REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 163 OF 2019

(CORAM: F. GIKONYO J.)

ABDINASSIR JARO................................ APPELLANT

-versus-

REPUBLIC...RESPONDENT

(A**n appeal from the judgment of Hon. S.M MUNGAI (CM) delivered on 18/9/2019 in ISIOLO CM'S S.O NO. 2 OF 2018)**

JUDGMENT

1. The appellant herein was charged with defilement contrary to **Section 8 (3) of the Sexual Offences Act** and an alternative charge of **Committing an indecent Act with a child contrary to Section 11 (1) of Sexual Offences Act No. 3 of 2006**. The particulars of the offence in the main charge are that on 12th January 2018 in Merti sub County of Isiolo County within Eastern region intentionally caused his penis to penetrate the vagina of **SA** a girl aged 15 years. Particulars of the alternative charge were that on the 12th day of January 2018 in Merti sub County of Isiolo County within Eastern region he touched the vagina of **SA** a child aged 15yrs with his penis.

2. The trial court found the appellant guilty of the offence of defilement and sentenced him to life imprisonment.

3. Aggrieved by the aforesaid determination the appellant filed a petition of appeal on 1st October 2019 raising six grounds of appeal that; **the trial magistrate erred in finding that the offences of defilement and committing an indecent act with a child had been proved beyond reasonable doubt. That the trial magistrate failed to consider the inconsistencies raised by the prosecution witnesses. That the trial magistrate failed to make a finding that the appellant's constitutional rights have been infringed specifically being subjected to a medical examination. That the trial magistrate failed to consider the mitigation and probation report to guide it into giving a lesser sentence to the appellant.**

Submissions

4. Both parties canvassed the appeal through written submissions. The appellant submitted that the age of the minor was not established as required in law. To support this submission, he cited the cases of; **Patrick Mutwiri Gikinyo versus Republic [2018] eklr, Benard Kimngetich Rono versus Republic [2016] eklr, and Eliud Waweru Wambui versus Republic [2019] eklr.**

5. The appellant also urged that penetration was not proved. According to him, the complainant's statement that the appellant had sexual intercourse with her was not proof of penetration. The appellant cited the following cases on this point; **Julius Kioko Kivuka versus Republic [2015] eklr, Francis Mutonda Ogeto versus Republic [2019] eklr.**

6. The appellant did not stop there. He argued that there were glaring inconsistencies in the evidence adduced by the prosecution witnesses especially on identification of the appellant, the date of the complainant's examination, and her averment that she had been impregnated. He relied on the cases of **Micheal Muno Nzioka versus Republic [2019] eklr.**

7. The appellant also challenged the sentence imposed on him for being harsh and excessive. He stated that the probation officer gave a favourable report and therefore the maximum sentence imposed on him was extremely unfair.

8. The Respondent submitted that the prosecution had proved its case. That the age of the complainant was proved through the production of the P3 report and the treatment notes i.e. **Pexh 1 & 2**. He relied on the case of **Richard Wahome Chege v Republic [2014] eklr & Joseph Kieti Seet versus Republic [2014] eklr.** According to the prosecution, penetration was also proved from the detailed statement of Pw1, the complainant herein. In any case, that the sole evidence of Pw1 was sufficient to found a conviction as per the proviso to **Section 124 and 43 of the Sexual Offences Act.** They relied on the case of **PMM v Republic [2014] eklr**. On the identity of the perpetrator the respondent submitted that the complainant properly identified the appellant for the two days she was locked in the 2nd Accused person's house. On this,

they cited the provisions of **Section 15 of the Sexual Offences Act** and the case of **Lucia Kasisa Mulinge v Republic.**

9. Lastly it was the Respondent's submissions that the inconsistences in the prosecution witnesses were not material enough to disturb the decision of the trial magistrate. They cited the cases of **Robert Peter Kazawali v Republic [2018] eklr and Erick Onyango Ochieng v Republic [2014] eklr.**

Analysis and Determination

10. As first appellate Court, I should re-evaluate the evidence and make own findings as to the guilt or otherwise of the appellant. See the case of **Okeno vs. R (1977) EALR 32.** But I should always bear in mind that this court did not have the advantage of seeing and hearing the witnesses as to be able to observe nuances of the demeanour of the witnesses.

Elements of crime

11. In defilement cases the three intrinsic elements that the prosecution must proof are;

> **(i) That the victim was a child**
>
> **(ii) There was penetration; and**
>
> **(iii) The penetration was by the Appellant**

Age of the Complainant

12. Given the nature of the offence of defilement, age of the victim is an essential element of the offence. It must be proved through evidence that the victim was a child- a person below the age of 18 years. On the one hand, the appellant argued that the age of the complainant was not proved. On the other hand, the Respondent argued it was proved as required in law. The evidence will resolve this dilemma.

13. **Pw1,** the complainant in her testimony stated that she was a student at [particulars withheld[Primary School at Class 7. **Pw3** a clinical officer at Merti Sub County testified that during the examination of the complainant PW1 was about 15 years. The P3 form indicates the age of the complainant to be about 15 years of age. In the history noted in the treatment notes from Merti Sub County Hospital the age of the complainant is indicated to be 15 years. The trial magistrate considered these pieces of evidence and relying on the case of **Richard Wahome Chege (supra),** determined the age of the complainant to be 15 and therefore a child.

14. It bears repeating that age of a person for purposes of Sexual Offences Act may be proved through documentary or other forms of evidence. Certificate of Birth is the best way of proving a person's age. But, it is not the only way of proving age of a person. Other evidence, oral or documentary, or a combination of the two, may prove the age of a person. On this proposition, I find support in the case of **Richard Wahome Chege v Republic [2014] eKLR** where the Court of Appeal held as follows;

> **"……it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself…."**

15. Buttressing this proposition is not harmful. See also the case of **Joseph Kieti Seet v Republic [2014] eKLR** the court cited the case of **Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000.** It was held thus:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."**

16. In **Joseph Kieti Seet (ibid)** the court found that the birth notification, the P3 form and the evidence of the complainant was enough proof of the age of the complainant.

17. Case law show that each case is to be determined on its own facts and circumstances. I have carefully considered the evidence adduced in this case and I am properly grounded in stating that the prosecution provided credible oral as well as documentary evidence on the age of the victim. Contrary to the submission by the appellant, this case is not wholly anchored on the oral evidence of the complainant and her mother on age. There are other cogent pieces of evidence which support the evidence by the mother. First and foremost, the evidence of her mother was clear that the victim was 15 years old at the time of the commission of the offence. This was corroborated by Pw3 who provided further evidence; that at the time of examination, the victim was 15 years old. Treatment notes and the P3 form also indicated the estimated age of the complainant to be 15 years. These pieces of evidence proved beyond reasonable doubt that the victim herein was 15 years old at the time of the crime. I so find and hold. The appellant's grounds of appeal on this aspect fail.

Penetration

18. **Section 2 of the Sexual Offences Act** defines penetration as:

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

19. As a requirement of the law, penetration must be proved. Pw1 stated clearly how the appellant took her to the house of the 2nd accused, locked her therein, removed her clothes and had sexual intercourse with her for the two days she had been locked in there. She provided succinct details of the sexual act. She specifically stated as follows in her testimony;

> **"the 1st accused closed the door and told me to remove my clothes. I had a buibui. I refused to remove my clothes. He then removed my clothes. He then laid me on the bed and had sexual intercourse with me up to 10:00 P.M."**

20. Medical evidence corroborated her claim of sexual intercourse. The treatment notes show that the hymen was broken, the vaginal wall bruised and had lacerations. **PW3** testified that the injuries were about 3 days old and probably caused by penile penetration. **Pw3** presented the **treatment notes** and the **P3** form as **Pexh 1 & Pexh 2**. The history of events provided by her was consistent from the time of the offence to her reporting the crime to the history provided to the medical officers during examination and treatment. Accordingly, penetration of the complainant was therefore proved beyond reasonable doubt.

Identification of the Penetrator

21. The million-dollar legal question is; was the penetration by the appellant? **Pw1, SA** testified that he knew the appellant as she used to see him in Merti. That on the 10th of January 2018 the appellant approached her and offered to marry her. That she agreed to accompany him to Isiolo where the appellant took her to a mud walled house, removed her clothes and had sexual intercourse with her. That on the next day the appellant requested her to wash her clothes. She was also offered tea by Ali Adan, the 2nd accused person. See the trial court's proceedings. She also stated that she slept in the said house for two days, but she was later chased away by the appellant. It was her testimony that she approached a neighbour, **PW2 Adan Alakano** who called her father. Her father then came for her and took her to the police station where they reported the incident and later to the hospital where she was examined and treated.

22. **Pw2 Adam Alakano** testified that he lived in a rented house neighbouring that of the 2nd accused person. That he was in his house when he was approached by Pw1 who informed him that the appellant had brought her to the house and had sexual intercourse with her. That he approached the 2nd accused person and asked him if he was familiar with the complainant to which he answered in the affirmative, but informed him that the complainant had been brought by the appellant. He also told the court that the complainant would later give him his father's number. He called Pw1's father who came and took Pw1 to the police station and later to the hospital. In cross examination he stated that the complainant had stated that the appellant brought her to the house on 10th January 2018 and chased her on 12th January 2018. The appellant had informed him that he had given her a lift from the river on 11th. He also reiterated that the 2nd accused person had informed him that it was the appellant who had brought the complainant to the house.

23. **Pw4 Eric Sanya, the investigation officer,** testified that he was informed of the case on 12/1/2018 and he proceeded to the scene where he found the complainant and his father. That the complainant informed them that it was the appellant who had sexual intercourse with her. That he took the complainant to Merti Health centre where she was examined and it was confirmed that she was impregnated. That the complainant then led them to the suspect i.e. the appellant herein. They waited till he appeared and the complainant identified him to them. They also took the appellant to the hospital where he was examined and then charged. He identified the accused person on the dock.

24. It was also his testimony that the 2nd accused person was arrested for allowing the appellant to use his house to defile the complainant. That the 2nd accused person did not however defile the complainant. He stated that to the best of his knowledge there was no grudge between the appellant and the complainant and/or his family.

25. **Dw1 Abdinassir Jaro Roba,** the appellant herein testified that on the material date he was on vacation using his father's motor bike. That he only met the complainant on 12/1/2018 when she requested for a lift in his motor cycle. That he offered her a lift, as a good Samaritan and took her to Manyatta, then proceeded home. He told the court that he was familiar to the complainant's father who operated a bus in Isiolo. That on 13/1/2018 he was informed by her mother that the police were looking for him. That when he arrived at home he found the police who took him to Merti Police station where he found the complainant and her father. That it was then that he was informed that the complainant had complained about the defilement. In cross-examination he conceded that the 2nd accused person was his relative and he usually passes by his place on his way home. He however stated that he did not pass by his house on the 10th, 11th and 12th and that they only met in the mosque.

26. **Dw2 Ali Adan** denied giving the house to the appellant. It was his testimony that he was familiar to the appellant but had not given the house to the appellant. That the house belonged to Adan Roba who had left it to him to take care of since they had gone for safari. That on 12/1/2018 the appellant came to the house to greet him and later on left. That later the complainant came with his father and on interrogation she denied that she was the one who had defiled her. That the complainant was asked whether she knew the appellant and initially answered in the negative. That it was only after being coerced that she stated that she knew the appellant. He denied being with the appellant on 10/1/2018 and stated that it was only until 12/1/2018 when they came to visit him at his house.

Of discrepancies

27. Before I analyse the foregoing evidence on identification, I should determine the tenor and effect of the inconsistencies pointed out by the appellant in the statement of Pw1 and Pw4. Pw1 had stated that she left the house of the 2nd accused person on 14th but she later stated that she had stayed in the house of the 2nd appellant for two nights and was taken to the police station on 12th. It was also her testimony that she was taken to the house of the 2nd accused person on 10th. What does the law say of inconsistencies and contradictions in evidence?

28. I am content to cite the case of **Njuki & 4 others versus Republic [2002] 1KLR771** at page 782 paras. 15-25 is relevant, that:-

> **“....what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”**

29. When I consider the evidence in totality, the discrepancies in the evidence of Pw1 did not affect an otherwise proved set of facts on the time of the commission of the offence. The discrepancies pointed out by the appellant are easily reconcilable within the evidence adduced by PW1 and the other witnesses. In providing the history of events of the material day to Pw3- and which were recorded in the treatment notes and P3 Form- PW1 was clear that the offence took place on 10th January 2018. The evidence of Pw2 that he found her on 12th January 2018 was also consistent with the evidence presented by PW1 and the treatment notes. Pw1 also did well in clearing the discrepancies in her own testimony. Accordingly, I find and hold that the discrepancies pointed out by the appellant do not rout the core of the evidence by PW1 and PW4.

30. Having settled that issue, I now get back to the main. I have considered the evidence as whole and analysed both the prosecution’s testimony and that of the defence. Pw1 was found within the compound of Dw2 and Pw2. She identified Dw1 as the perpetrator of the offence. This is a person she knew. Pw2 identified Dw2 as the custodian of the house where the offence took place. Pw1 also identified Dw2 as the custodian of the house- Dw2 conceded that he was the custodian of the house. PW1 was clear that the appellant had sexual intercourse with her. She identified the appellant- a person she knew- as the perpetrator of the crime. In law, her evidence alone of defilement would be sufficient to convict as long as reasons for believing her are recorded. The trial magistrate was alive to this position of the law and aptly relied on the provisions of section 124 of the Evidence Act. **Section 124 of the Evidence Act** provides as follows:

> **“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **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.”**

31. Be that as it may, other evidence placed the accused at the scene. DW2 stated that the appellant had visited him on the material time. The appellant was also arrested at the scene. The evidence adduced by the prosecution completely routs the defence. I find the defence to be mere denial. There was also no element of grudge or malice or any ill-motive which may have prompted trump-up charges against the appellant. This is a crime most foul committed by the appellant upon a perfect pretext and promise to marry the complainant. It was a cunning and most stealth way-ward method of luring young girls into accepting sexual intercourse. I note also that the appellant in his demented scheme had a perfect scene to commit this heinous act- the house which Dw2 had been left to take care. But, it be known that the law will punish such sexual predators who prey on children for sex; the law will also zealously protect children from such debauchery acts committed by inconsiderate persons. Having said that, I wish to conclude; I find that the appellant was identified by recognition by the victim as the person who had sexual intercourse with her. I find nothing which suggests mistaken identity or delusion. Accordingly, the appellant was the perpetrator of the offence.

32. The overall impression of the evidence adduced is that the appellant defiled PW1. Consequently, I find him guilty of defilement of a child of the age of 15 years. In light thereof, his appeal on conviction is without merit and it fails.

Of sentence

33. **Section 8 (3) of the Sexual Offences Act** provides that:

> **(3) 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.**

34. The appellant was sentenced to imprisonment for life. Upon, considering the age of the victim, the age of the appellant, mitigating and aggravating factors, I am satisfied that life imprisonment is a harsh condemnation of the appellant. I am also alive to the advent of Supreme Court decision in **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR** that a law that fetters court’s discretion in sentencing is unfair and unjust, and therefore unconstitutional. The minimum sentence provided in section 8(3) of the Sexual Offences Act should not tie my hands if circumstances of the case are that appropriate sentence falls below the minimum provided. Taking all these factors into account, I set aside the life imprisonment imposed on the appellant. And, sentence him to serve a jail term of 15 years from the date of the original sentence. It is so ordered.

Dated, signed and delivered at Meru this 30th day of June 2020

....

F. GIKONYO

JUDGE

Representation

1. Muriuki for appellant
2. M/S Nandwa for respondent