



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 173 OF 2015

GEORGE NJAHI WANJIRU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable C. OBULUTSA in Eldoret Criminal Case No. 6271 of 2014, dated 11th December, 2015)

JUDGMENT

1. The appellant *George Njahi Wanjiru* alias *Sungu* was tried and convicted of the offence of defilement contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006*.
2. The particulars of the offence allege that on 19th August, 2014 at Huruma Estate, Eldoret West District of Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ to penetrate the genital organ of *M A* (Name withheld) a child aged 9 years.
3. Upon his conviction, the appellant was sentenced to life imprisonment. He was aggrieved by his conviction and sentence hence this appeal. In his petition of appeal dated 16th December, 2015, the appellant through his counsel on record *Ms Adambi & Company Advocates* listed thirteen grounds of appeal. In a nutshell, the appellant complained that he was wrongly convicted mainly because in his view, the evidence adduced by the prosecution was insufficient to prove his guilt as charged beyond any reasonable doubt; the trial magistrate erred by treating the evidence adduced in his defence lightly and casually and in failing to appreciate the issues raised in his submissions.
4. At the hearing, learned counsel *Mr. Adambi* argued the appeal on behalf of the appellant while learned prosecuting counsel *Ms Kigegi* represented the state. In his oral submissions, *Mr. Adambi* re-iterated the submissions made before the trial court and invited the court to find that the evidence on record did not meet the threshold of proving the appellant's guilt beyond any reasonable doubt. He invited the court to note that the minor's evidence was not corroborated by any other evidence and that it was not credible. He urged the court to allow the appeal and acquit the appellant.
5. The state contests the appeal. *Ms. Kigegi* in her submissions implored the court to find that the prosecution had proved all the elements of the offence beyond any reasonable doubt; that the appellant's defence was actually a sham and that he had been correctly convicted. She in addition contended that the sentence imposed upon the appellant was the sentence prescribed by the law and that it was therefore lawful. She urged the court to support the appellant's conviction and sentence.
6. This is a first appeal to the High Court. I am well aware of the duty of the first appellate court which is

to re-evaluate and to consider afresh all the evidence tendered before the trial court to arrive at my own independent conclusions on the validity of the appellant's conviction and sentence. In doing so, I should be careful to remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage.

See: *Akeno V Republic* 1972 EA 32; *Njoroge V Republic (1987)* KLR 99; *Kinyanjui V Republic (2004)* 2 KLR 364.

7. I have given due consideration to all the evidence placed before the trial court, the grounds of appeal and the submissions made on behalf of the appellant and the state.

8. What emerges from the evidence and the submissions made both on appeal and before the trial court is that the complainant's age stated to be nine years on the material date was not disputed by the defence. What is strongly disputed is her claim that the appellant defiled her on 19th August, 2014 as alleged. In order to determine whether or not the appellant was properly convicted, it is important to briefly outline the evidence tendered by the prosecution before the lower court.

9. After a brief *voire dire* examination, the complainant narrated how the appellant took her to his home, undressed her, removed his trousers and defiled her. He then ordered her to dress up and go home. On her way home, she met her mother (PW1) and she reported to her what had happened. PW1 took her to a health centre and later to Moi Teaching Referral Hospital where she was examined by PW3 on the following day. PW3 in her evidence recalled having noted that PW2 had a fresh tear in her hymen which in her expert opinion was evidence of penetration.

10. In his defence, the appellant raised an alibi saying he was in town at the time the offence was committed. He called one witness his mother who purported to support his alibi. She in addition claimed that the appellant could have been framed with the offence because of a grudge she had with PW1.

11. In his judgment, the learned trial magistrate analysed the evidence adduced by both the prosecution and the defence. He made a finding of fact that PW2 was a credible witness. He was convinced that she was a truthful witness as her allegation of defilement had been corroborated by the evidence of the doctor. He also found as a fact that PW2 positively identified the appellant as the culprit who had sexually molested her.

12. On my own re-appraisal of the evidence on record, I find no good reason to fault the findings of the learned trial magistrate. I am satisfied that he properly analysed the evidence including the appellants defence which he dismissed as an afterthought. The appellants claim that he had been framed by PW1 allegedly because of a grudge that existed between her and his mother cannot be sustained given that this claim did not feature anywhere in his cross examination of PW1. Contrary to the defence's submissions, there was no evidence to suggest that PW1 had been coached by her mother on what to tell the court in a bid to frame the appellant. In addition, although DW2 purported to support the appellant's alibi defence, she expressed her doubts about the appellant's innocence when she said in her evidence on cross examination that she was not sure whether or not the appellant had committed the offence. The trial magistrate was therefore right to dismiss the defence as an afterthought.

13. As stated earlier, from the evidence on record, I find no reason to fault the findings of the trial court including the finding on the credibility of the complainant. The record shows that she gave an unsworn statement not because she did not appreciate the difference between truth and falsehoods but because she did not understand the significance of an oath. Her evidence was materially corroborated by the evidence of her mother (PW1) and the doctor who examined her the day after the appellant allegedly defiled her. PW3 confirmed that she had injuries on her private parts which was evidence of penetration. The fact that PW3 stated on cross examination that the tear she found on PW2's hymen could have been caused by a blunt object does not mean that the tear did not constitute evidence of penetration since it is common knowledge that a male's genital organ cannot be classified as a sharp object. PW2 was clear in her evidence that it is the appellant who sexually assaulted her. She knew him before as they resided in the same plot. This fact was not disputed by the defence.

14. Even if PW2's evidence was not corroborated by any other evidence, *Section 124* of the *Evidence Act* allowed the learned trial magistrate to convict the appellant on the basis of PW2's evidence alone if he was satisfied that she had told the court the truth and gave reasons for that finding. In this case, the learned trial magistrate was satisfied that PW2 was a truthful witness and clearly recorded his reasons for so finding. This being a finding of fact, this court cannot interfere with it unless it is satisfied that it was based on a wrong premise or on no evidence which is not the case here. I have therefore come to the conclusion that the appellant was properly convicted.

15. On sentence, under the *Sexual Offences Act*, the age of the victim determines the sentence to be imposed on an accused person convicted of the offence of defilement. In this case, the minor was 9 years old at the time the offence was committed. I say so because as noted earlier, her age as stated in the charge sheet was not disputed by the appellant. Under *Section 8(2)* of the *Act*, the sentence prescribed for an offender convicted of defilement of a minor aged 11 years and below is life imprisonment. This is a mandatory sentence. Given the age of the complainant in this case, the sentence of life imprisonment imposed on the appellant was lawful. The sentence is accordingly upheld.

16. For all the foregoing reasons, I am satisfied that the appeal herein is not merited. It is accordingly dismissed.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of May, 2017

In the presence of:

Appellant

Ms. Mokuu for the state

Mr. Langat for Mr. Adambi for the appellant

Sarah court clerk