REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.29 OF 2017

(FORMERLY NKR HCRA.84/14)

(Appeal Originating from Nyahururu CM's Court CMCR.883/12 by: Hon. P.o. Muholi – R.M.)

MICHAEL MAKAYA BIRURI…….....…….…..…APPELLANT

V E R S U S

REPUBLIC…….RESPONDENT

J U D G M E N T

Michael Makaya Biruri, the appellant herein, was convicted by Hon. Muholi, Resident Magistrate for the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 16/5/2012 at about 3.00 p.m. at [particulars withheld], intentionally and unlawfully caused his penis to penetrate the vagina of P.W.K. a girl aged 9 years.

He was sentenced to serve a period of 30 years imprisonment.

In the alternative, he had been charged with the offence of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act in that on 16/5/2012 about 3.00 p.m. intentionally caused his penis to come into contact with the vagina of P.W.K. a girl aged 9 years. No finding was made on the alternative charge.

The appellant is aggrieved by both conviction and sentence and preferred this appeal based on the following grounds:

(1) That the charge was defective;

(2) That the complainant did not appear before the court but somebody else;

(3) That the oath was administered on the complainant after the voire dire examination;

(4) That the court failed to recall the complainant after the substitution of the charge under Section 214 of the Criminal Procedure Code;

(5) That there was no medical evidence to connect the appellant with the offence;

(6) That his defence was not considered;

The appellant filed submissions in support of the grounds. He prays that the appeal be allowed, the conviction quashed and sentence be set aside and he be set at liberty forthwith. Learned counsel for the State, Mr. Mutembei opposed the appeal.

This being the first appellate court, it is the duty of this court to review the evidence afresh and make my own independent determination. See ***Okeno v Republic (1972) EA 32***.

I will first review the evidence that was adduced before the court. P.W. (PW1) a girl aged 9 years old gave unsworn evidence whereby she recalled that while coming from school on 16/5/2012, at about 3.30 p.m. she was waiting for Wangui at a junction when the appellant, got hold of her hand and took her to N's house; that there was nobody else in the house, he took her to bed, he removed her clothes, removed his trouser upto the knees, inserted his genital organ into her vagina. She felt pain; after he finished, she left for her home, found her mother but did not tell her what had happened. **PW2 V N,** the mother of the complainant recalled that she was at home on 16/5/2012 about 5.30 p.m. when P.W. arrived home and she noticed some blood on her dress from behind. She asked PW1 what happened but she declined to tell her. PW2 told her sister PW3 L K to enquire from PW1 what had happened to her but she declined to talk. PW2 decided to check the complainant's pants and her private parts. She found PW1's private parts to be swollen with blood stains, while the pants were stained with blood. They decided to take PW1 to [particulars withheld] at a clinic where she was examined by a doctor. PW4 Benson Wambugu is the nurse that attended to the complainant at Kiandege clinic. PW4 observed that PW1 had blood stained clothes and PW1 opened upto him that a person who was lame had taken her to his house and defiled her. PW2 & 3 reported the matter to Assistant Chief and at Mairo Inya Police Station where they were given a letter to go to Nyahururu District Hospital for treatment. She was later called and informed that the Assistant Chief had arrested the appellant. She found out that from her house to the appellant's home is only 200m although she did not know the appellant before. PW2 said that her daughter was 9 years having been born on 19/9/2003 and produced the immunization card.

PW5 Sgt. Peter Kinyua of Shauri Police Post, told the court that on 17/5/2012, the Assistant Chief of Kiandege, Amos Mariera called and informed him of a defilement incident and also got a report from Mairo Inya Police Station giving the description of the suspect as a brown boy whose one arm had a problem; that he went to Kiandege with APC Joseph Chepagon and met the appellant along the way; he suspected he was the one from the description given; he stopped and interrogated him and arrested him.
PW6 PC Eric Odak of Mairo Inya Police Station was at the police station when PW1, 2 & 3 went to report the incident of defilement; he carried out investigations and the complainant took him to the appellant's home but did not enter the house.

Dr. Korir (PW7) of Nyahururu District Hospital examined the complainant on 18/5/2013, with a history of vaginal bleeding and pain when passing urine; found tenderness on labia majora, hymen was freshly torn and blood clots in the vagina, tears of various degrees of the vagina; vaginal swabs revealed numerous pus cells and red blood cells.

When called upon to defend himself, the appellant made an unsworn defence, that he is from Kiandege, that at the time of arrest, he had a broken hand as a result of an accident and could not even put on clothes; that he lives with his family who share the house with him; that the complainant, her mother and the doctor all told lies and that they did not describe him well because he had an injury on the left and right hand.

It is the appellant's contention that the charge was defective because it did not include the words '***unlawfully***', secondly, that the complainant in the charge sheet is P W but PW1 introduced herself as '***P W'.***

In reply Mr. Mutembei argued that the appellant never objected to the charge and participated in the proceedings. Counsel also said that the appellant should have raised the issue of different names earlier and he invoked Section 382 of the Criminal Procedure Code as being a cure for the defect.

Section 382 of the Criminal Procedure Code provides as follows:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

I have looked at the charge sheet that was substituted and I see no defect. The particulars state in part "***intentionally and unlawfully caused….***" the word "***unlawfully***" was used and that ground is unfounded.

The appellant complained that the complainant never testified because the names of PW1 and those in the charge sheet are different. Section 137(d) of the Criminal Procedure Code deals with description of persons and that misdescription or none description of a person in a charge is not fatal.

Section 137(d) Criminal Procedure Code provides that:

"The description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as "a person unknown"

As regards the names of the complainant, the charge sheet described the complainant as P. W K. Indeed all the documents produced in court including the immunization card produced by PW1's mother (PW2) identify the complainant as P. W K. She however described herself as '***W***'. As per PW2's evidence, her mother is P W. So could PW1 have been named after PW2's mother and so be known as both '***W***' as well as '***W***'? As per the immunization card, W's parents are V N (PW2) and D K. If there is any defect, it is cured by Section 137(d) of the Criminal Procedure Code. It is sufficient that the statement of offence described the complainant as a minor, irrespective of the names; she was the victim of defilement. I have no doubt she is one and the same person.

Section 8(1) of the Sexual Offences Act provides as follows:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

To prove the said charge, one has to prove the act of penetration and the age of the complainant.

In the instant case, the complainant was described as being 9 years old. PW2, the mother of PW1 produced an immunization card (P.Exh.1(a). It clearly shows that the complaint was born on 19/9/2003. PW2 is the mother of PW1 and the best placed person to know PW1's age. It is evident that PW1 was a minor because even after the ***voire dire*** examination, the court found that she could not testify on oath. I am satisfied that by 2012, the complainant was 9 years old.

As to whether the complainant was defiled, there is overwhelming evidence that she was defiled on 16/5/2012. PW1 described what happened to her; that the man who took her to his house, undressed her, inserted his genital organ in hers. PW2, 3 observed her genitalia and found that she was swollen, with blood. Her underpants and dress was blood stained. PW6, the doctor who examined PW1 later found that PW1's hymen was freshly torn, the genitalia were swollen with blood clots, tears in varying degrees and pus cells. That was evidence that there was penetration of PW1 and she took part in a sexual act.

Having found as above, the next crucial question whether the appellant is the perpetrator? PW1 is the single identifying witness from her testimony she was never questioned as whether she knew the assailant before this day. In court, however, she pointed at the appellant as the perpetrator. PW1, 2 & 3 told the court that PW1 narrated to them how the assailant lured her to a house and that he had a lame leg and hand. The court observed the appellant in court ant recorded "***the accused person is made to walk and sees the arm***" the appellant was arrested at Kandege by PW5 because of the physical – he was limping and had a bad arm. In his defence the appellant admitted that he had been involved in an accident. The description of the appellant was given by PW1 on the same day and he was arrested next day. It means that PW1 had not been compromised because there was no time to change one's mind. Identification of the appellant was lock identification. However, PW1 had been with the assailant for quite a while. They walked together to his house; he was then engaged in a sexual act with PW1. I am satisfied that the complainant had ample opportunity to see the assailant well and be able to identify him. The best way that the police should have proceeded is to hold an identification parade. However, even without the identification parade I am satisfied that the appellant was sufficiently identified by PW1 as the culprit. The court believed her and this court cannot fault that finding. Under Section 124 of the Evidence Act it is sufficient that the court believes the victim and records the reasons for the believing. The court believed the description of the appellant as a brown man with a lame hand which fitted the appellant and the offence was in the day.

Whether the defence was considered, the court observed that the appellant claimed to have been with other occupants in the house but did not call them. Further, the court also observed that the appellant never talked of the events of the evening but only said it was lies. It is true that the trial court considered the appellant's defence but tended to shift the burden on the appellant which should not be the case because in a criminal case the burden always rests on the prosecution to prove its case beyond any doubt. I have considered the defence in this case but I find it to be a mere denial and a sham.

The prosecution, in order to support their case, would have also taken the appellant for medical examination to compare the specimen found in the complainant's genitalia with the saliva/blood of the appellant to ascertain whether they matched. However, despite that failure, I am satisfied that the appellant was properly identified and the trial court arrived at the proper finding that it is the appellant who defiled the complainant. The conviction is sound.

The court sentenced the appellant to 30 years imprisonment. Under section 8(3) of the Sexual Offences Act, the only sentence upon conviction is life imprisonment. The prison sentence of 30 years is illegal. The magistrate had no discretion to reduce the sentence. I therefore set aside the prison sentence of 30 years and replace it with life imprisonment.

In the end, find the prosecution proved their case beyond reasonable doubt. The appeal is without merit and is hereby dismissed.

Dated and **Signed** at ***NYAHURURU*** this ***28th*** day of ***July***, **2017**.

……..

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Shiundu - Court Assistant

Appellant – present/absent