REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 32 OF 2019

ROGERS KIBET KOECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment/Decree and Orders of Hon R. Amwayi Senior Resident Magistrate dated 4th April, 2019 in Molo S.O Case No. 90 of 2018)

JUDGMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) as read with subsection (3) of the sexual offences Act No.3 of 2006.** The particulars were that, on diverse dates between 2nd and 3rd July 2018 at Kio area in Kuresoi North Sub-County within Nakuru County intentionally and unlawfully did cause his genital organ namely penis to penetrate genital organ namely vagina of a girl aged 15 years by the name F.K.

2. The appellant was also charged with alternative charge of indecent with a child contrary to **Section 11(1) of the Sexual Offences Act**. The particulars are that on diverse dates between 2nd and 3rd July 2018, at Kio area in Kuresoi North Sub County within Nakuru County, unlawfully and intentionally did cause his genital organ namely penis to come into contact with the genital organ namely vagina of F.K a girl aged 15 years.

3. The appellant pleaded not guilty; the case proceeded for full trial with prosecution calling 6 witnesses while the appellant choose to remain silent in his defence. The trial magistrate found that the prosecution had proved their case beyond reasonable doubt which the appellant did not water down in his defence; upon conviction, the appellant was sentenced to 20 years' imprisonment.

4. The appellant being dissatisfied by the conviction and the sentence, filed this Appeal dated 8th April 2019 on the following 4 grounds as follows: -

i. That the learned magistrate erred in law and in facts by failing to find that the appellant was not accorded adequate time to prepare his defence contrary to Article 50 of the constitution.

ii. That the learned trial magistrate erred in law and facts by failing to observe the provisions of Section 211 of the criminal procedure code.

iii. That the learned trial magistrate erred in law and fact by filing to find that the appellant's right to a fair trial was infringed upon denying him an opportunity to avail his defence witness.

iv. That the learned trial magistrate erred in law and fact by failing to find that the medical evidence adduced was insufficient to corroborate the charge.

5. The appellant further filed amended grounds of appeal together with his written submissions, to urge the honourable court to quash the conviction, set the sentence aside and set him at liberty;

a. The learned trial magistrate erred in law and fact by relying on a defective charge sheet in the trial.

b. That the learned trial magistrate erred in law and facts by not considering that he was not served with full prosecution's evidence.

c. That the learned trial magistrate erred in law and fact by considering that the language used in the trial court was

understandable by the appellant.

d. That the learned trial magistrate erred in law and fact in considering that appellant was positively identified.

e. That the learned trial magistrate erred in law and in fact in not considering the contradictory nature and insufficient of the prosecution's evidence.

f. That the learned trial magistrate erred in law and fact in concluding that penetration was proved beyond reasonable standard required.

6. The state opposed the appeal on both conviction and sentence. The appellant relied on the grounds of appeal and submissions filed while the state counsel responded orally.

APPELLANT'S CASE

7. During the hearing on 16th March 2020, the appellant relied on his written submissions and grounds of appeal. He submitted that the prosecution relied on a defective charge sheet to convict the appellant. Age of the complainant is paramount in the offence of defilement as the consequence or the punishment is determined by the age of the complainant. The appellant submitted to have been charged under **Section 8(1) as read with Subsection (2) of the Sexual Offences Act** in the charge sheet which indicated the complainant is 15 years. Further the prosecution proved through production of the birth certificate of the complainant that she was aged 15 years. The appellant submitted that the fact that he was convicted and sentenced on a different section other than what he was charged with in the charge sheet is prejudicial to the appellant's right and has occasioned failure of justice in a fair trial.

8. On ground that he was not served with full prosecution's evidence, the appellant submitted that **Article 50(2) of the Constitution** states that every person has a right to be informed of the evidence the prosecution intends to rely on and have reasonable access to that evidence. This right is paramount to every person and it is trite law the right should not be infringed at any cost. The appellant submits his right to be served with all the prosecution evidence and given adequate time to prepare for his case was infringed as he was partly supplied with some evidence while others were deliberately left out by the prosecution.

9. He stated that he was supplied with witness statements, P3 form, Charge sheet and the birth certificate but prosecution failed to supply him with Post Rape Care Form and the general outpatient card. The appellant submits that due to the infringement of this right he is entitled to an acquittal irrespective of the nature and the strength of the evidence adduced by the prosecution. The PRC form is a crucial document which was omitted among the documents supplied to the appellant and thus was not able to adequately prepare for his defence case.

10. On language used in Court**,** the appellant submitted that he was from a diverse community and the languages used in Court are English and Kiswahili. He therefore did not understand fluent Kiswahili or English and the trial Court did not avail an interpreter to ensure that the appellant understood the court proceedings. He stated that the Court recorded that the appellant was stated to in the language he understood while there wasn't any translator in Court in the language he understood.

11. On identification, the appellant submitted that the act of defilement as alleged by the prosecution happened at night, PW1 and PW2 stated they saw somebody with a torch at the gate who then caused their panic and they ran to the main house; that they also said there was somebody in the house behind the door, this being their initial words of their testimony and the appellant believe that they didn't know who that was. Having testified that they knew the appellant, they would have recognized the appellant at the first sight without hesitating and calling him somebody. Appellant submitted that the amount of light from the lamp PW1 and PW2 are alleged to have used did not have light sufficient enough in viewing object; that it was weak and could not be relied on in identifying him. The appellant relied on the case of **Gabriel Kamau Njoroge V Republic (1982-88) KLR P134.**

12. Further that the prosecution failed to prove there was penetration as according to the testimony of PW5, the complainant's hymen was broken though it did not have any lacerations; that she had menstrual thus the doctor was not able to establish if she had been raped as he did not see anything abnormal with her. Appellant submitted that the trial magistrate erred in law and in fact by heavily relying on the sole evidence of the broken hymen to conclude that defilement occurred without considering that broken hymen can be caused by so many factors and not only sex alone.

13. The appellant orally submitted that he was a chairman of *Nyumba Kumi* and he worked with the chief. He submitted the case before court resulted from business grudge that existed between him and PW3 as PW3 had given him a donkey which was stolen in his custody and PW3 concluded he had stolen the donkey. He stated that PW3 had even beaten him and he has a mark in the ear. He said he has issues with the complainant's family.

PROSECUTION'S CASE

14. The prosecution through its state counsel, Rita, made oral submissions. She submitted that on age PW1, the complainant, testified she was 15 years old and produced birth certificate marked as exhibit 1 this was conclusive prove of age.

15. On identification PW1 said the appellant was well known to her as **Rodger Koech** who was a member of *nyumba kumi* and a neighbour. On the date of the incident the complainant saw the appellant, he saw a lamp in her hand which she carried to the room, the appellant was in the house for 6 hours and during that period of time the lamp remained on. She submitted that the appellant was seen by PW1 and PW1 saw the appellant slap PW2 and it is because PW1 had carried the lamp in her hand. PW2 saw the appellant defile the complainant and she remained in the room throughout the incident.

16. PW6 identified the appellant as the suspect who had been arrested as per the identification of the complainant. PW1 said she had been defiled twice, PW5 noted broken hymen and inner wear was torn and were produced in court by PW6. The P3 form was produced as exhibit 2, general outpatient card exhibit 3 and the PRC form exhibit 4.

17. The state counsel submitted **section 11 of the Criminal Procedure Code** provides that the accused has a right to remain silent in his defence and he was not therefore prejudiced as the Court accepted the appellant's right to remain silent. The prosecution further submitted that the charge sheet brought before the trial Court was not defective; that it was read and explained to the appellant. She submitted that the prosecution availed credible evidence and proved their case beyond any reasonable doubt against the appellant and urged the court to dismiss the appeal.

ANALYSIS AND DETERMINATION.

18. This being the first appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of ***Okeno Vs Republic [1972] EA 32*** where it was stated as follows: -

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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; it must make its own findings and draw its own 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 the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

19. Having considered the petition of appeal, grounds of appeal and the parties' submissions, I find the following as the issues for determination;

i. Whether the charge was defective.

ii. Whether the prosecution proved its case beyond reasonable doubt.

iii. Whether the appellant was accorded a fair trial.

(i) Whether the charge sheet was defective.

20. On the ground that the charge sheet relied on by trial Court was defective in that the appellant was charged with **section 8(1) as read with Section 8(2) of the sexual offences Act** yet the complainant's age was 15 years and what was proved by the prosecution was 15 years. He submitted that he was charged with **section 8(1) as read with Section 8(2) of the sexual offences act** while he was Convicted and **sentenced under Section 8(1) as read with Section 8(3) of the Sexual Offences Act**. Subsection 8 of the Sexual Offences Act provide as follows: -

> **1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **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.**
>
> **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.**

21. The question is, does that make the charge defective? In the case of **Sigilani v. Republic [2004] 2 KLR** it was held:

> **"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."**

22. **Section 179 of the Criminal Procedure Code** provides as follows: -

> **"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
>
> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."**

23. The Court of Appeal in **Kalu vs Republic (2010) 1 KLR** observed as follows: -

> **"With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which**

are under the heading: -

"Convictions for Offences Other than Those Charged" and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus, it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder".

24. In **David Mwangi Njoroge vs. Republic [2015] eKLR Ngenye-Macharia**, J stated as follows: -

"…the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with."

25. Record show that the particulars of the offence were properly and clearly spelt out in the charge sheet which captures the date the offence was committed, the place it took place, the act that constitute the alleged offence and the names of the victim and that of the appellant. It is clear that he understood the charges he was facing, the defects he alleges was on the sentencing where he was sentenced as per **Section 8(3) of the Sexual offences Act** which provides for an imprisonment of not less than 20 years upon being convicted on defilement of a child aged between 12 to 15 years years other than **Section 8(2)** which provide for defilement of a child aged 11 years and below and carries sentence of life imprisonment. The evidence adduced proved defilement of a girl aged 15 years and he was sentenced under the correct provision of the law. The appellant never suffered any prejudice; there was no miscarriage of justice. Evidence proved a lesser sentence and he was convicted for that.

26. The Appellant has not demonstrated how exactly the charge sheet is defective. His argument is that the evidence tendered by the prosecution was inconsistent with the charge hence it is defective. This cannot in law constitute a defective charge sheet.

(ii) **Whether the Prosecution proved its case beyond reasonable doubt.**

27. The appellant was charged with the offence of defilement under **Section 8(1) as read with subsection (2) of the Sexual Offences Act**. In performing its duty as a trial court, the prosecution was expected to proof the following elements/ingredients of defilement:

(a) Proof of penetration.

(b) Proof of complainant's age

(c)That the assailant was identified.

28. In respect to age, the complainant testified to be 15 years having been born on 12th January 2003. PW4 the mother of the complainant testified the complainant was born on 12th January 2003. This was confirmed by birth certificate to prove she was born on 12th January 2003 and was therefore 15 years old. There is therefore no doubt on age of the complainant.

29. On positive identification of the assailant, the appellant submits that the magistrate erred in concluding that he was positively identified by the complainant. The complainant, PW1 testified to have been defiled by **Rodgers Koech**; she said the appellant was a member of *nyumba kumi* committee and the complainant used to see him at the canteen on her way from school. The incident happened at night at the complainant's uncle home; there was a lamp in the house, using the light from the lamp the compliant was able to see the appellant and he stayed in the room for 6 hours.

30. PW2 also testified that on the day of the defilement she was with PW1 and that while heading to the main house from the kitchen, they saw somebody with a torch at the gate and on seeing them they rushed into the main house where they met the appellant who locked the door. PW1 said the appellant slapped PW2 and pushed her to a corner and proceeded to the bed where PW1 was. PW2 stated that she saw the appellant clearly as there was a lamp in the room.

31. On penetration PW1 testified that while in bed in her uncle's house and in the watch of her cousin **CC**, the appellant removed her skirt and tore her panty. He then proceeded to unbuckle his belt, pulled his trouser and underwear and laid on top of the complainant and started to have sexual intercourse with her by penetrating the complainant vagina with his penis. He repeated that twice as he was in the house for about 6 hours. He thereafter threatened to kill the complainant and PW2 by stabbing them with a knife if they told anybody what had happened. **Section 2 (1) of the Sexual Offences Act** defines penetration to mean**;**

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

28. PW2 testified to have seen the appellant unzip PW1 and removed her skirt and forcefully removed her panty. PW5 the medical doctor testified to have examined PW1 after 3 days of the alleged defilement. On observation she did not have any injuries but her hymen was broken. She had menstrual flow at the time of her observation and therefore the doctor was not able to establish if she had been defiled.

29. From the evidence on record the appellant did not adduce any evidence to challenge the prosecution evidence. He opted to be silent. On the ground that the prosecution witnesses adduced contradictory evidence, the appellant did not submit evidence that he found

contradictory. In the absence of any evidence to challenge to the testimony of the complainant, the medical officer, and the documents produced by him to corroborate the testimony of PW1, I find that all the three ingredients for offence of defilement were proved.

(iii) Whether the appellant was accorded a fair trial.

30. On grounds 2, 3 and 5 the appellant submitted not be accorded a fair trial as the prosecution failed to provide him with all the evidence the prosecution intended to rely on to enable him prepare his defence and also stated that the proceedings were conducted in a language he did not understand.

31. On the issue of language, the record shows that on the date the appellant took his plea, the learned trial magistrate put it on record that the charge had been read and explained to the appellants in the Kiswahili language as this is the language they understood.

32. **Section 198 of the Criminal Procedure Code** and **Article 50(2) (M) of the Constitution** provide for interpretation of court proceedings to an accused person to a language that he fully understands as an important and essential component of a fair trial and is a constitutional and fundamental right.

33. **Section 198 of the Criminal Procedure Code** provides as follows: -

> **1. Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.**
>
> **2. If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.**
>
> **3. When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.**
>
> **4. The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.**

34. The right to a fair trial is absolute in the sense that under **Article 25 of the Constitution**, it is one of those rights and fundamental freedoms that cannot be limited. In **Diba Wako Kiyoto Vs Republic (1986) KLR 48,** the Court of Appeal held as follows;

> **"It is a fundamental right of an accused charged with a criminal offence to have the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands....."**

35. It is imperative for the trial Court to demonstrate through the Court record that either the proceedings were conducted in a language which the accused person indicated he understood or if a different language was used, that it was interpreted to the language he understood. In the instance case the witnesses testified in Kiswahili language, the language the appellant had indicated he understood.

36. On the issue of prosecution evidence, the appellant submitted to having been supplied with part of the prosecution evidence and not all. **Article 50 subsection (2) clause (j) of the constitution** provides that every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

37. It is on record that the Appellant informed the court that he was ready to proceed as he had been supplied with the statements. There is no indication that he alerted the Court that he had not been supplied with all the prosecution evidence that the prosecution was relying on; he also did not object to the production of the said documents. He submitted to having been supplied with witness statements, P3 form, charge sheet and the birth certificate. The prosecution failed to supply him with Post Rape Care Form and the general outpatient card. In my view the two were not crucial documents that would have hindered the appellant to prepare for his case since the PRC form is filled with the contents in the P3 form and the general outpatient card was prove the complainant attended hospital a fact that is very well within the knowledge of the appellant.

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

38. The appellant was charged for **defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. He was however convicted under **section 8 (3)** as the complainant was undoubtedly 15 years old. **Section 8 (3)** provide for an imprisonment of not less than 20 years upon being convicted on defilement of a child aged between 12 to 15 years.

39. The section under which he was charged provides for mandatory minimum sentence of 20 years. The trial magistrate imposed the minimum sentence provided by statute.

40. However mandatory nature of sentences was however declared unconstitutional by the Supreme Court in **Muruatetu** case. In the absence of discretion, the mitigating factors raised by an accused person are rendered superfluous. In this case the appellant said he had no parents in his mitigation, the prosecutor also said he was a first offender.

41. I have considered circumstances of this case, the age of the complainant and mitigating factors of the appellant and in view of the Supreme Court's decision in M**uruatetu** case I am inclined to reduce the life sentence to 15 years' imprisonment.

42. <u>FINAL ORDERS</u>

1. Appeal on conviction dismissed.

2. Appeal on sentence is hereby allowed.

3. sentence is reduced to 15 years' imprisonment.

4. Sentence to run from the date of sentence by the trial court.

Judgment dated, signed and delivered via zoom at Nakuru This 24th day of July, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person.