REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 24 OF 2019

JOHN KARANJA NG'ANG'A.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence by Hon. N. M. Kyanya – SRM Gatundu dated and delivered on the 29th day of October 2018 in the original Thika Chief Magistrate's Court Criminal Case No. 90 of 2017}

JUDGEMENT

The appellant was sentenced to twenty (20) years imprisonment upon conviction for **Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.** The particulars of the charge stated that on diverse dates between 12th and 19th November 2017 at around 1830hrs in Thika West Sub-county within Kiambu County he intentionally and unlawfully caused his penis to penetrate into the vagina of MA a child aged 13 years.

Being aggrieved by the conviction and sentence the appellant preferred this appeal. The grounds of appeal are: -

> **"1. That the learned trial magistrate erred in law and facts when he conducted my trial without considering the provisions of article 50 (2) (b) of the Constitution of Kenya 2010.**
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> **2. That the learned trial magistrate erred in law and facts when he relied on the inconsistent evidence adduced by the prosecution's side.**
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> **3. That the learned trial magistrate erred in law and facts when he convicted me in the present case yet failed to see that no proper investigations were done in this case and that the key witness did not identify vital exhibits.**
>
> **4. That the learned trial magistrate erred in law and facts when he conducted the trial in violation of Section 213 of the CPC."**

The appeal is opposed.

As an appeal is in the nature of a retrial, my duty as the first appellate court is to re-consider and evaluate the evidence before the trial court so as to arrive at my own independent conclusion. I do so bearing in mind that I did not see or hear the witnesses giving evidence and making provision for that **(see Okeno v Republic [1972] EA 32).**

Briefly the facts of the case were that on 12th November 2017 the complainant who at the time was 13 years old disappeared from home and her father (Pw5) could not find her. Four days later he was called by an officer (Pw3) who asked him to go to Makongeni Police Station and there informed him that the complainant had been taken there together with a young man she had been found with. In court, the complainant told the court that on that material day at about 7pm the appellant found her at their gate and grabbed her by the waist and took her to his house; that on that day the appellant tried to have sexual intercourse with her but she resisted and started shouting and she slept on the floor and he slept on the bed. The next morning however, he locked her up in the house and went to work. She testified that while he was away she saw a small boy and asked him for a knife to open the door but the boy refused. That evening the appellant again attempted to have carnal knowledge of her but she again refused and this time her screams were heard by a woman who demanded to know who was screaming. The appellant allegedly told the woman that they were friends. This happened again the next day but his attempts were again thwarted by a neighbour who threatened to report the matter to the appellant's landlord if the person screaming did not stop. The complainant stated that when the appellant left for work the next morning he locked the door with two padlocks and when he returned in the evening he became violent and this time forced himself on her and penetrated her saying he would marry her. He did that even the next day but when his landlord went to his house for rent and found her she (appellant's landlady) reported to the area Assistant Chief that she had seen a child in the appellant's house. This prompted the Assistant Chief (Pw4) and David Chege (Pw2) to go to the appellant's house. Upon

confirming their ages, the Assistant Chief (Pw4) took both of them to Makongeni Police Station. The girl was then taken to Thika Level 5 Hospital for examination. According to Dr. Kiprotich Ngetich (Pw5) the results of the examination revealed the girl had been defiled. The appellant was then charged with this offence.

In his defence (unsworn) the appellant stated that he had merely accommodated the complainant and that when in the morning she refused to leave he held her by the hand and removed her from his house.

Having evaluated the evidence by both side carefully, I am satisfied the charge against the appellant was proved beyond reasonable doubt. The ingredients of the offence of defilement which are age of the victim, penetration and identification of the perpetrator were duly proved against the appellant. Although the complainant stated that she was thirteen years old, the Post Rape Care Form (PRC), the lab requisition forms, the P3 Form and her father all put her age at fourteen (14) years. In the judgement the trial Magistrate has alluded to a baptism card indicating the age of the complainant as thirteen years but I could not find it in the file. It is my finding therefore that the age of the complainant was proved by the documents tendered in evidence and that she was fourteen years at the time of the offence.

Regarding her testimony, I must admit that the same was inconsistent. She was inconsistent as to the reason she was at the gate where the appellant found her and she was also less than candid when she told the Assistant Chief (Pw4) that she was an orphan and the appellant had just accommodated her. Her inconsistency does not however vitiate the fact that the appellant stayed with her, a child, in his house for a number of days. The appellant himself admitted that the Assistant Chief (Pw4) found them together. The Assistant Chief's attention that the appellant had a minor in his house was drawn by the appellant's landlord. The complainant testified that whereas she resisted the appellant's advances in the first two days he eventually forced himself on her and had sexual intercourse with her. The law does not require corroboration in sexual offences – (**see the proviso to Section 124 of the Sexual Offences Act)** and in **Kassim Ali v Republic Criminal Appeal No. 84 of 2005 (Mombasa)** the Court of Appeal held that the absence of medical examination to support the fact of rape is not fatal as rape can be proved by oral evidence of a victim or by circumstantial evidence. Much as the complainant was inconsistent I believed her evidence that the appellant eventually had his way and committed an act which caused penetration of his genital organ with her genital organ.

In his submissions the appellant contends that he did not follow the proceedings. However, it is recorded that the witnesses testified in Kiswahili which language is what the appellant elected even in this appeal. I am satisfied that the proceedings were conducted in a language he could understand and it may have been his choice not to ask questions.

In regard to disclosure of the evidence of the prosecution, the record reveals that on 28th January 2018 the trial court granted the appellant's application for witness statements and documentary evidence. It also shows that the trial was adjourned severally so that the appellant could be supplied with a P3 Form. The same was finally supplied on 20th March 2018. From a reading of the record, the appellant must have been supplied with all the other evidence since he did not raise the matter again save for the P3 Form which as I have stated was supplied. It is therefore my finding that the submission by the appellant that his right to a fair trial was violated is not correct.

The documentary exhibits need not have been identified by the victim of the offence for them to become admissible. It is my finding that it was sufficient that Dr. Kiprotich (Pw6) confirmed that the same were completed at Thika Level 5 Hospital and produced them in evidence. The Investigating Officer (Pw3) testified that she issued a P3 Form to the complainant. She identified that P3 Form as the one before the court. The P3 Form was subsequently produced by the Doctor (Pw6).

As for the age of the victim the question of proof of age was settled by the court of Appeal in the case of **Mwalango Chichoro Mwajembe v Republic Criminal Appeal No. 24 of 2015** where it was held that **age can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if sufficiently intelligent or the evidence of parents or guardians or medical evidence among other credible forms of proof.** I have already made a finding that the age of the complainant was proved by the documents produced at the trial.

As for the allegation that the court did not comply with **Section 213 of the Criminal Procedure Code** the record shows that the court allowed the appellant to file submissions before writing its judgement. When on 20th September 2018 he stated his submissions were not ready the court adjourned to 24th September 2018 and it was not until he intimated the submissions were ready that the trial magistrate gave a date for judgement. In the said submissions he raised the issue of a statutory defence arising from the conduct of the complainant and referred to **Section 8 (5) (6) of the Sexual Offences Act**. The defence provided under the above section is that the appellant was deceived by the child into believing she was an adult. In my view the child must have expressly deceived the accused and it has nothing to do with the conduct of the victim as such. In any event the appellant does not allege to have taken any steps to ascertain the age of the complainant his only excuse being that she took herself to him. I find therefore that the defence does not avail to the appellant. The elements and substance of the charge of defilement which are the age of the victim, penetration and identification of the perpetrator were proved against the appellant beyond reasonable doubt and the appeal against conviction has no merit.

As for the sentence, he was sentenced to the minimum sentence of twenty (20) years imprisonment. In recent decisions by the Court of Appeal, the trial courts now have a discretion in the sentence and each case must be decided on its own circumstances **(see Evans Wanjala Wanyonyi v Republic [2019] eKLR and Christopher Ochieng v Republic [2018] eKLR).** This is in line with the principle in the Supreme Court decision in the case of **Francis Muruatetu & Another v Republic [2017] eKLR** that the mandatory nature of minimum sentences is unconstitutional.

Given the circumstances of this case, I would reduce the appellant's sentence to ten (10) years imprisonment. For the avoidance of doubt in sentencing him to ten (10) years imprisonment, I have also taken into account the one year he spent in remand custody. The appeal on conviction is dismissed but the sentence of twenty (20) years imprisonment is set aside and substituted with one for ten (10) years imprisonment. It is so ordered.

Signed and dated this 23rd day of September 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 26th day of September 2019.

C. W. MEOLI

JUDGE