REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.21 OF 2017

GILBERT CHERUIYOT YEGON..APPELLANT

VERSUS

REPUBLIC..RESPOND ENT

(Being an appeal from the original conviction and sentence in Kericho Chief Magistrate's Sexual Offence Case No. 82 of 2016 (Hon. C. K. Mungania (SRM) dated 7th June 2017)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section (3) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 12th and 13th October 2016, at Cheptuiyet sub-location in Sigowet/Soin Sub-county within Kericho County, he intentionally and unlawfully caused his penis to penetrate the vagina of JCB, a child aged 13 years. The appellant also 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 count were that on the same dates and place as in the main count, he intentionally and unlawfully touched the vagina of JC, a child aged 13 years, with his penis.

2. The appellant pleaded not guilty to the offence and the trial proceeded before Hon. Mungania (SRM). The appellant was found guilty on the main count and sentenced to 20 years imprisonment.

3. Aggrieved by both his conviction and sentence, the appellant has filed the present appeal in which he raises five grounds of appeal. He argues, first, that the trial court erred by convicting him while there was insufficient evidence. Secondly, that the court erred by giving undue weight to the prosecution case and least weight to the defence case. It is his argument, thirdly, that the court erred by placing the burden of proof on the defence, rather than the prosecution. Fourth, that the trial court erred in convicting him based on the incredible evidence of PW1. Finally, it was his contention that the sentence meted out was harsh and excessive in the circumstances of the case.

4. The prosecution case before the trial court was that on 13th October 2016, PW1, JC, a child aged 13 years, was at home where she had just arrived from the river. On the way from the river, the accused had called her and told her to go to his home. She left her house, leaving her mother at home without telling her where she was going, and went to meet the appellant. She and the appellant went to a home belonging to a relative of the appellant, a distance of about half an hour, where they arrived at about 6.00 p.m. and spent the night together in the same bed. The complainant described how the appellant removed her clothes then his, then inserted his penis in her vagina, and she felt pain. The following day, the appellant and the complainant went to his home in Kabianga where the appellant left her and went to the shop.

5. The appellant's grandfather then went to call elders and they said they would take the complainant home the following day, and she slept in the appellant's grandmother's home. She was taken home the following day. Elders looked for the appellant, and she and the appellant were taken to Sondu Police Station. She was later taken to Sondu Health Centre where she was examined.

6. Joseph Koros, PW2, was an elder at Tililbet. He had received a report from the mother of PW1 that her daughter had gone missing. They had searched for the girl but did not find her, then their chief was called by an elder from Kabianga and informed that there was a girl who had been found in the village. The child had been brought back and given to her mother. Later they searched for the accused whom they found in Telwet where he had gone to hide.

7. The complainant's mother, ACB (PW3) was at home on 13th October 2016 as she was unwell. She sent PW1 to the river to fetch water. PW1 then stepped out of the house, and her mother waited for her to return but she did not. PW3 went out to look for her but did not find her. The following morning, she called Joseph Koros (PW2), a village elder, and they started looking for her daughter. She was informed that the child had been seen with someone from Kabianga, and the child was later brought from Kabianga by an elder and the chief. The appellant was later arrested and the child was taken to hospital and given a P3 form which was filled at the Sondu District Hospital, PW3 stated that the child was born on 16th June 2003 and was 13 years old at the time of the offence.

8. The medical evidence was produced by Dr. Willy Kibet Kitur, a medical officer at Sondu Health Centre. He had examined the

complainant on 15th October 2016. Her genitalia was normal with no bleeding. Her hymen was ruptured, but not recently. She had vaginal bleeding, but this was from her menses. A high vaginal swab showed presence of red blood cells, while a urinalysis showed epithelial cells. He concluded that there was vaginal penetration. With respect to the ruptured hymen, he expressed the view that it could have occurred more than two weeks prior to the date the complainant was examined.

9. No. 84621 PC Rose Mukangai from Sondu Police Station was the investigating officer. She had been informed that some people had been arrested and were on the way to the station. She went with another officer and escorted the appellant, the complainant and the elders to the station. The following day, they escorted them to the hospital.

10. When placed on his defence, the appellant elected to give an unsworn statement. He stated that the charge sheet shows he was arrested at Cheptuiyet, while he was arrested at Kaplelatech. He observed that the complainant was arrested at Cheptuiyet, and so there was a contradiction.

11. His first witness, Robert Kipkorir Talam from Tililbei stated that on 15th October 2016, at around 11.00 p.m. -12.00 a.m., he heard people talking. He went and found someone who had been tied on allegation that he had defiled a child. He did not see the complainant.

12. DW3, Isaiah Kimutai, a neighbour of the appellant at Kabianga, heard on 16th October 2016 that the appellant had been arrested at Kaplelatech sub-location. He did not know why he had been arrested.

13. Finally, the appellant called DW4, his cousin Kennedy Cheruiyot Rotich. Rotich was with the appellant when he was arrested. He did not know why he was arrested.

14. In challenging the conviction of the appellant on behalf of the appellant, Learned Counsel, Mr. Nyadimo, confined himself to the first ground of appeal, the sufficiency of the prosecution evidence. He submitted that for the charge of defilement to be sustained, the prosecution must prove three elements- the age of the child, the act of penetration, and the identity of the accused as the one who committed the act.

15. Learned Counsel argued that from the evidence of PW4, the clinical officer, and the P3 form (exhibit 2), there was no tenderness of the vagina of the complainant and her vagina was normal with no injuries. That the clinical officer had stated that even if the complainant's hymen was ruptured, the rupture was not recent. Further, that the complainant had normal external genitalia as indicated in section C of the P3 form. According to Mr. Nyadimo, the minor was taken to hospital on 15th October 2016, while the charge sheet showed that the offence occurred between the 12th and 13th of October a difference of two days. Mr. Nyadimo observed that the evidence of the clinical officer was that the hymen had been ruptured, but not recently, and that it could have been more than 2 weeks before the date of the examination, a disparity of more than 12 days.

16. It was his submission therefore that there is no correlation between the date when the appellant allegedly committed the offence and the date given by the expert on when penetration took place. He submitted that penetration is a key ingredient in the establishment of defilement, and in the absence of penetration the prosecution case shall fail. Counsel relied on **Criminal Appeal No. 155 of 2011 –Dominic Kibet Mwareng vs Republic (2013)eKLR** and **Crim Appeal No.14 of 2013 – Joseph Njiru Kithaka vs R (2014) eKLR** in support. It was his submission, in reliance on these two cases, that the evidence of the complainant must be corroborated by medical evidence to found a conviction against the appellant.

17. Mr. Nyadimo further submitted that the complainant had stated that the appellant's grandfather had seen them enter the house. His submission was that this was hearsay evidence as the prosecution did not call the eye witness to corroborate that statement.

18. Finally, he submitted that it was not reported that the accused person had previously defiled the minor two weeks before as indicated by the doctor, and there was therefore no nexus between the appellant and the offence of penetration indicated in the P3 form. The prosecution had therefore failed to prove an essential ingredient in defilement, and the conviction cannot stand.

19. Mr. Ayodo for the state opposed the appeal. He noted that the appeal centred on the medical evidence, and that PW4, who examined the complainant, stated that her genitalia was normal with no injuries and her hymen was ruptured but nor recently. He further noted that the clinical officer had given an approximation of two weeks as the age of the ruptured hymen. He observed, however, that there was a laboratory report of a vaginal swab and that the urinalysis showed epithelial cells in the urine. It was his submission that though the doctor did not explain to the court what it means when a person has epithelial cells and whether it means there was penetration, from the evidence given by the prosecution, it shows that the complainant was recently penetrated.

20. He submitted that the complainant may have been sexually active even before she was defiled by the appellant. It was his submission, however, that the doctor's opinion on the age of the ruptured hymen does not take away the criminal liability of the appellant.

21. Counsel observed that the complainant in her testimony stated that she was called by the appellant while she was on the road. That he took her to his relative's place, one Arap Tuwei, where they found no-one. She had also testified about how the appellant convinced her to spend the night, and they spent the night at the appellant's relative's place in the same bed. She had also described how the appellant defiled her and she felt pain.

22. Counsel noted that her evidence of being away had been corroborated by PW2 and PW3. In his view, the prosecution evidence was consistent and corroborative, and it was clear that the appellant committed the offence.

23. Mr. Ayodo further noted that neither the appellant nor his witnesses testified about the events of 12th and 13th October 2016. Rather, they testified about being with the appellant between 15th and 16th October 2016. In his view, the trial magistrate was properly convinced

from the evidence presented that the evidence of PW1 was credible, which was in line with section 124 of the Evidence Act.

24. Counsel urged the court to consider the totality of the prosecution evidence and find that the prosecution proved its case beyond reasonable doubt, that the conviction was safe, and the appeal should fail.

25. It was his submission, however, that should the court be inclined to be convinced that the prosecution did not prove its case beyond reasonable doubt based on the age of the hymen, then the court should exercise its power and convict the appellant on the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. This was because there was sufficient evidence before the trial court even in the absence of medical evidence.

26. In submissions in reply, Nr. Nyadimo submitted that as observed by the state, the complainant may have been sexually active. Consequently, if an act of defilement was committed, it was not by the appellant as stated in the charge sheet. In his view, the time and dates set out in the charge sheet are an essential ingredient in the formulation of a charge against an accused person. In the event that there is a disparity either on the face of it or in the evidence adduced by the prosecution which raises a doubt as to the commission of the offence, the appellant should benefit from that doubt.

27. I have considered the record of the trial court, the appellant's grounds of appeal and the submissions of the parties. I note that Learned Counsel for the appellant, Mr. Nyadimo, did not address himself to the other grounds of appeal, confining his submissions to ground 1 on the sufficiency of the prosecution evidence.

28. I have also considered the two authorities cited in support of the appellant's case, both of which are from courts of concurrent jurisdiction and therefore of persuasive authority only.

29. While I agree that it is important to establish the age of the complainant, I believe that proof of age is not limited to production of a birth certificate or age assessment. In this case, the mother of the child gave evidence as to her age, and it has been held that evidence of a mother is the best evidence with respect to the birth of a child-see the decision of the Court of Appeal in **Richard Wahome Chege vs Republic Criminal Appeal No 61 of 2014.**

30. The second important consideration is the evidence of penetration. The evidence of PW1 was that the appellant took her to his relative's house where they spent the night. He removed her clothes and his, and he inserted his penis into her vagina and she felt pain. The medical evidence showed the presence of epithelial cells. The trial magistrate found that the presence of epithelial cells proved penetration.

31. While the appellant's Counsel relied heavily on the evidence of the medical doctor that the complainant's hymen had been ruptured earlier, the evidence of PW1 and the medical evidence does prove that the appellant did have sex with a child, and this amounts to defilement. I agree with the state that the fact that the complainant might have been defiled before does not take away the criminal liability of the appellant. He deliberately lured the complainant, a child of 13 years, from her home to a relative's home and defiled her. This is what the Sexual Offences Act prohibits and provides specific penalties with respect thereto.

32. In the circumstances, I am not satisfied that the appellant's appeal has merit. It is accordingly dismissed and the conviction and sentence upheld.

Dated Delivered and Signed at Kericho this 27th day of February 2019

MUMBI NGUGI

JUDGE