REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. 184 OF 2017

(Appeal against the Judgment of the Chief Magistrate's court of Kenya at Nyahururu by S.N Mwangi -SRM in Criminal Case No 2771 of 2014 delivered on 18th August, 2017)

JACKSON KARIUKI KAMAU.....APPELLANT/RESPODENT

VERSUS

REPUBLIC.....RESPONDENT/APPLICANT

JUDGMENT

Jackson Kariuki Kamau, the appellant, was on 18/8/2017 convicted for the **Offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offence Act** by Hon S.N Mwangi SRM.

The particulars of the offence are that on 26/10/2014 at [Particulars withheld] Village in Laikipia County, unlawfully and intentionally caused his genital organ namely Penis to penetrate the vagina of JN, a girl aged 16 years.

In the alternative, the appellant faced a charge of ***Indecent Act with a child Contrary to Section 11(1) of Sexual Offence Act.***

The particulars of the charge are that on 26/11/2014 at [Particulars withheld] village caused his genital organ to come into contact with the vagina of JN, a girl aged 16 years.

Upon conviction the appellant was sentenced to serve a period of 20 years imprisonment. The appellant is aggrieved by the judgment of the trial court and raised eleven grounds of appeal which can be summarized as follows;

(a) That the trial court erred in failing find that the complainant behaved like an adult;

(b) That the complainant's evidence was not corroborated;

(c) That failure to call Wambui as a witness was fatal to the prosecution case.

(d) That there was no medical evidence to support the charge.

(e) That the complainant's clothes allegedly found in the appellant's house were never produced as evidence

(f) That the appellant was sentenced under the wrong provision of law.

(g) That the evidence adduced was at variance with the charge.

(h) That the evidence on record was full of glaring contractions and inconsistences.

(i) That the appellant was denied chance to defend himself.

The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty forthwith.

The appellant was represented by Mr. Waichungo Advocate who filed written submissions in support of the grounds on 17/4/2020. The

appeal was opposed and Ms. Rugut, learned counsel for the State also filed written submissions on 3/6/2020.

This is a first appeal and this court has a duty to exhaustively examine all the evidence that was tendered in the trial court, evaluate and analyze it and draw its own conclusions. The court however has to make allowance for the fact that it neither saw nor heard the witnesses testifying, an opportunity which the lower court had. This court is guided by the decision of **Okeno vrs Republic (1972) EA 32;**

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination *(Pandya v R [1957] EA 336)* and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions *(Shantilal M. Ruwala v R* [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.**

Evidence;

The prosecution called a total of four witnesses in support of their case.

PW1 JNM a girl aged 16 years recalled that on 26/10/2014, after church at 1.00 pm, she went to Kithima and met with Jackson Kariuki at a shop; that Jackson was her boyfriend. They entered his house where she spent the whole day. At night, they had sexual intercourse and next day he took her to her friend's place by name Wambui and left her there and promised to return in the evening. At about 2.00 pm police officers found her at Wambui's place. She later found Jackson at the Olmoran Police station. She was taken to the Health centre and examined. She said it was her first time to engage in sexual intercourse. PW1 also stated that she left her clothes at the appellant's house.

PW2 JMK, the complainant's father, recalled that he came home at night and learned that the complainant had not slept at home. He received information that she had been held at a shop at Kithima. He got police officers from Olmoran Police Station, went to Kithima but found the appellant alone in the shop and he was arrested. He learned from somebody else that the complainant had been taken elsewhere. The complainant was found and taken to the police station. The complainant confirmed to having slept at the appellant's place and she was taken to Olmoran Health Centre , then to Ndindika Health Centre where PW1 was issued with a P3 form. PW2 said that PW1 was born on 16/4/1999 as per the birth certificate. PW2 also stated that they found PW1's clothes in the appellant's house.

PC Jackson Mwingiro (PW3) of Olmoran Police Station received a complaint from PW2 on 27/0/2014 that his daughter who was 15 years had not returned home. Later, PW2 returned and reported that he had information that the complainant was in the appellant's shop. He found the appellant in the shop but the complainant was not there. The appellant was arrested and later they recieved information that the complainant was at the house of Mary Wambui who informed them that the complainant was recently married to the appellant.

Both Wambui and PW1 were arrested. PW3 produced a letter from [Particulars withheld] Secondary School confirming that the complainant was a student there; PW3 said that the appellant was released on 29/10/2014 but later rearrested and charged.

PW4 David Muriithi a Senior Clinical Officer examined the complainant 8 days after the incident in November 2014 with a history of defilement. PW4 found no abnomality to the complaint's genitalia but the hymen was absent. There was no evidence of sperms or any other discharge. PW4 said that if there had been any injuries, he would have found signs of them. PW4 also relied on treatment notes from Olmoran Health Centre.

When called upon to enter his defence, the appellant opted to remain silent. That is his right to do so and that does not in any way lessen the burden placed on the prosecution to prove its case beyond reasonable doubt

The appellant's submissions:

Mr. Waichungo submitted that the evidence adduced by both PW1 (complainant) and the Clinical Officer PW4 did not prove that there was penetration; that the complaint merely stated that she had consensual sexual intercourse but never told the court exactly what happened to her on the night of 26/10/2014 while at the appellant's house or that the appellant caused his penis to penetrate her vagina as alleged in the charge sheet.

Counsel also submitted that the complainant being a girl of 16 years, her evidence required corroboration but there was none; that PW4's findings upon examining PW1 did not disclose penetration.

Counsel also argued that the prosecution failed to call key witnesses i.e. Wambui and Chege who were mentioned by PW1 and PW2 and that clothes which were allegedly left at the appellant's house and recovered by police according to PW1 and PW2 were never produced in evidence and PW3 denied having recovered them.

As respects the charge sheet, it was counsel's view that the appellant was prejudiced by the fact that the charge sheet indicated that the complainant was 15 years yet the evidence was that she was 16 years and the court should have made a finding on the discrepancies; that the trial court erred in sentencing the appellant under ***Section 8(3) of the Sexual Offence Act.***

Lastly, counsel argued that some allegations of bribery were raised in cross examination. The court should have considered them because after arrest, the appellant was not charged till 21/11/2015 and no explanation has been given for that delay. Counsel urged the court to reduce the sentence if the court did not find merit in the appeal.

Respondent's submissions;

Ms. Rugut on her part, submitted that the element of penetration was proved as PW1 stated that she had intercourse with the appellant who was her boyfriend and that PW4, confirmed that lack of spermatozoa did not rule out penetration; that the complainant was examined 8 days after the incident and that may explain why no injuries were found on examination.

As for failure to some witnesses, counsel submitted that it was unnecessary to call all witnesses to prove that the complainant was found at Wambui's house because PW3 said they found PW1 at the said house and the prosecution is not required to call unnecessary witnesses.

As regards the charge sheet, counsel argued that the defect if any is not fatal because the complainant's age was proved through production of a birth certificate which indicates that she was born on 16/4/1999 and hence was 15 years of age at the time of commission of the offence

Analysis and determination:

I have duly considered the grounds of appeal and submissions by counsel. The appellant faced a charge of defilement under ***Section 8(1) and 8 (2) of the Sexual Offences Act.*** The onus rests on the prosecution to prove beyond any reasonable doubt the following elements.

(i) Proof of penetration;

(ii) Proof of identity of the perpetrator;

(iii) Proof of age of the victim.

As respects the age of the complainant, her birth certificate was produced in evidence as P. Exhibit No 2. The complainant was born on 16/4/1999 and that is the best evidence to prove age. As of 26/10/2014 when the offence was allegedly committed, she was 15 years old. The complainant testified in 2015 when she was just about to turn 16 years old. I find no prejudice suffered by the appellant because the court sentenced the appellant under ***Section 8(3) of the Sexual Offence Act*** which provides that if the victim of defilement is between the ages of twelve and fifteen years, then he will be liable to imprisonment for a period not less than twenty years. The appellant had been given the minimum sentence under that section.

The allegation that the charge was defective is not tenable. The mistake was corrected by the trial court.

Whether penetration was proved:

Section 2 of the Sexual Offences Act defines penetration as ***"as partial or complete insertion of the genital organs of a person into the genital organs of another person"***

The complainant told the court that she had sexual intercourse with the appellant who was her boyfriend. She did not explain what sexual intercourse entails and exactly what happened between her and the appellant. The complainant never explained whether the appellant caused his genital organs namely penis to penetrate her genital organs.

PW4 who examined PW1 after 8 days did not find any evidence of penetration. The hymen was absent but that is not per se evidence of penetration unless it was shown that it was recently perforated. PW4 told the court that he also relied on treatment notes from Ol Moran Health Centre which had the same information as the P3 form. The complainant was seen at the Health Centre immediately after the incident, that is, on the day after the incident and it would have been expected that some evidence of penetration would have remained but it seems there was none. PW4 said ***"If there were injuries and I would still have expected signs and symptoms of infections even 8 days later."*** PW4 did not find any evidence of penetration and without PW1 telling the court what had happened, the court would not presume that sexual intercourse meant there was penetration.

Penetration is a key element of the offence of defilement and without evidence that it took place, I find that defilement was not proved.

As regards the identity of the perpetrator, PW1 identified the appellant as her boyfriend. She went to his shop willingly. I have no doubt that some unlawful sexual activity took place between the complainant and appellant save that the prosecution counsel did not lead the witnesses to tell the court what exactly happened nor did the trial court bother to find out what the complainant meant by the term 'sexual intercourse'.

Having found that penetration was not proved, I do not think that I need to consider the other grounds of appeal because without proof of penetration, the offence of defilement is not sustainable.

Whether the alternative charge of indecent act under Section 11 (1) of the Sexual Offences Act was proved;

An indecent act is defined under **Section 2 of the Sexual Offences Act as "…..an unlawful intentional act which causes;**

Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration."

In her testimony PW1 did not tell the court whether the appellant's genital organs came into contact with her genital organs as alleged in the particulars of the charge. An offence of indecent act was also not proved.

The appellant's conviction was therefore made in error. The conviction is hereby quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and **Delivered** at **Nyahururu** this **30th Day** of **September,** 2020.

.....

R.V.P Wendoh

JUDGE

PRESENT:

Ms Rugut for State

Ms Wanjiru for appellant

Henry – Court Assistant

Appellant present