REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 4 OF 2020

JOSEPH NYAGOKA KABI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. M. O. Wambani (Mrs.) – CM Nyamira dated and delivered on the 28th day of February 2019 in the original Nyamira Chief Magistrate's Court Criminal Case No. 487 of 2016}

JUDGEMENT

The appellant was charged with Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars of the offence were that on 29th April 2016 at [Particulars Withheld] Sub-location in Manga Sub-county within Nyamira County, the appellant intentionally and unlawfully caused his genital organ to penetrate the genital organ of SKO a child aged 14 years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of this alternative charge were that on 29th April 2016 at [Particulars Withheld]Sub-location in Manga Sub-county, Nyamira County the appellant intentionally and unlawfully touched the genital organ of SKO a child aged 14 years with his genital organ.

After hearing and analyzing the testimonies of the four prosecution witnesses and also that of the appellant the trial Magistrate found the appellant guilty on the charge of defilement, convicted him and sentenced him to a term of imprisonment for fifteen (15) years.

This appeal is premised on the following grounds: -

> **"1. That the learned trial magistrate misdirected herself on the law and fact in convicting and sentencing the Appellant whereas the Prosecution had not proved their case beyond reasonable doubt;**
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> **2. The learned trial magistrate erred in law and fact for failing to take into consideration that the medical evidence given by the medical officer failed completely to support the charge and/or connect the accused person to the offence.**
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> **3. The learned trial magistrate erred in law and fact for failing to take into account that the totality of the medical evidence produced was in favour of the accused person.**
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> **4. The learned trial magistrate erred in law and fact for failure to appreciate that the evidence against the accused was not sufficient to discharge the burden of proof on the prosecution.**
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> **5. As such, the learned trial magistrate erred in law and fact by sentencing the Appellant to a callous and capricious sentence without tangible evidence connecting the accused to the offence."**

I have reconsidered and evaluated the evidence before the trial court and the rival submissions of Counsel appearing in this appeal and I am satisfied that the appellant was properly convicted for the offence of defilement. I am satisfied there was proof beyond reasonable doubt that the complainant was a child. The age of the complainant was proved by way of a certificate of birth which states that she was born on 29th October 2001. While I agree that the witnesses gave inconsistent evidence regarding the age of the complainant, I do not agree with Mr. Ondari's submission that this is fatal. Indeed, whether the complainant was fourteen (as expressed in the charge sheet), fifteen (as per her mother's (Pw2) testimony), or thirteen (as opined by clinical officer Concepta Kwamboka - Pw3), the fact is that she was a child incapable of consenting to a sexual act and hence the offence of defilement occurred. Her exact age would only become material in so far as the sentence is concerned. It is my finding that the prosecution having proved that the complainant was a child within the meaning of the Sexual Offences Act by way of a birth certificate, which is the best evidence of proof of age, the inconsistency in the evidence of the prosecution witnesses is not fatal.

On penetration, Mr. Ondari, Counsel for the appellant, submitted that the complainant's evidence that the appellant did not manage to insert his penis should have been interpreted as an attempt only. Counsel also submitted that the trial court ignored evidence that an examination conducted upon the appellant did not reveal he had defiled a child and that the fact that one Janet was not called as a witness was fatal to the prosecution's case. I have considered the evidence on record carefully. The complainant candidly told the court that although the appellant tried to insert his genital organ into hers he did not manage. She went on to say: -

> ***" ……. Joseph wanted to rape me. He lay on top of me. Joseph tried to insert his penis in me but I could not widen my legs. He tried to put his penis in my vagina. He did not manage to insert it. Joseph tried to insert the penis in my vagina but could not go through. I felt pain as Joseph tried to put his penis inside my vagina. I felt pain in my vagina…."***
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> ***……. I started bleeding. I noticed I was bleeding in the morning when I rose from the bed……"***

We now know as this was confirmed by the clinical officer (Pw3), that the bleeding was not as a result of what the appellant did to her but her menstrual period. Be that as it may I am satisfied that her evidence discloses the complete offence of defilement but not merely an attempt. The fact that the appellant tried to insert his genital organ in hers but did not manage does not mean that he did not commit the offence. Penetration takes place even when it is only partial which in my view is what was described by the complainant; that the appellant inserted his genital organ into hers though not fully. The clinical officer (Pw4) testified that there was evidence indicative of defilement hence corroborating the evidence by the complainant.

As for Counsel's submission that Janet was not called as a witness and that the complainant's character ought to absolve the appellant, my considered view is firstly that not calling Janet is not fatal. This is because under **Section 124 of the Evidence Act**, the complainant's evidence alone is sufficient to convict the appellant. The only rider to that is that the court believes her evidence and gives reasons for so doing. On my part I believed the complainant as she was very consistent in her testimony. Secondly, the complainant's delinquency or otherwise would not in my view sanitize or legitimize the appellant's conduct. It is also in any event evident that it was Janet, an adult who should have known better, who ***'delivered'*** her to the appellant and left them to spend the night together on the pretext that she was going to pick clothes for her. Janet was so to speak an accomplice. Thirdly, the fact that the medical examination conducted upon the appellant did not disclose he had defiled a child does not in my view rebut the evidence of the complainant. As I have already stated, the court can rely only on the evidence of the victim and there need not be medical evidence concerning the perpetrator. In this case I have already stated that I believed the victim and given reasons for doing so. To say that medical examination ought to have proved the appellant committed the act would be asking for corroboration hence negating the letter and spirit of **Section 124 of the Evidence Act.**

As regards the issue of identification there is no doubt at all that this was evidence of recognition. The complainant knew the appellant before and having spent the entire night with him there was no possibility of a mistaken identity. The appellant's defence that he did not know the complainant is not convincing in light of the cogency of her evidence and that of her mother. Moreover, even if they were not known to each other there is evidence that they met at 4pm and stayed together until morning which in my view rendered circumstances of a positive identification very favourable. I am satisfied therefore that all the elements of the offence of defilement which are the age of the victim, penetration and identification of the perpetrator were proved beyond reasonable doubt and the appeal against conviction does not therefore have merit.

What about the sentence? **Section 8 (3) of the Sexual Offences Act** prescribes the punishment for defilement of a child within the age bracket of twelve and fifteen years as not less than twenty years. The trial Magistrate after considering the appellant's plea in mitigation and record sentenced him to fifteen years imprisonment which is below the minimum sentence. I see no reason to disturb the sentence imposed. This is in light of the fact that the courts are now moving away from minimum sentences and the sentence being fair in the circumstances. In the upshot the appeal against the sentence is also unmerited and the appeal is dismissed in its entirety.

Signed, dated and delivered in Nyamira this 17th day of September 2020.

E. N. MAINA

JUDGE

Judgement delivered virtually via Microsoft Teams