REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NO. 189 OF 2015

BENSON NJOROGE NGUGI.....APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

(Being an appeal against conviction and entire in judgment in Nakuru Chief Magistrate Court - Cmcr No 178 of 2011 delivered before Hon. J.N. NTHUKU – Resident Magistrate on 30th April 2015)

JUDGMENT

1. The Appellant **Benson Njoroge Ngugi** was convicted for the offence of defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 6 of 2006**, and sentenced to twenty (20) years imprisonment on the 10th August 2015.

The offences is alleged to have been committed on the 25th September 2011, at [Particulars withheld] village to one MMC, then 13 years old hereinafter called the victim.

2. This appeal is against both the conviction and sentence, on grounds that

(a) The age of the complainant was not proved

(b) That penetration as not proved

(c) That there was no sufficient identification of the assailant

(d) Uncorroborated evidence.

The appellant relied on his written submissions filed on the 2nd April 2019.

3. **Section 8(1) Sexual Offences Act** that provides that

8(1) A person who commits an act that causes penetration with a child is guilty of an offence termed defilement.

8(3) 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.

4. For a conviction to be sustained, the trial court must satisfy itself that the victim was a

a. Child as defined under the children's Act No. 8 of 2001, below eighteen years old.

b. That there was penetration of the genital parts of the offender into the genital parts of the victim as described under Section 2 the Sexual Offences Act to mean the partial or complete insertion of the genital organs of a person in to the genital organs of another person.

c. And positive identification of the offender or assailant.

5. My duty as the first appellate court is to re-examine the totality of evidence adduced before the trial court and to satisfy myself that the said evidence supports the findings but warning myself that I never saw or heard the witnesses testify – **Republic –vs- George Anyango**

Anyang (2016) e KLR, Gabriel Gatonye Gakunga –vs- Republic e KLR, among others.

6. In **Okeno –vs- Republic (1972) EA 32 the East African Court of Appeal** rendered that

> *"It is not the function of a first appellate court merely to crutinize the evidence to see if there was some evidence to support the lower court's findings and the conclusion, it must make own findings and draw own conclusions. Only then can it decide whether the magistrate's findings should be supported….*

7. **Age of the victim** is a very essential ingredient in Sexual Offences as sentence is based on the age. The victim testified as **PW1**. Her evidence was that she was fourteen years old and in primary school class five. **PW2** the victim's mother did not testify to the victim's age, and stated that she was in class four.

PW3 the victim's Aunt testified that the victim was twelve years old.

PW4 the clinical officer who examined the victim three days after the alleged incident stated her age as thirteen years.

None of these witnesses produced any documentary evidence of age.

8. The importance of proving age of the victim in a defilement case by cogent and credible evidence cannot be gainsaid as it forms an important ingredient of the charge, because the prescribed sentence is dependent on the age. – **Hudson Ali Mwachongo –vs- Republic (2016) e KLR.**

It is trite that the component of age of a sexual offence victim can be proved not only by a birth certificate, but also through assessment certificate, baptism certificate, observations and common sense, by stating some age bracket.

9. In the case **Dominic Kibet –vs- Republic - Criminal Appeal No. 155 of 2011,** it was held that

> *"While the court may in certain circumstances rely on evidence other than and age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."*

10. Apart from medical evidence, age may also be proved by the victim's parents or guardian or by observation and **common sense.** See **Chipala –vs- Republic (1993) 16(2) MLR 498 Malawi High Court**.

It is therefore safe, in this appeal to come to a finding that the victim having been in class four, going by her own evidence and her statement of age as fourteen, and having considered the variations stated by PW2, PW3 and PW4, to hold and find that the victim **was above 12 years old, and below 15 years old** and therefore subject to **Section 8(3) Sexual Offence Act**.

I find no merit in that ground of appeal.

The **Court of Appeal in Mark Oiruri Mose –vs- Republic (2013) eKLR** rendered that

> *"----So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ…"*

See also **Erick Onyango Odeng –vs- Republic (2014) e KLR.**

11. **Was the victim therefore penetrated?**

The appellant submits that for penetration to be proved, medical proof ought to be made within 72 hours, and that the victim's evidence of a first defilement was contradictory to the doctor's evidence that the victim had previous penetration by the appellant.

12. I reproduce the clinical officer's (PW4) findings three days after the incident, as appears in the **P3 Form – PExt 1**.

> *Whitish vaginal discharge, no lacerations or bruises or blood, hymen broken, pus cells seen on urinalysis Accused male brought for urinalysis non-reactive*.
>
> *- test, no spermatozoa*.

On cross examination, the clinical officer testified that the above observations were proof of penetration.

13. The **Court of Appeal in Erick Onyango Odeng –vs- Republic (2014) e KLR** rendered that

> *"…..We agree with the appellate court that to establish defilement, it is not necessary that the hymen must be broken, even partial penetration of the female genital by the male genital will suffice to constitute the offence."*

It is therefore not in doubt that the victim was penetrated, and thus defiled. That ground of appeal fails.

14. **Whether the appellant was positively identified as the offender?**

The victim (PW1) testified to have known the appellant for a considerable period of time (over 10 years) and had visited the appellant before the incidence.

PW2 and PW3 knew the appellant as their neighbour.

The victim was old enough and of sufficient understanding as certified by the trial magistrate when he conducted a *voire dire* examination before taking her evidence on oath.

15. In sexual offences, uncorroborated evidence is sufficient to find a conviction if the victim's evidence is found to be truthful and credible.

Proviso to Section 124 of the Evidence Act empowers the court to convict on such uncorroborated evidence upon warning itself of dangers of such evidence – **Chila –vs- Republic (1967) EA 722.**

The victim told the clinical officer that she had been defiled twice but did not tell her parents nor reported to the authorities. In my view this victim was not an innocent young girl. She was sexually active (medical evidence), and therefore the reason, why bruises, lacerations or blood were not observed in her vaginal walls, and the broken hymen. She obviously lied to the court that it was her first time to have sexual intercourse and admitted having taken herself to the appellant's house and indeed bought *mandazi* (buns) for the appellant and took them into his house for them to eat together. There was a relationship between the appellant and the victim, and therefore an inference of friendship as evidenced in the manner of the victim's actions.

16. That is not to say that the appellant had unfettered authority and consent to defile the victim, who had no legal capacity to consent to the sexual intercourse. The victim's evidence is cogent that the appellant was positively identified as the offender, and that the two had a sexual relationship for a period of time before the appellant was arrested and charged for the offence. It is also clear that the victim was not forced into the relationship but participated voluntarily. The minor contradictions in the prosecution evidence is not enough to invalidate an otherwise valid judgment.

17. However, the law speaks differently. A minor has no legal capacity to give consent to any sexual activity, even when it appears that the minor willingly participated in the sexual encounter as it appears to be the case in this appeal. The victim had been exposed to and had had penetrative sexual intercourse prior to the present incident.

Taking the circumstances together, I do not find any evidence of forced sexual intercourse. This is not however to state that the appellant can run away from his actions as all elements of defilement have been satisfactorily proved to the required standard.

The upshot is that the conviction is upheld.

18. The sentence meted to the appellant is lawful as provided under **Section 8(3) of the Act**.

the offender,

> "*…..is liable upon conviction to imprisonment of a term of not less than twenty years."*

This is a minimum sentence. However, it has been held in particular in **NOO –vs- Republic (2019) e KLR (Hon. Mativo J)** that

> "*the words "shall be liable." Does not in their ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while liability existed the court might not see it fit to impose it …."*

19. In **RKS -vs- Republic (2018) e KLR** in a conviction for defilement of a 14 year old girl, the court (Prof. Joel Ngugi J) reduced a 20 years imprisonment to time served in jail by the minor offender.

20. Further, the **Court of Appeal in Criminal Appeal No.102 of 2016 Eliud Waweru Wambui –vs- Republic** set aside conviction and the sentence for the offence of defilement of a 17 years old girl, citing what it termed as **"The mystery of growing up which is a process, and not a series of disjoined leaps"** and put forth by **Lord Scarman** in the case **Gillick –vs- West Nortolk and Wisbech Area Health Authority (1985) 3 all ER 402**, Page 421 that

> "*If the law should impose on the process of "growing up"*
>
> *Fixed limits were nature knows only continuous process, the price would be artificially and a lack of realism in an area where the law must be sensitive to human development and social change."*

21. Sentencing is at the discretion of the trial court. minimum sentences take away this discretion and independence of thought which from the court, tends to erode the courts independence which is core to fair and just determination of cases as enshrined under **Article 10 of the Constitution** and very ably expounded by the Supreme Court of Kenya in **Francis Karioko Muratetu & Another –vs- Republic – Petition**

No.15 of 2015 (2017) e KLR, when it echoed and cited S.V, Jansen 1999 (2) SACR 368 (c at 373 – Davis J – thus

> *"Mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted.*
>
> *Such a system can only result in a gross disregard of the right to dignity of the accused."*

22. In **Raphael Mutunga Mutinda –vs- Republic (2019) e KLR**, the court considering the special and individual circumstances of the offence of defilement of a fourteen (14) year old girl, set aside the ten(10) years imprisonment and substituted it with a five(5) year jail term. Further, the court reduced the sentence for defilement for a 13 years old girl from 15 years imprisonment to seven years in **HCRA No 319 of 2015 Dominic Muli Omboga -vs- Republic e KLR.**

23. Having taken into account the peculiar circumstances and character of this matter, I am persuaded that the sentence imposed by the trial magistrate was not only excessive but also inappropriate.

I quash the sentence of twenty (20) years imprisonment and substitute it with the time served in prison todate.

The appellant is therefore set free unless otherwise lawfully held.

Orders accordingly.

Delivered, Signed and Dated at Nakuru this 24th Day of October 2019.

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J.N. MULWA

JUDGE