REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 35 OF 2018

WILLIAM KAMAU TSANGO...........APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal against conviction and sentence by Hon. Nang'ea, Chief Magistrate, delivered on 24th April, 2018 in Mombasa Chief Magistrate's Court Sexual Offence No. 245 of 2017)

JUDGMENT

1. The appellant, William Kamau Tsango, was convicted for the offence of 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 charge were that on the 5th day of May, 2016 in Likoni Sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of BMH (name withheld), a child aged 16 years. He was sentenced to serve 20 years imprisonment.

2. The appellant was dissatisfied by the decision of the Trial court and filed a petition of appeal on 18th May, 2018 through the law firm of Munyao, Muthama & Kashindi Advocates. He raised the following grounds of appeal:-

(i) That the Learned Magistrate misdirected himself in fact and law by holding that the medical findings corroborated the complainant's evidence of penetration of her genital organs;

(ii) The Learned Magistrate misdirected himself in fact and law by holding that it was clear that the *'mdudu'* described by the complainant as having been used to penetrate her was the appellant's penis.

(iii) The Learned Magistrate misdirected himself in fact and law by holding that the complainant was under the age of 15 at the time of the penetration, if any;

(iv) The Learned Magistrate misdirected himself in fact and law by finding that the appellant unlawfully and intentionally penetrated the complainant's genital organs;

(v) The Learned Magistrate misdirected himself in fact and law by making a finding that since the appellant was found in his house with the complainant on the material date, it corroborated the complainant's evidence that the appellant was the culprit;

(vi) The Learned Magistrate misdirected himself in fact and law by finding that there was overwhelming evidence to charge the appellant yet the Investigating Officer testified under oath that there was no evidence to charge him;

(vii) The Learned Magistrate misdirected himself in fact and law by finding that the appellant was the complainant's defiler;

(viii) The Learned Magistrate misdirected himself in fact and law by finding that the prosecution had proved the main charge against the appellant beyond reasonable doubt; and

(ix) The Learned Magistrate misdirected himself in fact and law by sentencing the appellant to twenty (20) years in prison.

3. It was PW2's evidence that he went back home and interviewed PW1's step-mother who told him that PW1 had left for School. His other daughter told them that PW1 had been found in a house belonging to Ibrahim. She also told him that the said man had gone to their house and hired an axe and a jembe. She was however curious since Ibrahim was not their regular customer in the hiring of such implements. PW3

told PW2 that she followed Ibrahim up to his house and heard PW1 crying inside.

4. PW3 was BMH (name withheld) who was PW1's elder sister. She testified that on 5th May, 2016, PW1 went to School in the morning. Her father then went there at 9.00 a.m., when he returned home he told her that PW1 was not at School. PW3 gave evidence that at 10.00 a.m., one of her usual customers went to buy snacks but they were not ready. He returned 30 minutes later and asked for an axe. She clarified that her parents hire out such tools.

5. PW3 testified that on the evening of the day the incident happened, the boy's mother and the area Village Elder went to their home and requested for settlement of the matter. PW2 declined and told them that the matter was with the Police. PW3 indicated that they became angry and a man who was accompanying the Village Elder dared their father to pursue the matter.

Submissions made before this court

6. Mr. Mugambi, Learned Counsel for the appellant submitted that the appellant's arrest and prosecution was coerced and forced. He elaborated the said claim by stating that after the incident, the Investigating Officer was of the view that no offence had been committed. He submitted that 9 months later, the Investigating Officer was called by the Regional Commissioner, Mr. Marwa, to inquire about the said case and that he ordered for the appellant to be arrested and charged.

7. Counsel submitted that the appellant was a stranger to PW1 and her father, PW2. It was further submitted that PW3 who was PW1's sister said that she did not know the appellant's name and that the 3 witnesses referred to the appellant as ***Ibrahim*** but none explained how the name changed to ***William***. Mr. Mugambi therefore stated that since there was no identification parade conducted, the dock identification done was not proper. He cited the case of **Jali Kazungu Gona vs Republic** [2017] eKLR at page 19 paragraph 14, to support his submission.

8. In making reference to the evidence of PW1, PW3 and PW5, the appellant's Counsel posited that the alleged incident happened at a public place. He elucidated on the same by saying that PW1 testified that the appellant showed her his house and that PW2 said that the house was by the road side and on the way to their house. It was submitted that it was said that the incident happened at 6.00 a.m. He argued that since it happened near a school, students and teachers must have been passing by. Further, that if the testimony given by PW1 detailing that the appellant dragged her into his house as she was screaming was true, members of the public would have heard her cries for help.

9. He cited the case of **David Ochieng Aketch vs Republic** [2015] eKLR, where the court held that an incident of struggling and pushing would have attracted the curiosity and attention of passersby. It was also stated that the Doctor said there were no injuries sustained as a result of the struggle. He relied on the case of **Moses Kipchirchir vs Republic** [2017] eKLR to support his argument.

10. The appellant's Counsel argued that prosecution witnesses gave inconsistent evidence, such as by PW2 having said in his evidence that when he broke into the appellant's house, he found PW1 wearing her clothes yet PW1 said that she was tied up. He submitted that the foregoing was contradictory to the testimony of PW3 who said that they found PW1 emerging from the appellant's bedroom but did not say she was tied up.

11. On the part of PW1's testimony where she said she was beaten by Police Officers, Mr. Mugambi was of the opinion that it was not possible for her to have been beaten by Police Officers in the presence of her father, as he stood aside and watched it happen. He doubted PW1's evidence that she was detained at the Police Station for 8 days.

12. In regard to PW1's broken hymen, he submitted that it does not necessarily mean that there was sexual intercourse as a hymen can be broken by any other means. Counsel for the appellant made reference to the case of **Moses Kipchirchir vs Republic** (supra) where the court held the said view. It was submitted that the Doctor's report made no mention of penetration and that it was not logical for the appellant to have penetrated PW1 once. He prayed for the appeal to be allowed.

13. Ms Marindah, Prosecution Counsel relied on her written submissions filed on 5th February, 2019. She took the position that the prosecution's case was proved beyond reasonable doubt. She stated that the appellant was arrested several months after the commission of the offence and that the Police could not determine if the case met the evidentiary threshold. She said it was therefore up to the Director of Public Prosecutions (DPP) to determine whether to charge the appellant or not.

14. She submitted that the Police detained PW1 at Likoni Police Station for 8 days and it was apparent that the Police Officers who investigated this case were biased. She indicated that PW1 sought refuge at the Police Station but was detained until Mr. Marwa intervened. She indicated that PW2 was told to go home and leave his child (PW1) at the Police Station pending investigations.

15. In regard to the identification of the appellant, the Prosecution Counsel was of the view that it was by way of recognition as the appellant lived 100 metres from PW1's house. Furthermore, he had gone to PW2's house to look for him on the material day.

16. She submitted that the appellant was found naked and PW1 was with him. In addition, PW2 was in the company of PW5 and others when they rescued PW1 from the appellant's house.

ANALYSIS AND DETERMINATION

17. The duty of the first appellate court is to analyze and re-evaluate the evidence tendered in the Trial court and come to its own independent decision, while bearing in mind that it has neither seen nor heard witnesses testify and make an allowance for that. In **Okeno vs Republic** (1972) EA 32, the Court of Appeal held as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

18. The issues for determination in this appeal are:-

(i) If the age of PW1 was established;

(ii) If the appellant was positively identified ;

(iii) If the prosecution proved its case beyond reasonable doubt; and

(iv) If the sentence was harsh or excessive.

If the age of PW1 was established

19. The appellant was convicted for the charge of defilement of a child aged 16 years. PW1's father who testified as PW2 was recalled on 2nd November, 2017 and he produced the birth certificate for PW1 which gave her date of birth as 21st July, 2001. According to the charge sheet, the offence occurred on 5th May, 2016. PW1 was therefore 15 years of age as at the time of the alleged offence. The age of PW1 was proved as that of a minor who was not capable of giving consent to the appellant to have sex with her.

20. The charge sheet gave the age of PW1 as 16 years. It is this court's finding that the said error in the charge did not prejudice the appellant in any way as it is curable under the provisions of Section 382 Criminal Procedure Code. The Trial Court also found that PW1 was 15 years old as per her birth certificate.

If the appellant was positively identified

21. In her evidence, PW1 stated that the appellant lived a short distance from their home. He was however a stranger to her when she first met him on 4th May, 2016 when she was on her way home from school. In her evidence, PW1 stated that when she met the appellant, he introduced himself as ***Ibrahim***. PW2 testified that he had not seen the appellant before the 5th of May, 2016. They however found his daughter (PW1) in the appellant's house. They found the appellant naked in the said house.

22. PW3 testified that the appellant was her regular customer who used to buy snacks from her and that on 5th May, 2016 he bought juice from her. She stated that the appellant was commonly known in their area as ***Ibra***. On cross-examination, PW3 stated that she had known him for 3 years.

23. PW3 in her evidence stated that on 5th May, 2016 she became curious when the appellant went to their home and asked for an axe. She told him that her father who hires out such tools was not in. She did not therefore give him the axe. However, out of curiosity, she decided to take the axe to his house. She called out his name but he did not respond. When she peeped through a crack in the house, she saw him standing.

24. When PW2, PW3 and PW5 went in search of PW1 in the appellant's house, they found her in there. The appellant was well known to PW3 before he was charged in court and therefore the issue of mistaken identity does not arise. Although the charge sheet gives the name of the appellant as ***William Kamau Tsango***, I am satisfied without a doubt that he was commonly known as ***Ibrahim*** or ***Ibra*** in their neighborhood. In the said circumstances, an identification parade would have served no useful purpose.

If the prosecution proved its case beyond reasonable doubt

25. PW1 was fooled by the appellant into giving him her math exercise and text books in the pretext that he would assist her to do her homework. After some coaxing, she agreed to do so on condition that she would pick her books the following morning with her math homework duly done.

26. The following day at 6.30 a.m., PW1 passed by the appellant's house and asked for her books through the window. The appellant requested her to get into his house but she refused. They quarreled. In an effort to retrieve her books from the appellant's house, she went to his doorway but the appellant dragged her inside. She tried to scream but he covered her mouth with his hands. He removed her school uniform and then removed his clothes. In PW1's words, he then put his *"mdudu"* which is used for sexual intercourse and to urinate by men, into her vagina. He penetrated her once. He then left and locked the door from outside and returned after 1½ hours. PW1's evidence was that although she screamed, nobody went to her rescue. She said that he had tied her hands and legs with clothes. He had also covered her mouth.

27. The evidence on record was that PW1 was rescued from the appellant's house and he was found naked. According to PW1, the appellant wanted to penetrate her again. The foregoing evidence shows the extent of the appellant's culpability in the offence of defilement. The appellant had no justifiable reason whatsoever to lock PW1 in his house. The fact that he was found naked in his house by PW2, PW3 and PW5, together with PW1 who should have been in school is evidence of criminal intent.

28. What followed after the appellant was arrested was frustration of PW1 and PW2 in the hands of some Police Officers at Likoni Police Station who set out to ensure that the appellant was not charged. According to PW2 the appellant was arrested and released after 2 days. PW2 testified that PW1 was detained at the said Police Station for 8 days. PW3 stated that PW1 was held at the said police station for a week. In PW1's evidence, the Police made her write a false statement after she was beaten. This led her to tell the Police that it was one Ali who had defiled her. Mr. Mugambi urged this court to disbelieve the evidence of PW1 detailing that she was locked up for 8 days at Likoni Police Station. This court however believes the evidence of PW1, PW2 and PW3 to that effect. It is obvious that some police officers and some of the appellant's family members were out to obstruct justice in favour of the appellant.

29. The testimony of the Investigating Officer lends credence to the evidence of PW1, PW2 and PW3 that PW1 was frustrated in her pursuit of justice against the appellant. The said Officer who previously worked at Likoni Police Station on being cross-examined by the appellant said that she was not certain of the evidence. This court notes that had it not been the spirited effort of her father, PW2, to get justice for his daughter, the appellant would not have been charged. It was the evidence of PW2 and PW3 that the appellant's mother, the area Village Elder and the appellant's relatives on 5th May, 2016 at 8.00 p.m., went to PW2's house and suggested that they resolve the matter out of court. PW2 further said that he put his phone on loud speaker when he was called by a Police Officer from Likoni Police Station who asked him to take his daughter to the said station for recording of her statement. PW2 stated that one of the men who had gone to his house to persuade him to settle the case out of court abused him and told him that they would influence the Police to drop the charges. PW2 further stated that after PW1 was released from police custody after 8 days, she had swellings on her back due to the beatings she had sustained at the Police Station and that her step-mother soothed the wounds with warm water.

30. PW1 was examined at Likoni District Hospital on 5th May, 2016. The medical notes indicate that she was frightened and shaken. On vaginal examination, she had fresh mucoid fluid oozing from the vagina, her hymen was broken but she was not bleeding. Her vagina was tender but not swollen. The conclusion was that she had been defiled. A Post Rape Care form filled on 5th May, 2016 indicated that she had a vaginal discharge. Her hymen was broken. There were no blood stains. As at the time she was examined at Coast Province General Hospital for filling of the P3 form, it was established that her hymen was broken.

31. PW1 testified that the appellant penetrated her once with his *"mdudu"*. She clarified that mdudu means the body part which men use for sexual intercourse and to urinate with. It left no doubt in the court's mind that the body organ PW1 was calling a *"mdudu"* is a penis.

32. Inasmuch as the appellant's Counsel submitted that penetration was not proved. I am of the considered view that there was ample evidence of penetration of PW1's vagina from her evidence and that of the Doctor PW4, who produced medical notes, PRC and P3 forms for PW1.

33. Apart from the direct evidence of PW1, the circumstantial evidence on record inextricably connects the appellant to the commission of the offence. PW3 on the morning of 5th May, 2016 saw PW1's shoes outside the appellant's house. When PW2 told PW3 that PW1 had not gone to school, she told him that she knew where PW1 was as she had seen her shoes outside the appellant's house. When PW2, PW3 and PW5 went to the appellant's house they found him naked and PW1 was in the said house. The appellant could not have stripped his clothes off for the purpose of assisting PW1 with her homework. The state the appellant was found in and the medical evidence adduced conclusively established that he is the only one who had the opportunity to defile PW1 and not one Ali.

34. The submission by Mr. Mugambi stating that it cannot be true that PW1 was defiled since the appellant's house was by the roadside yet no one went to assist her boils down to whether the appellant's neighbours were present in their houses or not and if there was any member of the public who happened to pass by the road near the appellant's house at the time of the defilement. Moreover, PW1 testified that the appellant covered her mouth when she tried to scream as he was dragging her into his house. He then covered her mouth. There was therefore no way in which PW1 would have attracted the attention of PW1's neighbours and passersby.

35. The contradictions in the prosecution's case, was that PW2 said that when he broke into the appellant's house, he found PW1 wearing her clothes, whereas PW1 said that she was tied up. PW3 on the other hand said that they found PW1 emerging from the appellant's bedroom.

36. In **Ahamad Abolfathi & Another vs Republic** [2018] eKLR**,** the Court of Appeal cited the case of **John Nyaga Njuki and 4 others vs Republic**, Criminal Appeal No. 160 of 2000 in which the Court expressed itself as follows with regard to the issue of discrepancies in the evidence of witnesses:-

> ***"In certain criminal cases particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, minor in nature considering the facts and circumstances of the case."***

37. It is the finding of this court that the contradictions in the evidence tendered by the witnesses who testified in the court below do not affect the veracity of the evidence against the appellant in having defiled PW1.

38. When called upon to give his defence, the appellant opted to remain silent. That was well within his rights. Having considered all the evidence adduced, it is my finding that the prosecution proved its case beyond reasonable doubt. I uphold the conviction.

If the sentence was harsh or excessive

39. Section 8(3) of the Sexual Offences Act provides for a minimum sentence of twenty years imprisonment for an offender who defiles a child between the age of twelve and 15 years. In this case, it was proved that PW1 was 15 years of age as at the time she was defiled. The sentence imposed against the appellant of 20 years imprisonment was lawful. I uphold the said sentence. The appellant has 14 days right of

appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of September, 2019.

NJOKI MWANGI

JUDGE

In the presence of: -

Appellant present

Mr. Muthomi, Prosecution Counsel for the DPP

Ms Peris – Court Assistant