REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 19 OF 2014

DENIS KINYUA NJERU...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An Appeal from the Sentence and Conviction by the Principal Magistrate Runyenjes in Criminal Case No. 72 of 2014 on 15th April, 2014)

J U D G M E N T

The appellant was charged and convicted by Runyenjes Ag. Principal Magistrate of the offence of defilement contrary to Section 8(1) of the Sexual Offences Act and sentenced to serve 20 years imprisonment. In his petition of appeal, he argued that the case was not proved against him to the standards required in criminal cases citing the following grounds.

i. *That the age of the complainant was not proved;*
ii. *That there was no medical evidence to prove the offence;*
iii. *That the evidence of the minor victim was not corroborated;*
iv. *That the evidence was contradictory; and*
v. *That the charge sheet was defective.*

The appellant was represented by Mr. Mogusu who argued the appeal before this court. He relied on several High Court decisions to support his argument on the issue of proof of age of the complainant.

The respondent's counsel Ms. Matere opposed the application. She argued that medical evidence was not the only way to prove age relying on the case of ***RICHARD WAHOME CHEGE VS REPUBLIC HCCRA No.61 of 2014*** where the court admitted the evidence of the mother of the victim as sufficient to prove age.

It was argued further that the medical evidence of sexually transmitted disease, existence of lacerations and discharge was sufficient prove of penetration. The respondent said that the contradictions on the source of the case given by the appellant to the minor was negligible since it was not raised in the lower court. In regard to the charge sheet, the respondent argued that the defect was minor and curable under Section 382 of the Criminal Procedure Code and that no prejudice was occasioned to the appellant.

The duty of the first appellate court was explained in the case of ***JOSEPH NJUGUNA MWAURA & 2 OTHERS VS REPUBLIC [2013] eKLR*** where the Court of Appeal held:-

> *"The duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the 1st appellate court may, depending on the circumstances of the case come to the same conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision".*

This is the duty bestowed upon this court on appeal by the law. I therefore proceed to analyze and re-evaluate the evidence and to make my own conclusions as well as having regard to the reasoning and findings of the trial magistrate.

The facts of this case were that the complainant aged eight (8) years was at school on the 30/01/2014 when PW1 realized that she was in possession of cash 400/=. She inquired as to the source of the money and was told that her father had given her as a reward. The teacher doubted the explanation and called for the complainant's father who went to the school the following day. On further interrogations before the head teacher the complainant said that one Kinyua Chungu whom she later identified as the appellant had given her the money. It was given by the appellant for a sexual favour on 27th January 2014.

The matter was reported to the police and the child was examined. Investigations led to the arrest of the appellant. He was subsequently charged with the offence in this case.

The court conducted a *voire dire* test on the complainant and PW4 took unsworn evidence. She told the court that she knew the appellant by his name Kinyua. She recalled that on 27th January 2014 at about 2.00 p.m., he carried her on a motor cycle and took her to Mumbi's home on the road. He then led her to a nearby bush where he removed her pants before removing his trouser and had sexual intercourse with her. The appellant then gave PW4 Kshs.500/=. He then warned her that he would kill her if she disclosed what had happened. The child went home and kept quiet about the incident. Her father PW2 testified on how he was summoned by PW4's school by the teacher.

The complainant was interrogated on the source of the case she had but refused to talk. At the Karurumo AP post a certain lady who had gone to the chief's office talked to the child. She disclosed to her what the appellant had done to her. PW2 reported the matter to the police and escorted the complainant to Karurumo Health Centre for examination. The doctor PW3 testified that she examined the complainant, fount lacerations In the vagina and pus which was put under laboratory investigations revealing a sexually transmitted disease. The child was given treatment. PW3 produced the P.3 form after a lady officer PC Lydia interrogated the girl and recorded her statement. He said the appellant was arrested by Administration Police from Karurumo Police Post and handed over to him on 5/2/2014. He is the one who charged the appellant with the offence.

The appellant alleged that the charge was defective in that it indicated that the appellant was charged under Section 8(3) of the Sexual Offences Act which cover the 12 – 15 years bracket. The charge read:-

> *DENIS KINYUA NJERU:*
>
> *On the 27th January 2014 a Kathanjuri sub-location, Kaveti village in Embu County, intentionally and unlawfully caused his penis to penetrate the vagina of DGN, a child aged 8 years.*

The statement of the charge read:-

> *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 correct since appellant had no issue with them. They were also consistent to the evidence of the key witnesses. The offence of Section 8(1) was also correctly stated. It is the section which defined the offence of defilement while Sections 8(2), 8(3) and 8(4) give to the age

bracket of the victim and also guides the court in imposing the sentence upon conviction. In this case the complainant was aged 8 years which clearly stated in the charge. Her age bracket is eleven years and below which is covered by Section 8(2). The citing of Section 8(3) instead of 8(2) was wrong. However, the charge was properly framed and all the ingredients of the offence included.

The appellant was aware of the offence facing him from the date of the plea to the end of the trial. The citing of the wrong sub-section as to the age did not cause any prejudice or occasion injustice to the appellant.

It was held in th case of ***JOSEPH KIETI VS REPUBLIC [2014] eKLR Machakos HCCR Appeal No. 91 of 2011*** which cited the case of ***RIDGE VS BALDWIN [1964] AC Lord Morris*** with approval:-

> *"Where an accused person is given sufficient particulars of the charge to enable him know the charge against him is to enable him rebut it, then it cannot be said that the charge is defective".*

The charge was framed in such a way that the appellant knew and understood the charge facing him. The defect of citing the wrong sub-section in the second part of the statement of the charge is minor and is curable under Section 382 of the Criminal procedure Code.

The age of the complainant was said to be eight (8) years by her father PW2. As he testified in court he showed a birth notification which showed that the child was born on 12th August 2006. It was marked as MFI2. However, the investigating officer did not produce the document when he gave his testimony later on. The appellant argued that the evidence of the father of the child was not sufficient proof of age. The state relied on the ***RICHARD WAHOME case (supra)*** where it was held that the evidence of the mother on the age of the child was adequate proof. The appellant relied on three high court decisions:-

1. *BUNGOMA HCRA NO. 128 OF 2009*

2. *KITALE HCRA NO. 95 OF 2010*

3. *MOMBASA HCRA NO. 161 OF 2008*

It was held in those cases that the age of a person can only be proved through a death certificate or through an age assessment report.

I have perused the said cases which I find distinguishable from the case before me. The facts of the case of ***Embu HCCRA No. 45 of 2014*** deal with the issue of whether the plea was unequivocal and the decision of the court revolved on the plea other than proof of age.

That of ***Embu HCCRA No. 212 of 2009,*** Judge found that the appeal record had no evidence at all on age of the complainant as opposed to the facts of this case. In the Kitale case of ***ELIJAH ONGUTI VS REPUBLIC HCRA. No. 95 of 2010*** the Judge observed that the complainant said she did not know the day or the month she was born. There was no evidence from any of her parents on her age. Neither was there any document presented to the court on proof of age. The same case applies to the ***BUNGOMA HCRA No. 128 of 2009.***

In the case before me the evidence of the father of the child on the date of birth was tendered and found to be reliable and credible. He had a birth notification which was shown to the court and marked as an exhibit only that it was not produced through an omission of the investigating officer.

The P3 form gave the estimated age of the complainant as eight years. Even in the absence of any document, provided there is evidence of a parent, such evidence is sufficient to prove age. I rely on the Ugandan Court of Appeal case of ***FRANCIS OMURONI VS UGANDA, Criminal Appeal No. 2 of 2000*** where it was held:-

> *"In defilement cases, medical evidence is paramount in determining the age of the 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 victim's parents or guardian and by observation and common sense..."

In the ***Machakos High Court Criminal Appeal No. 91 of 2011 JOSEPH SEET VS REPUBLIC*** the court relied on the Clinic Health card of the child in a defilement case to uphold a conviction in a case where proof of age was an issue.

I am aware that there was a time when courts continually relied on the notion that age assessment report for a birth certificate. The law is not static and the jurisprudence created by the superior courts must be embraced. The court of Appeal case of ***RICHARD WAHOME CHEGE (SUPRA)*** relied on by the respondent demonstrates growth of jurisprudence. I reach a conclusion that the age of the complainant in this case was proved.

The appellant argued that the complainant's evidence required corroboration since she was a minor. In view of the proviso Section 124 of the Evidence Act, corroboration of a minor's evidence in cases of defilement is not a requirement. The proviso reads:-

"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".

The magistrate in his judgment said that the complainant was telling the truth. The magistrate even gave leave to the appellant on his request to cross examine the minor. The answers to the questions put to her demonstrated her confidence and credibility. I find no merit in this ground based on the proviso to Section 124(1) of the Evidence Act and on the evidence tendered before the Court,

It was argued that there was no medical evidence to prove penetration. PW3 testified that the vulva had lacerations and discharge which was pus. The incident had taken place only three days before and the lacerations had not healed. The appellant disputed the laboratory tests on the discharge which showed that the minor had contacted a sexually transmitted disease on ground that the laboratory results were not produced. There is no requirement that treatment notes or laboratory results be produced in evidence.

The report of the doctor in the P3 form which is based on those documents is sufficient. The lacerations and the sexually transmitted disease was evidence of penetration. It was also not necessary to indicate the probable type of weapon in the P3 form. There was evidence by the complainant herself that there was sexual intercourse on which the medical report was based. The particulars of the charge are as clear as daylight.

The appellant was within his rights of defence to choose to remain silent. However, the court had only the prosecution's evidence to consider in its judgment. The record shows that the magistrate evaluated the evidence thoroughly and reached the correct finding. I find the conviction safe and hereby uphold it.

As regards the sentence, the respondent urged the court to enhance it in pursuance with th provisions of section 8(2) of the Act. The complainant was aged 8 years and the sentence provided by the law is life imprisonment. The magistrate erred in failing to address the anomaly in the charge sheet and to give the correct sentence.

I therefore set aside the unlawful sentence of 20 years imprisonment and substitute it with life imprisonment.

The appeal has no merit and it is accordingly dismissed. The conviction is hereby upheld and sentence corrected as afore stated. The appellant shall therefore serve life imprisonment.

DELIVERED, SIGNED AND DATED AT EMBU THIS 19TH DAY OF MARCH, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for State

Ms. Muriuki for Mogusu for the Appellant