REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 109 OF 2018

WESLEY KIPRONO KORIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate (RM) Hon. Soita E. delivered on 13th day of December 2018 in Molo CM Criminal Case No. 45 of 2017)

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 main count are that on the diverse dates between the months of May 2017 at [Particulars withheld] Location in Kuresoi District within Nakuru County intentionally caused his penis to penetrate the vagina of **WC**, a child aged 15 years.

2. The particulars of the offence were that, on the diverse dates in the month of May 2017 at [particulars withheld] location in Kuresoi County within Nakuru County intentionally touched the vagina of WC, a child aged 15 years.

3. The appellant denied both the main and alternative charge. The case proceeded for hearing with prosecution calling 4 witnesses, and the appellant gave unsworn statement. The trial magistrate found the appellant guilty and convicted him of the main charge and sentenced to 15 years Imprisonment. The Appellant being dissatisfied with the conviction and sentence have appealed to this Court on the following grounds: -

i. THAT the Learned Trial Magistrate erred in law and in fact by convicting the Appellant on uncorroborated evidence of PW 1 a minor contrary to the clear provisions of Section 124 of the Evidence Act

ii. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the prosecution had failed to discharge its burden of proving their case beyond reasonable doubt.

iii. THAT the Learned Trial Magistrate erred in law and in fact by failing to give the Appellant plausible defence adequate consideration

iv. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the prosecution case was not only insufficient but was speculative, fabricated, unconstitutional and

lacked probative value

v. THAT the Learned Trial Magistrate erred in law an in fact by failing to resolve that crucial witnesses were not called by the prosecution thus the prosecution case remained unproved.

vi. THAT the Learned Trial Magistrate erred in law and fact by failing to comply with the clear provisions of section 169 of the Criminal Procedure code

vii. THAT the Learned Trial Magistrate erred in law and I fact by failing to consider the medical evidence that excluded the Appellant from the offence charged

viii. THAT the Learned Trial Magistrate erred in law and in fact in admitting evidence which was inadmissible

SUBMISSIONS BY THE APPELLANT

4. Appellant submitted that he does not dispute that the complainant was attacked but my arguments are fully based on my involvement in the said offence. He submitted that he only fell victim of the circumstances under which he knew nothing. He submitted that the complainant could not prove that he was involved.

5. On ground two, he submitted that prosecution evidence which was unreliable and lacked merit to warrant any conviction; that it was PW1's evidence in chief that she knew the appellant before the incidence and even visited the appellant severally. He added that according to PW1's evidence is that she knowingly walked into the accused home and even met the appellant's parents. He stated that PW1's evidence shows how she was approached by the appellant by the word of the mouth. It is in her evidence that she went back to the parents' home and then to school; that she again said that the appellant rang her and she sneaked from school and went to her boyfriend's home and stayed there for days. He submitted that that the complainant herein had deceived the people that approached her to be an adult (above 18 years) since she had the same interest. Further that she deceived the appellant's parent to believe that she was a mature enough to befriend the appellant; that PW1 deceived the appellant who was innocent and therefore the appellant believed that PW1 was above the average age and thus **Section 8(1), 6(a) of the Sexual Offences Act No. 3 of 2006** should prevail.

6. In respect to P3 form he said the P3 indicated that the complainant was defiled by someone known to her and it was her friend. He submitted that there was nowhere in record where the doctor concluded that there was penetration, freshly/old broken hymen and the doctor herein did not clearly explain whether the complainant herein was defiled and what made her believe that. He further submitted that the P3 form admitted herein was not genuine since it did not have the official stamp to prove from which facility it was obtained from. In the issues in proof to whether there was any penetration or not remained unproved since the P3 lacked its origin the evidence it contained remained unreliable.

7. He further submitted that **Section 200(3) of CPC** and cited the case of **Robert Fanali Akhuya Vs Republic (2002) eKLR** where the jury ruled that miscarriage of justice should not be encouraged and entertained in the corridors of justice and therefore the appeal should be allowed.

8. He further submitted that the complainant's age remained unproved. He submitted that the birth certificate was not examined whether it was official document or not.

9. In conclusion he submitted that the *alibi* defense that I gave was not challenged by the prosecution side thus it remained unshaken; that the trial Court assumed the *alibi* defense adduced by the appellant and yet there were very important issues raised therein.

10. He urged Court to keenly analyze the evidence adduced before arriving at a conclusion. He prayed that the conviction be quashed and sentence set aside.

SUBMISSIONS BY THE RESPONDENT

11. **Ms. Rita Rotich** for the state submitted that in respect to age, the complainant PW1 stated that she was 15 years old and the same was corroborated by her mother PW2 and PW3 the investigating officer produced the birth certificate as exhibit 2.

12. On identification, she submitted that PW1 said she had lived with the accused and was well known to her and further that he was arrested by PW3 upon being identified by PW1. She submitted that PW3 also identified him.

13. On penetration the state counsel submitted that PW1 stated that she had been defiled severally by the accused and her evidence was corroborated by PW4, the clinical officer who noted a broken hymen and he also carried out a pregnancy test which turn out positive.

ANALYSIS AND DETERMINATION

14. 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.)"**

15. In view of the above, I have perused and considered evidence adduced before the trial Court. PW 1, the complainant testified that at the time of the alleged offence, she was aged 15 years old and in class eight. She stated that in April 2017 while going to the posho mill, she met the appellant who asked for her number. She said the appellant insisted that she accompany him to his home to greet his mother. It is her testimony that the appellant forced her to go to his home to meet his parents. She stated that on reaching his home, he took her to his house where they slept together. She said he tied her hands with a handkerchief then defiled her. She stayed there until Saturday. On the 16th of May 2017, she did not go to school instead she went to the appellant's house and he promised to marry her. She said on 17th of May 2017, when the complainant's mother called the appellant, he told her she would never see the complainant again. She said she stayed there for 5 days and lied to her mother that she was in Narok. She stated that the appellant informed the complainant's mother that the complainant was pregnant. On the 21st of May 2017 they were arrested. On cross examination, she stated that the appellant forced her to go to his home. She stated that they took tea at Kiplemaiyo then he locked her in his house. On re-examination, she stated that it's the appellant who defiled her.

16. PW2, **ECK**, the mother of the complainant, when she posted a picture of the complainant on 17th of May 2017 asking who had seen her, appellants brother informed her that she was with the appellant. She then called the appellant who told her that he was with the complainant in Narok and told her that the complainant was his wife. On the 21st of May 2017 at around 11.00 am with the assistance of the area chief they went to appellant's house where they found the complainant. The complainant was taken to hospital where she was tested and she was negative for the pregnancy and HIV.

17. The complainant's mother testified that the appellant professed love for the Complainant and said he wanted to marry her. She stated that she knew the Appellant.

18. PW3**, P C Emma Moraa, No. [xxxx]**, the investigating officer. Testified that she arrested the Complainant who had run away from school and stayed with the Accused for 5 days. She testified that the complainant was born in 2002 and produced her birth certificate. She stated that she did not know the appellant before the incident.

19. PW4, **Julius Koech Wahome**, Clinical Officer at Olenguruone Hospital produced P3 form signed by his colleague **Risper Kirui** who was sick. He stated that they had worked together for 5 years. He stated that the P3 form showed that she had been defiled on her genitalia but she did not have any injuries. That it was not her first time to be defiled. He could not ascertain the time of the defilement.

20. On cross examination, he stated that there was whitish discharge which was taken to the lab. He stated that the P3 was not rubber stamped and he could not confirm if it was filled at the hospital. On re-examination he stated that a document with a rubber stamp without a signature is invalid.

21. The appellant in his defence stated that he was 20 years at the time of the offence and that on 21st of May 2017, the mother of the complainant came to his home with five other people including two police officers and he took him to the police station where he recorded a statement.

22. Having considered evidence above and consider the following to be in issue: -

i. Whether the Prosecution discharged its burden of proving the ingredients of the offence beyond reasonable doubt

ii. Whether the sentence imposed in harsh and excessive

i. **<u>Whether the Prosecution discharged its burden of proving the ingredients of the offence beyond reasonable doubt</u>**

23. 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 the critical ingredients forming the offence of defilement are;

i. age of the complainant,

ii. Proof of penetration

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

24. In respect to age, **Njagi J**, in the case of **GKS Vs Republic [2019] eKLR** stated as follows:-

"The age of a person can be proved by documentary, oral or by medical evidence. In the case of **Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No. 24 of 2015**, cited in **Edwin Nyambogo Onsongo Vs Republic (2016) eKLR** where the Court of Appeal held that; -

> **"... 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."**

25. Record show that the complainant's birth certificate was produced. It confirmed that she was born on the 20th of September 2002. The date of the offence as per charge sheet is diverse dates in the month of May 2017. The complainant was therefore 15 years at the time of the alleged offence. There is therefore no doubt as to her age.

26. In respect to penetration, the P3 produced confirmed that the complainant had been defiled and that it was not her first time to be defiled. The evidence of PW3 however confirm that the complainant was found with appellant in his house and he had been with the appellant for 5 days.

27. On identification, evidence adduced show that the complainant would meet the appellant when going to the posho mill. She stayed at the appellant's house for 5 days which gave her sufficient opportunity to know the appellant. At time of arrest the complainant was with the appellant who told her mother that he wanted to marry her. There is therefore no doubt on identification.

28. From the foregoing there is no doubt that all the ingredients of the offence of defilement were proved.

ii. **Whether the sentence imposed in harsh and excessive**

29. The provision under which the appellant was charged provided for minimum sentence of 15 years. The Court imposed the minimum sentence provided by statute.

30. However, the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** declared mandatory minimum sentence unconstitutional for denying the judicial officer the discretion to impose sentence depending on circumstances of each case.

31. In view of the above I have considered mitigation raised by the appellant as recorded. I have also considered the age of the complainant and circumstance of this case and find that it would be appropriate to impose a sentence less that the minimum sentence provided by statute. I find that sentence of 5 years' imprisonment would be appropriate in the circumstances.

32. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.

2. Appeal on sentence is allowed.

3. Sentence is hereby reduced to 5 years' imprisonment.

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

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person