REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.35 OF 2018

(Appeal Originating from Nyahururu CM's Court SOA.51 of 2017

by: Hon. A. Mukenga – S.R.M.)

SAMUEL KIRANGA BOITH.....APPELLANT

-V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

Samuel Kiranga Boith, the appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with (4) of the sexual Offences Act.

The particulars of the charge are that on 9/4/2017 in Laikipia West Sub-County, intentionally caused his penis to penetrate the vagina of DCR a child aged 17 years.

In the alternative, the appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. No finding was made on this charge.

He was sentenced to serve 15 years imprisonment. The appellant is dissatisfied with both the conviction and sentence. He filed this appeal dated 27/4/2018 and written submissions on 13/6/2019 citing several grounds that can be considered into the following:

(1) ***That the medical evidence did not link the appellant to the offence;***

(2) ***That the age of the complainant was not proved;***

(3) ***That relevant witnesses were not called;***

(4) ***That there was no corroboration of PW1's evidence;***

(5) ***That there were contradictions in the prosecution evidence;***

(6) ***That the magistrate failed to appreciate that the whole incident was stage managed and a frame up;***

(7) ***That the offence of defilement was not proved to the required standard;***

(8) ***That the sentence was harsh.***

The appellant submitted that he was a police informer and he was framed because he had made a report to the police about the complainant's family engaging in brewing illegal brew. The appellant's prayer is that the conviction be quashed, sentence be set aside and he be set at liberty forthwith.

Ms. Rugut, learned counsel for the State opposed the appeal contending that PW1 vividly narrated what happened on the fateful day; that the appellant chased her, caught up with her when she fell, forced her to go to his home where he defiled her; that efforts to try and rescue the

complainant from the ordeal by the appellant's mother and brother failed when the appellant overpowered them and it is not until the complainant's family broke into the appellant's house that she was rescued. Counsel further submitted that PW1's evidence was corroborated by PW2's evidence, her brother and PW5, the Doctor; that her age was proved to be 17 years; that the defence was a mere denial. Counsel urged this court to dismiss the appeal.

This being a first appeal, this court is required to re-examine all the evidence that was tendered before the trial court afresh, evaluate and analyze it and make its own findings. This court however bears in mind that it did not have the opportunity to see or hear the witnesses in order to weigh their demeanor**.** ***See Okeno v Republic (1972) E.A. 32***.

The evidence that was tendered before the trial court was as follows: PW1 DCR, who was then aged 17 years was going home from her sister's place at about 6.00 p.m. on 9/4/2017. The appellant was walking behind her and when she reached a corner, she noticed that the appellant was running and she got scared and ran. Unfortunately, PW1 fell and the appellant caught up with her; that the appellant got hold of her started to strangle her and told her to go his house and they did go. they found his mother who told him to leave PW1 alone but she was told her she did not know where he found her. His brother also tried to intervene but appellant threw him out of his house. His mother screamed and people came but the appellant chased them. He pushed her to his house where he forced her to have sex with him and he defiled her the whole night. People came to his door at 1.00 p.m. but the appellant started to beat up people but he was overpowered, police arrived and arrested him. PW1 said they knew each other before ever by name.

SKK (PW2) an uncle to PW1 recalled that PW1 went to visit her sister on 9/4/2015 but did not return. About 11.00 p.m., the appellant's brother called John went to tell him that PW1 had been raped by the appellant. PW2 called the chief and police but they were far. He asked some neighbours to accompany him to the appellant's house which they did. They ordered the appellant to open the door but he refused and they broke down the door and found him armed with a mattock; they managed to overpower him and just then, the Administration Police arrived and took him to Sipili Police Station.

PW3 PKK a brother in law to PW1 recalled that on 9/4/2017, about 1.00 a.m., PW1's father called to tell him that PW1 had not arrived home and he had information that she had been kidnapped by the appellant. PW3 reported to Sipili Administration Police Post and the police accompanied him to the appellant's home where they found people had beaten him up and he was taken to the post.

PW4 Cheruiyot Lechora, a clinical officer from Sipili Health Centre attended to PW1 on 10/4/2017 at 8.00 a.m. Her clothes were torn. He found that her shoulders were swollen, her genitalia were swollen and she had a foul smelling discharge.

PW5 Margaret Mugure, Community nurse at Sipili Health Centre also attended to PW1 about 10.30 a.m. He examined her private parts but there were no lacerations but there was no hymen but nothing traumatic had happened. She filled the PCR forms on 10/4/2017.

PW6 Cpl. Jacob Musungu of Sipili Patrol Base, the investigation officer, was at the base when the appellant was taken there in company of the complainant and members of public, who reported that the appellant had forced PW1 to his house and defiled her. He noted that the appellant had been beaten up and was taken for treatment at Nyahururu Hospital whereas the complainant was treated at Sipili Health Centre.

When called upon to defend himself, the appellant said that he was given a motor cycle with chang'aa by the chief, to take it to the police station and that the complainant and her witnesses attacked him with bars and arrows and shot at his face and hands.

I have carefully reviewed the evidence on record and read the judgment of the trial court and the grounds raised on appeal. The trial court considered Section 8(1) of the Sexual Offences Act which defines defilement as:

> ***"a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

To prove an offence of defilement, the following elements:

> ***(1) Proof of penetration;***
>
> ***(2) Proof of the victim's age;***
>
> ***(3) Proof of the perpetrator's identity.***

PW1 told the court that she was 17 years. Her evidence was corroborated by the production of her birth certificate which shows that she was born on 28/6/2000. As of 9/4/2017, the complainant was just about to turn 17 years old. She was therefore a minor.

The appellant complained that penetration which is a key ingredient of the offence of defilement was not proved. Penetration is defined under Section 2 of the Sexual Offences Act as:

> ***"the partial or complete insertion of the genital organ of a person into the genital organs of another person."***

The complainant vividly narrated how the appellant chased her, caught her, forcefully took her to his house where he forcefully inserted his genital organ into hers after efforts to rescue her by appellant's family failed. On examination by the nurse and doctor, she was found to have no injuries to her genitalia. The hymen was missing and there was a whitish foul smelling discharge. The clinical officer PW4 found that both shoulders were swollen and her clothes had tears; PW4 and 5 did not tell the court whether the hymen was recently torn or not and hence broken because of the sexual act. The torn clothes, injuries to the shoulders are evidence of the force used on the complainant. The trial court was convinced that the presence of the foul smelling discharge with epithelial cells goes to corroborate the act of penetration.

PW1 was the sole witness to the alleged act as is common in most sexual offences. The trial court considered Section 124 of the Evidence act which provides that no corroboration is required in cases of sexual offences and the court may convict on the evidence of a complainant if it believes the complainant to be truthful. The court made a finding that the complainant was truthful and her evidence was corroborated by the tears on her clothes and the swollen shoulders.

PW1 said that the appellant beat her and forced her into taking part in the sexual act. I am satisfied on the evidence on record that the trial court correctly found that there was evidence of penetration.

The appellant's ground that there was no penetration is untenable in light of the provisions of Section 124 of the Evidence Act.

It was the appellant contention that no DNA was conducted to connect him to the offence. It is trite law that the offence of defilement or rape is not proved by DNA. The offence of defilement can be proved by oral or circumstantial evidence. In the case of ***AML v Republic (2012) eKLR***.

The court held as follows:

> ***"The fact of rape or defilement is not proved by a DNA test but by way of evidence."***

The same position was echoed in ***Kassim Ali v Republic MSA Cr.A.84/2005*** where the court said:

> ***"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 of a victim of rape or by circumstantial evidence."***

There is no requirement in law that a charge of defilement or rape should be proved by DNA or medical evidence.

The appellant also complained that relevant witnesses, that is, the mob that beat him or the neighbours, his mother and brother who allegedly tried to rescue the complainant from the appellant.

Section 143 of the Evidence Act provides that no particular number of witnesses in absence of any provisions of the law, to the contrary, is required to prove any fact. It means a fact can be proved even by even one witness.

In the case of ***Keter v Republic (2007) IEA 135***, the court held inter alia that:

> ***"The prosecution is not obliged to call a superfluity of witness but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."***

In ***Cr.A.257/2009 Benson Mbugua v Republic (ELD)*** the court held that it is the general principle that it is the discretion of the prosecution to call whoever they wish to call as a witness and it is not for the defence to determine that issue for the prosecution. However, in exercising that discretion, the prosecution should not fail to call relevant witnesses for some oblique motive, ***(see Bukenya & others v Republic (1972) EA 549***. Otherwise, an inference would be drawn that if called, the evidence would have tended to be adverse to the prosecution case.

In the instant case, PW1 mentioned that neighbours came to try and rescue her but the appellant overpowered them. There is no evidence that she recognized any of the neighbours. As respects the appellant's mother and brother, there is evidence that they declined to record statements. PW2 told the court that he went to the appellant's house and with the help of the crowd, they broke in, found the appellant armed with a mattock and found PW1 therein. He testified as to what happened. There is no evidence that he knew the crowds. Besides, if the prosecution are satisfied that witnesses called were sufficient, there is no need to call a superfluity of witnesses.

As respects what time the appellant was arrested, PW1 was accosted in the evening of 9/4/2017 about 6.00 p.m. and PW1 said she was rescued on the same night. PW2 said they were informed of PW1's kidnap by the appellant's brother about 11.00 p.m. and they proceeded to the appellant's house the same night. PW3 talked of having been called by PW1's father around 1.00 a.m. on 9/4/2017 and he went to the police station where he found the appellant beaten and injured. PW4 saw the complainant on the morning of 10/4/2014 and PW6 received the appellant at police station about 3.00 a.m.

I find that the incident occurred on 9/4/2017, when the appellant detained PW1 and the appellant was arrested on same night at about 1.00 a.m. on 10/4/2017.

PW1's evidence was corroborated by PW2's testimony that she was indeed rescued from the appellant's house. In the process of the rescue, that is when the appellant was assaulted because he was armed and refused to open. I have no doubt as to the identity of the perpetrator who is the appellant. PW1 was found in his house on the night of 9th and 10th April, 2014.

In his submissions, the appellant claims to have been a police informer and that the complainant and her family framed him because he had caused them to be arrested with illegal liquor brewing.

In his defence, however, the appellant claimed to have been given a motor cycle by the chief which had chang'aa to take to police station and that is when the complainant and her brother's attacked him at night.

In cross examination of PW1, the appellant claimed that he had caused the complainant's alcohol to be poured in 2015 which PW1 denied

knowledge of. In any event, it is not a reason why the complainant and the family would wait from 2015, to attack the appellant in 2017 or have him framed.

The defence is very contradictory and not believable. Like the trial court rejected it as without merit, likewise, I find the defence to be contradictory and unbelievable and therefore dismiss it.

In the end, I find that the prosecution did prove its case to the required standard of beyond any reasonable doubt and the conviction must stand.

The appellant was sentenced to 15 years imprisonment under Section 8(4) of the Sexual Offences Act. The said Section provides for a minimum sentence of 15 years upon conviction where the victim of defilement is between 15 and 18 years. The appellant has complained that the sentence is harsh.

In the recent Court of Appeal decision of ***Jared Koita Injiri v Republic CRA.93/2014 ,*** the court adopted the reasoning by the Supreme Court decision in ***Francis Karioko Muruatetu and another v Republic SC.Pet.16/2015***, where the Supreme Court declared Section 204 of the Penal Code that provided for mandatory death sentence, unconstitutional, for reasons that it denied the court discretion in sentencing. The same reasoning was applied by the Court of Appeal which held that the mandatory sentence stipulated by Section 8(2) of the Sexual Offences Act was unconstitutional. The Court of Appeal reduced the sentence from life imprisonment to 30 years imprisonment where the victim of defilement was 9 years old.

In this case the complainant was 17 years old. However, I take into account the force and violence that the appellant employed when he accosted the complainant and fought off those who came to rescue the complainant. I will sentence him to 9 years imprisonment and the sentence will run from the date he was imprisoned by the trial court, on 18/4/2018.

It is so ordered.

Dated, Signed and Delivered at *NYAHURURU* this *28th* day of *June,* 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – Prosecution Counsel

Soi – Court assistant

Appellant - present