REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.54 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No1308 of 2014 by: Hon. P.O. Muholi– R.M.)

FRANCIS KARIMI NJIRU...........APPELLANT

V E R S U S

REPUBLIC................................RESPONDENT

J U D G M E N T

Francis Karimi Njiru (the appellant) was convicted by **Hon. Muholi – R.M.**, for the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006.

The particulars of the charge were that on 17/5/2014 at [particulars withheld], unlawfully caused his penis to penetrate the vagina of A.M.M. a child aged 6 years old. In the alternative, he was charged with committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. No finding was made on the alternative charge.

The appellant is aggrieved by the said conviction and sentence based on grounds contained in the memorandum of appeal dated 10/7/2015 and further grounds found in the amended memorandum of appeal.

The grounds can be summarized as follows:

(1) That no DNA was carried out;

(2) That no explanation was given for the delay in reporting the offence;

(3) That the appellant's fundamental rights were violated in that he was not given witnesses statements;

(4) That the prosecution failed to call all the relevant witnesses especially the arresting officer;

(5) That the offence of defilement was not proved to the required standard;

(6) That the court failed to evaluate all the evidence on record and failed to consider his defence.

In support of the grounds, the appellant filed written submission. He therefore prays that the court do allow his appeal, quash the conviction and set aside the sentence.

The appeal was opposed by learned counsel for the State **Mr. Mong'are**.

This is the first appeal and it is the duty of this court to consider all the evidence adduced in the trial court, evaluate and analyze it afresh and then arrive at its own conclusions but bearing in mind that the appellate court did not have an opportunity to see the witnesses testifying to weigh their demeanor. *See* ***Okeno v Republic (1972) EA 32***.

In the trial court, the prosecution called a total of four witnesses. **PW1, A.M**. is a child aged 6 years. After a ***voire dire*** examination, the witness was sworn and she testified that on 17/5/2014, she had gone with her mother and her small brother to wash clothes in the river when her mother sent her back home to get *ngumu – mandazi* from Njiru (appellant) *ngumu*. That appellant used to work for them, making *'ngumu'* told her to lie on the back, removed her clothes and slept on her and she felt pain in her genitalia; that she bled and he told her to clean herself with paper and throw it in the toilet; that the appellant promised her a mandazi; that she was unable to sit in school and her mother noticed and took her to the doctor at OlKalou and thereafter reported to Shamata Police Station.

PW2 Lucy M M the mother of PW1 said that she was washing clothes in the river and sent her 2 children back home to get *ngumu*; that it is the appellant who used to cook '*kangumu*'; that the son returned to the river but the complainant did not; that on 19/5/2014, the complainant came from school but could not sit and PW2 enquired what the problem was and she claimed to be feeling pain in the leg. Next day, PW2 took her to hospital at OlKalou and the Doctor asked who 'Njiru' was and she explained that he was an uncle; that the doctor called her to observe the child and thereafter the husband went to report to police station. PW2 produced the complainant's birth certificate which shows that she was born on 9/1/2008. PW2 said that the appellant had worked for them for a month.

PW3 PC Denis Barasa of Shamata Patrol Base was on duty on 21/5/2014 when the complainant and the parents went to report that the complainant had been defiled and he issued them with a P3 form and later the appellant was arrested by Kichungu Police Post.

PW4 Peter Nginyo is a Clinical Officer at J.M. Kariuki District Hospital and he examined the complainant (PW1) on 22/5/2017 after 7 days of the alleged defilement; that PW1 had difficulty walking and passing urine. He examined her genitalia and found it to be normal except the hymen was broken. He did not find any spermatozoa or bacterial infection. He said that the hymen was perforated and so 50% of it would be due to sexual intercourse.

When called upon to defend himself, the appellant admitted that he used to cook '*kangumu*'; that on 14/5/2014, he woke up and went to sell *kangumu* and that when he came back, someone told him to wait for his money but the person came back with police who arrested him. He denied having defiled the girl.

The appellant has complained that his fundamental right was breached in that he was not given the witness statements to enable him know the case that he was facing. In reply, Mr. Mong'are argued that during trial the appellant never complained that he had not been supplied with witness statements. Under Article 50 (2)(j) of the Constitution, it is an accused's right to know the case he will face in advance to enable him prepare his defence and this is by the prosecution availing him all the witness statements and exhibits if any.

In this case, after the appellant pleaded not guilty to the offence, the prosecutor stated thus, "**5 witness, 5 page witness statements**". The magistrate did not record whether or not the witness statements were given to the appellant. But then, even after that day the case came up several times for hearing and the appellant never requested for witness statements. This request is being made late in the day. Unfortunately, the court did not record whether or not statements were given to the appellant and in my view, it would be a good practice for the trial court to do so. The appellant cross examined witnesses. This court will believe that he was aware of the case he faced hence had been issued with witness statements. That ground must fail.

The appellant complained that he was not taken for medical examination nor was a DNA done. In reply Mr. Mong'are argued that a DNA is not necessary in a case of defilement and relied on the Court of Appeal decision in ***Flappyton Mutuku Ngui v Republic CRA.32/2013*** where the court cited the case of

AMI v Republic 2013 KLR 45 where the court had held that '***the fact of rape or defilement is not proved by way of DNA test but by way of evidence.***'

Further in the case of ***Kassim Ali v Republic CRA.84/2005 (MSA)*** the court held:

> ***"(the) essence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence***."

The provisions of Section 124 of the Evidence Act now provides that if the court believes the evidence of victim of an alleged sexual act, it can go ahead and convict and therefore no longer requires corroboration through medical evidence.

Section 124 of the Evidence Act provides as follows:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap.15), where the evidence of the alleged victim is 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, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".***

From a reading of the above provisions, it was not mandatory that the appellant be taken for medical examination for purposes of corroboration.

The appellant has also questioned the manner in which the court believed PW1's evidence. No doubt, PW1 was a minor aged 6 years. A birth notification was produced by PW1's mother as proof that she was born on 19/1/2008 and so by the time the offence was committed, she was 6 years old.

A ***voire dire*** examination was conducted by the trial court. A ***voire dire*** examination is supposed to determine the intelligence of the minor and whether she understands the meaning of the oath. Although the court did not make a ruling as to whether PW1 was intelligent and understood the meaning of the oath, the record shows that the minor was sworn meaning that the court was satisfied that she understood the meaning of the oath and found to be intelligent to understand the proceedings. The trial magistrate had an opportunity to see PW1 which this court did not. This court cannot doubt the findings of that court without a basis.

The appellant has challenged the prosecution for not calling all the relevant witnesses especially the arresting officer. The appellant did not deny having been arrested. It is only in his submissions in court that he alleges that he was in prison, thus purporting to raise an alibi. The appellant can only raise an alibi in his defence but not on appeal.

As respects the failure to call the arresting officer, as a witness, the appellant has not alluded to anything specifically that the prosecution evidence did not cover. The investigating officer, PW3 said that the appellant was arrested by Kichunga Police Post. No question was put to PW4 challenging that fact.

In the case of ***Bukenya & others v UG, (1972) EA 549*** the court held:

> ***'The prosecution must call all witness necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution'***.

It is the duty of the prosecution to call such witnesses as will be able to establish the case to its required

standard.

In ***Mwangi v Republic (1984) KLR 595***, the Court of Appeal said:

> ***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."***

In the above cited case, the court was of the view that if the prosecution called witnesses that corroborated each other, the court would not interfere in the exercise of discretion.

In the case of ***Jeremiah Gathiku – Republic CRA.73/2008***, the court held as follows: "***The effect of failure to call police officers in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each case so demonstrate."***

In the instant case, the circumstances are not such that it would be fatal to the prosecution case if the arresting officer was not called.

Coming to the crucial issue of whether the offence of defilement was proved, PW1 was alone when she was allegedly defiled. This offence was committed in broad daylight. The mother seems not to have been keen or observant in taking care of the child because she did not notice what had happened to the complainant sooner. PW1 identified the appellant as the perpetrator. The appellant was a person who was working for them at the time. PW1 said so and so did PW2. The trial court believed them. The appellant now alleges that he was framed, something he never raised in his defence. He did not even allude to the reason why PW1, a child of 6 years would frame him.

The complainant explained what happened to her the appellant undressed her and lay on her and she felt pain in her genitalia. By the time PW2 noticed that all was not well with PW1 about 6 days later, she was not walking properly nor could she sit. PW4, the Doctor who examined PW1 after 7 days said spermatozoa could only be traced within 72 hours but that the complainant's hymen was perforated. That evidence corroborated PW1's evidence that indeed she was defiled by the appellant. I am satisfied that the trial court did evaluate the evidence on record and came to the correct finding that the offence of defilement was proved beyond any reasonable doubt. The appellant's defence was a bare denial and I dismiss it as such.

As regards the delay in reporting the case, as alluded to earlier, it seems PW2 was not observant and did not notice that PW1 had any problem. PW1 did not disclose it to PW2 and that is not uncommon of victims of sexual offences especially of that age. The delay in reporting cannot be taken to mean that the offence was not committed. There is ample evidence on record that the complainant was defiled.

In the end, I find that the conviction is well founded and there is no good reason to interfere. The appellant was sentenced to serve life imprisonment. The complainant was 6 years old and under section 8(3) Sexual Offences Act, that is the only sentence known in law. I therefore dismiss the appeal.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***22nd*** day of ***September,*** 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Tirian - Court Assistant

Appellant – present in person