REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 45 OF 2017

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 8 of 2016 in the Chief Magistrate's Court, Naivasha, (V Chianda SRM)

SIMON KAMAU GACHIGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant Simon Kamau Gachigi was charged with defilement contrary to **Section 8(1)** as read with **section 8 (2)** of the **Sexual Offences Act.** The particulars are that on 22 January 2016 at [Particulars Withheld] estate, Naivasha in Nakuru County, he intentionally and unlawfully caused his genital organs to penetrate the vagina of MIH a girl aged five years old.

2. The appellant denied the offence, was tried, found guilty and was sentenced to imprisonment for life. Dissatisfied with the judgement, the appellant has appealed against the same.

3. The appeal is premised upon the following grounds:

> ***"1. That the learned magistrate erred in law and in fact two of convicted the appellant yet failed to appreciate the penetration was not proved to have been occasioned via the medical evidence.***
>
> ***2. That the learned head trial magistrate erred in law and in fact two of convicted the appellant yet failed to appreciate that age was not proved.***
>
> ***3. That the learned trial magistrate erred in law and fact two of convicted the appellant yet failed to appreciate that the identification evidence was shaking and un-procedurally done.***
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> ***4. That the learned trial magistrate erred in law and in fact to have convicted the appellant on evidence which was otherwise contradictory***
>
> ***5. That the learner trial magistrate erred in law and in fact of convicted the appellant yet failed to appreciate that his own judgement failed to reach the threshold of a standard judgement required of a legally qualified personnel"***

4. The appellant filed written submissions to which he added oral highlights. The appeal is opposed by the DPP who made oral submissions.

5. On a first appeal, the court is required to evaluate the evidence afresh and to come to its conclusions. **Okeno v R [1957]EA 32** set the bar for an appellate court as follows:

> ***"An appellant on a first appeal is entitled to expect evidence as a whole to be submitted to afresh an exhaustive examination (Pandya v R [1957] EA336) and to the appellate court's own decision on the evidence. The first appellate court must self with conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R 1957[EA] 570). It is not the function of a first appellate court merely to scrutinise the evidence to see there was some evidence to support the lower court findings and conclusions; it must make its own findings and draw its own conclusions."***

6. The brief background is as follows. MIH gave evidence as PW1. In her *voir dire* examination the court determined that she was intelligent enough to give evidence but because of her tender years, she would give unsworn evidence.

7. She testified that she was outside playing with her friend Susan when Kamau, the appellant, came by held her hand and took her to his nearby house. She knew Kamau, as he stays near their home. She identified him in the dock. Kamau made her lie on a big chair, removed her clothes, removed his trousers and pant. He then lay on her and put his "dudu" thing and made her dirty between her legs. She said he puts in her his things, and that she felt pain and was embarrassed. She did not scream because he told her he would hit her.

8. After he completed his act, he chased her out of the house and she went back to play. She did not tell her mother. But when she went to the potty for tropical she felt a lot of pain. Her mum noticed, made her lie on the bed and examined her. Thereafter, that took her to hospital and to the police station.

9. In cross examination, evidence stood fast. She said that at first the appellant called her, but she refused to go and that it was then that he came and took her by the hand. She testified that her mum was in the house and that her friend Susan was playing outside, there were no people outside the compound; that most were inside their houses. At the time they were playing outside there was sunlight. She said that at church and in school they are taught good manners, but that he taught her bad manners.

10. PW2 VS, is PW1s mother. She testified that on the night of 22 January 2016 at about 1:00 am, PW1 woke her up asking to go for a short call. Being night and not wanting to go out, she gave PW1 the potty. PW1 sat on it and while urinated started crying. She refused to tell her mother what the problem was, but when PW1 stood up, PW2 noticed a thick whitish substance ooze out. PW2 late PW1 on the bed and, on examining her private parts, noticed she was not normal and had stains between her thighs in addition to the thick discharge.

11. That same night, PW2 took her to the Naivasha District Hospital where PW1 was treated and given drugs. She was told to return the following morning for more drugs. That day PW1 did not go to school because she wasn't feeling very well. PW1 told her mother that she had been alone with Kamau. She knew Kamau as a neighbour that she usually sees. They have never disagreed, and he found her living there as she first came to reside in the area six to seven years ago. She also testified that it was PW1 who led them to the appellant's house as there were two Kamaus living in the area. PW1 even showed them the chair that she was made to lie on.

12. In cross -examination, PW2 said she could not commence on whether the appellant was away on duty. She also denied that she had attempted to solve the matter out of court for money, as no amount could be equated to the life of her daughter

13. Medical evidence was adduced by PW3, Sylvester Messa, a clinical officer from Naivasha district Hospital. He testified that he examined complainant found her thighs near her private parts were tender, found that her hymen was broken and she had hyperaemia. She also had a whitish discharge, but no sperms were seen. She produced P Exhibit 2, the P3 form and also P Exhibit 1, the Post Rape Care form. PW3 also testified that the complainant was examined at Naivasha District Hospital for age assessment at the dental department and her age approximated at six years. She produced P Exhibit 3 the medical assessment report.

14. PW4 the investigating officer, was CPL Audrey Cherono, the fourth and last prosecution witness. She testified that on 23rd January, 2016 a defilement case was reported by the mother of the complainant child, who came to report with the child in tow. PW 4 interrogated the child and she told her the story about how she was called by the appellant and defiled on the chair. The child knew the perpetrator who she said lived in the next plot, separated by a road. The child was taken to the district hospital and treated, after which PW4 issued the mother with a P3 form report for the child having filled it.

Issues for determination

15. Three issues arise for determination :

1. Whether the age of the complainant was proved

2.. Whether penetration was proved

3. Whether identification was proved

Proof of age of the complainant

16. The child's mother testified that the child was born in August 2010:

> ***"… and will turn six years in August 2010"***

The appellant has impugned the statement that the child would turn six years in August 2010 as proof that the age is not truly proved. In my view, this appears to be an obvious, but inconsequential error for the child couldn't turn six in the same year she was asserted to have been born

17. PW 3, the clinical officer gave the child's approximate age as five years. He testified that the child:

> "….was examined at Naivasha District Hospital for age assessment. She was seen at dental assessment department. Approximate age is 6 years."

The clinical officer produced the Medical Certificate of Age as PExbh 3 and it shows that the child's present age is approximately 6 years old.

18. Given the mothers estimate, the medical age assessment report and the fact the in the voire dire examination the trial court considered the complainant to be too young to understand the meaning of taking an oath, I am satisfied that the child's age was proved as six years at the time of hearing. In any event all that the prosecution is required to prove is that the victim is a minor.

Whether penetration was proved

19. **Section 8(1)** of the **Sexual Offences Act** provides that a person who commits an act which causes penetration with a child commits the offence of defilement. Section 2 of the Act defines *"penetration"* as the partial or complete insertion of the genital organs of a person to the genital organs of another person. As already indicated, the complainant in this case was proved to be minor, and the only aspect now requiring proof is the aspect of penetration by the appellant.

20. In his submissions, the appellant homed in on the absence of bruises and spermatozoa in the complainant's vaginal area during her examination, and the fact that the child's whitish discharge proved nothing as there was no proof of penetration. He also took issue with the fact that ii did not make sense that a child of five years after going through such an alleged trauma would merely go back to playing without showing any signs of pain and discomfort, and without crying. Whilst he appreciated that there could be penetration without ejaculation, it was evident from the child's testimony that the alleged perpetrator made her dirty between her legs, suggesting ejaculation which was not proved by spermatozoa.

21. The medical examination report, PExbh 2 describes the examination of the vaginal area as follows:

> ***" hymen – broken – new , hyperaemic vagina"***
>
> ***"Hyperaemia"*** is defined in the ***Concise Oxford English dictionary*** as follows:
>
> ***"an excess of blood in an organ or other part of the body"***

This shows that the child had a freshly broken hymen with hyperaemic vagina - meaning that the vagina had increased blood flow to that part of the body. Similarly, the Post Rape Care form indicates that the hymen was newly broken and hyperaemic. There are reports were prepared within three days of the incident.

22. The obvious conclusion from the medical examination is that the child had been freshly defiled. She had reported the defilement to her mother, PW2, the night after the incident, after her mother noticed that she was having problems going to the potty, and was crying in pain. According to PW2, the child told her mother that:

> ***"Kamau called her while she was playing with her friends. He held her hand and took her to his house and lay her on the chair removed her clothes and his she felt as though she had been bruised"***

23. PW2, being concerned, also examined her then took her to Naivasha district hospital that very night. PW2 testified that the doctor told her that her daughter's hymen appeared broken and that she had been raped. She was treated at the hospital. PW2 then also immediately reported the matter of the police station

24. This sequence of events in which PW1 has this sudden pain while urinating, then having to disclose to her mother the events of the day and naming Kamau as the central to them in spite of the threats she had been given by him not to tell anyone; the mother taking her to hospital that very night and being advised that her daughter had been raped; all these tend to suggest that the child was not telling untruths. Her evidence is clear and consistent.

25. I therefore find the child's evidence wholly credible and reliable. Although no other eyewitness saw the act being done, the evidence is clear that the child was with the appellant when the incident occurred. That incident led her to crying during going to potty and she eventually spilled the beans. That incident left her with a broken hymen.

26. I am satisfied that based on the narration of the complainant, the appellant penetrated her leading to her hymen being freshly broken.

Proof of Identification

27. The appellant argued that the evidence of identification was shaky, and could have led to a wrongful conviction. He questioned how a five year old girl could have known that the appellant;

> ***"… stays alone and I have always known that he stays alone."***

He referred to **Kinyua & Another v R Criminal Appeal No 11 of 2013** wherein the courts held that in general, dock identification is worthless if identification of a suspect who was a stranger at the time the offence was committed which was not followed by the witness describing the suspect to the police who would organise a properly conducted identification parade at which the witness is afforded an opportunity to identify the accused.

28. He further argued that evidence of visual identification can bring about miscarriage of justice and it is of vital importance that such evidence is carefully to minimise this danger. On this point he relied on **Wamunga v R [1989] eKLR.**

29. In the present case, I note that the child describes how she was called by Kamau who she knew; how he held her hand and led her to a chir in his house, how he defiled her and threatened her against reporting. She testified that:

> ***" I always see Kamau because he stays near us. He smeared me with madudu''"***

In cross examination she said:

> ***"At the time we were playing there was sunlight. It was in the morning"***

30. The complainant no doubt knew the appellant very well. Indeed, according to PW2 it was the complainant who was present for the arrest of the appellant. PW2 testified:

> ***"Kamau is accused at the dock. On arrest the girl identified him. There are two Kamaus thereby and I led her to 1 st Kamau but she said that wasn't him. She led us to his house and showed us the very chair she was made to lie on"*** (emphasis supplied).

31. This evidence is clear. There can be no doubt that the child knew the appellant quite well. She saw him frequently. He is a neighbour, and she led the police to him to arrest him. On this the ground the appeal cannot succeed.

The Disposition

32. Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find that on the basis of the available evidence, the learned magistrate correctly convicted the appellant.

33. Accordingly, the appeal is dismissed.

34. Orders accordingly.

Dated and Delivered at Naivasha this 28th Day of February, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Appellant in person

2. Mr. Koima for the State

3. Court Clerk - Quinter Ogutu