IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 129 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

KELVIN GITONGA ANTONY.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. L. Ambasi, CM dated 12th September 2018 at the Magistrate's Court at Meru in Sexual Offence Case No. 14 of 2018)

JUDGMENT

1. The appellant, **KELVIN GITONGA ANTONY**, was charged and convicted of a single count of the offence of defilement contrary to **section 8(1)** as read with **section (2)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the charge were that on 1st May 2018 in Buuri District within Meru County he intentionally and unlawfully caused his penis to penetrate the vagina of WKK, a child aged 13 years.

2. The appellant was sentenced to 20 years' imprisonment and now appeals against conviction and sentence. The appellant relies on the amended supplementary grounds of appeal filed on 21st July 2020 and written submissions. The thrust of his appeal is that the prosecution did not prove the offence beyond reasonable doubt. He complained that the evidence was contradictory with a lot of falsehoods and that the doctor who testified is not the one who prepared the medical report. He submitted that the investigating officer who testified was not the one who recorded the charge sheet. The appellant challenged the charge sheet and contended that it was faulty as he was charged under the wrong provision of the law given the age of the child and that the sentence was harsh and excessive. The respondent supported the conviction on the grounds that the prosecution proved all the elements of the offence.

3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.

4. The complainant, WKK (PW 2), testified on oath after a voire dire that she was 13 years old and in Class 6. She recalled that on 1st May 2018 at about 4.00pm, she was at home with her friend, BK (PW 5) when the appellant, who was a neighbour, came to where they were. She explained what happened as follows:

> *He pushed me into Karimi's house he was not even staying there. He had a knife for peeling potatoes which he pointed at BK. He threw me on the bed and removed my panty pink in colour with the front left (sic). He did to me "tabia mbaya". He did rape. He put his penis in my vagina. He did once and then my mother came. I felt pain. He was holding a knife at me so I kept silent.*

5. On her part, PW 5, also testified on oath after a voire dire. She stated that she was 13 years old. She recalled that she was with PW 2 when the appellant came to where they were and asked PW 2 to assist him to wash his dishes. PW 2 did not answer him but he followed her into his house and pushed the door. After a while the complainant's mother, PW 4, came looking for PW 2.

6. PW 4 recalled that on the material day, she had taken food to her husband in the shamba. When she returned, she found PW 5, who had been with PW 2, seated alone. She inquired from PW 5 where PW 2 was. PW 2 told her that she was in the appellant's house. She went to the house, knocked the door and when he did not respond, she opened it. She saw the appellant putting on his trousers. She screamed causing neighbours to come. When the neighbours came, they arrested the appellant. She also found PW 2's pink panty in the house. She took PW 2 to the hospital and reported the matter to the police.

7. PW 1, a medical officer, produced the P3 medical form and the Post Rape Care (PRC) form on behalf of the doctor who examined PW 2 on 2nd May 2018. According to the P3 form, the doctor observed that PW 2 had an inflamed and swollen vulva and a perforated hymen.

8. When put on his defence, the appellant denied the offence. He stated he was at a nearby bar when the incident took place. He heard about the incident and when the mother screamed, he was the one arrested. He stated that the panty that was recovered belonged to his cousin. The appellant's cousin, DW 2, told the court that she was called about the incident and that the panty that was recovered was hers as she had removed it in the morning.

9. In order to prove the offence of defilement under **section 8(1)** of the ***Act***, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

10. The complainant gave direct and clear testimony of what took place on the material day. She knew the appellant and the incident took place at day time. Her description of what took place leaves no doubt that the appellant committed an act of penetration. The complainant's evidence alone was capable of supporting a conviction as the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth.

11. In this case though, there was sufficient corroborative evidence. First, the testimony of PW 5 who was with PW 1 on that afternoon confirmed that PW 1 followed the appellant to the house where the appellant committed the felonious act. Second, the testimony of PW 4, who came and found the child in the house and the appellant putting on his trousers. Third, the fact that the child's panty, which was produced in evidence was found in the house. All this evidence supports PW 2's testimony in material particulars.

12. The medical evidence of PW 1 was also corroborative in nature. **Section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** allows another medical practitioner to produce a report on behalf of another doctor. The P3 medical form and the PRC form were therefore properly admitted. Examination of PW 2, which was done a day after the incident, shows that the child had an inflamed and swollen vulva and a perforated hymen. These observations were consistent with an act of penetration.

13. All this evidence was sufficient to displace the appellant's alibi defence more particularly because he was found at the scene of the incident and the child's panty found in his house.

14. The appellant complained that the investigating offer was not called as a witness. The law does not require all witnesses be called in order to prove a fact. The investigating officer will normally be called to give a summary of the case and the investigation process. In this case the chain of events from the time the incident took place, the point of arrest at the scene and the medical examination were all within a short span of time and sufficient to prove the offence.

15. The age of a child is a question of fact. PW 3, testified that she was 13 years old. This was confirmed by the assessment conducted by the doctor who prepared a P3 medical form. The prosecution established that the complainant was a child and aged 13 years old as stated in the charge sheet.

16. On the issue of the sentence, the appellant was charged under **section 8(2)** of the ***Act*** which refers to the defilement of a child under the age of 11 years. The prosecution proved that the child was aged 13 years old. The proper section is therefore **section 8(3)** of the ***Act***. This, however, is not fatal and is indeed curable under **section 382** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** as the appellant was not prejudiced as the section only concerns the sentence which, in any case, is no longer mandatory.

17. The mandatory minimum sentence prescribed under **section 8(3)** of the ***Act*** is 20 years' imprisonment. The Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; ***BW v Republic*** **KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in ***Jared Koita Injiri v Republic*****, KSM CA Criminal Appeal No. 93 of 2014.** Based on those decisions, I quash the sentence of 20 years' imprisonment and substitute the same with a term of 15 years' imprisonment.

18. I affirm the conviction but allow the appeal on sentence only to the extent that the sentence of 20 years' imprisonment is quashed and substituted with a sentence of **fifteen (15) years** imprisonment to run from the date of arraignment, that is, 3rd May 2018.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 20th day of AUGUST 2020.

A. MABEYA

JUDGE

Appellant in person.

Mr Maina, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.