REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 68 OF 2015

JOSEPH WAWERU KANIARU.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Sentence of the Chief Magistrate's Court at Nakuru Hon. J. N Nthuku –Senior Resident Magistrate delivered on the 12th March 2015 in CMCR Case No. 37 of 2012)

JUDGEMENT

The Appellant **JOSEPH WAWERU KANIARU** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at the Nakuru Law Courts. The appellant had been charged with the offence of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 9th day of February 2012 at* [particulars withheld] *in Nakuru District within rift Valley unlawfully and intentionally committed an act by inserting your male genital organ namely penis into female genital organ namely vagina of P N W a child aged 13 years which caused penetration"***

The appellant faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded **'Not guilty'** to both charges. His trial commenced on 6/5/2013 at which trial the prosecution led by **CHIEF INSPECTOR MUREITHI** called a total of four (4) witnesses in support of their case.

The complainant who testified as **PW2** was '**P N'** a girl-child aged 13 years. Before giving her testimony the trial magistrate conducted a ***'voire dire'*** examination after which she found the child comprehended the nature of an oath and directed that the child would give sworn evidence.

The complainant told the court that on 9/2/2012 she left school in order to collect a book she had forgotten at home. As she walked home she met the appellant who grabbed her hand and pulled her into the nearby bushes. He removed her clothes and his as well. The appellant then proceeded to defile her. The child screamed and the appellant ran away.

PW5 BOAZ WEKESA is security officer who lives in Lanet. He told the court that on the material day

he was out herding his cattle. He heard a girl scream from the bushed and went to check what the problem was. **PW5** met the complainant who informed him that she had just been defiled. **PW5** began to search the surrounding area. He saw footsteps within the bushes and followed. Crawling on his stomach **PW5** found the appellant lying under a bush. Together with other members of public they apprehended the appellant. The child identified him as the man who had defiled her. The appellant was taken to the police station. The child was taken for medical treatment. Upon conclusion of police investigations the appellant was arraigned in court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied having defiled the complainant.

On 12/3/2015 the learned trial magistrate delivered her judgment in which she convicted the appellant on the main charge of Defilement and sentenced him to serve twenty-Five (25) years imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this appeal. The appellant who was not represented by counsel during the hearing of this appeal relied entirely upon his written submissions which had been duly filed in court. **MS OUNDO** Senior Assistant DPP made oral submissions in which she opposed the appeal and urged this court to confirm both the conviction and sentence by the lower court.

This being a first appeal this court is obliged to re-examine and re-evaluate all the evidence adduced during the trial and to draw its own conclusion on the same **(see AJODE Vs REPUBLIC [2004] KLR 81).** Similarly in the case of **MWANGI Vs REPUBLIC [2004] KLR 28**, the Court of Appeal held that

> ***"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 weight the conflicting evidence and draw its own conclusions"***

Before a considering the merits or otherwise of this appeal I do consider it important at the outset to clear up certain questions that were raised in the trial regarding the age and the mental capacity of the appellant. These were matters which were raised before the trial began. On 9/7/2012 **HON. J. NTHUKU** the learned trial magistrate ordered that the appellant be escorted to PGH – Nakuru for an age assessment and for a psychiatric examination. This took quite a while to happen and the trial court had to issue a Warrant of Arrest against the doctor concerned. However, on 14/11/2012 **DR. WAHIGI NJAU** produced a mental report dated 9/11/2012 which indicated that the appellant was fit to stand trial. The age-assessment conducted on 9/7/2012 found that the appellant was aged 21 years old – therefore he was not a minor.

This being a charge of Defilement the following crucial issues must be proved beyond reasonable doubt.

1. The fact of defilement of the complainant

2. The age of the complainant

3. The identity of the appellant as the perpetrator of the offence.

Regarding the first issue the complainant told the court that on the material day she left school to return to her home to collect a book she had forgotten at home. As the child walked home she met the appellant sitting by the road. As she walked past him the appellant grabbed her hand and pulled her into the nearby bushes where he proceeded to defile her.

This was a young girl a school girl. There was no reason for her to allege that she had been defiled if no such incidence occurred. She had absolutely nothing to gain by fabricating such a tale.

PW2 **MARGARET NJERI** also a resident of ADC Lanet corroborates the evidence of the complainant. **PW3** told the court that on that day she had taken her children to hospital at 9.00am. As she walked back home she heard someone screaming from the bushes. **PW3** recognized the voice of the person screaming as that of **'P'** (the complainant). Then **PW3** saw the complainant emerge from the bushes walking with her legs apart. This was a clear indication that all was not well with the child. The complainant revealed that she had been defiled and she was then rushed to hospital.

PW1 **DR. JUSTUS NONDI** was the doctor who examined the complainant and who filled out her P3 form. Upon examination of the child **PW1** noted that 'she had inflamed vaginal walls and whitish vaginal discharge. He concluded that the complainant had been defiled. **PW1** filled and signed the P3 form which was produced in court as an exhibit **P. Exb 1**. At the appellants request and insistence **PW1** was recalled for further cross-examination on 9/1/2014. **PW1** confirmed his earlier testimony and stated

> ***"I don't expect a 13 year old to have whitish vaginal discharge and a broken hymen if she is normal".***

PW1 confirmed the absence of any spermatozoa in the child's vaginal canal. This was expert medical evidence which was not controverted by the appellant the testimony of the doctor corroborates the evidence of **PW2** that she had been defiled. The fact of a broken hymen and vaginal discharge in a child so young is incontrovertible proof that penetration had occurred.

The absence of spermatozoa in the complainant's vaginal canal does not negate the fact of defilement. The act of defilement is deemed to be a complete once penetration has occurred. It is not necessary that the sexual act be proved to have been carried out to conclusion and it is not necessary to prove emission of sperm. From the evidence on record I do find that the complainant was indeed defiled as she alleged.

In cases of defilement the age of the victim is a critical fact in issue one requiring proof beyond reasonable doubt. This is because the age of the victim is a crucial factor in determining the punishment to be imposed if the accused is convicted.

In her testimony the complainant gave her age as 13 years. She stated that she was born in 1998 but did not know the **exact** date of her birth. However, the complainant's Immunization Card which was produced as **PW1** as an exhibit **P. Exb 2** gave her date of birth as 10/9/1998. This is an official document which gives the date of birth of the complainant and suffices as proof of that fact. Therefore as at February 2012 when she was defiled the complainant was aged 13 years. I am satisfied that the age of the complainant has been proved beyond reasonable doubt.

The final question requiring determination is whether it was in actual fact the appellant who defiled the complainant on the material day. In her testimony the complainant did not give the exact time when the incident occurred but given that she was returning from school to collect a book she had left at home it is reasonable to assume that the incident occurred during the day time. **PW2** told the court that the incident occurred at about 9.00am. It was therefore broad daylight and visibility was good.

The complainant told the court that as she was walking home she passed the appellant who was sitting by the side of the road. He grabbed her and pulled her into the nearby bushes where he proceeded to defile the child. As stated earlier it was broad day light and visibility was good the complainant spent a fair amount of time in close proximity to the accused. He lay on top of her face to face during the act. As such she had ample time and opportunity to see him well. The complainant positively identified the appellant in the trial court. During cross-examination she stated

> ***"I saw his features well all the time he was defiling me...."***

PW3 heard the child scream from the bushes and went to her aid. The complainant told **PW3** that she had been defiled. **PW3** also shouted and other villagers came. They searched the nearby bushes and found the appellant hiding therein. **PW3** identifies the appellant as the man who was pulled out of the bushes at the same place from where she had heard the child scream for help.

PW5 **BOAZ WEKESA** told the court that on that material day he was out tending his cattle. He heard screams and rushed to check what the problem was. He met the complainant with **PW3** and the complainant told him that a man had defiled her in the bushes. **PW3** went crawling in the bushes searching for the culprit. He found the appellant lying on his stomach and pulled him out. The child identified the appellant as the man who had defiled her.

PW3 gave clear and cogent testimony. He was an impartial witness who would have had nothing to gain by framing the appellant. In her defence the appellant denied that he was hiding in the bushes. He claimed that he was there relieving himself. However this notion was effectively countered by **PW3** who stated as follows under cross-examination by the appellant.

> ***"You weren't answering a call of nature because I found you lying on your tummy which is not the position you should be if you are urinating or passing stool...."***

The appellant was found lying on his stomach in the bushes. He was clearly not answering a call of nature. I reject this defence entirely.

The appellant was found hiding precisely where the complainant claimed to have been defiled. The complainant had described that her attacker was dressed in jeans jacket and jean trouser. This re precisely what appellant was wearing when he was pulled out of the bush. The complainant immediately identified the appellant as the man who had defiled her. The evidence points squarely at the appellant as the perpetrator of this offence. I am satisfied that there has been a clear, reliable and positive identification of the appellant as the man who defiled the complainant. The prosecution I find proved their charge beyond reasonable doubt. The appellant was properly convicted and I do confirm that conviction.

The Sexual Offences Act vide Section 8(3) provides for a sentence of not less than twenty years upon conviction for the defilement of a child aged between 12-15 years. The appellant was granted an opportunity to mitigate after which the trial magistrate sentenced him to serve 25 years imprisonment. No reason and/or justification was given by the trial court for the imposition of a sentence above the mandatory minimum sentence. I myself find no peculiar or aggravating circumstances in this case which would require a sentence above this mandatory minimum. I therefore set aside the 25 year sentence imposed upon the appellant and in its place substitute the mandatory minimum sentence of twenty (20) years imprisonment. The sentence to run from the date when the appellant was convicted by the trial court.

Dated in Nakuru this 9th day of December, 2016.

Read in open court

Appellant in court

Maureen A. Odero

Judge

9/12/2016