2017. The court was urged to call for and examine the records in those two cases. Counsel has urged the court to revisit the issue of the appellant's age as he should not have been referred to as an adult and was entitled to pro bono services. Counsel also submitted that the prosecution was full of contradictions whereby the complainant denied knowing the appellant and said that it is her mother who told her his names. It was his submission that the complainant had never met the appellant before and that the investigating officer should have conducted an identification parade. Counsel relied on the decision of ***Ajode vs Republic (2004) eKLR.***

Counsel also argued that no evidence connected the appellant to the house where the complainant was allegedly defiled; that whereas PW1 said it was one roomed, PW3 said there was another room; that though there was allegation of faeces being found in the house, there was no evidence connecting him to it; that the boy that PW6 referred to as having informed them of the appellant's house was not called as a witness; that the appellant's defence was never considered and hence the evidence was not properly analyzed. Counsel also relied on ***Boniface Onyango Oguk vs Republic (2016) eKLR.***

In reply Ms. Rugut urged that she had gone through the court record and there is nothing to prove that the appellant was 16 years old nor was any documentary evidence produced to that effect; that nowhere in the court record was it directed that the appellant be remanded at Rumuruti Police Station and Counsel urged the court to dismiss the said allegations.

Counsel also submitted that the appellant was properly identified by PW1 when she stated that she used to see him with the aunt and that he lived near their home and that her first statement may be interpreted to mean that she did not know the appellant's name; counsel also argued that PW1's evidence was corroborated by PW3's evidence who informed his mother (PW2) of how they had met the appellant and he lured them into his house; that the complainant's testimony is further corroborated by the Doctor's testimony; PW4, 5 and 7 confirmed that there were faeces on the appellant's trouser. Faeces had also been found all over PW1's body and even though no photographs were taken of the complainant, the appellant and the house, the same connects the appellant to the offence. The counsel urged the court to dismiss the appeal.

The appellant was charged under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. To prove an offence under Section 8(1) of the Sexual Offences Act, the prosecution has to establish the following beyond reasonable doubt;

a. Whether the complainant was a minor;

b. That there was penetration;

c. The identity of the perpetrator.

Whether the complainant was a minor;

There is no doubt as to the complainant's age. The complainant's immunization booklet was produced in evidence which indicates that the child was born on 27/12/2010 (P.Exh.1). The complainant's mother and father PW5 and PW7 confirmed that fact. PW1 was a child of tender age who was still going to baby class. PW1 had just turned four years old.

Whether there was penetration;

Section 2 of the Sexual Offences Act defines penetration as ***"partial or incomplete insertion of the genital organs of a person into the genital organs of another person."*** In her unsworn evidence, PW1 stated that the appellant took her to his place and did bad things to her with his 'dudu' and that he inserted his 'dudu' where she urinates and she pointed to her private parts. The Magistrate found as follows ***"my understanding was that 'dudu' is the name used by children to commonly refer to the penis. She said that it was inserted in the place where she urinates meaning vagina."*** The findings of PW10 corroborated PW1's evidence that the hymen was broken, there were bruises on the lower vaginal wall and lower perineum and that there was evidence of forced penetration. The court was satisfied that there was vaginal penetration of the complainant. I am of a similar view and find that there was sufficient evidence to prove penetration.

The next question was who was the perpetrator;

The appellant contends that the complainant's evidence was contradictory because at first she stated ***"I knew Moses Kigera. My mother told me his name. I had not seen him before."*** She also said ***"I never used to see him anywhere."***

However later in her evidence she said ***"I used to see Moses sitting at his place near the motor bikes,"*** and in cross – examination she further said ***"I used to see you when passing with aunt."*** I agree with Ms. Rugut's observation that when PW1 first said that the mother told her the appellant's name, means she knew the appellant but not the name. This is because PW1 later said that she used to see the appellant near the motor bikes and indeed there is ample evidence on record that the appellant repaired motor cycles and also was a motor cycle rider.

PW1 was not alone when she met the appellant. She was with PW3 K who did not waste time because once he escaped from the appellant's house on hearing the complainant crying, informed his mother PW2, who is the complainant's aunt. It is also PW3 who went to inform PW5, the complainant's mother. Together with PW2, 4 and 5, they went back to the house where the complainant was defiled. PW3 was consistent in his narration. He is the one who also told PW6 who rescued PW1 on the road and even PW7 how the appellant enticed them to go to his house to eat 'ngumu' a type of mandazi only to turn on PW1.

PW4, 5, 6, 7, 8, and 9 all told the court that the complainant was covered in faeces when she was found by PW6. All these witnesses went to the house they were shown by PW3 and another boy where they found faeces on the bed and on the floor of the floor. PW10 also saw feces on the complainant when he examined her.

PW5, 6, 7, 8 and 9 also stated that at the time of arrest there were traces of faeces on the appellant's trouser. The investigating officer should have ensured that photographs of the house and the said minor were taken but it was not. Despite that, I find there is overwhelming evidence by the witnesses to connect the appellant to having been in contact with the complainant and the scene was in his house. The finding of faeces in the said house was not a coincidence. The appellant's act caused the complainant such pain that she defecated on herself. The appellant was a person known to all the witnesses because they lived in the same neighborhood. Even the appellant's mother knew the complainant and her mother. I have no doubt in my mind that the appellant was positively identified as the perpetrator. I find that the conviction is well founded and I affirm it.

Whether there were material contradictions in the prosecution case, PW1 told the court that the appellant's house was one roomed while PW3 talked of there having been another room where the appellant took the complainant.

PW1 and 3 were minors aged about 4 – 5 years. Other witnesses who visited the house did not mention how many rooms there were nor did the appellant raise the said issue. In my view, the issue of how many rooms there were in the appellant's house is not material to the case and does not go to the root of the prosecution case. In ***Ndungu Kimanyi v Republic (1979) KLR 282***, the court said:

> ***"The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."***

In this case, as observed earlier, PW1 and PW3 are children of tender age. There was nothing to suggest that they are of doubtful integrity PW1 and 3's evidence was convincing.

I have considered the appellant's defence. It was a mere denial. DW2's evidence did not add any value to the defence. DW2 talked of having parted with the appellant at noon and could not tell what he did from the time they parted. The complainant was defiled about 3.00 p.m. The evidence did not in any way dislodge the prosecution evidence. The conviction is well founded and I hereby affirm it.

The ground that the appellant's counsel dwelt on at length is the fact that the appellant was a minor at the time of committing the offence. I have looked at the lower court file. I note a writing in biro on the charge sheet that the appellant's age was 16. However, there is nothing on record to show that the court ever recorded that the appellant be remanded at Rumuruti Police Station because he was a minor. I have no idea where Counsel got such information. Even after the appellant's bond was cancelled, he was never remanded at Rumuruti Police Station. The appellant was placed in remand during the trial.

I have called for ***Cr.Case 173/2014 Republic v Samuel Kamau Warari and Moses Ngera Kinyoto*** where the two accused faced charges of stealing Contrary to Section 275 and preparation to commit a felony Contrary to Section 308(2) of the Penal Code.

The appellant was the 2nd accused. I have seen a Probation Officer's Report and the Report indicates that he was 16 years old. There was however no age assessment report.

He was placed on two years Probation on 13/2/2014.

In ***Cr.Case 1809/2017 Republic v Moses Kegara and Jackson Perian***, the accused were charged with the offence of stealing from the person. Again a Probation Officer's Report was prepared which indicated that the appellant who was the 1st accused was18 years. If the appellant was sixteen (16) years in 2014, he could not be 18 in 2017. He must have turned 18 by 2016.

The offence that the appellant was convicted of in this matter was committed in July, 2015 when the appellant was serving sentence on Probation and he was placed on another period of Probation a second time in 2017. Since there is no age assessment, I direct that the appellant be taken for age assessment by a radiologist or dentist before the court can pass sentence.

Dated, Signed and Delivered at NYAHURURU this 30th day of June, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Ms. Muriithi for appellant

Eric – Court Assistant

Appellant – present (virtual hearing)