REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 28 OF 2019

PETER NYABONGA.....APPELLANT

-VRS-

THE REPUBLIC.....RESPONDENT

(Being an appeal against the Judgement of Hon. C. W. Waswa – RM Nyamira dated and delivered

on the 30th day of May 2019 in the original Nyamira Chief Magistrate's Court Sexual Offence No. 24 of 2018)

JUDGEMENT

The appellant is serving a term of imprisonment for thirty (30) years for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act.

The particulars of the charge were that on diverse dates between 1st September 2015 and 9th September 2016 at Nyamira North Sub-county, Nyamira County, he unlawfully and intentionally caused his penis to penetrate the vagina of AN a child aged twelve years who was to his knowledge his daughter.

He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act in that on diverse dates between 1st September 2015 and 9th September 2016 at Nyamira County he intentionally and unlawfully touched the vagina of AN a child aged twelve years, with his penis.

His appeal which is against the conviction and sentence is premised on grounds that he did not get a fair hearing as he was not supplied with the evidence of the prosecution in advance and that he was not accorded adequate time and facilities to prepare for the trial. In his submissions both written and oral he pleaded his innocence and stated that the prosecution was actuated by malice following his estrangement from the complainant's mother and a land dispute between him and his in-laws.

Mr. Majale, Learned Counsel for the prosecution opposed the appeal. He disputed that the appellant was not afforded enough time to prepare for the trial. According to him delay was occasioned by the prosecution hence compelling the court to give them the last adjournment because the appellant had expressed he was ready to proceed. On the P3 Form Mr. Majale submitted that the appellant did not oppose its production and did not cross examine the witness who produced it on its contents. Mr. Majale submitted that it was therefore properly produced in evidence and correctly formed the basis of the conviction. On the age of the complainant Mr. Majale submitted that it was proved she was twelve years old when the offence was committed. He urged this court to disbelieve the defence put forth by the appellant and uphold the conviction.

Regarding the sentence, Mr. Majale pointed out that Section 20 of the Sexual Offences Act prescribes life imprisonment where the victim is a child and submitted that the sentence of thirty years imposed by the trial Magistrate was insufficient. He nevertheless urged this court to uphold the conviction and the sentence.

As an appeal is in the nature of a pre-trial, I have reconsidered and evaluated the evidence in the court below while bearing in mind that I did not see or hear the witnesses give evidence. It is my finding that the charge against the appellant was not proved beyond reasonable doubt. The charge against the appellant was that he defiled his daughter, the complainant, on diverse dates between 1st September 2015 and 9th September 2016. In his testimony Corporal Gilbert Nato (Pw1), the investigating officer in the case, testified that the complainant and her mother went to the police station on 9th September 2016 and reported that the appellant defiled the complainant on 8th September 2016. In his own words they: -

"…reported that on 08/09/16 the accused person had differed with his wife. He chased away the wife who slept away from

home due to that. On that night the accused sneaked into the victim's room and defiled her. I booked the report and referred the victim and the mother to Ekerenyo Sub-county hospital for examination and treatment……The victim said that apart from 8/9/2016 the accused had previously from 1/11/2015 had developed a habit of defiling her whenever the accused differed with the wife. The accused had instilled fear on the victim and the mother hence they were afraid of report previously."

The complainant's mother did not give evidence but Nancy Kerubo (Pw1), a clinical officer at Ekerenyo Sub-county hospital, testified that the complainant was examined at the hospital on 9/9/2016 and that she had **"a tear on the labia and minora."** She testified that spermatozoa were also seen which confirmed there was penetration. This testimony by the clinical officer was baffling given that in her testimony the complainant was emphatic that on 8th September 2016 she was not defiled as alleged. Indeed, initially her evidence seemed to suggest she was defiled on 1st September 2016 (1/9/16 as recorded by the trial Magistrate). However, during cross examination she was emphatic that the incident took place in the year 2015 but not in 2016. In her words: -

"……. He didn't defile me in the year 2016. The accused defiled me only in the year 2015."

One wonders then how spermatozoa noted a year later on 9th September 2016 was attributed to an incident of defilement that had taken place in 2015. The trial Magistrate ought to have noted this discrepancy. It is also instructive that whereas the report made to the police was that the defilement had started from 1st November 2015 (1/11/15) the complainant stated it was in September 2015. That the date on the last page of the P3 Form was altered to read 2016 instead of 2015 and that indeed all the medical records had similar alterations should also have created doubt in the mind of the trial court. Even granted that prosecution of sexual offences has no limitation one wonders why the prosecution tampered with the treatment notes, Post Rape Care Form and P3 Form. One wonders why or what motive one would have to package an "old" case and make it appear as if it were a new one. Could it be that, as stated by the appellant, someone was trying to fix him?

It is also noteworthy that the complainant did not give any evidence from which it can be deduced that what took place between her and the appellant amounted to defilement. Defilement is itself a technical and legal term which applies where there is proof that an accused person committed an act which caused penetration of his genital organ into the genital organ of a victim who was a child. For there to be penetration, the accused must have inserted his genital organ into the genital organ of the child be it partially or completely. The Prosecutor and the trial Magistrate should therefore have enquired from the complainant what exactly the appellant had done to her and her exact words should have been recorded. In **Muganga Chitejo Saha v Republic [2017] eKLR** the Court of Appeal exhorted trial courts as follows: -

"Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generated accepted the use of euphemisms like, *"alinifanyia tabia mbaya",* **(IE V R, Kapenguria H.C Cr. Case No. 11 of 2016),** *"he pricked me with a thorn from the front part of this (sic) body.",* **(Samuel Mwangi Kinyati v R, Nanyuki HC CR. A No. 48 of 2015),** *"he used his thing for peeing",* **(David Otieno Alex v R, Homa Bay HC Cr Ap. No. 44 of 2015),** *"he inserted his "dudu" into my "mapaja"* **(Joses Kaburu v Republic, Meru HC Cr. Case No. 196 of 2016),** *"he used his munyunyu"* **(Thomas Alugha Ndegwa, Nbi HC Cr. Appeal No. 116 of 2011),** ***as apt description of acts defilement. We, however, need to remind trial courts that the use of certain words and phrases like "****he defiled me****" which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony.*** **See A M M v R Voi HC Cr App. No. 35 of 2014, EMM v R Mombasa HC Cr. Case No. 110 of 2015, among several others.** ***Trial courts should record as nearly as possible what the child says happened to him or her." (emphasis added).***

As it stands there is no evidence from which penetration could be deduced and as I stated earlier the medical evidence alluding to defilement is not credible. The inconsistencies and contradictions in the prosecution's case give rise to doubt which should benefit the appellant. Accordingly, the appeal is allowed, the conviction is quashed and the sentence of imprisonment for thirty (30) years is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in Nyamira this 28th day of November 2019.

E. N. MAINA

JUDGE