REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.129 OF 2017

(Appeal Originating from Nyahururu CM's Court

Cr.No.1236 of 2016 by: Hon. A.W. Mukenga – R.M.)

BONIFACE MWANGI WAMUGI.....APPELLANT

-V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant **Boniface Mwangi Wamugi** was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence are that on 22/3/2014 at [particulars withheld] Location, intentionally and unlawfully caused his penis to penetrate the vagina of **L.J.W.** alias **L.M.W.** a child aged 13 years.

In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act in that on 22/3/2014 in [particulars withheld] Location, intentionally and unlawfully caused his penis to come into contact with the vagina of **L.J.W.** alias **L.W.M**., a child aged 13 years.

The appellant was convicted on the main charge and sentenced to Twenty years imprisonment.

The appellant is aggrieved by the conviction and sentence which provoked this appeal based on the grounds contained in the petition of appeal filed in court on 19/8/2016 by learned counsel Mr. Mbugua, counsel for the appellant. The counsel filed submissions and compressed the 13 rounds into 7 grounds which are as follows:

(1) There were inconsistencies in the prosecution case;

(2) That there was no medical evidence to corroborate the complainant's evidence;

(3) That vital witnesses were not called;

(4) That the police did not carry out any investigations before preferring the charge;

(5) That the trial court relied on speculation conjecture and extravenous evidence in convicting the appellant;

(6) That there was unexplained delay in reporting the offence and arrest of appellant;

(7) That the court failed to consider the appellant defence;

(8) That the offences were not proved to the required standard.

The grounds were further supported by submissions filed by the defence counsel.

The appeal was opposed by learned counsel for the State, Mr. Mutembei. This is the first appeal and it behoves this court to re evaluate all the evidence that was tendered before the trial court, analyze it and arrive at its own determinations but bear in mind that this court did not have the opportunity to see the witnesses testify in order to assess their demeanor. This is what the court held in ***Isaac Ng'ang'a alias Peter***

Ng'ang'a Kahiga v Republic CRA.272/2005 when it said "***in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze a fresh evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same……"***

The prosecution called a total of 5 witnesses in support of their case. The complainant **L.W. (PW1)** a girl aged 13 years testified on 22/3/2014 the appellant was her neighbour and her grandfather and mother went to the neighbour's house for funeral arrangements and they gave the key to the gate to accused; that accused called her name but she did not respond and instead called her child but she did not respond; that the appellant called her again, she went out and he gave her the key and she opened for him as he was outside. He asked for tea and she went to the kitchen, gave him. As he left she was locking the key when he grabbed her, covered her mouth and threw her to the ground, removed her clothes from the waist and inserted his private part to her private part used for urinating, he pushed himself into her, pushed her to the fence and her aunt found them there and she entered the house with her cut as the appellant left. She informed her aunt what the appellant did and she called her grandmother and they went to hospital at Salama and next day went to Nyahururu Hospital. She was examined, P3 form was filled and also reported to the police station.

PW3 L W M is the complainant's grandmother. She left her house to go to a funeral on 22/2/2014 about 10.00 p.m. and on the way met Boniface Mwangi the appellant who asked if he could go and take tea at PW2's home and she told the appellant that lives at home with the aunt M M and would give her tea; that Boniface headed to her home as she went to the funeral but was called by M who told her to go back home since L was sick. She returned to her home with her husband but on entering the house, the complainant could not talk to her but went to explain to her grandfather what had happened. Her husband informed her that Boniface had raped the complainant reported to police at Salama and they took her to Salama Hospital on Saturday they went to Nyahururu General Hospital. PW2 said she has known the appellant since 1991 as a neighbour. PW2 said the appellant regularly came to her home, ran some errands for her and would carry her on his mother cycle and that on arrival at her gate found the appellant but he ran away.

PW4 M M stated that on 22/3/2014 about 10.00 a.m., she went to put the baby to bed and asked the complainant to take to her the radio but she took too long; PW3 went to check in the bedroom but did not get her or the kitchen. She heard a voice outside L what was wrong and on going out, found the complainant with the appellant and asked what was wrong, but complainant did not reply. She took PW1 to the bedroom who told her '***Baba Ciku'*** had defiled her and she called the mother (PW2) who came with her husband who interrogated PW1 and they took PW1 to hospital. She knew the appellant as Baba Ciku, their neighbour. Whose voice she recognized and that she even left him in the dining room as she went to interrogate PW1 but found he had left.

PW5 PC Odek, the investigating officer in this case received a report of defilement from the complainant and mother on 23/3/2014. He recorded PW1's statement and issued them with a P3 form. He later arrested the appellant on 15/5/2014 because he changed his route he operated up as motor cycle rider.

PW6 Dr. Joseph Karimi produced the P3 form which had been filled by Dr. Mwangi Wagwa who had examined PW1 on 24/3/2014. The doctor found the hymen to have been freshly raptured and surrounding areas inflamed. Some spermatozoa were found. He also produced the Post Rape care form.

In his sworn defence, the appellant (DW1) recalled having met PW3 and her husband on 21/3/2014 about 9.30 p.m.; and PW3 gave him the key to her home and told him to go to the home where PW1 and 4 would give him tea; that he went and PW1 opened for him the gate after taking the key, gave him tea and she saw him off at the gate; that PW1 leaned on the gate and that is when he asked what was happening and PW4 came; they helped PW1 to the house; that PW3 called the parents and PW1 went outside with the grandfather and upon return, she alleged that the appellant had defiled her. They all went to the police station at Salama, police gave them a note, went to Salama Hospital and then referred to Nyahururu Hospital. He carried them on his motor cycle to Nyahururu and they went in to see the doctor but thereafter failed to take his calls. On 25/3/2014 he met PW1 and 3 when they reported at Mairo Inya; that he was arrested by a police officer on 26/3/2014, he stated his version of events and was released on Cash Bail and next day the Cash Bail was refunded and he was told to sort out the matter at home. He was asked for a cow or 3 sheep for the complainant's family by PW5 but he refused to pay. On 15/5/2014 he was arrested and arraigned in court. He said he had disagreements with PW1's family when his cow entered the complainant's grandparents land.

DW2 Joseph Kerani recalled that on 22/3/2014, he was with the appellant at Nyahururu at 9.00 a.m. carrying the complainant and grandparents and left them at the hospital gate;; that he went to complainant's house on 20/4/2014 to try a reconciliation and the grandmother wanted the appellant to admit the offence and shoulder PW1's treatment but he refused to pay because he did not commit any offence; that he was never arrested and continued to work as usual.

DW3 Michael Githiaka of Salama recalled the 25/3/2014 when a police officer went to the stage at Mairo Inya and asked for Mwangi Gataru, appellant; that on 3/4/2014 he accompanied the appellant to Mairo Inya where police had taken his motor cycle for allegedly defilement; that the appellant was released on bond and on 20th they went to the complainant's home with a view to arriving at a reconciliation but the appellant refused the terms; that the appellant never left the area.

I must point out at this stage that the trial court wrongly numbered the witnesses. Nobody testified as PW2. Somebody was sworn as PW2 and was supposed to testify but was stood down and at next hearing the court skipped to PW3. Only 5 witnesses testified not 6.

To prove an offence of defilement, the prosecution has to prove beyond any doubt that:

1) There was penetration;

2) The identity of the perpetrator;

3) The age of the complainant, for purposes of the sentence to be meted upon conviction.

Starting with the last ingredient, PW1 told the court that she was aged 13 years old and in class 7 by the time she testified. PW3, PW1's grandmother, who has looked after the complainant since she was 9 months old also confirmed that PW1 was 13 years old by then.

The doctor who examined PW1 on 22/3/2014 also formed the opinion that she was 13 years old. There was no birth certificate or birth notification to prove the date of birth but the courts have held that age can be proved by evidence of a guardian or parent or by observation or common sense. *See* ***Zablon Ongonyo Matoke v Republic CRA.168/2012***. I have no doubt that the complainant's age was proved to be about 13 years old.

The next question is whether penetration was proved. "***Penetration***" means "***the partial or complete insertion of the genital organs of a person into the genital organs of another person***". PW1 gave a detailed narrative of how she went to close the gate while in company of the appellant and was suddenly attacked, her clothes removed and the appellant inserted his male organ for urinating into hers. She informed PW3 & 4 Margaret, her grandmother, soon after the attack that she had been defiled. Upon examination by the doctor on 24/3/2014, it was found that the hymen was ruptured, the margins were fresh and labia minora were inflamed. She was found to have a whitish discharge which the doctor said had some spermatozoa.

Dr. Karimi, PW6 who produced the P3 form and the post care form as exhibits further told the court that the injuries found on the genitalia were evidence of forceful penetration. There is overwhelming evidence that the complainant had taken part in a recent sexual activity and therefore penetration was proved.

Another issue that needs to be resolved and which the trial court did not consider is when was the complainant defiled, on 21/3/2014 or 22/3/2014. The charge states that the incident occurred on 22/3/2014 and so did PW1, 3 & 4 state in their evidence. PW5, the investigating officer however told the court that the report he received was that PW1 was defiled on 21/3/2014 about 10.00 p.m. PW3 and 4 confirmed having reported the matter to the police on the next day, when the P3 form was issued to them. The P3 form indicates that the report was made to police on 22/3/2014 and that is the date that the P3 form was issued. Even on the P3, the date of the alleged offence is indicated as 21/3/2012. The appellant admitted and corroborated in part PW1, 3 & 4's testimonies that he went to PW3's home for tea and that it is PW1 who opened for him and gave him tea on 21/3/2014 at about 10.00 p.m. Incidentally, the defence never raised this discrepancy in the trial court yet the same counsel represented the appellant. From an analysis of the evidence, the incident must have occurred on 21/3/2014 about 10.00 p.m. and the confusion in the dates must have arisen from the person who drafted the charge and wrote the date of the commission of the offence as 22/3/2018. This is a mere error that is curable under Section 382 of the Criminal Procedure Code. It does not prejudice the defence because after all the appellant admits having been at the complainant's home on 21/3/2014 corroborating PW1, 3 & 4's evidence.

Whether there were contradictions in the prosecution evidence: In the case of ***Twehangene v Uganda CRA.139/2001*** it was held that not every contradiction warrants rejection of the evidence. To be rejected, it must be so grave as to affect the substance of the charge.

It was the defence contention that the appellant could not have defiled PW1 while outside the gate. PW1's testimony was very clear that as she locked the gate, the appellant grabbed her. Nowhere did PW1 say she was outside the gate. I found no contradiction in PW1 and 4's evidence as to how PW1 made the report to her. PW1 & 4's evidence was consistent that PW1 revealed what had happened to her when they went to the bedroom with PW4 when the appellant was still outside the house. PW4 then called to inform PW3 who then came home but that PW1 preferred to disclose the ordeal to her grandfather.

As regards when the appellant allegedly left the complainant's home, PW4 said she left the appellant at the dining while PW3 found him at their gate and he ran off. There was no contradiction in their evidence. Save for minor discrepancies if any, there is no serious contradiction that goes to the root of the charge. Minor discrepancies are expected where different witnesses testify because people perceive differently and even express themselves differently.

It is also the appellant's case that the medical documents i.e. Post Rape care form and P3 form did not tally and that the doctor who filled the P3 form about 3 days later made more findings than the person who filled the PCR form. Thus the court should not have been guided by the documents before it.

PW6 told the court that the person who fills the PCR form is a clinical officer while the P3 form was filled by a doctor. The clinical officer was not called as a witness and the court cannot tell whether he was able to conduct the same tests that the doctor did. It is however noteworthy that the PCR form indicated that there was a whitish discharge from PW1. The doctor had also indicated that there were treatment notes made by the clinician which he captured on the P3 form, that the vulva was reddened, spermatozoa were present and PW1's pants had grass. It therefore seems that there were other notes which were made by the clinical officer that were not produced in court. But the question I ask myself is whether failure to produce the said notes was fatal to this case. I find not. The courts have held that a fact of rape or defilement is not necessarily proved by medical evidence. *See* ***Kassim Ali v Republic CR.App.84/05*** the court said ***"…..the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

In my view the P3 form is a document prepared by an expert in which the expert makes his opinion on his findings. The PCR form does not contain the opinion of the expert. In fact, it is clear that the clinician after the treatment of PW1, referred the complainant to hospital, meaning the doctor had to see the complainant again and given an expert opinion. I am satisfied that the medical evidence contained in the P3 form did corroborate PW1's evidence that she was defiled.

The appellant alleged that there was an unexplained delay in reporting the offence and arrest of the appellant.

From PW1, 3 and 4's testimonies, a report was made to the police on the next day, 22/3/2014. PW5, the investigating officer confirmed that fact. Indeed PW1 and 3 were issued with a P3 form on 22/3/2014 meaning a report had been made at the police station. The P3 form contains the O.B. No.10 of 22/3/2014. On the night of 21/3/2014, PW1 identified the perpetrator as her neighbour and it was recorded in the P3 form and even PCR forms. Once a complaint was made, it was the work of the police to make the arrest. In his defence, the appellant alleged that the investigating officer wanted him to compensate PW3. However, PW3 & 5 testified and the allegations made in the defence

regarding the issue of settlement were never put to them. For example, the appellant alleged that PW5 demanded a cow or sheep and DW2 & 3 visited PW3's home for purposes of a settlement. PW3 & 5 totally denied that there were attempts to have the parties reconcile.

The appellant was represented by the same counsel and these issues would have been brought out during cross examination. In my view the defence that the delay in arresting the appellant was due to attempts to force the appellant into a settlement to be an afterthought and that ground lacks basis.

Whether the appellant was the perpetrator: The appellant was well known to PW1. The appellant does not deny it. The appellant alleged in his defence that there was a dispute with the complainant's family when his cow crossed to PW3's farm. But that allegation cannot be true because the appellant would not have gone to take tea at PW3's house nor would he have been given a key for the gate as admitted. That line of defence was an afterthought and totally untenable. It is apparent that the appellant related very well with PW1's family. PW1 went into the house with the appellant. She gave him tea and they had a conversation. Though it was night, the issue of identification did not arise. After the ordeal, PW1 informed PW4 of the act soon thereafter and PW4 in turn informed PW3. PW4 found the appellant still in company of PW1.

Swift action was taken on the same night by taking PW1 to the hospital at Salama. I am satisfied beyond any doubt, that the appellant had the opportunity to commit the offence and even his defence placed him at the scene of crime. The evidence of DW2 & 3 did not in any way dislodge PW1's testimony as to the events of 21/3/2014 night.

Therefore before the appellant and PW1's family had a very good relationship and there was totally no reason why PW1 and her family could have framed the appellant. I am satisfied as did the trial court, that PW1 positively identified the perpetrator as the appellant.

The defence took issue with the investigating officer having preferred a charge of attempted defilement against the appellant which was later amended to defilement. It is not uncommon for an investigating officer to prefer a charge that may be amended by his supervisor or by the Director of Public Prosecution (DPP) or even the court, if the evidence discloses a different charge. The fact that the charge was amended cannot be fatal to this case. It was for the court to evaluate the evidence and determine whether or not an offence was committed which was done.

The defence alleged that the judgment was speculative, the magistrate considered extraneous matters and conjecture and tried to fill loopholes in the prosecution case.

In its judgment, the trial court observed that the complainant was fine from the time she ushered the appellant into the home and gave him tea. The court did not believe the allegation by the defence that PW1 suffered from seizures as that allegation was denied by PW1, 3 & 4. The defence counsel contended that it was never suggested that PW1 suffered from epilepsy. The trial court used the word seizure and epilepsy interchangeably and found that there was no evidence that PW1 suffered from any seizure on that day and in any event the allegation of seizures was denied. Mere use of the word epilepsy instead of seizures is not conjecture or extraneous.

In the trial court's judgment, the defence was elaborately considered. The court considered the evidence of DW2 & 3 and dismissed it as not touching on the happenings of the material day; the court considered the appellant's defence that he took the complainant to hospital but disbelieved him especially that the complaint of defilement was already leveled against him or that he voluntarily went to the police station. The defence was aptly considered and disbelieved.

The appellant indeed raised an alibi in his defence as to his whereabouts on 22/3/204. However, this court has already considered and found that the offence was committed on 21/3/2014 but not 22/3/2014. On 21/3/2014, the appellant was at the scene of the offence.

As regards the issue of settlement the offence was committed against a child who had no capacity to consent to any negotiation or reconciliation. The trial court did address this issue by stating that any attempt to settle was against "***the spirit of protecting the best interests of the minor, and if indeed there were such attempts, the parties to the negotiations are not to be lauded but to be rightly condemned for attempting to muzzle the minor's right to justice.***" I agree and add my voice to the court's view on the attempted settlement if at all there was any. The trial court did consider the defence in detail and found it to be unbelievable.

The prosecution has the discretion to call all witnesses relevant to their case and it can only be faulted if they fail to call a witness due to an oblique or sinister motive. In ***Bukenya v Republic (1972) E.A***. the court said:

> ***"While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under general law of evidence to draw an inference that the evidence of these witnesses, if called, would have tended to be adverse to the prosecution."***

In this case, failure to call the clinician who filled the PCR form cannot be fatal to this case because in the ordinary cause of things, it is the P3 form which is produced and as earlier noted, medical evidence is not mandatory to prove a fact of defilement or rape. Defilement can be proved by other circumstantial or direct evidence.

Having carefully considered all the grounds raised in this appeal, I find no merit in any of them. I find the conviction by the trial court to be sound and I uphold it. Though the charge indicates that the appellant was charged under Section 8(1) and Section 8(2) of the Sexual Offences Act, the penalty Section should have been 8(3). Under Section 8(3) of Sexual Offences Act, when the victim of defilement is aged between 11 and 15 years, upon conviction, one is liable to imprisonment of not less than 20 years. Twenty years imprisonment is the minimum sentence under the section and hence lawful.

In the end, I find that the appeal lacks merit and it is dismissed in its entirety.

Dated, Signed and Delivered at *NYAHURURU* this *12th* day of *April,* 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut - Prosecution Counsel

Mr. Mbugua for appellant

Soi - Court Assistant

Appellant - present