REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 65 OF 2015

FRANCIS NGENGWA MUTHAMA….APPELLANT

VERSUS

REPUBLIC……..…..….....RESPONDENT

(From the conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 100 of 2014 – M. W. Murage Ag. SRM)

JUDGMENT

The appellant was charged in the magistrates court at Mwingi with defilement contrary to section 8 (1) (2) of the Sexual Offences Act no. 3 of 2006. The particulars of the offence were that on 15th February 2014 in Migwani District of Kitui County intentionally did an act which caused penetration of his genital organ namely penis into the female genital organ namely vagina of AWM a child aged 10 years 7 months 20 days. In the alternative he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally did an act which caused contact of his male genital organ namely penis with the female genital organ namely vagina of AWM a child aged 10 years 7 months 20 days. He denied both counts. After a full trial, he was convicted of the main count of defilement. He was sentenced to life imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his first petition of appeal on 10th February 2015. Before the hearing of the appeal however, he filed an amended petition and grounds of appeal as well as written submissions. He relied on the amended petition of appeal and written submissions.

The grounds of appeal are that:-

1. Crucial witnesses were not called to testify

2. Age of the complainant was not established

3. Mode of arrest was dubious

4. Prosecution did not prove the case to the required standards.

During the hearing of the appeal, the appellant adopted the written submissions and added that the people who arrested him were from the same family. He submitted that though he requested that they be called to court they were not. He added that the doctor who examined the victim was a relative of the mother of the victim and that was why the victim was not taken to Thitani Hospital, but instead was taken to Mwingi

Hospital. According to him, the relatives of the complainant framed him with the offence.

The learned Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that the oral submissions made by the appellant were not captured on the record. Counsel submitted that because the complainant required further medical attention there was no choice but to take her to hospital. He stated that there was no evidence that the hospital attendant was a relative of the complainant.

Counsel submitted further that the age of the complainant was proved as the victim was 10 years old. The age was confirmed by the mother Pw2. As for penetration, the medical evidence of Pw5 Dr. Wahinya was that he noted lacerations in the genital organs, the hymen was also broken and there was reddish and whitish discharge which was proof of penetration.

Counsel emphasized that the complainant knew the appellant before as he worked for her grandmother. According to counsel, there was no alibi defence raised by the appellant at the trial.

In response to the Prosecuting Counsel's submissions, the appellant stated that he did not live with or bring up the child. He maintained that nobody from the homestead came to testify and that all the people who arrested him were not from the homestead.

The summary of the prosecution evidence is that on the 15th of February 2014, the complainant came from school at 1pm. When he reached home with Muia, they met the appellant sitting. The appellant lived with them at home as a worker or employee of her grandmother, and was herding the animals.

After a short while, Muthiani was sent by the appellant to make tea. Muthiani thereafter asked the complainant to go and take firewood but the appellant called her and told her to meet him in the bathroom which was nearby. At the bathroom the door was not closed and the appellant instructed her to lie down and remove her pant which she did. The appellant then removed his trouser jeans and had sexual intercourse with her and promised to give her Kshs. 100/=.

She then cried and her mother Pw2 Alice Musyimi came to the bathroom. She found them there. The matter was then reported to the authorities. The complainant was taken to hospital, treated and a P3 form filed for her. The appellant was then charged with the offence.

When put on his defence the appellant gave unsworn testimony. He denied the charge. He said that on 15th February 2014 he tied the cows at 9am and went for the goats coming back 5.30pm. When he came back he found the mother of the complainant and the complainant's uncle's wife and her brother. When he greeted them, they did not respond and he went to sleep.

They then came and handcuffed him and police officers came and arrested him. He stated that the mother of the complainant had his money which was 8,000/=. He did not know why she framed him but he thought maybe it was because of the money.

This is a first appeal. As a first appellate court, I am required to examine all the evidence on record afresh and come to my own conclusions and inferences. See the case of ***Okeno Vs.Republic [1972] EA 32.***

I have re-examined the evidence on record. I have considered the submissions on both sides. I have also perused the judgment of the trial court.

The incident is said to have occurred at 5pm. The appellant and the complainant Pw1 knew each other well. The mother of the complainant Pw2 also knew the appellant very well. The evidence is quite clear from both Pw1 and Pw2 that the offence was committed in the bathroom. Pw2 found both the appellant and the complainant lying down on the floor on the bathroom which was not locked. The doctor Pw5 Dr. Christopher Walunga testified that a sexual encounter must have occurred as there were lacerations in the genital organ of the complainant and her hymen was also broken.

In my view, it was established that the complainant was penetrated sexually. As to whether the appellant

was the culprit, the appellant stated that he was framed for no good reason. On appeal he stated that the mother of the complainant Pw2 was his lover. During the trial he asked questions about the love relationship and initially Pw2 said there was no love relationship, and later changed and said there was such a relationship.

Be that as it may even if the two were lovers in my view that could not be a reason for Pw2 Ann Musyimi simply framing the appellant with this offence. There is no indication that the two had ceased to be lovers or that they disagreed. The appellant stated that Pw2 had his Kshs. 8,000/=. Again he did not give any reason which would lead the mother of the complainant Pw2 to frame him, even if she had his Kshs. 8,000/=. The mere fact that a person is owned by another some money does not establish any ill motive, unless there are other circumstances that would convince a reasonable person that a grudge had arisen. None of such reasons has been given. I thus find that the culprit was the appellant.

With regard to age which is very crucial in offences of defilement, the complainant was said to be 10 years and some months. For those who commit sexual offences on minors who are less than 12 years, the sentence is mandatory life imprisonment. The appellant was thus sentenced to serve life imprisonment on the basis of immunization report or card and the verbal evidence of Pw2 the mother of the complainant.

Being a borderline case with respect to age and considering the severe sentences in sexual offences I will find that the age proved would easily fall within the bracket of 12 years. Nobody came to court to testify on correctness and source of information on the entries in the immunization card. I thus give the benefit of the doubt to the appellant and find that the child victim was between age 12 and 15 years. I will thus interfere with the sentence and sentence the appellant to serve 20 years imprisonment.

Consequently, I dismiss the appeal. I however substitute a conviction under 8 (1) (3) of the Sexual Offences Act. I set aside the sentence and order that the appellant will serve 20 years imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 17th August, 2016

GEORGE DULU

JUDGE