REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 45 OF 2019

GODFREY NJEHIA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate (RM) Hon. Amwayi R. delivered on 5th of November 2018 in Molo CM Criminal Case No. 2281 of 2014)

JUDGMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006** with alternative charge of **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.** The particulars of the of the main charge were that on the 16th day of May 2014 at [Particulars Withheld] in Molo District within Nakuru County intentionally and unlawfully caused his penis to penetrate the vagina of **OH** a girl aged 15 years.

2. The particulars of the offence were that, on the 16th of May 2014 at [Particulars Withheld] in Molo District within Nakuru County intentionally and unlawfully touched the vagina of **OH** a girl aged 15 years.

3. The appellant denied the main and alternative charge. After hearing the trial Court found the appellant guilty of the main charge and sentenced to 15 years imprisonment. The Appellant being dissatisfied with the conviction and sentence and have appealed to this Court on the following grounds: -

1.THAT the Learned Trial Magistrate erred in law and in fact to appreciate that the medical evidence adduced was not corroborative to the charges preferred against the Appellant.

2. THAT the Learned Trial Magistrate erred in law and a fact by failing to appreciate that the Complainant age was not proved as required by the law

3. THAT the Learned Trial Magistrate erred in law and in fact by accepting and relying on the evidence of a single witness without exercising proper caution on the dangers of such evidence.

4. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that Section 214 of the Criminal Procedure code was not adhered to when the matter was handed over to a different magistrate

5. THAT the Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's defence yet the same was cogent enough to water down the prosecution evidence.

4. The Appellant later filed an amended grounds of Appeal set out as hereunder:-

1. THAT the Trial Magistrate erred in law and in fact by failing to appreciate that the prosecution did not discharge its duty of providing the Appellant with witness statement and other documentary evidence as part of evidence

2. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that Section 200 of the Criminal Procedure Code was not observed to the later in that the Appellant was never provided with the opportunity to cross examine the Complainant after the case was ordered to go denovo

3. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Complainant's Age was not proved beyond reasonable doubt as provided for by the law

4. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that crucial witness were not called upon by the Prosecution to testify

5. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced by the prosecution did not create any nexus between him and the alleged offence

6. THAT the Learned Trial Magistrate erred in law and in fact by relying on the evidence of a single who was from the face was not a credible witness without warning herself on the dangers of relying on such evidence

7. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that in totality the Prosecution case was not proved beyond any reasonable doubt as prescribed by the law.

APPELLANT'S SUBMISSIONS

5. During the hearing, the appellant adopted his grounds of appeal and submissions which he filed.

6. The Appellant submitted that the right to fair trial is paramount right that the Constitution of Kenya provides for any Accused person. He further stated that the practical test for a fair trial is to ensure that an accused person is granted an opportunity to adequately prepare for his/her defence and for this to materialize, the accused person should be supplied with the witness statements and all material documents that the prosecution intends to rely on. He submitted that the duty to supply the documents rests on the prosecution but the record of proceedings shows that this was not done.

7. Appellant referred to the case of **Paul Mwangi Murunga v Republic in Cr. App 35 of 2006** which cited the case of **Ndende v Republic (1991) eKLR 56**. The gist of the case being that the Court must enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution.

8. He submitted that the prosecution ought to supply witness statements to enable the prosecution to provide or disclose the evidence in its possession failure to disclose impedes the ability of the defence to make a full answer and defence.

9. Appellant further submitted that his counsel requested for the witnesses to be recalled for the purpose of cross examination. The Court ordered that PW1 be recalled and failure by the Appellant to recall PW1 for cross examination led to miscarriage of justice especially because PW1 was the chief complainant and the chief witness.

10. In respect to complainant's age the appellant submitted that in a bid to prove the complainant's age, the prosecution produced an alleged baptism card which asserted that the complainant was born on the 30th of March 1998 but the validity of the said baptism card was not attested to by the prosecution.

11. He submitted that the conduct of the complainant (picture of her and her husband) were inconsistent with the alleged facts that she was a child and this grossly assails and taints the credibility of PW1 and PW2.

12. He cited the case of **Francis Omuroni v Uganda** where it was held that medical evidence is paramount in determining age of the victim and **Mangunyu v Republic** the gist of the case was that age may be proved by a birth certificate or in particular in Africa by the person present at his/her birth.

13. He submitted that the prosecution did not prove the age of the victim beyond reasonable doubt to warrant a conviction.

14. Under ground 4, the appellant submitted that crucial witness were not availed and referred to **Section 143 of the Evidence Act**. He further made reference to the case of **Bukenya & another v Uganda (1972) EA 549**, where the Court held that the Prosecution is duty bound to make available all witnesses necessary to establish the truth even if their evidence is in consistent and urged Court to find that the two witnesses that were not called by the prosecution created considerable gaps that the trial Court only filled by unlawfully and precariously shifting the burden of proof to the Appellant.

15. On medical evidence adduced by the prosecution to corroborate their evidence, he submitted that it did not create any nexus between the appellant and the alleged offence; that no medical document was produced to ascertain that indeed the alleged pregnancy existed and was connected to the appellant and the medical evidence left out much to be desired.

16. On evidence of a single witness Evidence, the appellant states that after receiving the evidence of the complainant, the Court should have warned itself on the dangers of relying on such evidence.

17. In conclusion, the appellant submitted the investigating officer carried out shoddy work and this case was therefore not proved to the required standard.

RESPONDENT'S SUBMISSIONS

18. **Ms. Rita Rotich** for the state submitted that in respect to age, the complainant stated that she was 16 years old and her aunt PW2 corroborated her evidence and PW 3 produced her baptism card.

19. On identification, the complainant stated that the appellant was called **Godfrey Njehia** and that he was employed in their home and PW2

was friends with the appellant's wife while PW3 stated that the appellant was arrested after being identified by the complainant.

20. On penetration PW 4, stated that the complainant had an open cervix and this was due to conception. The Doctor detected a pregnancy that was 14 weeks.

21. In a rejoinder the appellant after months the girl was married, showed a photo and that there was no evidence that the pregnancy was the appellant's. He restated that crucial witnesses were not availed; that he tried to apply for the witness to be recalled but she was not availed. appellant submitted that the complainant's parents were not called to confirm her age.

22. He confirmed that the complainant knew him from the time she worked as a house girl. He denied having committed the offence. He stated that the investigating officer only relied on the statements and never went to where the girl was working; that he did shallow investigations.

ANALYSIS AND DETERMINATION

23. 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.)"**

24. In view of the above I have perused the trial Court record. Record show that the complainant informed the Court that she worked for the appellant and on the 16th May 2014 at mid-day, she was working for the appellant when he went to her room and locked the door, threatened her and defiled her. She said she reported the matter to the appellant's wife who chased her away a month after it happened. She testified that on the 15th of July 2014 she started feeling bad and when she went to the dispensary, she was told she was pregnant but had a miscarriage.

25. On cross examination, the appellant produced photo showing that she was married. On re-examination, the prosecution stated that they needed to investigate further.

26. PW2, **EI**, an aunt to the complainant testified that she took the complainant to stay with her after completing primary school and later she talked to **Mercyline Cherono** who agreed to stay with the complainant. She stated that a few days later, the complainant went back home stating that she was not feeling well. PW2 found a blood-stained pant. She took her to hospital where the doctor stated that she had a miscarriage. On PW2 questioning her on the pregnancy PW1 told PW2 that **Mercyline's** husband likes to defile young children. She produced the complainant's baptismal card that showed she was born on the 30th of March 1998. She said that the appellant's wife went to the hospital and told her of the appellant's habit of defiling children. On re-examination, she stated that the appellant's wife offered to pay the hospital bill.

27. PW3, **P C Sammy Ojiambo**, **No. 75398** testified that the complainant reported to him that she had been defiled where she was employed; that she was impregnated but had a miscarriage. She recorded her statement and issued her with a P 3 which was returned duly filed.

28. PW4, **Doctor George Biketi**, the Government Medical Officer. He produced the P3 Form. He stated that on general examination, the external genitalia did not have any injuries and the cervix was open with product of conception. Abdominal examination revealed pregnancy of 14 weeks which was lost, he also produced in court discharge summary.

29. In his unsworn statement the appellant confirmed that the complainant was working for him. He said that she had an identification card. He said later in September PW2 the complainant's aunt told him that the complainant was to go to school and when they released her, the police came to arrest him later.

30. Upon considering evidence set out above I find the following as issues for determination: -

i. Whether the Prosecution proved the ingredients of defilement beyond reasonable doubt

ii. Whether the sentence imposed was harsh and excessive

i. Whether the Prosecution proved the ingredients of defilement beyond reasonable doubt

31. The ingredients of the offense of defilement were laid down in the case of **Dominic Kibet Mwareng v Republic [2013] eKLR**, where the Hon. Justice Linnet Ndolo stated as follows:

> **"The critical ingredients forming the offence of defilement are;**

i. age of the complainant,

ii. Proof of penetration

iii. **Positive identification of the assailant.** "

32. In respect to age, I refer to the case **Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No. 24 of 2015**, cited in **Edwin Nyambogo Onsongo Vs Republic (2016) eKLR** the Court of Appeal held as follows:-

> **"... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence , among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."**

33. And a similar position was held in the case of **Richard Wahome Chege –Vs- Republic Criminal Appeal No 61 of 2014**,

> **"The Court of Appeal held that case the Court was considering the question of proof of age of the victim held as follows "On the contention that the age of the complainant was not established, it is our considered view <u>that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself</u>"**

34. In this case baptismal certificate showing that the complainant was born on the 30th of March 1998 was produced in Court. The document was not challenged during the trial and in my view and guided by the above authorities, the complainant's age wad proved beyond reasonable doubt.

35.In respect to penetration the P3 form produced showed that the complaint's cervix was dilated and that she had conceived though at the time of examination, she had suffered miscarriage. There is therefore no doubt that the complainant's genital organ was penetrated.

36. In respect to identification, the appellant confirmed that the complainant was working in his house. There is therefore no doubt on identification as the appellant, his wife and the complainant lived in the same house. From PW2's evidence, the appellants conduct after the offence corroborate the complainant's evidence of being defiled by the appellant.

37. From the foregoing, I find that the ingredients of the offence of defilement were proved beyond reasonable doubt.

ii. **<u>Whether the sentence was harsh and excessive</u>.**

38.The trial magistrate imposed 15 years' imprisonment being the minimum mandatory sentence provided by statute. However, the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** declared mandatory nature of sentences unconstitutional for taking away the discretion of the judicial officer handling the matter. It renders mitigation superfluous and immaterial of the circumstances of each case, the statute ties the hand of the judicial officer on the sentence to impose.

39. In view of the above, I have considered mitigating factors recorded, the circumstances of this case and age of the complainant; the fact that the appellant was a married person and the complainant's employer who betrayed trust bestowed on him. However, in the interest of balancing the scale of justice I am inclined to reduce the sentence imposed to 10 years imprisonment.

40. **<u>FINAL ORDERS</u>**

1. Appeal on conviction is dismissed.

2. I hereby reduced sentence to 10 years' imprisonment.

3. Sentence to run from the date it was imposed in the lower court.

Judgment dated, signed and delivered via zoom at Nakuru This 17th day of September, 2020

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RACHEL NGETICH

JUDGE

<u>In the presence of</u>:

Jeniffer - Court Assistant

Rita for State

Appellant in person