REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 180 of 2018

DUNCAN MUTWOTA NJOROGE.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 1115 of 2015 delivered by Hon. Jalango, SRM on 10th November, 2017).

JUDGMENT

Background.

1. Duncan Mutwota Njoroge, hereafter the Appellant was charged in the main count with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Act No. 3 of 2006. The particulars of the offence were that on 28th January, 2015 at Mwiki Township in Kayole Division within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of E.K, a child aged 15 years. In the alternative he was charged with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that he intentionally and unlawfully touched the vagina and breast of E.K, a child aged 15 years by his hands.

2. The Appellant was found guilty in the main count and sentenced to 20 years imprisonment. He has preferred the instant appeal against both the conviction and sentence. He filed amended grounds alongside written submissions. He was dissatisfied that his conviction was premised on no credible evidence, that his constitutional rights were violated, that essential witnesses did not testify and that essential elements of the offence were not established.

Submissions

3. The Appellant relied on written submissions while Ms. Akuja for the Respondent made oral submissions. The appeal was canvased on 17th October, 2018. The Appellant questioned the credibility of PW1 and PW3. He submitted that PW3 alleged that he had an affair with the complainant before her family left their former residence and he questioned the failure by the complainant to testify on the issue. He submitted that the complainant was not at his house during her disappearance and he had simply been used as a scapegoat. The Appellant also submitted that Articles 49 and 50 of the Constitution were infringed as he was held in police custody for a period of eight days in prison with no explanation. He also took issue with the fact that essential witnesses were not called. He cited a man the complainant reported to the incident after she escaped and a child who had allegedly seen him and complainant together. He then submitted that two essential elements of the offence of defilement namely, identification and penetration were not proved beyond a reasonable doubt. With regards to penetration, he argued that the medical evidence was not conclusive about the age of the injuries and did not connect him to the offence. He concluded by urging the court to allow the appeal.

4. Ms.Akunja in opposing the appeal submitted that all elements of the offence of defilement were proved with the age of the complainant being established through the production of a birth certificate which indicated that she was 15 years when the offence occurred. With regards to identification she submitted that the Appellant was identified by recognition as the complainant knew him before the incident. She submitted that the witnesses adduced credible evidence that was not contradictory. With regards to the violation of the Appellant's rights, she conceded that the Appellant had been detained more than the mandated period under the Constitution but argued that he can seek redress through civil proceedings. She added that the prosecution called necessary witnesses who sufficiently established their case. She concluded by stating that the offence was proved beyond a reasonable doubt and urged the court to dismiss the appeal in its entirety.

Evidence

5. **PW1,** E. K, recalled that on 28th March, 2015 at around 6.00 p.m. she was sent to photocopy some documents and on the way she came

across the Appellant who was drunk and gave her a soda. She drunk the soda and became nauseated at which point the Appellant asked her to escort him to his place to pick a sweater. When they got to the house the Appellant pushed him into the house. She fell in and lost consciousness. She regained consciousness at around 2.00 a.m. and found herself on a mattress naked. The Appellant gave her water to bathe and then left the house after locking her in. That was after he sprayed the house. She fell asleep and only woke up in the evening when the Appellant returned with some food and after they ate he defiled her again. He defiled her yet again on the following day in the morning. She then took a shower. She recalled that on the third day the Appellant again went home carrying food and defiled her. He asked her to shower and after she had showered he left for the shops but forgot to close the door which enabled her to escape from the house. She found her way to a friend of her father to whom she reported what had happened. The friend took her home and the matter was reported to the chief who arrested the Appellant. She was treated at MSF Hospital on 30th March, 2015 at 10.00 p.m. **PW2,** Irene Nyagwachi a Clinical Officer at hospital produced the medical report.

6. In cross examination PW1 stated that a child had seen her in the Appellant's company. In re-examination, she stated that one of the Appellant's friends visited the house on Sunday but did not see her as the Appellant had placed a curtain.

7. The medical examination revealed no physical injuries but the counselor noted that the patient appeared cold, distant and in deep thought. Her external genitalia appeared normal while the vagina had a thick cream although not smelling. There were healing bruises of the posterior fouschette but no bleeding. The hymen had multiple healed tears. A Post Rape Care report was also filled.

8. **PW3,** V.N.W., PW1's mother arrived home on the fateful day she and did not find PW1. She was informed that she was at the shops. At 9.00 p.m. they reported the matter at Mwiki Police Station. On the following day at around 1.00 p.m. PW1 was brought home by a friend of her father. They reported the matter to the police and took her to hospital. In cross examination she stated that the Appellant used to be their neighbor and had tried to have an affair with PW1 but she warned her and they moved from the plot.

9. The case was investigated by **PW4, CPL Binti Mwakusamat**. She interrogated the witnesses, recorded their statements and issued PW1 with a P3 Form. She also produced her Birth Certificate which indicated that she was 15 years as at the time of the incident.

10. After the close of the prosecution case, the court ruled that a prima facie case had been established and the Appellant was consequently put on his defence. He gave a sworn statement of defence in which he denied committing the offence. He confirmed he was a resident of Mwiki. He recalled that on 30th March, 2015 he was at home when two men knocked at his door. One of them identified himself as the chief and they arrested him and took him to Mwiki Police Station. On the following day the complainant and her mother made an accusation that the complainant had been missing for three days. He stated that he had been a neighbor with the complainant and her family but that he was not involved in her disappearance. He denied he defiled PW1 and that the complaint was made merely so that PW1 could shield herself from her mother.

Determination.

11. It is now thee onerous task of this court to reevaluate and reanalyze the evidence afresh and come up with its own independent finding. After doing so and considering the respective rival submissions, I conclude that the following issues arise for determination;

(i) Whether the Appellant's right to a fair trial was violated.

(ii) Whether the prosecution failed to call crucial witnesses.

(iii) Whether the offence was proved beyond reasonable doubt.

Whether the Appellant's right to a fair trial was violated.

12. The Appellant contends, and the Respondent concedes, that the Appellant's rights to a fair trial which mandate that a trial begins and be concluded without unreasonable delay under **Article 50(2)(e),** and at the same time that an arrested person be brought before the court as soon as reasonably possible under **Article 49(1)(f)** were violated. This was in view of the fact that the Appellant was held in police custody for seven days against the required period of 24 hours, having been arrested on 30th March, 2015 and arraigned in court on 7th April, 2015.

13. The court takes judicial notice of the fact that the period 3rd April, 2015 to 6th April, 2015 was within the Easter celebrations. There was therefore a delay of only three days which in the view of this court, though unconstitutional was not inordinate. In this regard, I take cognizant of the Court of Appeal finding in **Paul Mwangi Murunga[2008] eKLR**, where the court discussed similar provisions under the Constitution, 1963 and held that:

"…the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that."

14. Be that as it may, the Appellant is at liberty to pursue legal redress through a civil suit. And so the observation of this court must not be seen to fetter the Appellant's right to seek civil redress for the violation of his constitutional right.

Whether the prosecution failed to call crucial witnesses

15. The Appellant contends that crucial witnesses were not called. He singles out one Baba I and a child witness who it is alleged PW1 first met after she left the Appellant's house and saw the Appellant in the company of PW1 respectively. With regards to the aforementioned Baba I he was reported to be the first person to meet the complainant and therefore the first person to learn of the incident that had occurred. The importance of initial reports was ably set out by the then East African Court of Appeal in **Tekerali s/o Korongozi & others v.**

Rex[1952] EACA 259, thus:

> ***"Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishments or the deliberately made-up case. Truth will often come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."***

16. The court went on to state that:

> ***"Evidence of first complaints to persons in authority are important as they often provide a good test by which the truth and accuracy of subsequent statements may be gauged and provide a safeguard against later embellishment or a made-up case."***

17. Given the importance of report made at first instance, no doubt Baba I was a crucial witness as he would provide the court with information of what the complainant informed her when he met her. This evidence would be essential to consider against the rest of the evidence adduced in determining whether the complainant had embellished her story after the fact. The evidence of other witnesses clearly did not support PW1's assertion that she was held in captivity by the Appellant for four days. For instance, her own mother testified that she returned home on the following day. In that case, the evidence of Baba I would have been crucial to figure out whether the complainant had actually fingered the Appellant as her assailant for the four days when she reported the matter to him and what other details she may have disclosed to him. The failure to call him must lend credence to an inference that had he been called his evidence was likely detrimental to the prosecution's case as was set out in on **Bukenya and Others *v.* Uganda[1972] EA 549,** that;

> ***"...the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; the court has the right and the duty to call witnesses whose evidence appears essential to the prosecution of the case, and lastly that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

Whether the offence was proved beyond reasonable doubt.

18. The prosecution was enjoined to proof three essential elements, namely; (i)age of the victim (ii) identification of the perpetrator, and (iii) penetration. The age of the complainant as at the time of the offence was proved to be 15 years through the production of her birth certificate which indicated that she was born in the year 2000. As regards the identification, it is not in contention that the Appellant and complainant were known to each other as they were formerly neighbors. What is in question is whether the Appellant was identified as the perpetrator of the offence. The only evidence on this front came from the complainant's testimony that the Appellant had abducted her during which period he consistently defiled her before her escape. Having made the observation above about possible embellishment or a made-up case on the part of the complainant, I place a doubt in my mind on the credibility of the complainant's evidence.

19. The complainant testified that she met the Appellant who gave her a laced soda before leading her to his house. Her evidence was that she met the Appellant drinking the laced soda which he then used to drug her with. The issue of her being drugged did not arise in her mother's evidence as she testified that the complainant had stayed at the Appellant's place without stating anything about her being drugged. Besides, common sense dictates that if the soda that the Appellant was drinking is what PW1 drank, then the Appellant would not have been in a position to lead her to his house and subsequently defile her as he too would have fallen unconscious. It follows that PW1's assertion did not up to a consistent believable story.

20. Furthermore, the complainant's evidence also contained material contradictions. She testified that the Appellant lived in an iron sheet house that was simply a "single room with a mattress" and that was where she was being held for the three days she was missing. In re-examination she stated that on Sunday the Appellant was visited by a friend who did not however see her as the Appellant "had placed a curtain". The curtain seems to be referring to a partition of the room but given the description of the house it is doubtful that a visitor would not have realized her presence in the house.

21. The court noted the comments indicated in the report made during her examination at MSF Hospital that the complainant was cold, distant and in deep thought. This contrasted her account that she escaped from the Appellant which would not depict of a person described by the medical expert. This is informed by her testimony that after escaping in the morning she went and stayed by a railway line until 11.00 a.m. when she resolved to go to Baba I. She indicated that she failed to go home as she was afraid of being beaten by her mother. These are not sentiments that the court would associate with a child who had been abducted, drugged and defiled. These accounts do not also depict the conduct and disposition of a person who had been abducted.

22. It is my view that even if PW1 was defiled, the perpetrator was most likely not the Appellant. And even if it was the Appellant, sufficient evidence of his identification was not adduced to warrant a conviction. His conviction was not therefore safe. In the result, I find that the appeal succeeds. I quash the conviction, set aside the sentence and set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and **DELIVERED 26TH** DAY OF **NOVEMBER, 2018.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2. *Mr. Miiri for the Respondent.*