REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL APPEAL NO 16 OF 2014

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No. 406 of 2012

in the Chief Magistrates Court, Naivasha, S M Githinji, - CM)

MOSES WAMUMBE GITAU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with defilement of a girl with mental disability contrary to section 7 of the Sexual Offences Act, No 3 of 2006. On being found guilty, he was sentenced to serve a twenty year imprisonment term. The Particulars of the offence were that on 6th day of February, 2012, at [particulars withheld] within Nakuru County, he intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of J W, a girl aged twelve years

2. He appealed against the outcome, in particular the sentence, in the following terms contained in his petition of appeal filed on 7th April, 2013:

> **"I …appeal against the Sentence of 20 years imprisonment for the offence of defilement….on the following grounds:**
>
> **1. THAT I am a first offender and very remorseful and apologetic and for that reason coupled with the fact that I was misguided by disgruntled peer group whom I have long forsaken. I pray that the excessive sentence be lessened;**
>
> **2. THAT on the alternative, I being now a born again Christian, I pray that I be given freedom as a result of clemency for I utterly regret the said act;**
>
> **3. THAT I have a wife who is only a house wife and children who need my presence for am their only bread winner;**
>
> **4. THAT I promise henceforth to be a true citizen and lead a constructive life;**
>
> **5. I pleaded guilty at trial;**
>
> **6. Here states grounds of appeal and use a separate sheet if necessary (sic);**
>
> **7. I am a poor man and have no money for appeal fee;**
>
> **8. I do wish to be present at the hearing of the appeal."**

3. The Appellant filed written submissions which veered away from the line of apology and remorse on the basis that he was misguided by his peers who he has since forsaken, as contained in his grounds in the filed appeal. Instead, his submissions went well beyond attacking the sentence. In fact he challenges the merits of the conviction, and seeks that both the conviction and sentence be quashed and set aside.

4. Accused impugned the child's evidence as she said she was told what to say in court by her father; that the failure of the school girls who accompanied child to report to the teacher to give evidence shows manipulation of the case, that the court failed to find penetration occurred; that there was nothing in the medical reports to link accused with the offence of defilement; that there was no evidence of mental retardation of child;

5. The DPP opposes the appeal and has argued his opposition as if the appellant had, in his grounds of appeal, attacked the merits of the conviction in addition to the sentence.

6. The record of proceedings shows that the Appellant pleaded not guilty despite his stating in his appeal that he pleaded guilty at trial; he also states in his appeal that he is:

> **"remorseful and apologetic and for that reason coupled with the fact that I was misguided by disgruntled peer group whom I have long forsaken"**

This implies a post facto admission of guilt that cannot, however, be taken into account, as he pleaded not guilty and the offence must be proved beyond reasonable doubt in the usual manner.

7. The Appellant impugns: the evidence of PW4 on the ground that he did not identify himself using his TSC registration number; the evidence of PW 6 the police officer who, having said that the other girl refused to give evidence, appears to have disclosed that the case was manipulated or invented;

> the evidence of PW1 who said he came home at 6:30 PM while PW5 states that the incident took place at 7 PM. According to the appellant, the evidence of these witnesses creates an impression of suspicion in the mind of the court, that the witnesses are not reliable or trustworthy. Thus, the totality of the prosecution evidence creates doubt as to its veracity. On this, the appellant relies on the case of **Ndungu Kimani v Republic Criminal Appeal No 22 of 1979**.

8. The Appellant also challenged the learned Magistrate's conclusion of penetration on the basis that the examination of the complainant's genitalia revealed the existence of pus cells and then made a connection between that with the sexual activity. The appellant's argument is that no DNA test was done to determine the origin pus cells and to link the appellant with any such activity.

9. Further, the appellant urges that there was no evidence to prove that the complainant was mentally retarded. The absence of such proof casts doubt on the conclusions reached by the magistrate. He also submits that identification was faulty as no identification parade was carried out. On this the appellant cites the case of **Francis Kariuki Njiru & 7 Others v Republic [2001]eKLR** where the court of appeal stated the settled law that evidence relating to identification must be scrutinised carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

10. On his part, the DPP submitted that the complainant, PW5, testified that on 6th February, 2012 while on her way from school she met the accused who took her to a bush, removed her undergarments and raped her. After the incident she met other schoolgirls who she told what had happened. These girls reported the incident to the PW4, their teacher the following day on 7th February, 2012, who informed her parents, PW1 and PW2, and requested them to come to school.

11. PW1, the mother made inquiries and W told her what happened. The parents therefore reported to the police and took W to hospital.

12. On identification, the DPP pointed out that the incident occurred at daytime; that the child was able to identify the accused as Gitau, a neighbour she knew. He urged that there was no suggestion in the evidence of mistaken identity.

13. On penetration the DPP submitted that PW7, the doctor, testified that she examined the complainant PW5, and saw a white discharge.

A vaginal swab was also carried out on the complainant, and her vaginal opening was found to be enlarged.

14. The court has carefully considered the submissions of the appellant and the state and the accompanying documents. The issues for determination are:

> 1. Identification
>
> 2. Penetration
>
> 3. Sentencing

15. According to the proceedings, the learned magistrate conducted a *voir dire* examination of the minor complainant on 7/2/2013, and ruled that:

> **"The girl is intelligent enough to offer evidence but does not understand the nature and meaning of the oath. She will give unsworn testimony"**

In her testimony, PW5 testified that Gitau, the Appellant:

"…did something bad to me. He did it in the bush….He did remove my clothes. He removed petticoat and pant. He did it while we were standing. I told my father about it. I told some pupils about it. They were class 8 girls. I was taken to hospital. My mother took me. I felt pain when he did the bad thing to me. I felt pain here (touches the genital area). I had not done such a thing before"

16. In cross-examination by the accused PW 5, inter alia, stuck to her story and insisted that the Accused did a bad thing to her, and that he should not deny it.

17. There was no other eye witness. PW 1, her mother, testified that on the 6th February, 2012, her daughter, the complainant came home at 6.30pm. This was unusual as she normally arrived home at 4.00pm. She was brought home by her brother who had responded to a neighbour that had called him to pick her. On 7th February, the complainant told her mother that someone had told her to remove her pants and they had sex. Her mother examined her and noticed a whitish substance and an enlarged vaginal opening. She took her to hospital where the complainant was checked.

18. A P3 form was issued on 9th February, 2012. It indicates the complainant's injuries upon examination as follows:

"Whitish discharge per vagina; Hymen broken"

A PRC Form was produced and showed that a vaginal swab of the complainant's vagina when tested disclosed no spermatozoa, but that there was a urinary tract infection.

19. None of the complainant's schoolmates whom she had told of the incident were called to give evidence. It would have been hearsay, except as to confirmation that the complainant had told them.

20. The Investigating Officer, PW 6, said she received a report from the parents of the child that their daughter who was mentally retarded had been raped. The child was a student at [particulars withheld] Primary School. On questioning the girl, she confirmed what had happened. She took the child to the police station and a P3 form was filled. They then went to the hospital

21. PW6 testified that on 10th February, 2012, they traced the accused in a relative's house. The child confirmed the accused was the perpetrator when she saw him. PW 6 produced Exhibit 2, the child's birth certificate showing she was born on 10th July, 1988, and therefore a minor.

22. On the mental state of the child PW 3, Dr Kanyuru produced a report containing a psychiatric report by a Mr Kabaza which indicates that the child attended psychiatric treatment every month since 20th August 2010. The Clinic cards were exhibited as Exhibits 1 C and 1D

23. In his defence, the Accused gave an unsworn statement. He said that on 10th February, 2012, which he referred to as the material day, he left work and went home. He was then called to help his sister in law, and he stayed there till evening repairing her fence. At 8.30 pm that night the police and the complainant's father came and arrested him. He had quarrelled with the complainant's father, PW 2, about a path he had allegedly opened in his farm. He said nothing about his whereabouts on 6th February, 2012.

24. The court notes that whilst cross examining PW1, the Appellant did not ask any question relating to their alleged quarrel. This suggests that the alleged quarrel was made up as an afterthought, an attempt to create a motive for unnecessarily blaming him.

25. The court notes that the child, PW 5, did state in cross examination that:

"You did bad thing to me. It was along the road. Nobody else saw us. It was 7pm."

Whilst the mother PW 1 testified as follows of her daughter:

"She came home at 6.30pm. She used to come at 4.30pm"

The Accused has latched onto the time inconsistency to show that the case was fabricated.

26. I do not think the thirty minute inconsistency in time is a matter of great consequence in this case. No one reasonably looks at their watch when events are happening in the course of a day, so it is to be expected that the times asserted are really estimates. Further, the child is a minor who it was shown has been attending hospital for psychiatric treatment. The real question, however, is whether there was penetration of child by the accused.

27. On penetration, there was evidence from the doctor that the child's hymen was broken, and that there was a discharge from the vagina which was not semen. The doctor also stated that a hymen can be broken from other causes such as horse riding and cycling, but there was no evidence that the child engaged in any of these activities or in sexual activity.

28. There was also the following evidence on penetration: PW1, the child's mother examined her on 7th February after she was told of the incident. She stated that she found her daughter's genitalia enlarged. The medical report showed that the hymen was broken; the P3 form showed a whitish discharge from vagina and broken hymen but with no bleeding or lacerations; the PRC also showed broken hymen.

29. In **Evans Wamalwa Simiyu v Republic [2016] eKLR**, the Court of Appeal stated as follows with regard to penetration:

> **''[14] from the above quoted section 8(1) it is apparent that the offence of the defilement is complete immediately there is an act that causes penetration and the victim of the act as a child. Section 2 of the sexual offences 'act defines an act that causes penetration ' as 'an act contemplated under the Sexual Offences Act '. The same section defines 'penetration' to mean 'partial or complete insertion of the general genital organs of a person into the genital organs of another person'. As regards the definition of 'Child' section 2 of the Sexual Offences Act adopts the definition of child provided under the Children Act, that is 'any human being under the age of 18 years of age and therefore child within the definition of the Children Act. Thus the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organs of the perpetrators genital organs into a child's genital organs regardless of the age the child."**

30. I find there is no reason to doubt the child when she asserted that the accused was the one who did a bad thing to her. No motives have been imputed. There is no suggestion that she was settling a score, or had something against the accused. The police officer, PW 6, said :

> **"….the girl (child) confirmed to us he was the one when she saw *him*"**

PW 4, the teacher who received the report of the incident from the child's friends stated that one of the girls told him:

> **"….she (child) was from a certain home where she was defiled"**

31. PW 1, the child's mother testified that her daughter showed her where the assailant was living. PW2, the child's father testified that his daughter told him the man is called Gitau, and that she identified him at the police station.

32. The incident allegedly happened in the evening when the child was on her way from school. She was able to identify the accused. She told her mother where he stayed, and told her father his name. She identified the accused after he was arrested. I am thus satisfied that, given all the circumstances, the accused was duly identified.

33. The Magistrate concluded in the judgment as follows:

> **"The chain of events here is natural and believable. It is not PW2 who initiated it (the complaint) and even if he had a grudge against the accused, he did not aim to score even in this case"**

I find no fault in the learned Magistrate's finding and conclusions. I see no reason that would motivate the child in this case, more so one who is not mentally agile and is attending psychiatric treatment, to make such serious allegations as to being sexually violated.

34. On sentencing: the role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in **Wanjema v Republic [1971]EA 494** that:

> **'An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case"**

35. The sentence of 20 years meted by the learned magistrate is provided for under **section 8 (3)** of the **Sexual Offences Act** which provides that:

> **"A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term <u>not less than twenty years</u>"**

36. The sentence is mandatory if a child is between 12 and 15 years, and in this case, the child was 14 years of age. Accordingly the learned Magistrate was entitled to mete out the sentence given. I would not interfere with the same.

37. In the end, I would say, as was said by Meoli J in HCCRA 158 of 2015:

> **"…the testimony of the minor is valid on its own and was properly accepted by the court. Further it was corroborated by other equally solid evidence. The appellant was convicted by sound evidence"**

38. In light of all the foregoing, I am satisfied that the learned Magistrate properly, reached the correct decision. Accordingly, the appeal is hereby dismissed.

39. Orders accordingly.

Dated and Delivered at Naivasha this 27th Day of September, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Moses Wamumbe Gitau in person

2. Mr. Koima for the State

3. Court Clerk – Quinter Ogutu