REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.30 OF 2017

JOHNROCHI KARIETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

(Appeal against the conviction and sentence of Hon. P. Mutua SPM in Nyeri CMCR (S.O) no. 59 of 2015)

The appellant was charged with the offence of Defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006 and in the alternative he was charged with indecent act with a child contrary to section 5(1) (b) of the Sexual Offences Act No.3 of 2006.

By his judgment delivered on 17.5.2017 the appellant was found guilty of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act convicted, and sentenced to 30 years' imprisonment.

On 13.2.18 he filed his amended petition and grounds of appeal together with his written submissions. He set out 4 grounds of Appeal: -

> *1. That the learned magistrate fell into error in affirming conviction and sentence in failing to hold that he was not with PW1 on the material day and further the prosecution case was contradictory and fraught with inconsistencies.*
>
> *2. That the learned magistrate equally fell into error in affirming conviction and sentence in failing to find that the medical evidence cast doubt on the prosecution's case and further the pregnancy in question was not established as required in law.*
>
> *3. That the learned magistrate fell into error in convicting the appellant in failing to find that the prosecution did not prove its case beyond all reasonable doubt.*
>
> *4. That the learned magistrate equally fell into error in failing to consider his credible defence that displaced the reliability of the prosecution case.*

In his written submissions he argued the grounds seriatim.

He relied on **Rankerai Rankishman Pandya –Vs- Republic (1957) EALR 336** with regard to the weight the court should place on contradictory evidence.

The appeal was opposed with the state taking the position that the charge was properly proved and there was no reason to disturb the trial magistrate's findings.

I have carefully considered the rival submissions, the evidence on record, and the authorities cited by the appellant. It is now settled that the role of the 1st appellate court is to re-evaluate the evidence in the trial court as was set out in **OKENO VERSUS REPUBLIC [1972] EA 323 where the court said**

> ***"This is the evidence that was presented before the trial court. We are enjoined as the first appellate court to analyse it afresh and come to our own conclusion. It is the appellant's right as much as our obligation to undertake this task. As always we must bear in mind that the trial court had the benefit of hearing and seeing the witnesses and was therefore better placed to assess the witness's demeanor and disposition."***

Prosecution's case

The prosecution called four witnesses. Upon conducting a voire dire examination the court formed the view that the complainant was intelligent, and understood the nature of an oath. She gave sworn statement. EW was 16 years old at the time of giving her testimony on 16/1/17. She told the court that on 23/10/15 she came from school and was sent to collect water.

The appellant was her grandmother's herdsman. In the evening of that day she went to her grandmother's place. She met the appellant who gave her his sweater as it was cold. The appellant took her to a certain forest, went to the shopping Centre and came back with a cake. It was already open. When she drank it, it tasted of alcohol. He took off her clothes- skirt, pant, stockings, opened his trouser and inserted his penis into her vagina while lying on top of her. She did not scream. She felt pain. When he was done he left her there. This was not their first sexual encounter. They had had sex together before.

In the meantime, her mother JWN was looking for her. In fact, the truth was she had sent the complainant to fetch water and the complainant had refused to do so. She had taken the Jerri cans but had left them without having fetched the water. Her mother had punished her and that is when she disappeared.

JWN was told that the complainant had been seen with the appellant. She told her brother PW3 H M who is the complainant's uncle. They began to look for the child. Around 1.00am PW3 saw her near their latrine and took her home. She was smelling of alcohol and was wearing the appellant's sweater.

Upon interrogation the complainant said she was with the appellant. Police were called. Both the appellant and the complainant were taken to the police station, and later to the hospital where the P3 was completed. Upon examination it was confirmed that her hymen was broken, and she was pregnant.

The Defence

the appellant testified on oath. He told the court that the only reason he had been charged is because he had declined the sexual designs upon him of one Mama W who was a neighbour to M wa M his employer. He said he reported these to his employer who warned the said Mama W but she was so irked she promised revenge.

The next thing he saw was his arrest by the police and the complainant who was brought to the police station as well.

He closed his case.

Analysis and Determination

From the evidence the issue is whether the prosecution did indeed prove the charges against the appellant.

Section 8(1) defines defilement, section 8(3) provides the penalty.

The prosecution must establish-

1. The age of the complainant

2. Penetration.

3. For the alternative charge- contact between the genitalia of the appellant and that of the complainant.

The trial magistrate found that the charge was fatally defective with regard to the alternative charge because it was headed *'indecent act with a child'* yet the section of the law cited was section *5 (1) (b) of the Sexual Offence Act which provides for sexual assault instead of section 11(1) of the same Act.*

I will come back to that.

On Age: -

According to the certificate of birth the complainant was born on 9. 3.2001. As at 23.10.15 she was 14 years old. Her age was proved.

On penetration: -

Penetration is defined by section 2 of the Sexual Offences Act as 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'

The complainant clearly described what happened. She went to her grandmother's house where the appellant worked. She and the appellant went to some forest where the appellant brought her a coke with alcohol in it. They then had sex and it was not for the first time. She told the court that the appellant inserted his penis into her vagina. Her hymen was broken, and she was found to be pregnant on examination.

Even though the issue of whether or not she was pregnant for the appellant or not was not scrutinized, the trial magistrate was persuaded by her evidence, which he found consistent, cogent and unshaken during cross examination.

This is supported by the fact that when she was found by PW3 she was smelling of alcohol, and was wearing the appellant's sweater a fact that was never challenged.

Although her evidence with regard to what had happened just before she left home was inconsistent as submitted by the appellant, it did not affect her credibility when it came to what transpired between her and the appellant.

From the evidence on record the complainant appears to have become delinquent, disobeying her mother, refusing to carry out house chores after school and even this act of being with the appellant and taking soda with alcohol with him appears not to have been an accident but something that they would do with the appellant. They had become comfortable enough for him to give her his sweater to wear.

Taking into consideration that I never had the opportunity to observe the demeanor of the complainant like the trial court, I still find that her evidence on what transpired on the material night credible and corroborated by the evidence of PW3 who found her that night in the appellant's sweater. She immediately told her mother and the uncle she had been with the appellant

On the identity of the accused person?

The appellant was well known to the complainant. She went to the place where he worked at her grandmother's and they went to the forest together. He gave her his sweater to wear. The identity of the person who committed the defilement is not in issue as it is the appellant.

The appellant was arrested the following day. His defence that he was arrested and charged because of the wrath of the woman whose sexual advances he rejected is not believable. This is because he did not establish any relationship between the complainant and the alleged woman, except that she was a neighbour to his employer, who is the complainant's grandmother. He testified that his employer Mama W. The complainant's grandmother, and on his own evidence, stood up for him. How then would she turn and support such an ill intended move and even allow her granddaughter to be used in it? Nothing on record gives any clue as to why she would do that and in any event he never said he had any issues with her to warrant her to join a scheme to frame him up.

I found that line of defence incredible believable and I find that the magistrate was right in rejecting the said defence.

I also find that the trial magistrate relied on section 124 of the Evidence Act and its interpretation in **Kibet -Vs-Republic (2009) KLR**. He gave his reasons as to why he believed that the complainant was telling the truth.

I found that on the evidence on record the prosecution proved penetration, age of the complainant and the identity of the culprit. In my view the conviction is sound.

With regard to the sentence, the trial magistrate sentenced the appellant 30 years' imprisonment. The offence carries a minimum sentence of 20 years as per s.8(3) of the Sexual Offences Act. The offender was 1st offender. He said he was an orphan, and the one taking care of his siblings.

Except to state that he had considered the mitigation by the accused person and that this was a serious offence, the magistrate did not give any reasons for giving the extra 10 years above the minimum. While sentencing is not easy It is my view that even when a person is being punished for a horrendous offence, it is important that he understands the reason for it. It is the only way as a judiciary we can lift the myth around sentencing. This is what Mr. Justice Mbogholi Msagha Chairperson - *Judicial Taskforce on Sentencing* had to say in the Foreword to the Sentencing Policy and Guidelines (2016)

> *Reaching a fair decision in sentencing is neither an easy nor straightforward process; several considerations come into play. While sentences are defined by law, the measure of what is an appropriate sentence in a given case is left to the discretion of judges and magistrates. As Justice McArdle is famously quoted saying,* ***"Anyone can try a case. That is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty."***

This was the reason for the sentencing guidelines. The sentencing policy guidelines (2016) at paragraph 22 provide guidelines for the sentencing process and provides guidelines on how it should happen. It was necessary for the trial magistrate to explain circumstances that would require an extension of the minimum sentence just like any magistrate considering a custodial sentence. I found no explanation for the extension. In my view the minimum sentence of 20 years' imprisonment is sufficient in the circumstances.

Hence the Sentence is revised to a term of 20 years' imprisonment to run from the date appellant was remanded in custody- 26th October 2015.

Dated, delivered and signed in open court at Nyeri this 30th May 2018.

Mumbua. Matheka

Judge

In the presence of:

Court Assistance: Atelu

Appellant

Mr. Magoma for state