REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 66 OF 2015

JOHN NGUGI KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable E. Tanui Resident

Magistrate, delivered on 27th February, 2009 in Nakuru

Chief Magistrate's Court Criminal Case No. 102 of 2008)

JUDGMENT

1. The Appellant, John Ngugi Kariuki, was arraigned before the Nakuru Chief Magistrate's Court in Criminal Case No. 102 of 2008 charged with a single count of defilement of a child contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act. The particulars of the offence are that between 16th and 20th day of June, 2008 at [particulars withheld] Village in Nakuru District, the Appellant is alleged to have unlawfully and intentionally caused the penetration of his genital organs (penis) to a child of thirteen (13) years, namely, P M.

2. The Appellant faced an alternative count of performing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

3. The Appellant denied the charges and a fully-fledged trial ensued. The Prosecution called seven witnesses and closed its case. The Trial Court put the Appellant on his defence. He elected to give an unsworn statement and did not call any witnesses. At the conclusion of the trial, the Learned Trial Magistrate found the Appellant guilty of the main count and convicted him to imprisonment to twenty-five years.

4. The Appellant is dissatisfied with both the conviction and sentence and has filed the present appeal against both. The Appellant based his appeal against conviction on two grounds as follows:

> a. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the medical evidence produced before Trial Court did not support the charge against the appellant.
>
> b. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the prosecution did not prove the age of the complainant beyond any reasonable doubt as required by law.

5. The Appeal was opposed by the State. Mr. Motende appeared for the State and made oral submissions in support of the conviction. The Appellant filed written submissions and indicated to the Court during the hearing of the appeal that he had nothing to add orally.

6. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

7. The evidence that emerged from the trial was as follows.

8. The victim testified that she was thirteen at the time the incident happened. She was a Standard Four student at [particulars withheld] Primary School. She knew the Appellant; who was their neighbour at home. She knew him by name and identified him as such in Court.

9. On 16/06/2008, the Complainant testified, she was on her way to school early in the morning – at 6:00am. She met the Appellant who had a message for her: in the future, she should be passing through his house otherwise he would come looking for her and kill her.

10. With the enormity of that threat understood, the Appellant reportedly ordered the Complainant to follow him to his home. While there, he made her lie on the bed and proceeded to remove her panties. Next he removed his trousers. In the Complainant's own words, the Appellant, then, "put his thing which he uses to urinate into [her] vagina..." According to the Court record, to deliver that message, the Complainant pointed to her crotch rather than say the word "vagina".

11. The Complainant testified that the Appellant then gave her Kshs. 5/- and warned her not to tell anyone. The Complainant also testified that the Appellant had showed her a knife and warned her not to scream during the ordeal.

12. Recalling the Appellant's dire message, the Complainant went to the Appellant's house again the following day as well as the next day. Each day, the Appellant would give her Kshs. 5/- after having sex.

13. The series would come to an end on the fourth day. A neighbour, John Nyanga, found the Complainant at the Appellant's house. Apprehensive that something unholy was amiss, he threatened to report the matter to the Complainant's father – and the Complainant confessed what had been happening. John Nyaga then told the Complainant's father, who, in turn told the mother. The mother promptly reported to the Police and two days later the Appellant was arrested – and the formal process of investigations and prosecution kicked off.

14. The Complainant's mother, L W, testified as PW2. She testified that the Complainant was thirteen years old and in Standard four at [particulars withheld] Primary School. She testified that she noticed that the Complainant's dress was wet when she came from school on 20/06/2008. On inquiry, the Complainant was not forthcoming – until the Complainant's father came home and informed them what John Nyaga had told him. On inspecting the Complainant's private parts, the mother witnessed a swollen vulva and smelly discharged hence triggering her report to the Police. The Complainant told the mother and a friend the mother had called about the illicit sexual encounters she had had with the Appellant.

15. Dr. Daniel Wainaina examined the Complainant on 23/06/2008 and confirmed that her history of defilement was backed up by evidence: a missing hymen and whitish discharge from the vagina. He, however, did not find any bruises or tears. This was unsurprising since the

16. John Nyaga testified as PW7; and the Complainant's father, S K M was PW4. They both corroborated the narratives told by the Complainant and her mother. So did Anna Wambui – who was the neighbour the Complainant's mother called when the Complainant first disclosed what had happened to her, and who had examined the Complainant's private parts together with the Complainant's mother. John Nyaga testified that he has been seeing the Complainant going to the Appellant's house every morning the whole week.

17. The Investigating Officer, PC Sangala Peter rounded off the Prosecution case. He testified about the report made about the defilement and how he ended up arresting and charging the Appellant.

18. Put on his defence, the Appellant delivered a denial. He explained how he was arrested on Saturday 21/06/2008 and taken to the Chief's office. He stated that he had told the Chief in front of the Complainant's parents that the Complainant had gone to his house the previous Thursday and Friday to ask for sugarcane. He claimed that he did not defile the Complainant but that the Complainant's parents tried to force him to "settle" the matter out of court but he declined.

19. The Appellant claimed that his private parts were not "functioning" and that he demanded to be taken to the hospital but that never happened. He produced some photos meant to prove that his private parts were "sick". On cross-examination, the Appellant claimed that he had a dispute with the Complainant's parents and that the case was a frame up to settle the scores.

20. After summarizing the evidence adduced at trial, the Learned Trial Magistrate concluded as follows:

> *I have considered, evaluated and weighed evidence as a whole; the evidence adduced by the Prosecution was consistent and well corroborated. The defence of the [Appellant] was not for believing. The same did not cast any doubt on the Prosecution case. Though the [Appellant] had proved he has a sickness in his private parts, the treatment notes indicate that he attended hospital for the first time on 25/08/2008. The offence herein was committed between 16th and 20th June, 2008. The treatment notes are not relevant.*

21. To obtain a favourable verdict, the Prosecution was required to prove three critical ingredients of the offence of defilement:

> a. That the Complainant was under-age – in this case thirteen years old (See section 8(1) of the Sexual Offences Act);
>
> b. That there was a partial or complete insertion of the genital organs of the Appellant into the genital organs of the Complainant ("penetration")(see section 2 of the Sexual Offences Act); and
>
> c. That it was the Appellant who caused the penetration. (See ***Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013*****)**

22. The age of the Complainant was proved through oral evidence by the Complainant and her mother (PW2). The P3 form also had the same figure: thirteen years old. This was not seriously contested in the trial. While the Appellant now argues that the age of the Complainant was not proved to the requisite standard. In making that argument, the Appellant placed heavy reliance in ***Elias Kaingu Kasomo v Republic [2014] eKLR***. He suggests, wrongly, in my view, that in that case the Court of Appeal held that there must be documentary evidence to satisfactorily prove the age of a complainant in a defilement case.

23. In fact, that is not the position established in our decisional law. Our law on the point is the one pithily stated by the Court of Appeal in ***Mwalongo Chichoro Mwanjembe v Republic, [2015] eKLR***. The Court of Appeal stated as follows:

> ***…****the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See* ***Denis Kinywa v R, Cr. Appeal No.19 of 2014*** *and* ***Omar Uche v R, Cr. App.No.11 of 2015****. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in* ***Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000****. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…*

24. In the present case, the age of the Complainant was proved beyond reasonable doubt by the Complainant's testimony in *voir dire*; the testimony of the Complainant's mother; as well as the P3 form produced by the doctor. There really is not much room to contest the age.

25. What about the issue of penetration? The Appellant relied on ***Michael Odhiambo v R (High Court Crim. App. No. 280 of 2004*** for the proposition that rapture of a hymen without more is not conclusive proof of penetration.

26. The Appellant is right on this score. Rapture of the hymen of a child, without more, cannot establish the element of penetration in a defilement case. There has to be evidence linking the missing hymen with the defilement. In this case, the oral evidence adduced by the Complainant; her mother; her father and John Nyaga cumulatively prove beyond reasonable doubt that the Complainant was defiled and that the missing hymen is consistent with the defilement. The Prosecution did not have to prove by medical evidence that any fluids found in the Complainant's genitalia was the Appellant's spermatozoa as the Appellant argues on appeal. As our decisional law has established many times, rape or defilement is proved by evidence, not by way of DNA test. See ***AML v Republic [2012] eKLR***.

27. Finally, there is the issue of identification. Is there sufficient evidence pointing to the fact that it was the Appellant who penetrated the Complainant's genitalia? Again, the answer is clearly in the affirmative. The oral evidence of the Complainant as corroborated circumstantially by the evidence of her mother; father and John Nyaga satisfactorily show that the Appellant defiled the Complainant. Indeed, the Appellant does not deny that the Complainant is known to him or that she went to his house. He only claims that he did not defile her.

28. Finally, on conviction, I should point out that I have re-considered, as I am required to do, the sworn testimony of the Appellant whose theory was one of denial. The Learned Trial Magistrate simply did not believe him. She found, instead, the Prosecution narrative more believable. She found the evidence of the Appellant's sick genital parts to be irrelevant to the question of the determination of the guilt of the Appellant in part since the Treatment Notes produced showed that the Appellant had reported the sickness at least two months after the alleged offence.

29. I am in agreement with the Learned Trial Magistrate that the Appellant's narrative has no inherent possibility that it is might be true. This means that it is not capable of raising any reasonable doubts in the mind of a reasonable Tribunal.

30. The Court of Appeal had this to say about a finding on credibility of a witness by a Trial Court:

> *Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not.*

31. This was in ***Keter v Republic [2007] 1 EA 135***. There is nothing in this case to suggest that it was an abuse of discretion for the Learned Trial Magistrate to disbelieve the Appellant; and, on the other hand, believe the Prosecution witnesses. Indeed, there is enough on the record to affirm that Learned Trial Magistrate's finding of incredulity of the Appellant's narrative: consistency of the Prosecution witnesses' narratives even under scrutiny in cross examination; their points of convergence; and lack of motive to lie and/or frame the Appellant. Conversely, much in the Appellant's story does not inspire confidence that it is true:

32. Consequently, after all is said and done, there is no ounce of reasonable doubt that the Appellant committed the offence of defilement against the Complainant.

33. Turning to the sentence, the State conceded that the penalty meted out was excessive given that the minimum sentence under the Sexual Offences Act is 20 years. As a first offender, Mr. Motende argued that it was not necessary for the Trial Court to impose a sentence that was above the statutory minimum.

34. I would agree with Mr. Motende that, as a first offender and without any notable aggravating circumstances (other than the age difference between the Appellant and the Complainant), the Learned Trial Magistrate should have sentenced the Appellant to the minimum penalty allowed.

35. **The upshot, then, is that the appeal against conviction is hereby dismissed. However, the appeal against sentence has succeeded to the extent that the sentence is reduced from imprisonment for twenty-five years to imprisonment for twenty years**.

36. Orders accordingly.

Dated and delivered at Nakuru this 14th day of June, 2018

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(PROF.) JOEL NGUGI

JUDGE