REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL

NO. 74 OF 2017

BETWEEN:

EDWARD MWANGEMI............................APPELLANT

AND

THE REPUBLIC......................................RESPONDENT

(Being an Appeal from the Judgment of Hon. M.Onkoba SRM

at the SPM's Court at Voi. CR. Case No. 859 of 2016

delivered on 8th Seprember 2017)

JUDGMENT

1. The Court has before it an Appeal against both conviction and sentence. The Appellant was convicted of the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006 on 8th September 2017 pursuant to the Judgment of Hon Senior Resident Magistrate M. Onkoba sitting at Voi.

2. The Appellant applied for leave to appeal out of time by an Application filed on 20th September 2017. The Application was granted by Hon J. Kamau J. on 24th October 2017. The Application is noteworthy because when it was made the 14 days allowed for an appeal had not lapsed.

3. The Charge Sheet comprised of two Counts. Firstly, "*Defilement of a Child contrary to Section 8(1) read together with 8(3) of the Sexual Offences Act No 3 of 2006".* The Particulars of the Offence are recorded as "*EDWARD MWAGEMI On the 8th day of October 2016 at around 2:00 pm at [particulars withheld]Village in Voi within Taita Taveta County, intentionally inserted your male genital organ (penis) into female genital organ (vagina) of E M a girl aged (14) years*". There was an alternative Charge being "*Indecent act with a Child Contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006*". The Particulars of the Offence are set out as "*EDWARD MWANGEMI On the 8th day of October 2016 at around 2:00pm at [particulars withheld]Village in Voi within Taita Taveta County intentionally and unlawfully touched the female genital organ of one E Ma girl aged (14) years with your male genital organ.*".

4. The Accused was found guilty of the Main Charge. The Accused filed a Petition, Grounds of Appeal, Amended Grounds of Appeal and Written Submissions. The Respondent filed Written Submissions. They have been considered carefully and taken into account. The Grounds relied upon are set out below:

MEMORANDUM GROUNDS OF APPEAL

An appeal from the original conviction and sentence in cr. Case no 859/016. Judgment delivered and dated 8th day of September 2017 at SPM's court Voi.

1. That the learned trial magistrate erred in law and facts by failing to consider the charges were fatally and incurable defective.

2. That the learned trial magistrate erred in law and facts by failing to consider the prosecution failed to prove their case beyond reasonable doubt c/sec 109 and 110 of the evidence act.

3. That the learned trial magistrate erred in law and facts in relying on the evidence of a single witness which is insufficient to

sustain a conviction.

4. That the learned trial magistrate erred in law and facts by failing to consider both conviction and sentence were against the merits of the entire case.

5. That the learned trial magistrate erred in law and facts by relying on incredible prosecution's adduced evidence which was inconsistent and contradictory c/sec 163 (1) (c) of the evidence act.

6. That the learned trial magistrate erred in law and facts by failing to consider that my defence was unrebutted or buttressed by the prosecution witness.

AMMENDED GROUNDS

1. That the learned trial magistrate erred in law and fact in convicting and sentencing me while not considering that the appellant was not assigned an advocate by the state as required by the law since I am a layman in law.

2. That the learned trial magistrate erred in both law and fact in convicting and sentencing me while not considering that the BURDEN OF PROOF WAS NOT DISCHARGED BEYOND REASONABLE DOUBT.

3. That the learned trial magistrate erred in law and fact in not considering that, the appeallant was a first offender hence deserved an alternative sentence.

4. That the learned trial magistrate erred in law and fact in not considering that my defence evidence which created a reasonable doubt to the prosecution whereby the benefit ought to have been given to me

5. The Learned Trial Magistrate heard oral testimony from 6 Witnesses for the Prosecution and two Witnesses for the Defence. It is the duty of the first appellate court to review the evidence and give it due weight bearing in mind that the trial court had the advantage of observing and assessing the witnesses while they gave their testimony. The first prosecution witness was not the Complainant but her brother. Although he was not asked his age, from the evidence it is assumed that he was older than, and had charge of the Complainant while their parents were away. He told the Court that on 8th October 2016, the Complainant did not go to school. She claimed to be unwell. That was not unusual because she suffered from epilepsy and often missed school. Later he discovered she had left the house. Her explanation to him was that she went to see her sister. However, that is not all that is alleged to have happened on that date. Subsequently, the Complainant is reported to have confided the female employee with whom she shares a bed-room and her friend at school that she had met the Appellant, travelled with him to his house and had sexual intercourse after he told her he loved her and wanted to marry her. The matter only came to light after the Complainant's school teacher and head teacher noticed a change in her behaviour. In addition, following an epileptic fit, she was found to have, in her possession, a large sum of money (KShs. 1,260). An inquiry into the source of those funds resulted in the school teachers discovering that the Complainant had sexual intercourse with the a man who took her to his house on a motorbike on 8th October 2016. That person was identified as a mason who had worked in the home of the Complainant and was known to her, the family and the house maid. The said mason was noted to have attempted to befriend the Complainant by admiring and complimenting her looks and borrowing beauty products namely vaseline petroleum jelly from her.

6. The class teacher J K (PW 6) and the head teacher, J M M did what any responsible adult would have done. They took the Complainant to hospital to be examined. It seems their primary concern was that she may have become pregnant. The evidence of PW 2, (the headmaster) is that the money was discovered on 11th October 2016. He sent for the Complainant's parents. The parents instead sent their son D to represent them. This is the same son who noticed that the Complainant had left the house on 8th October 2016. Dennis attended on 12th October 2016 and that is the date on which "Er was interrogated" in the presence of her friend L. It was that friend who made the disclosure. She said that the Complainant had confided in her about the Complainant having intercourse with "her boyfriend". Under that interrogation E confirmed what she said happened on 8th October 2016. The facts she put forward were (1) she did not attend school on 8th October 2016

(2) However she did not remain home and went out

(3) While she was out she met the Accused

(4) The Accused took her to his house

(5) His house was a one bed-roomed house in Kaloleni

(6) The Accused had sexual intercourse with her

(7) The person who she had sexual intercourse with was a mason who had built a house in her family's homestead.

(8) The person with whom she had sexual intercourse gave her money, said to be Kshs. 100/=.

7. The headmaster also took the Complainant and her brother to the Children's Department which was the start of the Police investigation. The Headmaster said under cross-examination that he had no reason to believe that the Complainant was lying. The Complainant's school teacher also gave evidence as PW-6. She said that on 8th October 2016 which was a Saturday, she was at school from 8:00 am. She said the Complainant did not attend school. She also corroborated that the Complainant had epilepsy and as a consequence would miss school. She said on the following Tuesday (11th October) the Complainant was at school and had an epileptic episode"fit". She corroborated the evidence of the Headmaster. Both the teacher and the Headmaster were present when the events of 11th and 12th October took place.

Therefore they are competent witnesses to relate what they were told. However, they are not competent witnesses as to the truth of those statements because the veracity of the contents of those statements is hearsay evidence and therefore not admissible.

8. The Complainant was PW-3. Her age and date of birth was established by the introduction of her birth certificate into evidence. She was born on 31 January 2002 (and not 2012 nor 1992 nor 2017 as recorded elsewhere). The judgment sets out that although the Complainant was a minor, the Learned Trial Magistrate did not find it necessary to have a voire dire to see if she understood the proceedings and the need to tell the truth because she had attained the age of 15 by then. She gave evidence in relation to the events upon which the Charge was founded. She said that the day in question was 8th October 2016. She said she did not go to school she said at around noon she left her home. All those facts are corroborated by the evidence of other witnesses. She also said that on the way she met a man who had earlier carried out some building work in her house. That man is also referred to as a mason. She is clear they met in Mazeras and that they travelled to Kaloleni on a motorcyle where they both rode pillion. She described the setting and interior of the house. Subsequently, she was able to lead the investigating officer to that house. She was able to relate in fine detail what transpired between herself and the man. The man was not a stranger to her because when he asked her to wait while he showered, she did so. She described what he was wearing; only shorts. She described what she was wearing, a skirt and blouse and underwear. She described the intercourse in step by step detail. She remembered that the man told her repeatedly that he loved her and wanted to marry her. The Proceedings record that she was smiling during this part of her evidence, perhaps suggesting she believed what she was told. She said that he did bad manners to her and that caused pain and bleeding. She said that she understood what was happening and he did "bad manners" things to her. Afterwards he gave her a glass of water and danced with her. He also gave her a gift, which she says was KShs.100/=. She says she concealed the events from her family but told a house maid called Loise. She thought her brother discovered what happened from overhearing that conversation. It is the evidence of the brother that he learned what transpired from the school. The Complainant in her evidence, seems to attribute the pregnancy testing to changes in her physical appearance showing that she is still a child in her understanding of matters of reproduction.

9. Tests were done at the Moi Referral Hospital. The Prosecution called Dr Kagonda Gitau who confirmed that a P3 form was filed on 18th October 2016 and was completed by him. He also said that the treatment notes show that on 12th October 2016 an examination was done. A pregnancy test was conducted and contraceptives administered. There was also tests for HIV and Syphilis done which were negative. The examination did find that (1) there was a white vaginal discharge indicative of an infection but there was no urinary tract infection; (2) the hymen was broken and (3) the presence of blood was recorded indicating an injury to the vagina including a broken hymen. PW-5 also noted that he had recorded that the Accused be tested for HIV. It seems that is not done, "the offender was not examined" the doctor said. The Appellant now complains that he was not tested. That is surprising because that complaint is in fact an admission that he was the person who caused the hymen to be broken. Under cross-examination the doctor confirmed that there was no spermatazoa found but that could be explained by the use of a condom. The presence of blood was attributed to the broken hymen. In addition the patient had abdominal pain and vaginal discharge.

10. The only eye witnesses to the defilement were the Complainant and the perpetrator/offender. The Accused was identified by the Complainant. First she took the Police to his home, which was also the scene of the crime. Then she described him as the mason who had worked in her home. That was corroborated by other family members. She also identified him at the police station. Given her age and familiarity with the Accused (who she believed was her boyfriend) the fact of the identity of the Accused was found to be proved beyond reasonable doubt. The Grounds of Appeal do not raise any reason why that finding should be interfered with by this Court.

11. The medical examination also proved the defilement beyond reasonable doubt. The only reasons the Appellant puts forward for to challenge the medical evidence is that a pregnancy test was done and he was not tested. Clearly, the only reason he would be tested would be if he was the perpetrator.

12. The Appellant had, at trial put forward an alibi, namely that he was elsewhere at the time. He did not produce any evidence to support that. He did call one witness a supposed wife with whom he did not co-habit and who was having a child with another man. In the circumstances, the Learned Trial Magistrate was not convinced and neither is this Court.

13. For those reasons, the Appeal against conviction is dismissed.

14. Moving onto the issue of sentence. The Appellant feels his sentence is too harsh. The Charge was brought under Section 8 of the Sexual Offences Act 2006. Section 8(3) provides "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable on conviction to imprisonment for a term of not less than twenty years.". In the circumstances, the Learned Trial Magistrate handed down the very minimum sentence. Are there grounds for this Court to impose a different sentence? Given that the evidence clearly demonstrates that the Appellant undertook a course of grooming behaviour to gain the trust and friendship of the child before he defiled her, in the opinion of this Court a higher sentence is warranted. However, the Prosecution have not made any application for review of the sentence and therefore the sentence handed down by the trial court stands. Appeal against sentence also dismissed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 20th day of February 2019.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In person

Respondent: Ms Anyumba