REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 15 OF 2017

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Sexual Offence case No 71 of 2016 delivered by G.N. Sitati Resident Magistrate on 16/2/2017)

FRANCIS JUMA WANYONYI alias FRANCO.....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

J U D G M E N T

1. **Francis Juma Wannyonyi alias Franco** "the appellant" was charged with the offence of **defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.** Particulars being that the appellant on the diverse dates between 1st **May 2016 and 30th day of May 2015, at [Particulars withheld] Farm within Trans-Nzoia County , intentionally caused his penis to penetrate into the vagina of L M a child aged 10 years.**

He also faced an alternative count of committing an indecent act with a child contrary to Section11(1) of the same Act.

2. He denied the charges and the case proceeded to full hearing whereby he was found guilty and convicted on the principal count and sentenced to life imprisonment.

Being dissatisfied with the judgment he filed this appeal raising the following grounds:

i) That no specimen was taken for examination to determine whether or not he was the one who committed the crime in question.

ii) That the trial magistrate erred in law and fact when he did not take into account that the complainant's mother was his employee and was capable of implicating to any case.

iii) That the trial magistrate erred in law and fact by failing to note that according to the medical report the tearing was old looking while according to the prosecution side the complainant was examined in two days time after the incident in question.

iv) That the trial magistrate erred in law and fact by not taking the complainant for age assessment to determine her exact age.

v) That the trial magistrate erred in law and fact by convicting the appellant basing on the contradictory evidence adduced by the prosecution side.

vi)That the trial magistrate erred in law and fact by failing to summon the crucial witnesses to appear before the honourable court.

vii) That the trial magistrate erred in law and fact by failing to note that the exhibits e.g. dress, pantie, were not produced before court.

viii) That the trial magistrate erred in law and fact by failing to prove the case beyond any reasonable doubt and at the same time rejecting his defence without any cogent reason hence shifting the burden of proof to the appellant.

3. During the hearing of the appeal the appellant relied on his written submissions. He submitted that the prosecution case is based on falsehoods since PW2 was beaten before she made a confession to her relative (PW1).

He asked the court to disregard the evidence of the complainant insisting there should have been evidence of bleeding, pain, limping etc. He further denies ever trying to sort out the issue.

He dismissed the evidence of PW3 and PW4 as being unreliable . He argues that PW2's age was not established and the medical evidence of PW5 did not support the charge of defilement. He stated further that PW5 did not notice anything unusual in the genitals of PW2.

4. Mr Kakoi for the State opposed the appeal. He submitted that the age of PW2 was proved to be 10 years and that PW2 explained what the appellant used to do to her several times. This she did after she was asked about it. He submitted that penetration was proved by PW2 and PW5 who produced the P3. The appellant was well known to PW2 he said.

5. The prosecution called a total of five (5) witnesses.

PW1 L N B is an aunt to the complainant (PW2), and is married with 2 children. PW2 used to stay with the grandmother. She testified that on 30th May 2016 8pm she had come from milking when she found Franco (the appellant) in their kitchen. PW2 was making tea while the appellant was leaning on her showing her a phone. He pretended to have been looking for her and then left. She soon discovered that PW1 had also disappeared.

6. When PW2 returned she told her she had gone for a short call. PW1 did not believe and so beat her. It was then that she told her that she had gone to the maize field to have sex with the appellant who had given her Shs 10/-. She also told her he had done it severally with her (about 5 times). PW2 was taken to hospital and a report made. PW2's grandmother went to the appellant's, PW2 later repeated the same words in the presence of the appellant who offered to have PW2 treated but the family refused.

7. In cross-examination she said the appellant had been coming to the home severally but she denied owing him Shs 300,000/= or anything.

PW2 (L M) who was taken through voire dire examination testified on oath. She said she knew the appellant as a neighbour and one who used to come home frequently. That he would give her Shs 5/- or 10/- and she could sleep with him. She explained about the evening he had come and found her in the kitchen making tea. She took tea to her grandmother and the appellant called her and took her to the maize field and had sexual intercourse with her. He went away but when she returned she found pw1 cooking. On being asked where she had come from she did not say. Later she informed PW1 of her sleeping with the appellant, not just once but severally.

8. She was taken to hospital and recorded a statement with the police. In cross-examination she denied having been told by PW1 and her grandmother what to tell the court.

PW3 Joshua Wangila Wacheche is one of the village elders who followed up on the matter as he had received a report from the village elder. He went to the home and found a crowd which wanted to assault

the appellant. He arrested him and took him to Saboti Police Post together with the girl, who was taken to hospital.

9. **PW5 Kinisu Labat** a clinical officer testified that PW2 was treated at Saboti sub district hospital. He examined her and found the following:

- Fair general condition

- External genitalia normal.

- No vaginal discharge

- No hymen in place (not freshly broken)

- No signs of penetration

He produced the P3 form (exhibit 1) notes (exhibit 2) and PRC Form (Exhibit 4). In cross-examination he explained that if any penetration occurred it could not be ruled out. He said PW2 had an infection, but there were no bruises on both labia.

10. P**W4 P.C Mary Umazi** is the investigating officer. She testified that she interrogated both PW2 and the appellant and took their statement. The complainant was confirmed to be ten (10) years of age.

11. The appellant in his sworn defence denied the offence. He testified that on 2nd May 2016, he met L B (PW1), who was walking. She gave her a lift and she told him she needed a job. They exchanged mobile numbers and they agreed to meet on 3rd March 2016. She called him and they met. He offered her a job to sell petrol, Diesel and kerosene. She was to be paid Kshs 6,000/- per months and the appellant was to house her. She worked well and he would pick the sales in the evening.

12. He went on to explain that on 26th May 2016 he was informed of his father's death. He went where PW1 was working and she insisted on working. He travelled leaving his wife in charge. On 31st May 2016 his wife called to tell him that PW1 had escaped with Shs 300,000/-. He called PW1 who told her she was at her home and should not be disturbed. She threatened him with an arrest. He reported at Lukhome Police Post but PW1 could not be traced.

12. He explained further that he went back to work but he saw people who assaulted him, and he even lost his phone. He found himself at Kitale police station. In a short while he saw PW1 who stopped the people from beating him up and instead told them to take him to Saboti police post where he was placed in cells. On 2nd June 2016 he was taken to Kitale police station. In cross-examination he said he never knew where PW1 used to stay, and though he had reported the matter of theft to the police he had no O.B. number.

13. His witness **Lilas Juma (DW1)** a welder at Muthoni said the appellant is his brother. On 26th May 2016 they had gone for a burial at Chepchoina. On 1st June 2016 he was home while the witness went to work. He later learnt he had been arrested. In cross-examination he said on 30th May 2016 him and the appellant were attending their uncles funeral and had been home for a week. He did not however produce anything to confirm the death.

14. This being a first appeal this court has a duty to re-evaluate the evidence on record and arrive at its own conclusion.

The count of Appeal in outlining the duty of a first appeal court stated thus; in the case of ***Mwangi V Republic [2004] 2 KLR 28.***

> ***" 1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to***

a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.

3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness."

15. In line with that duty of a first appeal court I have considered the evidence, and the grounds of appeal. I have equally considered the submissions by both parties. I find the following issues to be falling for determination.

i) Whether PW2's age was proved.

(ii) Whether there was sexual penetration of PW2.

(iii) Whether the appellant was identified as the person who caused the penetration of PW2.

Issue No. (i) whether PW2's age was proved.

16. PW2 (L M) did not say anything about her age. Her aunt (PW1) indicated that she was 10 years old having been born on 14th June 2006. A health clinic card in respect of the complainant (pw2) was produced as (Exhibit 3).

It shows her date of birth as 14th June 2006. The appellant had submitted that because the child was not subjected to age assessment her age was unknown.

Proof of age becomes a critical element in defilement cases because in case of a conviction the sentence is determined by the age of the victim.

It is not correct to state that age can only be proved by medical evidence i.e age assessment .

17. Besides the medical evidence there are other ways of proving the victims age . In the case of ***Francis Omuroni V Uganda Criminal Appeal No. 2 of 2000*** the court held:

"In defilement cases medical evidence is paramount in determining the age of a victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victims parents or guardian and by observation sense."

See Hadson Ali Mwachongo Vs Republic Court of Appeal Mombasa Criminal Appeal NO. 65 of 2015;

18. In the present case, not only did the victim's aunt testify as to her age but a clinic health card showing her date of birth was produced as Exhibit 3. The trial court also observed and noted that she was a child of tender years and conducted a voire dire examination for her.

In this issue I find that age was proved to be 10 years.

Issue no. (ii) Whether there was sexual penetration of PW2.

19. PW2 explained that the person she has identified as the appellant had sexual intercourse several times with her prior to the one of 30th May 2016. She gave a detailed explanation of what was done to her, in

the maize field, at page 16 lines 5-8 of the record of appeal she states:

> ***" He told me to remove my panty and i removed and he inserted his thing in here (pointing in between her legs). It is used to urinate and it is used on women. I used mine to urinate."***

20. PW2 was taken to hospital. PW5 produced the P3 form Exhibit 1. The examination was not conclusive on penetration. The only significant thing he pointed out was that the hymen was broken but not freshly broken. That she also had an infection. (pus cells).

I note that the medical evidence was not of much help in confirming penetration of PW2's vagina on 30th MAY 2016. However it is important to note that the particulars of the charge are that the defilement took place on diverse dates between 1st May 2016 and 30th May 2016.

21. Though PW2 could not remember the dates when this took place, she was clear that it was severally and it was done by one person. Infact it had become kind of a routine to her. When the medical evidence is not of much help the court will consider other evidence available.

Justice Majanja facing a similar scenario in the case of ***Daniel Odhiambo Oyamo V Republic Migori HCRA No. 29 of 2014 (2014) eKLR)*** expressed himself thus:

> ***"the medical testimony of (PW3) was not helpful in proving penetration as an element of the offence. But this alone was not fatal to the prosecution as medical evidence is not necessary when the same can be proved by other means. (See Andrew Court Ndungu V Republic Criminal Appeal No. 132 of 2008 (2013) eKLR). In this case the testimony of (PW1) was sufficient to prove perpetration."***

22. PW1 herself had found the appellant in their kitchen showing PW2 the phone while leaning on her. The appellant immediately left and thereafter PW2 left. It was at night around 8.00pm. When PW2 returned it was quite normal for PW1 to demand to know where she had been. She was being a responsible parent; the appellant has submitted that PW2 was forced to say what she said because she had been beaten. She would still be beaten and refuse to speak!

23. After PW2 explained what had been happening to her, immediate action was taken the next day. She was taken to hospital and the administration notified. The finding of a broken hymen and infection confirms that PW2 had been involved in some sexual activity. PW2 was examined the next day after the complaint. There was no vaginal discharge nor signs of penetration. In the absence of concrete evidence on the penetration and from the evidence of PW2 I find that there had been contact between the man's male genital organ and PW2's vagina.

I find the alternative count established.

Issue No. (iii) Whether the appellant was identified as the person committed the indecent act.

24. PW2 testified that the person who had been sexually assaulting her was "Franco" whom she identified as the appellant.

when she appeared before PW5 for examination she told him the person who had been defiling her was a teacher known to her.

The Investigating officer PW4 gave similar evidence at page 23 lines 1-3 of he record of appeal. She stated :

> **" The minor confirmed that "Franco" had sexually abused her on (3) occasions and would give her cash after defiling her."**

The appellant said he had been a pastor and a teacher and PW2 to him as a neighbour and teacher.

25. In his statement of defence and supported by that of his brother (DW2) he said he went for a funeral leaving the wife in charge of his business. He explained how he had been so kind PW1 who betrayed him by stealing from him.

26. This defence was considered by the learned trial magistrate I her judgment when she stated that following page 41 lines 24- page 42 lines 1-5 (R.O.A.)

> **"The accused person stated that he had been framed up by (pw1) whom he had employed after she had stolen Kshs 300,000/- from his fuel business. First I do believe that this was a large amount of money and if true and reported at Lokhome police station, he would have mentioned it to the investigating officer the moment he was arrested for investigations to be lounged.**
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> **Secondly , it was correctly highlighted by the prosecution that he had no proof that he had reported the same at Lokhome police post. Lastly the issue of (PW1) Stealing as his employee never arose during cross-examination. It only came out as an alleged debt to him to the tune of Kshs 300,000/- which (PW1) denied.**"

27. PW1 testified in the presence of the appellant and he was given an opportunity to cross-examine her. At no point did he question her on his generosity to her, including employment. His wife who is supposed to have given him the information about the theft of Shs 300,000/- was never called to substantiate those allegations.

28. The only evidence against the appellant is that of PW2 who was a child of tender years.

Section 124 of the Evidence Act provides:

> **" Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **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, no reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

29. The court of appeal in the case of ***Jacob Odhiambo Omumbo V Republic Criminal Appeal No. 80 of 2008 (Kisumu)*** held:

> ***"Though P's evidence was that of a child of tender years, the court can convict on it by virtue of the proviso to Section 124 of the Evidence Act Cap 80 Laws of kenya, as amended by ct No. 5 of 2003"***

30. It had earlier in the case of ***Mohamed Vs Republic (2006) 2 KLR 138*** held;

> ***" It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

31. In a sexual offence under the Sexual Offences Act No. 3 of 2006 the court will convict on any reliable evidence available even where the only evidence reliable available is that of the victim. This is by virtue of the proviso to Section 124 of the Evidence Act.

32. The Court of Appeal emphasized this in the case of ***Geoffrey Kioju V Republic Criminal Appeal No.***

270 of 2010 (Nyeri) when it upheld:

> ***" Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We, however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed under the proviso to Section 124 of the Evidence Act cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

33. The learned trial magistrate who saw and heard PW2 testify found her to be trust worthy. This is what she said of this witness at page 42 lines 1-14.

> **" I found the minor herein to be trustworthy and reliable as she remained firm and consistent even during cross-examination as to what the accused person would do to her and I believed that she was telling the truth. But perhaps most importantly is that I see no reason for the minor to frame accused person. On the first day when PW1 found the accused with (PW2) he saw her showing her something on the phone. PW3 unpackaged it and stated that (PW2) told him that he watched a video from the Accused person;s phone as to how a wife and husband sleep together. It explains why the minor would state in court that the thing (penis) is used on women and to urinate. "**

34. After re-evaluating the evidence I am satisfied that the prosecution proved its case against the appellant on the alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences ct No. 3 of 2006. I therefore allow the appeal and set aside both conviction and sentence.

I substitute the conviction with one for committing an indecent act with a child.

I sentence the appellant to serve ten (10) years imprisonment from the date of conviction.

Orders accordingly.

Delivered, signed and dated on this 31st day of August 2017 at Kitale.

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H. ONG'UDI

JUDGE

In the presence of;

M/s Kakoi for Respondent

Appellant – present

Kirong – Court Assistant

Court: Judgment delivered in open court.

Right of Appeal explained.

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H. ONG'UDI

JUDGE

31/8/2017