REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO 36 OF 2017

DOUGLAS MWAURA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 401 of 2015 in the

Chief Magistrate's Court at Thika by Hon C.A Otieno Omondi (PM) on 28th February 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Douglas Mwaura Mwangi, was charged with the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the 2nd day of February 2015, at [particulars withheld] village in Gatanga District within Muranga County, he intentionally and unlawfully caused his penis to penetrate the vagina of B M N (hereinafter referred to as "PW 1"), a child aged 16 years.

2. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences.

3. The Learned Trial Magistrate, Hon C.A Otieno Omondi, Principal Magistrate, convicted and sentenced him to serve fifteen (15) years imprisonment.

4. Being dissatisfied with the said judgment, the Appellant filed a Petition of Appeal. He relied on ten (10) Grounds of Appeal. On 22nd March 2018, he filed Amended Grounds of Appeal and Written Submissions. This time he relied on fourteen (14) Amended Grounds of Appeal.

5. When the matter came up for hearing on 22nd March 2018, the State submitted orally in court.

LEGAL ANALYSIS

6. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor".**

7. Having considered the Appellant's and State's Written Submissions, this court found the following issues to have been placed before it for determination:-

> **1. Whether or not the Prosecution proved its case beyond reasonable doubt;**
>
> **2. Whether or not the sentence that was meted upon the Appellant herein was harsh, severe and manifestly excessive in the**

circumstances.

8. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

I. PROOF OF PROSECUTION'S CASE

9. Amended Ground of Appeal Nos (1) - (13) were dealt with together as they were related.

10. The Appellant submitted that the Prosecution did not demonstrate any connection between him and PW 1's broken hymen because no condom was adduced as evidence before the Trial Court. He added that there was no spermatozoa that were present or tears in the hymen.

11. He contended that witnesses from her school ought to have been called as witnesses in the case to corroborate her evidence on what had really transpired on the day she said she left school. It was his averment that no documentary evidence was adduced by a Safaricom witness to confirm that he spoke to her as she had alleged.

12. He was emphatic that she was not a truthful witness and that her evidence was inconsistent and full of contradictions. He pointed out that at one point she stated that on the material night, they had sex many times and then again said that they had sex twice. He also stated that they ate fish on that night and again averred that they ate pork. He stated that she also contradicted herself when she said that she used to go to his house on Sunday mornings and then also said that she did not use to go to his place every Sunday morning.

13. He was categorical that she was not a truthful child because if they had had sexual relations since 2012 as she had contended, then she ought not to have revealed the same only on the night they were allegedly accosted in his house.

14. He argued that the burden of proof lay with the Prosecution to prove its case but that it did not prove its case against him. He stated that his unsworn evidence was not considered before he was convicted which was contrary to the provisions of Section 169 of the Criminal Procedure Code and that the Learned Trial Magistrate failed to give his points of determination contrary to the law.

15. His submission was that this case was based on circumstantial evidence and urged this court to treat the evidence of the Prosecution witnesses with caution because no proper investigations were conducted and that the Prosecution did not explain the cause of his arrest. He relied on numerous cases to support his case, which this court considered. See- **Criminal Appeal No 11 of 2016 John Mutua Munyoki vs Republic** and **James Mwangi vs Republic [1983] KLR 327** & others.

16. On its part, the State submitted that its six (6) Prosecution witnesses proved the case against the Appellant, beyond reasonable doubt. It stated that the Charge sheet clearly indicated the date when the offence was committed, the place where the offence was committed and the name and age of victim. It pointed out that the Birth Certificate showed that PW 1 was aged sixteen (16) years at the time of the offence and that Dr Gachanga Kamau (hereinafter referred to as "PW 5") tendered in evidence P3 Form, Treatment notes and Laboratory results that showed that PW 1 had been defiled.

17. It stated that PW 1 was arrested at the Appellant's house and consequently, there was no doubt as to his identity. It submitted that the Prosecution had proved its case against him beyond reasonable doubt, because he was caught red-handed with PW 1 in his house.

18. According to PW 1, she was aged sixteen (16) years at the time of the offence. She adduced in evidence, a Birth Certificate that showed that she was born on 20th January 1999. She testified that on 2nd February 2015, she was sent home to get a book and that before she left school, she called the Appellant through the school secretary's number and they agreed to meet at Thika town. She met him as agreed and they went to Benwa Bookshop where he bought her the book. They then went for lunch. They were with another lady who left them at 6.00 pm on that day.

19. She accompanied the Appellant to his home at about 8.00 pm where they slept. They were awoken at around 5.00 am – 6.00 am by police officers, his uncle C K (hereinafter referred to as "PW 2") and J K T (hereinafter referred to as "PW 3") and taken to Kiruara police station where the Appellant was charged with the offences that he was facing. It was her evidence that the Appellant had been her boyfriend since 2012 when they first had sexual relations, and that thereafter she would visit him on most Sundays.

20. PW 2 stated that his mother's house help informed him that PW 1 had been seen around the stage near his mother's house with the Appellant herein. He said that he had been aware of the relationship between PW 1 and the Appellant herein and that in April 2014, he had visited the Appellant's parents to ask them to dissuade him from continuing with the love affair with PW 1 but he had failed to stop seeing her. They then arranged to go to the Appellant's house first thing in morning and nabbed him with PW 1 in the house.

21. PW 3 corroborated PW 2's evidence about the Appellant's arrest. No 83074428 APC Douglas Makanga (hereinafter referred to a "PW 4") also corroborated PW 2's evidence and testified how PW 2 called him and they hatched the plan to go to the Appellant's home at dawn so that they could catch the Appellant red-handed with PW 1, which he said they did.

22. PW 5 told the Trial court that PW 1's hymen was torn and she had a foul smelling discharge from her vagina. There was no spermatozoa and suggested that the Appellant may have used a condom.

23. No 68686 CPL David Cheruiyot (hereinafter referred to as "PW 6") was the Investigating Officer. He reiterated the evidence that was adduced by the Prosecution witnesses.

24. In his unsworn evidence, the Appellant stated that on the material date, he woke up feeling unwell and fatigued. His girlfriend, Ms M, who was a house help at PW 2's mother's house, visited him to resolve a dispute they had had and he questioned her why she gave PW 2 his

telephone number. She left his house and at 7.00 pm, he went to his mother's house where he ate supper and left for his room at 11.00 pm. He stated that he was awoken at 5.45 am by PW 2, PW 3 and PW 4 who were in the company of PW 1, who he said he had only known in Church.

25. In his defence, the Appellant had raised a defence of alibi on the material night. However, he did not call his parents who he had supper with on the material date. These were crucial witnesses as they would have corroborated his evidence. The Learned Trial Magistrate termed his unsworn evidence as an afterthought, which this court agreed with.

26. Indeed, whereas the burden of proof lies with the prosecution to prove its case against an accused person beyond reasonable doubt, it is trite law that once it adduces cogent and consistent evidence against an accused person, then it becomes incumbent upon that accused person to persuade the trial court that his or her case is more convincing than that of the prosecution.

27. In his judgment, the Learned Trial Magistrate stated that he was satisfied that the Appellant did in fact have sex with PW 1 twice on the material date because her evidence was devoid of any material contradictions and that her evidence remained unshaken.

28. In this case, PW 5 did not adduce any evidence to suggest that PW 1 was defiled on that material night. This court therefore had to fall back on PW 1's evidence of what transpired on the said date. Her evidence that she had sex with the Appellant on the material night was that of a single witness. The same fell within the ambit of the proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that empowers a trial court to rely on the evidence of a single witness in convicting an accused person for a sexual offence.

29. Section 124 of the Evidence Act provides as follows:-

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

30. This court was persuaded to find and hold that PW 1 was telling the truth. Her evidence that she had been friends with the Appellant was corroborated by PW 2 who testified that in April 2014, he went to the Appellant's parents to warn the Appellant to stop having an affair with her. As the incident herein occurred in 2015, a long relationship between PW 1 and the Appellant could be discerned. This court also agreed with the Learned Trial Magistrate that the Appellant's evidence that his girlfriend was the house help in PW 2's mother's house was an afterthought as it was introduced only during the defence hearing.

31. The inconsistencies in PW 1's evidence of what they ate on the material date, where they ate, how many times she went to the Appellant's house and on which days or how many times they had sex were inconsequential and did not dilute the Prosecution's case.

32. The fact that PW 5 confirmed PW 1's hymen was broken and she was in fact found in the Appellant's house at dawn suggested that PW 1 and the Appellant had engaged in sexual relations. The issue of a condom not having been adduced in evidence was neither here nor there. The Birth Certificate showed that she was born on 20th January 1999 making her sixteen (16) years at the material time. These two (2) ingredients, proof of penetration and proof of PW 1's age were demonstrative of the fact that the Prosecution proved the offence of defilement beyond reasonable doubt.

33. As the Prosecution's evidence was cogent, consistent and well corroborated it was not necessary to have called the secretary from the school PW 1 used to attend or to adduce documentary evidence of data in the Appellant's phone. All these were rendered moot when he was found in the same house at day break of the material date.

34. The Appellant's evidence was unsworn. It therefore had little or probative value. Weighed against the Prosecution's evidence, this court was also satisfied that the Prosecution proved its case beyond reasonable doubt.

35. In the premises foregoing Amended Grounds (1)-(13) were not merited and the same are hereby dismissed.

II. SENTENCE

36. Section 8 (1) (4) of Sexual Offences Act provides as follows:-

> **1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **2) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years**

37. It is clear that there was only one (1) sentence that the Learned Trial Magistrate could have meted to the Appellant once he convicted him. Similarly, once this court found that the Appellant was liable for the offence herein, its hands were also tied.

38. In view of the fact that the sentence of fifteen (15) years was the minimum sentence that could have been meted out under Section 8 (1) (4) of the Sexual Offences Act, it was the considered view of this court that the sentence that was handed down to the Appellant was not severe, harsh or manifestly excessive so as to warrant its interference.

39. In the premises foregoing, this court found Amended Ground of Appeal No 14 not to have been merited and the same is hereby dismissed.

DISPOSITION

40. For the foregoing reasons, the upshot of this court decision was that the Appellants Appeal that was lodged on 14th March 2017 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction and the sentence that was meted upon the Appellant herein as they were both lawful and fitting.

41. It is so ordered.

DATED at **NAIROBI this 28th day of July 2018**

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at KIAMBU this 31st day of July 2018

C. MEOLI

JUDGE