REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL No. 54 of 2017

BETWEEN

GIBRAN NYANGE DARIUS ....….…….........APPELLANT

and

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

(Being an Appeal from the Judgment of Hon. K.I. Orenge at the SPM's Court at Wundanyi. CR. Case No. 361 of 2010 delivered on 16th March 2011)

JUDGMENT

1. The Court has before it an Appeal against both conviction and sentence. The Appellant was convicted of the offence of defilement on 16th March 2011 pursuant to the Judgment of Hon Resident Magistrate K.I. Orenge.

2. The Appellant applied for leave to appeal out of time by an Application filed on 26th July 2017. The Application was granted by Hon J. Kamau J. on 24th October 2017. The Application is noteworthy because in his Supporting Affidavit, the Appellant states that his delay is excusable because he did not understand his right to appeal was limited to 14 days and that he was waiting for his family to hire a lawyer. In fact the Appellant had previously filed an Appeal on 10th October 2012. That Appeal (***No 232 of 2012***) was withdrawn on 6th November 2014.

3. The Petition of Appeal was filed on 26th July 2017. The Appellant states he pleaded not guilty. The Grounds of Appeal attached to the Petition are:

> *1. I pleaded not guilty.*
>
> *2. That the pundit trial magistrate erred in both law and fact fails to take into consideration that the evidence which was before the court was rendered with contradictions and inconsistency.*
>
> *3. The learned trial magistrate erred in both law and fact fails to consider that the applicant was under age during the trial hearing*
>
> *4. The learned trial magistrate erred in both law and fact that failed to take into consideration that the applicant was not examined by the doctor as the law stipulates.*
>
> *5. The doctor didnt appeared before the trial court as the law stipulates to produce his evidence*
>
> *6. The learned trial magistrate erred in both law and fact that there was insufficient evident to prosecute the appellant.*

The Appellant is asking the court to quash the conviction, set aside the sentence and release him.

4. The Appellant was charged with two Counts namely:

> *(1) Defilement of a girl contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006*. The Particulars of the offence were that ". There was an alternative Charge namely; *"Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006*". The Particulars of that offence were that *GIBRAN NYANGE DARIUS on the 27th day of May 2010 at in Mwatate District within the Coast Province, intentionally and unlawfully touched the vagina of QM a child aged 16 years with his penis*".

5. Both the Appellant and the Respondent have filed their respective Written Submissions. The issue of the Respondent's age can be dealt with quite easily. The Appellant informed the Trial Court that he was 17 years old. He was therefore remanded as a Child, however, an age assessment at the Wesu Hospital demonstrated that he was 19 years old. In addition the Appellant was working as a boda boda operator. In the circumstances, the trial court treated him as an adult. He has not put forward any evidence to counter that assessment. That ground (Ground 3) of Appeal must fail.

6. By Grounds 2, 4 and 5 the Appellant challenges the trial process and the evidence presented. This is dealt with in the Submissions by saying that the evidence of the Complainant was contradicted by the evidence of the Prosecutor/Investigating Officer ("prosecuting officer"). An investigating officer does not give evidence of the truth of the facts he or she is required to investigate but gives evidence of the process followed and the findings made. In addition the Appellant says that there was either no medical evidence placed before the Court or that there was no doctor to introduce the medical evidence. The Respondent has translated this as being that there was no DNA evidence collected from him to place him at the scene. The oral submissions that the Appellant made at the trial was that "The clinincal officer said he did not know the cause of the bruises". The record shows that on 25th November 2010 a Restituta Mghoi attached to Mwatate sub-district as a clinical officer attended and gave evidence as PW3. The Complainant was examined by Dr Seif and following the examination she was given a P3 form.

7. It is the duty of the First Appellant Court to reconsider the evidence before the trial court and re-evaluate it always bearing in mind that the appellate court has not had the benefit of seeing the witnesses and assessing their demeanour.

8. The principal witness for the prosecution was the Complainant. She gave evidence that she knew the Accused. He was a boda boda rider. That is not contradicted. She also said she went to the hospital in Mwatate. That is not contradicted and is corroborated by PW2. She said she asked the Accused to take her home after she had been to the hospital and the market. It was raining and she was taken to a house to wait because it was raining. The unsworn evidence of the Accused was that he was at his sister's home and knows nothing about the matter. It turned out the house the Complainant was taken to a house belonging to a cousin/relative of the Accused. That person, Mwasi is alleged to have also assaulted the Complainant resulting in pain on the back and neck. He was called as a witness for the prosecution and refused to testify.

9. In relation to the Sexual Assault, the Complainant said on oath that the Accused and his Cousin M forced her to drink a bitter liquid. Unfortunately, the investigating officer did not investigate what the liquid was but the Complainant said it made her feel dizzy. When she came to she was lying on the bed with the Accused on top of her. The Appellant now says that her evidence is inconsistent because she could not say how she ended up on the bed, however he did not cross-examine her to that effect at the time. In addition to the testimony of the Complainant, there was the medical evidence. The Complainant was examined shortly after the incident complained of. She was given a P3 Form.

10. The P3 records her injuries. The incident is recorded as the Complainant saying she was defiled by a person known to her. Her injuries were assessed as (1) bilateral should pains due to being hit". (2) "*labia majora had bruises and the hymen was absent*". That is evidence of intercourse. The Complainant is a minor. The Complainant's evidence was therefore firstly corroborated by the evidence of PW 2 in relation to her disappearance when she was expected to return home and secondly by the medical report. The Appellant suggests that he had an alibi but not was put forward to the trial court.

11. As the Prosecution's last witness did not attend there was no eye witness to the incident. In the circumstances, the trial court made its findings on the basis of circumstantial evidence. That is something the trial Court is entitled to do. The Respondent relies on the authority of Kassim Ali v Republic 92006) eKLR where it was stated that; "The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.". In this case all three classes of evidence were before the trial court.

12. The Appellant has argued that there were inconsistencies in the Prosecution's case. The Respondent has replied to that in its Written Submissions by citing a number of authorities which provide guidance on which contradictions can be put down to the fallibility of human recall and which are "grave contradictions" rendering the evidence unreliable. In this case the record shown no contradictions in the evidence of the Complainant. As a result that ground must fail.

13. Moving on to the issue of sentence. 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*.". ***Section 8(4)*** provides: "*A person who commits an offence of defilement with a child between the age of sixteen and eighteen is liable upon conviction to imprisonment for a term of not less than fifteen years."*.

14. At the time of the commission of the offence the Complainant had not attained the age of 16 years. In the circumstances, had the Learned Trial Magistrate addressed his mind to the issue he could have sentenced the Appellant to a term of at least 20 years. The record shows repeated reference to the age of the Complainant at the time of the trial. In the circumstances, the Appellant has not satisfied this Court that his sentence is unduly harsh, or of any other reason why this Court should interfere with the sentence of the subordinate court.

15. For the reasons set out above, it is the decision of this Court that (1) the Appeal against conviction is dismissed and (2) the Appeal against sentence is similarly 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