REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 4 OF 2019

ALEXANDER KIVUTI NJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, *Alexander Kivuti Njiru* was charged and convicted of the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (3)* of the *Sexual Offences Act*. The particulars supporting the charge alleged that on 29th December 2017 in Mbeere County, he unlawfully and intentionally caused his penis to penetrate the vagina of RN, a child aged 12 years.

2. Upon his conviction, the appellant was sentenced to serve twenty years imprisonment. He was aggrieved by his conviction and sentence and though in his petition of appeal he did not expressly challenge the sentence imposed by the trial court, he prayed that the same be set aside.

3. In his amended grounds of appeal filed on 3rd February 2020, the appellant relied on the following grounds of appeal which are reproduced verbatim:

> ***i. That the pundit magistrate erred in both matters of laws and facts when he relied on defective charge sheet based on where the alleged incident occurred thus contravening section 214 of CPC. [sic]***
>
> ***ii. That the evidence of PW1 was so contradictory in prove of allegations thus violate section 169 (1) of the CPC being a single eye witness.***
>
> ***iii. That the appellant was not examined and the medic findings after examining PW2 was inconsistence in evidence and no DNA was done. [sic]***
>
> ***iv. That the appellant defence was not at all considered by the trial magistrate as stipulated by provisions of section 169 (1) of the CPC.***
>
> ***v. That the case was not proved beyond standard required by the law. [sic]***

4. At the hearing, both the appellant and the respondent chose to entirely rely on their respective written submissions.

In his written submissions, the appellant urged the court to find that he was wrongly convicted as in his view, the charge was not proved beyond reasonable doubt. He based this submission on grounds that PW2, the victim, gave her mother (PW1) a contradictory version of the events of 29th December 2017, the date on which the offence was allegedly committed. He also submitted that the charge was defective since there was a variance between the charge and the evidence adduced by the prosecution regarding the place the offence was committed.

5. Further, the appellant submitted that the medical evidence relied on by the prosecution was unreliable since the victim was examined five days after the incident and his DNA profile was not taken to link him to the offence. He also urged me to find that his alibi defence was not considered by the learned trial magistrate.

6. In her written submissions, learned prosecuting counsel *Ms. Mati* contested the appeal. She submitted that the evidence adduced by PW1 and PW2 was corroborative and substantiated and that it proved all the ingredients of defilement beyond any reasonable doubt. She denied the appellant's claim that the charge was defective noting that it complied with *Section 134* of the *Criminal Procedure Code* and was thus competent.

7. Learned counsel invited me to dismiss the appeal against conviction for lack of merit. She had no objection to a review of the mandatory minimum sentence imposed on the appellant by the trial court but implored me to take into account the circumstances surrounding commission of the offence, the age of the minor and the seriousness of the offence.

8. This is a first appeal to the High Court. I am alive to my duty as the first appellate court which is to subject the evidence presented before the trial court to a fresh and exhaustive examination to arrive at my own independent conclusions. In doing so, I should remember that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give due allowance to that disadvantage.

> See: ***Okeno V Republic, [1972] EA 32; Kinyanjui V Republic, [2004] 2 KAR 364***.

9. The trial court's record shows that in support of its case, the prosecution called four witnesses. The victim testified as PW2. After a brief *voire dire* examination, PW2 recalled that on 29th December 2017, her mother (PW1) sent her to a *posho* mill at Karari and while on the way she met *Baba Macharia* who she identified in court as the appellant herein. The appellant took her to his house where he sexually assaulted her. He then gave her KSh.20 and a fruit and warned her against telling her parents about the incident threatening to kill her if she did. She then went home but did not tell her mother about the incident immediately.

10. PW1 was PW2's mother. In her evidence, she confirmed having sent PW2 to a *posho* mill on the material day and recalled that PW2 returned with unmilled maize. Upon enquiry, PW2 explained that she had found the *posho* mill closed. On 1st January 2018, PW2 reported to her that on 29th December 2017, while on her way to the posho mill, she had met with *Baba Macharia* who took her to his house and defiled her. After noting that PW2 was walking with difficulty, she reported the matter at Siakago Police Station. She also escorted PW2 to Siakago General Hospital for treatment.

11. PW4, *Mr. John Mwangi*, was the Clinical Officer who examined PW2 at Siakago General Hospital. He noted that besides being withdrawn, her hymen was broken with hymnal tags and there were bruises on her labia. He concluded that there had been penetration into her genital organ five days prior to his examination. He completed and signed the P3 form which he produced as *P exhibit 1*.

12. PW3, *Cpl. John Taveya* is the officer who investigated PW1's complaint. He recalled having arrested the appellant while in his house after he was identified by the victim and her father. After close of his investigations, he charged the appellant with the present offence. He produced PW2's birth certificate as *P exhibit 3*.

13. When placed on his defence, the appellant chose to give a sworn statement and called one witness, his wife. In his sworn statement, he admitted that he was well known to the victim and her family but he denied having committed the offence. He claimed that he spent the entire day of 29th December 2017 at his home; that his wife had gone to Siakago in the morning but had joined him at 1pm. His wife who testified as DW2 contradicted the appellant's testimony by claiming that she was with him in their home the entire day and that she did not leave their home at any time that day.

14. After analysing the evidence on record, I find that two key issues emerge for my determination: These are:

i. Whether the charge was fatally defective

ii. If the answer to issue No. (i) is in the negative, whether the trial court erred in its finding that the prosecution had proved the charge against the appellant beyond any reasonable doubt.

15. Before considering the two issues identified above, let me briefly address the appellant's complaint that the learned trial magistrate disregarded his alibi defence. I will start by observing that the defence offered by the appellant did not amount to an alibi. The offence was allegedly committed in the appellant's house and the appellant admitted that he spent the entire day the offence was allegedly committed in his house. He did not claim that he was at a different place from the scene of commission of the offence.

That said, from the judgment of the trial court, it is evident that the learned trial magistrate considered the evidence tendered by both the prosecution and the defence. He found and correctly so I must add, that the evidence presented by the appellant in his defence was contradictory and he rejected it. Nothing therefore turns on that ground of appeal.

16. Turning now to the first issue, the appellant contended that the trial court erred by relying on a defective charge sheet the defect being that the particulars supporting the charge regarding the place the offence was allegedly committed varied with the evidence adduced in court on that point.

In my view, variance between the particulars stated in the charge sheet and the evidence tendered in court cannot by itself render a charge defective. Such variance would only go towards establishing that the evidence adduced by the prosecution did not support the offence charged and may lead to an acquittal of an accused person. It cannot be a ground for invalidating a charge.

17. *Section 134* of the *Criminal Procedure Code* which provides for how charges should be drafted states as follows:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

18. A perusal of the charge sheet reveals that it contains a statement of the offence charged and the particulars supporting the charge. The particulars fully disclosed the offence charged including the date, place and manner in which the offence was allegedly committed. Looking

at the charge sheet, I am satisfied that the charge as framed was proper and is not defective as alleged by the appellant.

19. Regarding whether the charge was proved to the required legal standard, I have carefully evaluated the evidence on record. I have also read the judgment of the learned trial magistrate. I agree with the learned trial magistrate that the evidence of PW1 and PW2 was consistent in all material particulars and was reinforced by the evidence of PW4, the clinical officer who examined PW2 five days after the incident.

20. PW4 in his evidence confirmed that there was penetration in PW2's genital organ. PW2 was clear in her evidence that it is the appellant, a person she knew very well previously who had sexually assaulted her on the material date. The appellant admitted in his defence that his home was near a road which goes to the posho mill which lends credence to PW2's testimony. He also admitted that there was no grudge between him and PW2 and that previously, he had ran into trouble with PW1 for ''calling'' PW2. In my view, PW2 was a credible witness and she did not have any reason to falsely implicate the appellant with the offence.

21. It is instructive that the offence was committed during the day meaning that PW1's recognition of the appellant as the perpetrator of the offence was both positive and reliable. With this kind of evidence, failure by the prosecution to produce the appellant's DNA profile could not have affected the prosecution's case. PW2's evidence clearly linked the appellant to the offence. The defence offered by the appellant was obviously a scheme by him and his wife meant to exonerate him from the offence and was rightly rejected by the trial court.

22. As the age of the victim was not disputed, from my re-appraisal of the evidence placed before the trial court, i am satisfied that the evidence was sufficient to prove the charge of defilement preferred against the appellant beyond any reasonable doubt. It is thus my finding that the appellant was properly convicted. The appellant's appeal against conviction is thus not merited and it is hereby dismissed.

23. On sentence, the appellant did not lay any basis for his prayer that the sentence passed against him by the trial court be set aside. However, being the first appellate, this court is enjoined to enquire into the validity of his sentence. The trial court's record shows that the appellant was a first offender. In his plea in mitigation, he urged the court to consider that he had young children who depended on him.

24. In his pre-sentence notes, the learned trial magistrate though indicating that he had considered the fact that the appellant was a first offender as well as his plea in mitigation proceeded to impose a sentence of twenty years imprisonment after noting that it was the minimum mandatory sentence prescribed by the law. A perusal of the court record leaves no doubt that the learned trial magistrate considered himself bound by the mandatory minimum sentence prescribed under *Section 8 (3)* of the *Sexual Offences Act* and that is why he meted the sentence of twenty years imprisonment on the appellant.

25. It is clear from the court record that the learned trial magistrate did not exercise his discretion in deciding whether or not the minimum mandatory sentence was the appropriate sentence for the appellant in this case taking into account all the relevant factors.

The respondent conceded as much in its submissions and indicated that it was not in principle opposed to a review of the appellant's sentence.

26. It is pertinent to note that the trial court's decision on sentencing was made well after the Supreme Court made its decision in ***Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR***, which declared minimum mandatory sentences unconstitutional in so far as they denied a trial court of it's discretion in sentencing convicts. Though the Supreme Court's decision related to the mandatory death sentence prescribed for the offence of murder, it was adopted and applied by the Court of Appeal to the minimum mandatory sentences stipulated under the *Sexual Offences Act*. See: ***Christopher Ochieng V Republic, [2018] eKLR; Dismas Wafula Kilwake V Republic, [2018] eKLR*** among others. This was done before the trial court pronounced its sentence in this case.

27. By failing to exercise its discretion in deciding on the sentence that was appropriate in the appellant's case given his plea in mitigation; the fact that he was a first offender and all other circumstances of the case, the trial court made an error of law which this court is duty bound to correct.

28. I have considered the fact that the appellant was a first offender and the circumstances in which the offence was committed. No doubt defilement is a serious offence which leaves its victims, mostly young girl's scarred for life. It calls for a severe and deterrent sentence.

29. Having taken into account all relevant factors including the fact that the appellant was a first offender, I hereby set aside the sentence of twenty years imprisonment imposed by the trial court and substitute it with a sentence of ten years imprisonment which shall take effect from the date of the trial court's sentence.

It is so ordered.

DATED and SIGNED at NAIROBI this 24th day of November 2020.

C. W. GITHUA

JUDGE

DATED and DELIVERED at EMBU this 26th day of November 2020.

L. NJUGUNA

JUDGE

In the presence of:

Appellant present in person

Ms Mati for the respondent

Esterina: Court Assistant