REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 87 OF 2019

STEPHEN NAPOE MAINGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. 23 of 2017

at Kilgoris Law Courts before Hon. R.M. Oanda (P.M) delivered on the 24th July 2019)

JUDGMENT

1. The appellant was charged with defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that, on the 7th day of April at [Particulars Withheld] in Transmara West Sub County within Narok County intentionally and unlawfully caused his penis to penetrate the vagina of PN a girl aged 14 years of age. The alternative charge was Indecent act with a child contraryto section 11(1) of the Sexual Offences Act no. 3 of 2006. The particulars of this offence are that, on the 7th day of April 2017 at [Particulars Withheld] in Transmara West Sub County within Narok County, intentionally and unlawfully touched the vagina and breasts of PN a girl of fourteen (14) years.

2. The appellant was convicted and sentenced for the offence of defilement to serve 10 years' imprisonment. Being dissatisfied with the judgment and sentenced passed he has preferred this appeal on the following grounds;

i. *That the trial magistrate erred in law and fact in convicting the appellant of the offence of defilement notwithstanding that the evidence before the trial court, when properly analysed and evaluated did not support conviction.*

ii. *That the trial magistrate erred in law and fact by not finding that the prosecution had not proved its case beyond reasonable doubt against the appellant.*

iii. *That the trial magistrate erred in law and fact in convicting and sentencing the appellant on insufficient evidence.*

iv. *That the trial magistrate failed to appreciate that the prosecution case was riddled with contradictions which contradictions ought to have been resolved in favour of the appellant.*

v. *That the trail magistrate erred in law and fact by failing to evaluate, analyse and appreciate that the medical evidence was not enough to sustain a conviction.*

vi. *That the trial magistrate erred in law and fact by reaching conclusions based on his opinion rather than evidence.*

The appellant seeks to have the conviction quashed and sentence set aside.

3. The appellant filed written submission. He submitted as follows; that the vital evidence of the clinical officer who examined the victim did not support the charge. That the charge sheet indicates that the offence took place on the 7th April 2017 but the evidence of the clinical officer was to the effect that the victim was examined on the 26th of April 2017 and that she had come with a history of having been defiled 6 days before and established that the age of injuries was 5 days old. That if the defilement happened on the 21st April 2017 then mathematically the difference is approximately 14 days, thus the defilement cannot be attributed to the appellant but someone else. That vital witnesses were not called(see **Bukenya and Other vs Uganda (1972) EA 549).** That the evidence of the victim was not corroborated as the evidence of the clinical officer contradicted her evidence. That section 124 of the Evidence Act cannot apply as the trial magistrate did not

indicate that he believed the victim, thus the evidence required corroboration. That in the absence of corroboration of medical evidence the charge of defilement was not proved. That the rights of the appellant under Article 50 of the Constitution was violated as the ingredient of the charge sheet did not inform the appellant when the offence occurred as the evidence of the witnesses suggest that the offence was not committed on the 7th April 2017.

4. The appeal was opposed. Mr. Otieno the prosecution counsel submitted as follows; the case against the appellant was proved beyond reasonable doubt. Pw1 knew the appellant and named him. The appellant married her and her description was that the defilement took place on the 7th April 2017 but her testimony was that the defilement later took place and that this later defilement was the subject of the medical examination. That her testimony was that they used to have sex all the days they were together. Medical evidence confirms she was defiled. That the appeal should be dismissed.

5. As a first appellate court, this court will first analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions bearing in mind that it did not see or hear the witnesses. (See **Okeno vs. Republic [1972] EA 32**.)

6. After *voir dire* examination, the complainant P.N. (Pw1)testified that on the 7th April 2017 she was going home from church at 10p. she was with other girls. People followed them from behind and they got hold of her and put her on motor cycle. On reaching some place they stopped and forced her to remove her clothes. The appellant was one of the said people, the others were Dalmas Kimei, Jackson Ranga and Stephen. They took her to place at Oldanyati and she had sex with the appellant. The appellant is a neighbour and is known to her. They slept in a room at Oldanyati with the appellant and they had sex again. The next day the mother of the home asked them to return her to her home. She was not taken home she was taken to Mararianta at the home of Ole Koita who reported to the chief the next day. By the time the chief came e Stephen and Dalmas had ran away. Later she was taken home. After a day she went to fetch water from the river. She met the appellant and Dalmas and they took her to the home of the appellant. She stayed in the appellant's home for five days. They had sex the five days they stayed together. She left the appellant's home when the principal sent a motor cycle to take her to Enkakenya Dream Organisation. The matter was reported to the police and she was taken to hospital and examined and a P3 form filled. F P (Pw2) testified that she works with Kakenya Dreams organisation. On the 10th April 2017 her manager got a call that a girl P.N had been kidnapped. P. N was later taken to their institution. On the 26th April 2017 she took P.N to hospital for testing. She was advised by the doctor to report the matter to the police. D O (Pw3) a clinical officer at Transmara hospital testified he attended to PN. She has a history of defilement by a person known to her 5 days before. She has no injuries on her body. On her genitalia her hymen was broken and there was no discharge. The age of injury was 5 days. She concluded that there was defilement. The lab test revealed no infection. High vaginal swab revealed nothing. He produced the P3 form, treatment notes and age assessment. Pw4 P C Gregory Malakwen testified that a report was made on the 26th April 2017 that P N had been defiled on the night of 7th April 2017. He took her to the hospital recorded her statement and on the 8th May 2017 he arrested the appellant and charged him on the 10th May 2017. P N's friends were not available for recording statements.

7. The appellant gave an unsworn statement. He told court that he did not take the girl. He was arrested at Masurura centre and taken to the police station, then charged in court and taken to prison. That it was said he forced out the girl. He did not do that.

ANALYSIS AND DETERMINATION

8. The issue for determination in this appeal is whether the trial court erred in finding that the prosecution had proved the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act. The appellant was charged and convicted for the offence of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act** which provides;

> *8(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.*

9. The key ingredients to be proved by the prosecution in order to sustain a conviction for the offence of defilement are the age of the victim, penetration and the identification of the appellant. In this case the age of the victim was proved. There was an age assessment done by the clinical officer. It shows that the victim was 15 years old.

10. The next issue is whether the appellant was identified as the Pw1. Pw1's evidence was that on the night of 7th April 2017 the appellant and 3 other men followed them from behind and got hold of her put her on a motorcycle and went off with her somewhere. She testified as follows;

> *". They stopped and forced me to remove my clothes. I know the people: Dalmas Kimei, Jackson Ranga, Stephen and the accused herein, I can't recall the names of other. They took me to Oldanyati where I stayed for one day. We stopped somewhere where they forced me to remove my clothes. I then had sex with accused person herein. He is Stephen Mainge. I know the accused before. He is our neighbour. We are not related and were not friends before. At Oldanati I slept in a certain house with accused person. We again had sex. The next day, the mother of the home asked them to return me home. They did not take me home. They took me to Mararianta at the home of Ole Koita. I stayed there for one day and Ole Koita went and reported matter to the chief. The chief came but the duo (Stephen and Dalmas) had ran away…After one day I went to fetch water from the river. I again met accused and Dalmas. They emerged from the forest. They again took me to the home of the accused person. I stayed there for five days. Accused's parents knew I was there. I was then staying with accused. We used to have sex for all these days.*

11. From the above evidence it is clear that Pw1 knew the appellant well. She stayed with him for about 7 days and she told court that the appellant was her neighbour. In these circumstances there cannot be any mistake on the identity of the appellant.

12. The last issue is whether penetration was proved. It has been submitted that the appellant's conviction was unsafe her evidence was not corroborated. Penetration is defined under section 2 of the Sexual Offences Act to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. Pw1's evidence was that she had sex with the appellant on various days. Pw1 did not

describe what happened between her and the appellant. Her evidence was not specific as to the act of penetration. There was no evidence that there was penetration by the appellant of his genital organ in any part of the Pw1's genital organ. Merely stating that they had sex does not prove that penetration took place. Further according to the P3 form dated the 26th April 2017 there was no specific finding of defilement. Pw3 who examined Pw1 after examining her concluded that there was no obvious discharge and no tear. That the hymen was broken. Appropriate number of days of injury was days. My view is that the prosecution failed to prove its case as the evidence adduced was insufficient to prove the element of penetration which is an essential ingredient of the offence of defilement. There is no need to make a finding on the other grounds raised.

13. The upshot of this appeal is that the conviction is unsafe. The conviction is quashed and the sentence is set aside. The Appellant **STEPHEN NAPOE MAINGE** is set free and is at liberty to go forthwith unless otherwise lawfully held.

Dated, signed and delivered at KISII this 24th day of September 2020.

R.E. OUGO

JUDGE

In the presence of;

Stephen Napoe Mainge Appellant in person

Mr. Kaba For the Appellant

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Jacky Court Assistant