REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 29 OF 2016

GEOFFREY KINUTHIA KINYANJUI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case No. 314 of 2015 by Hon. J.W. Onchuru (PM) dated 31st March 2016)

JUDGMENT

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the year June 2014 and 17th June, 2015 at [particulars withheld] Village, Hongwe Location, Mpeketoni Division in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MW a child aged 13years.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on diverse dates between the year of June 2014 and 17th June, 2015 at [particulars withheld] Village, Hongwe location, Mpeketoni Division in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully touched the vagina of MW a child aged 13 years.

3. The accused pleaded not guilty and at the conclusion of the trial, the Appellant was convicted and sentenced to imprisonment for 10 years.

4. The Appellant being aggrieved by the conviction and sentence lodged his homemade petition of appeal on twelve grounds. He stated that the prosecution witnesses contradicted themselves; that there was no medical evidence of recent penetration; that the victim's father had a grudge against him, and; that the sentence was too harsh. He sought that the court orders a retrial.

5. The Appellant filed written submissions on the 4th April 2019 in support of his appeal. His submissions were to the effect that the prosecution failed to prove its case beyond reasonable doubt. He submitted that there was no medical evidence of penetration; there was no identification as no report was made to the police, village elder or chief for over a year, and; that the age of the minor was not proved. The Appellant further submitted that there were contradictions in the prosecution case; that the charge sheet did not specify the date and time of the offence and that his defence was not considered.

6. During hearing the Appellant further submitted that there was a grudge over mangoes between the complainant's father and himself. He asked the court to have his case retried.

7. Mr. Kasyoka learned counsel for the Respondent opposed the appeal in its entirety. In oral submissions, Counsel submitted that all the elements of defilement had been proved to the required standard during trial. He argued that there was no evidence of a grudge or trumped up charges and that the Appellant's submission was an afterthought. Counsel further submitted that the conviction was safe and asked the court to uphold the conviction.

8. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions. See **Okeno v R (1972) EA 32.** See also **Eric Onyango Odeng' v R [2014] eKLR.** Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and I can only rely on the evidence that is on record.

9. I have considered the grounds of appeal, the record and the respective submissions. The only issue for determination is whether the prosecution proved its case against the Appellant beyond reasonable doubt as required by law.

10. The elements of defilement are: age the of the victim, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

11. On the age of the complainant, the Sexual Offences Rules of Court 2014 **Rule 4** provides that:-

> ***"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."***

12. In the case of **William Odhiambo Siara -Vs- Republic [2014] E Klr H.C At Kisumu, Criminal Appeal No. 77 Of 2012 Muchelule J held that:-**

> ***"It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and, unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence. An age assessment by a doctor would be useful, but it should be borne in mind that any such assessment is a medical approximation. I am satisfied that PW3 was 12 going to 13."***

13. In this case, the victim, MWK (PW1), produced her birth notification (Exh1) which showed her date of birth to be 11/7/2001, which was not disputed by the Appellant. It was the same age that was indicated in the P3 form (Exh 2) produced by the clinical officer (PW5). It is abundantly clear from the birth notification that at the time of the latest incident on 17th June, 2015 the victim was only 13 years of age and therefore the age of the victim was satisfactorily proved.

14. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

> ***"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."***

15. In this case, the victim (PW1) gave evidence that on 17th June 2015 on her way from school at noon, she went to look for mangoes when she saw the Appellant picking mangoes. That the Appellant took her to his house and removed her pants. However, before anything could happen, her father FK (PW4) and brother NK (PW3) came to the Appellant's house and to ordered him to open the door.

16. The victim further told the court that the Appellant on several occasions took her to his house, removed her undergarments and defiled her. He would then give her money, between Ksh. 30/- to Ksh. 50/-, which she would use to buy "kangumu".

17. Her testimony was corroborated by the clinical officer, Stephen Ewoi, PW5. He produced a P3 (Exh 2) which indicated that while the external genitalia was normal the vaginal canal could accommodate two fingers. In his remarks, PW5 stated that there was conclusive proof to support recurrent penetration.

18. The Appellant's argument that the medical evidence did not reveal the presence of spermatozoa, that the genitalia was normal and that she lost her virginity long time before does not hold water. The charge refers to a long period of defilement on diverse dates between the year 2014 to 17th June, 2015. The evidence adduced, reveals that on 17th June 2015 the Appellant did not manage to defile the victim due to the timely intervention of her father and brother and this would explain the genitalia being normal and the lack of spermatozoa. However, the evidence by PW1 and PW5 did point out to the fact that the victim had been defiled severally before and it was not limited to the one occasion when the Appellant was finally caught.

19. It is also well established that a court can convict on the sole evidence of a victim of sexual assault under section 124 of the Evidence Act as long as the court is convinced the victim is telling the truth and records reasons for such belief. See **Arthur Mshila Manga v Republic Criminal Appeal No. 24 Of 2014 [2016] eKLR.**

20. In his judgement, the trial magistrate found that the victim was able to narrate the several occasions that the Appellant defiled her and given her money. The court found her to be honest and credible with no reason to doubt her. I find that penetration was conclusively proved.

21. On the issue of identification, it was the victim's evidence that the Appellant was her neighbour and she knew him as "Man B". She was able to identify him in court. She further told her teacher, PW2, that she had been hit by her father after she was found in "Man B's" house.

22. This was corroborated by her brother, PW2, who stated that he saw the victim go to Kinuthia's house who was their neighbour and informed his father. PW2 was able to recognize the Appellant in court. The victim's father (PW4) told the court that his son, PW2, came and informed him that the victim had been taken to Man B's house. He proceeded to the Appellant's house immediately where he found his daughter.

23. This was a clear case of identification by way of recognition. It is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in **Francis Muchiri Joseph – V- Republic [2014] eKLR** where it stated that:

> ***"In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…."***

24. The Appellant was well known to the victim, as he was her neighbour, a fact not disputed by the Appellant. She was further able to give his name to her teacher, PW2, when the teacher asked her she was beaten. PW3 the victim's brother was able to identify the Appellant by name to his father. On his part, his father immediately went to the Appellant's house a clear indication that he knew the Appellant by name. Furthermore, the victim was found in the Appellant's house and the Appellant was arrested by Pw4 in his house where he had locked the victim and was about to defile her again. I find that the evidence leaves no shadow of doubt that the Appellant was positively identified.

25. The Appellant contended that his defence was not considered and that the victim's father had a grudge. The Appellant's defence was that he left home and returned at 6pm when he went to bed until 8pm when he was arrested by the chief. The trial magistrate considered the defence and found it to be a general denial and disregarded it. I agree with the trial court's rejection of that defence. There may have been a grudge between the father of the victim and the Appellant but that would have no bearing on the question whether or not the Appellant defiled the victim.

26. On the issue of contradictions, the Appellant claims that there was contradiction as to the age of the victim as she stated she was 14 years old yet the P3 indicated that she was 13 years old. This is not a contradiction since at the time the offence took place the victim was still 13years old but when she was testifying she was already 14 years. After examining the record I find no other contradictions as claimed by the Appellant and this ground therefore fails.

27. The Appellant also contended that the charge sheet was defective as it did not provide the exact date and time of the offence.

28. Section 134 of the Criminal Procedure Code provides that:-

> ***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

29. The question is whether the information in the charge was sufficient for the Appellant to know the offence he was charged with. A look at the charge sheet shows the information was sufficient for the Appellant to know that he was charge with defiling the victim between the year 2014 to 17th June 2015.

30. The Appellant also contends that the sentence meted out was too harsh. Section 8(3) of the Sexual Offences Act provides that:-

> ***A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

31. It is clear that the sentence of 10 years meted out by the trial magistrate was 10 years below the mandatory minimum sentence of 20 years and the same ought to be enhanced.

32. However, the Court of Appeal in **Evans Wanjala Wanyonyi v Republic Criminal Appeal No. 312 Of 2018 [2019] eKLR** held that:-

> ***"In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015."***

33. In view of the above case I shall not interfere with the sentence meted out by the trial magistrate.

34. In the final analysis I find no merit in the appeal and uphold both the conviction and the sentence. The Appeal is dismissed.

Orders accordingly.

Judgment delivered, dated and signed at Garsen this 26th day of June, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

The Appellant in person

S. Pacho - Court Assistant

Mr. Kasyoka for the Respondent