REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 78 OF 2018

THOMAS EBOYA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(from the original conviction and sentence in Hamisi SRMC Criminal Case No. 175 of 2017 by N. L. Nabibya, SRM dated 13/10/2017)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment. He was aggrieved by the sentence and the conviction and filed the instant appeal. The grounds of appeal are that:-

    1. The prosecution failed to prove the case beyond reasonable doubt.

    2. The medical examination did not prove penetration.

    3. The sentence imposed was harsh and excessive.

2. The appellant filed written submissions. The state relied on the record of the lower court.

3. The particulars of the offence against the appellant were that on the 25th February, 2017 in Hamisi Sub-County within Vihiga County he intentionally and unlawfully caused his penis to penetrate the vagina of GK (herein referred to as the complainant), a child aged 12 years.

Case for Prosecution -

4. The prosecution case was that the complainant was at the material time a Std. 5 Primary School pupil. She was staying with her mother PW3. The appellant was working at the home of the complainant's neighbour, PW2. His employer PW2 was staying away from home. That on the material day the complainant's mother sent the complainant to buy vegetables at the home of PW2. That on getting there she found the appellant alone at the home. She gave him money to buy vegetables. The appellant held her hand and pulled her into a house. He locked the door. He then undressed. The complainant screamed. The appellant put his fingers into her mouth. He took a jembe and cut her with it between her eyes. He hit her with a panga and bit her. She fell down and lost consciousness. When she came to she saw the appellant take a 10 litre jerrican and went out through the gate. She ran to the home of a neighbour called R. She then realized that she was bleeding from her private parts. Her mother who was at the time attending a

burial nearby was called. She went and took her to Cheptulu Police Post where they reported the incident. She took her to Kaimosi Jumuia Hospital. She was examined and found with bleeding from the vagina area with a tear on the vaginal wall and swollen injury on the eyes. The vaginal tear was stitched. PC Ekirapa PW4 of Cheptulu Police Post issued her with a P3 form. It was completed by Dr. Musa PW5 of Jumuia Hospital, Kaimosi. He formed the opinion that there was penile penetration on the complainant. A dentist at the hospital did a dental examination on the girl and formed the opinion that she was aged 12 years.

5. Meanwhile the appellant had escaped from the home of his employer PW2. PC Ekirapa and PW2 looked for him. He was later found at Mudete. He was charged with the offence. During the hearing the doctor PW5 produced the treatment notes, the laboratory form, Post Care Rape form and P3 form as exhibits, P.Ex 1-3 respectively. PC Ekirapa produced the clothes that the complainant was wearing on the material day - a green skirt and a blouse – as exhibits, P.Ex 5 (a) and (b) respectively. He also produced the age assessment report as exhibit, P.Ex 4.

Defence Case –

6. When placed to his defence the appellant stated in an unsworn statement that he was arrested by policemen on 14/3/2017. He was taken to Cheptulu Police Post and locked up. He was thereafter charged with an offence he knew nothing about.

Submissions -

7. The appellant submitted that the charge was defective in that it was contrary to Section 8 (1) (3) of the Sexual Offences Act. That there is no such provision under the said Act. That the offence he was charged with is therefore non-existent. That the defect occasioned a failure of justice.

8. The appellant submitted that there was no proof of penile penetration as the complainant said that she became unconscious during the incident and only regained consciousness and saw the accused disappearing from the vicinity. Therefore that she cannot verify the type of weapon that caused a cut on her labia majora. Further that there was no evidence of spermatozoa, torn hymen, laceration nor was a DNA test conducted.

9. The appellant submitted that the trial court did not give his defence due consideration. That the trial court erred in alleging that he did not explain where he was during the time of the incident and that he did not raise any issue of there being a grudge between him and the family of the complainant. The appellant submitted that an accused person should only be convicted on the strength of the prosecution evidence but not on the weakness of the defence as was held in **Muiruri Ndaraga –Vs- Republic (2006) eKLR**.

Analysis and Determination –

10. The duty of a first appellate court is as was stated by the Court of Appeal in **Kiilu & Another –Vs- Republic (2005) IKLR 174** where the Court held that:-

> ***"An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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."***

11. The trial court in finding the appellant guilty of the offence stated that the age of the complainant was proved by the age assessment report. That the complainant's evidence on defilement was corroborated by the evidence of the doctor. That the incident took place in clear daylight. That the appellant was a person

well known to the complainant. Therefore that the appellant was positively identified by the complainant. Further that the appellant's defence did not dislodge the prosecution case as the appellant did not explain where he was on the date of the incident. That though there was danger in relying on the evidence of the minor her evidence was corroborated in material particulars. Further that there was no grudge between the family of the complainant and the appellant. Therefore that there was no reason for the appellant's lie against the appellant.

12. The appellant submitted that there was no evidence to proof penile penetration. Further that there was no medical evidence to support the charge of defilement.

13. The law in respect to medical evidence in defilement and rape cases is well settled. In **Geoffrey Kioji –Vs- Republic, Nyeri Criminal Appeal No. 270 of 2010** (cited in **Dennis Osoro Obiri Vs Republic (2014) eKLR**) where the Court of Appeal held that:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person …under proviso to section 124 of the Evidence Act Cap 80 Laws, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief."***

14. In **AML -Vs- Republic (2013) eKLR** the Court of Appeal stated that:

> ***"the fact of rape or defilement is not proved by a DNA (read medical) test but by way of evidence."***

15. The court upheld the same in **Kassim Ali –Vs- Republic in Mombasa Criminal Appeal No. 84 of 2005** where it stated that:

> **"(*The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence*."**

16. Section 36 (1) of the Sexual Offences Act allows a court to order a DNA test to be undertaken on an accused person. However the provisions of the section are discretionally and are not couched in mandatory terms – See **Hadson Ali Mwachungo –Vs- Republic (2016) eKLR**.

17. In the instant case the clinical officer found the complainant with a tear in the labia majora which can only have been caused by penetration into her vagina. The inevitable conclusion is that the penetration was by penis. The urguement by the appellant to the contrary has no basis.

18. The complainant testified that the appellant assaulted her by hitting her with a jembe between her eyes before he defiled her. The said injury was corroborated by the doctor PW5 who found her with a black eye on the left side. The body assault on the complainant led credence to her evidence that the appellant defiled her.

19. The appellant was a person well known to the complainant. As stated by the trial court the incident took place during the day. There was thereby no possibility of mistaken identity on the appellant by the complainant.

20. The appellant's defence was that he was charged with an offence he did not know anything about. He however did not state as to where he was on the date of the incident. It is apparent from the evidence of his employer PW2 that he, appellant, disappeared from his employer's home on the same day that the complainant was defiled. His employer was not at home when he disappeared. His conduct of disappearing from the home where he was employed without any notice to his employer can only lead to

the conclusion that he did so so as to escape arrest out of guilt consciousness of defiling the complainant.

21. The complainant said that she was aged 12 years. This was supported by the age assessment report that was produced in court. The complainant's age was therefore proved.

22. The charge sheet indicated that the offence the appellant was charged with was under Section 8 (1) (3) of the Sexual Offences Act. Section 8 (1) of the said Act creates the offence of defilement. Subsection 8 (3) of the Act provides the punishment for defiling a child between the age of 12 and 15 years. Though there is no offence under the Act that can be described to be under Section 8 (1) (3), it was clear that the appellant was being charged with defilement contrary to Section 8 (1) as read with Sub-section 8 (3) of the Sexual Offences Act. In convicting the appellant of the offence the trial court made it clear that the appellant was convicted of the offence contrary to Section 8 (1) as read with Section 8 (3) of the Act. The appellant all along knew the charges that were facing him. The defect in the charge did not occasion any prejudice to the appellant. Neither did it occasion a failure of justice. The defect is curable under Section 382 of the Criminal Procedure Code.

23. On my own analysis of the evidence, I find that the appellant was convicted on watertight evidence that proved beyond all reasonable doubt that he defiled a girl of the age of 12 years. The conviction is therefore upheld.

Sentence –

24. Section 8 (3) of the Sexual Offences Act prescribes a minimum sentence of 20 years imprisonment. The Supreme Court in **Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR** declared the mandatory death sentence for murder under Section 204 of the penal Code to be unconstitutional in that its mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose a mandatory death sentence in an appropriate case. Further that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

25. In **Evans Wanjala Wanyonyi –Vs- Republic (2019) eKLR** the Court of Appeal imported the reasoning in the *Muruatetu Case* and held that the mandatory sentence provided under Section 8 (4) of the Sexual Offences Act is a discretionary sentence. In the foregoing, the court has discretion to impose a lesser sentence in an appropriate case.

26. In **Republic –Vs- Jagani & Another (2001) KLR 590**, it was held that:-

> ***"The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular to and to society in general. This is also seen as promoting a source of responsibility in offenders."***

27. The appellant was sentenced to serve 20 years imprisonment. He was in custody for 6 months while undergoing trial. He assaulted the complainant before defiling her. Taking into account that the complainant was only aged 12 years at the time of defilement I am of the considered view that the sentence of 20 years imprisonment was neither harsh nor excessive.

28. The upshot is that the appeal has no merit and is accordingly dismissed in its entirety.

Delivered, dated and signed in open court at Kakamega this 28th day of November, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Ombega for state

Appellant - present

Court Assistant - Polycarp

14 days right of appeal.