REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL 52 OF 2017

From the conviction and sentence of Hon. Sogomo G., Senior Resident Magistrate in Tigania Criminal Case No. 1495 of 2011 on 3rd March 2017

(CORAM: GIKONYO J)

DOMINIC MWILARIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1] This is an appeal from the conviction and sentence of Hon. Sogomo G., Senior Resident Magistrate in Tigania Criminal Case No. 1495 of 2011 on 3rd March 2017. The Appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars are that on the 23rd Day of December 2011 at Rwanda location in Tigania West District of Meru County the Appellant intentionally caused his penis to penetrate the vagina of I N, a child aged 15 years. In the alternative, the Appellant was charged with indecent act contrary to Section 7 of the Sexual Offences Act. The particulars are that on the 23rd day of December 2011 at Rwanda location in Tigania West District within Meru County the Appellant did an indecent act to IN by touching her breasts and vagina by hands.

[2] Being dissatisfied by the said conviction and sentence, he preferred the following grounds of appeal:

> ***1. The trial Magistrate erred in law and grossly misdirected himself by convicting the Appellant for the offence of defiling a child aged 15 years in the absence of clear evidence as to the age of the complainant.***
>
> ***2. The trial magistrate erred in law and grossly misdirected himself by taking into consideration evidence that was not on record and in particular putting the age of the complainant at age 16 years, where there was no evidence on record to support that finding.***
>
> ***3. The trial magistrate erred in law and misdirected himself by relying on a P3 that was doubtful, discredited and disowned by the medical officer of health who produced it as an exhibit.***
>
> ***4. The trial magistrate erred in convicting the appellant on evidence that was clearly inconsistent and contradictory***
>
> ***5. Having found as he did in his judgment, that complainant was 16 years, the trial magistrate erred in sentencing the appellant to serve 20 years.***
>
> ***6. The sentence is manifestly excessive in the circumstances.***

Appellant's submissions

[3] On 20th November 2017 the Appellant's advocate Murango submitted that convicting the Appellant when the age of the Complainant was not ascertained was improper. The girl was over 15 years and so he could not be convicted under Section 8 (1) (iii) of the Sexual Offences Act. He also submitted that, no medical report or certificate was produced to determine the girl's age. Therefore, he urged that, the Trial Magistrate erred by relying on evidence that was not on the record when he referred to production of a biker though no biker was tendered in evidence. Additionally, that the person who completed the P3 form was not qualified. Also, the treatment card is dated 26.11.2011 while the P3 form shows that she was treated on 25. 12. 2011. The mother (PW2) said that the Complainant was taken to hospital on 25.12.2011. The P3 form is incomplete since no date of commission of offence, referral to hospital or escort to hospital. The investigation officer (PW4) said that the Complainant did not complain of any pain or bleeding on 25.12.2011 which contradicts the P3 form and treatment sheet. PW1 said that her father and Appellant had a serious argument on the day she reported her defilement to her mother but PW2 denied

this. The Appellant was admitted at the police station as he was making a complaint of assault against the Complainant's father. That there was real possibility of a cover-up of his assault and so they trumped up defilement charges. PW1 stated that she was assaulted 23rd December 2011. But she still delivered milk to the Appellant the following day. That the hard labour is and the appeal be allowed.

Submissions by the state

[4] Namiti counsel for the Respondent submitted that age was given by PW1 and when she was recalled a year later she said that she was 17 years. PW2 gave date of birth as 4th April 1996 and that the year 1986 was a typographical error. PW3 confirmed the Complainant's age and was qualified to produce the P3 form. Ultimately, the conclusion in P3 form is what matters. The other matters are minor complaints by the Appellant. The trial magistrate properly 'warned' himself of the evidence adduced, thus the appeal should be rejected.

DETERMINATION

Court's duty

[5] This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyse the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses. See **KIILU & ANOTHER vs. REPUBLIC [2005]1 KLR 174**where the Court of Appeal stated thus;

> ***1. 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Onlythen 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.***

In doing so, I am aware that there is no any particular prescribed method of re-assessing evidence. Nonetheless, merely rehashing of the evidence as was recorded will not pass for a good style. Of great significance, therefore, is for the appellate court to employ a style imbued with judicious emphasis, an eye for symmetry or balance and an ear for subtleties of the evidence so as not to miss the grace and power of the testimony of witnesses and the law applicable thereto. Such style also insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. And ultimately, the court should, in absolute clarity and directness, make its overall impression of the evidence adduced after placing it upon the scales of the law. I shall so proceed.

[6] The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal may be collapsed into three grounds:

> ***1. That the trial Magistrate erred in law and grossly misdirected himself by convicting the Appellant for the offence of defilement in the absence of clear evidence as to the age of the Complainant;***
>
> ***2. That the trial magistrate erred in convicting the Appellant on evidence that was clearly inconsistent and contradictory; and***
>
> ***3. That the sentence is manifestly excessive in the circumstances.***

Elements to be proved

[7] It is now beyond peradventure that, in cases of defilement, the prosecution must prove:

> 1. The age of the child. This is important because defilement relates to children who are persons below the age of 18 years. Secondly, the age of the victim determines the sentence to be imposed.
>
> 2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and
>
> 3. That the perpetrator is the Appellant.

See the case of ***Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013*** **where it was statedthat:**

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

What story emerges from the evidence herein?

Age of child

[8] The first ground was that the trial Magistrate erred in lawand grossly misdirected himself by convicting the Appellant for the offence of defilement in the absence of clear evidence as to the age of the Complainant. When the Complainant gave her evidence on 10th May 2012,

she stated that she was 16years of age. A year later when she was recalled on 8thAugust 2013, she testified that she was 17 years old and gave further details that she was a student at [particulars withheld] Secondary School. At the time of the offence she was 15 years old she left her birth certificate at home. She produced the P3 form which indicates that she was 15 years old. She also produced T/Cards – Exh 2 in court.

[9] The evidence adduced show that the Complainant was 15 years at the time of the commission of the offence. See her evidence, the P3 form and theT/Cards. The Complainant's mother (PW2) also stated that her daughter was born on 4th April 1996. Accordingly, contrary to Murango's submissions, the age of the Complainant was properly ascertained to be 15 years at the time the offence occurred. I must remind that courts have said time without number that proof of age for purposes of Sexual Offences Act need not only be by way of Certificate of Birth. And failure to produce or absence of Certificate of Birth does not mean that age of the victim cannot be ascertained through other evidence, say, evidence of the victim herself, her parents, school records, treatment records, P3 form, documents from her church/religious organization such as baptismal cards and so on and so forth. On this, see the case of **MusyokiMwakavi v Republic [2014] eKLR**where the court relied on the case of **Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** it was held:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

Mutende J further stated:

> ***"It was not mandatory for a birth certificate to be produced by the prosecution in the instant case. The evidence adduced by the witnesses in respect of the age of the complainant could not be dismissed as mere assertions per the authority cited by the appellant (see Muiruri Njoroge versus Republic Criminal appeal No. 115 of 1982)."***

Of alleged contradictory evidence

[10] The second ground isthat the trial magistrate erred in convicting the Appellant on evidence that was clearly inconsistent and contradictory. The evidence on record is this. On 23.12.2011 the Complainant was going to Kadebene Shopping Centre/Market for that is where her mother works. The Appellant owed her Kshs. 30 for she used to sell to him milk. On her way to the market she passed by his home and collected the money. After visiting her mother as she was heading home at around 4. 00 PM the Appellant followed her. Upon reaching the forest, the Appellant noticed that there was no one else, so he grabbed her hand and knocked her down. He tried to remove her undergarments and a struggle ensued between them. He tore her undergarments and then he opened his trouser zip and removed his penis and proceeded to have sex with her. After he was done he left and she returned back home. Her mother was not in as she was staying at the trading centre where she operates her shop. On 25.12.2011 she declined to sell milk to the Appellant and reported to her parents. It was then that she informed her mother that the Appellant had defiled her. They reported the matter to the police who referred them Miathene District Hospital where she was examined and treated. Thereafter they were issued with a P3 form which was completed at the said hospital. She produced the P3 form, T/Cards and the torn biker.

Of P3 Form

[10] P3 form was filled by one Mwanza Alex on 25. 12. 2011. It is dated is sated 26.12.2011 but gives a history and physical examination which occurred on 25.12.2011. PW3 (Geoffrey Muthomi) testified on behalf of his colleague Alex Mwanza who was transferred to Machakos. The Appellant did not object to its production. He stated that on examination she had normal external genitilia, hymen was torn with fresh bleeding and there was white discharge. The conclusion that was made was of defilement. During cross-examination he stated the first part of the form is not complete, that is the date of the offence and the date the Complainant was referred to hospital has not been indicated; and the officer's name who referred the Complainant to hospital has not been indicated. He added that the P3 form indicates that there was no sign of forceful penetration which means that there were no bruises. The author has not indicated that there was evidence of penetration. That the author was not qualified in pediatrics and should not have filled the P3 form.

[11] The P3 form it indicates that, *"There are no signs indicative of forceful penetration. However, changes may have occurred in the last 42 hours"*. The Complainant went to the hospital two days after the incident had happened which is 48 hours after. Hence, the doctor's opinion that changes may have occurred which affected signs of forced penetration. It was noted, however, in the P3 Form that there was white discharge and mild fresh bleeding from the torn hymen. With regard to the submission by the Appellant that the person who filled the P3 form was not qualified, I fall back to the evidence. According to the evidence of PW3 he stated that the author was not qualified in pediatrics and should not have filled the form. The author of the P3 Form is Mwanza Alex and he is a Medical Officer/ Practitioner.The Court of Appeal in the case of**FappytonMutukuNgui v Republic [2014] eKLR**held:

> ***"We do not think much turns on the appellant's complaint that PW5 was not competent to fill in a P3 form under section 48 of the Evidence Act. PW5 is a clinical officer who testified on behalf of his colleague, Alfred Toronke who examined and treated PW2 at Matuu District Hospital. In our opinion a clinical officer is qualified to fill in a P3 form. This is an area of his competence. (See Raphael Kavoi Kiilu v Republic Cr. App. No. 198/2008; Section 2 of the Clinical Officers Act (Training, Registration and Licencing) Act, Cap 260 (LOK)."***

See also the case of **Makau Sua v Republic [2015] eKLR** where the court held that:

> ***"Dr Mutunga was a Medical Doctor qualified to fill the P3 form. Even if he had been a clinical officer he would still have been qualified to discharge the duty."***

Further judicial decision; **Francis NdichuKuria v Republic [2015] eKLR**the court stated that**:**

> ***"My understanding of the person referred to therein is that person who is trained in medicine such as a clinical officer or a practicing doctorand any of them is competent to fill a P3 form. Regard must be given to the fact that not all medical facilities in our Republic are equipped with practicing medical doctors and where the medical doctors can be found may be far out of reach for most people. In those instances, P3 forms are competently filled by clinical officers."***

From the foregoing, I am of the opinion that a medical officer as Mwanza Alex needed not be qualified in paediatricsin order to fill in a P3 Form. He was qualified to fill in and sign the P3 Form.Consequently, the trial Magistrate did not err in convicting the Appellant on the evidence adduced. I have looked everywhere in the record and did not find any evidence that was inconsistent or contradictory.

Penetration and perpetrator thereof

[12] The evidence of the Complainant categorically showed that the Appellant inserted his penis into her vagina. This was penetration in law and was by the Appellant. The Appellant was a person known to the complainant and there was no element of any delusion on her part in recognizing the Appellant as the person who penetrated her genitalia. See Section 2 (1) of the Sexual Offences Act, that, penetration;

> ***"…means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

Although the P3 form indicates that;

> ***"There are no signs indicative of forceful penetration.***

The doctor concluded that:

> ***However, changes may have occurred in the last 42 hours".***

The doctor was examining a victim of defilement. Therefore, the findings in the P3 Formthat there was white discharge and mild fresh bleeding from the torn hymen support penetration of the complainant. Accordingly, as perSection 8 (1) of the Sexual Offence Act:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

From the evidence, all critical ingredients for the offence of defilement that is: age, penetration and the perpetrator have all been met.The Appellant was properly convicted for the offence of defilement.

Of sentence

[13] The third ground is that the sentence is manifestly excessive in the circumstances of this case. According to Section 8 (3) of the Sexual Offences:

> ***"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."***

Therefore, the sentence herein should be imprisonment for a term not less than twenty years. The Appellant was convicted for the offence of defilement and sentenced in accordance with section 8(3) of the Sexual Offences Act to imprisonment for a term of not less than 20 years. Now, therefore,the law as it stands, the sentence was in accordance with the law. I uphold it. However, following the thinking in the recent decision by the Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER vs. R & ANOTHER [2018] eKLR**on section 204 of the Penal Code, I should be delighted to pose a hypothesis: whether minimum sentences may be limiting judicial discretion in sentencing. A discriminating judicial debate thereto is most welcome. In the upshot, this appeal is dismissed. The Appellant shall serve the original sentence meted out by the trial magistrate. It is so ordered.

Dated, signed and delivered in open court at Meru this 20th day of February 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Nyenyire advocate for Murango advocate for appellant

Mr. Kinyua for state

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F. GIKONYO

JUDGE