REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 38 OF 2017.

DANIEL ONSONGO OCHAMBA..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an Appeal from the conviction and sentence of the senior principal Magistrate Hon. Wakumile delivered on 28th May 2017 in Nakuru Criminal case No. 118 of 2015.)

JUDGMENT

1. The appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006** with alternative charge of committing an **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.**

2. Particulars of the main charge are that on diverse dates of 10th – 12th May 2015 within Nakuru County unlawfully and intentionally committed an act by inserting a male genital organ namely penis into the female genital namely vagina of **HNM** a child aged 15 years which caused penetration.

3. Particulars to alternative charge are that on diverse dates of 10th – 12th May 2015 within Nakuru County intentionally and unlawfully committed an indecent act with a child by touching her private parts namely vagina of **HNM** a child aged 14 years with his male genitalia namely penis.

4. The appellant denied both the main and alternative charge. The case proceeded for full trial with prosecution calling 4 witnesses in support of their case while the appellant in his defence gave sworn statement of defence without calling any witness. By the judgment delivered on 26th May 2017, the trial magistrate found the appellant guilty of the main charge defilement and sentenced him to 20 years' imprisonment.

5. The appellant being aggrieved and dissatisfied with the conviction and sentence filed this appeal through a Petition of Appeal dated 4th of May 2017 on the following grounds: -

> *i. The learned trial magistrate erred in law and in fact by holding that the prosecution had proved the offence of defilement beyond reasonable doubt.*
>
> *ii. The learned trial magistrate erred both in law and in facts when he seemingly based the purported testimony adduced in Court without considering the weight of the defence brought by the appellant.*
>
> *iii. The learned trial magistrate erred in law and in fact when she acted on evidence that was clearly suspicious to convict instead of rejecting the same as the evidence did not meet the threshold set in the evidence act.*
>
> *iv. That the learned trial magistrate erred in law and in facts by convicting the appellant on hearsay evidence instead of facts.*
>
> *v. That the learned trial magistrate erred in law by convicting the appellant on age and yet the document to ascertain age was not produced in court.*
>
> *vi. That the learned trial magistrate erred in law and facts by relying on the victim's broken hymen as evidence on penetration.*

6. The state opposed the appeal on both conviction and sentence. On 30th of June 2020 the matter proceeded for hearing. The appellant indicated to the Court he had emailed his written submissions while the state counsel did oral submissions.

APPELLANT'S CASE

7. The appellant urged the honourable Court to allow his appeal by quashing the lower court conviction, setting aside its judgment and setting him. He stated that he has been in prison for 6 years.

8. The appellant submitted that there was a lady by the name **Mama Dan** who introduced the appellant to the complainant and that she testified how after being introduced to the appellant, she moved with all her clothes to the appellant's home but the police never found the clothes in his house.

9. Appellant further submitted that the prosecution did not produce any document to prove the age of the complainant.

PROSECUTION'S CASE

10. **Ms. Rita Rotich** for the state submitted that the prosecution called 5 witnesses and was able to prove the ingredients of defilement. On age, the complainant, PW1, testified to be 16 years at the time of the offence. PW2 who was the complainant's father corroborated the same. A birth certificate was produced as exhibit 3 by PW5, the investigating officer.

11. On identification PW1 testified to have known the appellant as a *boda boda* operator and he took her home that day when she requested for a lift from him. He defiled her for 3 days and nights. PW3 testified the appellant was his employee and had given him his motor bike to ferry passengers. PW5 testified the appellant was arrested in his home in the presence of the complainant who was staying in his house. PW2 stated he had initially spoken with the appellant to surrender PW1 to him but he requested for more time with her. PW2 identified the appellant in Court.

12. On the issue of penetration PW1 testified she had been defiled severally by the appellant. The medical doctor, PW4, testified to have examined the complainant and noted broken hymen and vaginal discharges. P3 form and PRC form were produced as exhibits 5 and 6 respectively and the appellant's lab tests as exhibit 7 to corroborate that he had defiled PW1. The prosecution prayed the appeal be dismissed.

ANALYSIS AND DETERMINATION

13. 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 demeanor. 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.)"**

14. Further in the Court of Appeal for Eastern Africa in **Pandya -Vs- Republic [1957] EA 336 :-**

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

15. In view of the above, I have considered submissions by both parties, grounds of appeal raised by the appellant and perused proceedings before the trial court. I have identified issues for determination as follows: -

i. Whether the ingredients of defilement were proved.

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

(i) Whether the ingredients of defilement were proved

16. For the Court to be satisfied that the offence of defilement has been proved, the following three ingredients have to be proved:-

- age of the complainants;
- penetration;

- identification of the perpetrator

17. In respect to age of the complainant, under the **Sexual Offences Act,** the sentence to be imposed on offender upon conviction is dependent on the age of the victim. This position was reaffirmed in the case of **Hadson Ali Mwachongo Vs. Republic [2016] eKLR** where the Court stated as follows: -

> “**The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim…”**

18. In the instant case, record show that birth certificate of the minor was produced as exhibit 3 by PW5, the investigating officer which showed that the victim was born on 4th February 2000, thus he was 15 years old at the time of the alleged defilement. The authenticity of the document was not challenged. The birth certificate being a public document, there is no doubt that age of the victim was proved.

19. The next ingredient is penetration**.** Penetration is defined under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006** as follows: -

> **“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”**

20. Record show that PW1 testified that on 10th May 2015 at around 9:00 while on his way to church, the appellant offered her a lift and he took her to his house where he had sex with her for 3 days and 3 nights. She said the appellant demanded to have sex with the complainant and undressed her. After the 3 days, the appellant dropped the complainant near their plot.

21. PW2 testified that the appellant stayed with the complainant for 3 days and when requested to surrender her, he always requested for more time with the complainant. He stated that the complainant had moved to the appellant’s house with her clothes.

22. P3 form produced in Court confirmed that the complainant had old torn hymen, had whitish vaginal discharge and outer side of her genitalia was dirty. The doctor concluded that the complainant had been defiled.

23. **Section 124 of the Evidence Act** is however very clear that no corroboration is necessary in criminal cases involving a sexual offence, in fact a Court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth.

24. **On identification of the perpetrator,** the complainant testified that she rode on the appellant’s motor cycle up to his house where they stayed for 3 days and 3 nights. The complainant further testified she had known the appellant very well prior to the incident as he had initially sent love advances which she declined. The trial magistrate further noted as follows: -

> **“…PW3’S testimony was corroborative in terms of examining the accused’s absence from duty. He was defiling the victim. The accused must have taken advantage of the victim’s vulnerability as stated by his employer and convinced her to elope with him.”**

25. There is no doubt that the complainant had sufficient stay with the appellant which rules out doubt on identification.

26. From the foregoing, there is no doubt that the three ingredients for the offence of defilement were proved beyond reasonable doubt.

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

27. The appellant was charged for defilement contrary to **Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006** which provides as follows:-

28. **Section 8. (1) of the Sexual Offences Act No. 3 of 2006** provide as follows: -

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

29. And **Section 8. (3) of the Sexual Offences Act No. 3 of 2006** provide as follows: -

> **“(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.”**

30. The appellant herein was sentenced to 20 years’ imprisonment being the minimum sentence for the offence he was convicted.

31. I take note of the decision in the case of **Muruatetu** where the Supreme Court declared unconstitutional mandatory nature of sentence as it takes away discretion of the judicial officer. The taking away of discretion results in mitigating factors superfluous; the trial officer’s hand is tied from entertaining circumstances of the case while determining sentence to impose on the offender.

32. In view of the above I have considered appellants mitigating factors, the fact that the complainant was 15 years old and circumstances of this case as per record and find it appropriate to reduce the sentence imposed to 15 years' imprisonment.

33. **FINAL ORDERS**

1. Appeal on conviction is dismissed
2. Appeal on sentence is allowed and sentence reduced to 15 years' imprisonment
3. Sentence to run from the time of sentence by the trial court.

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

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person