REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 30 of 2008

JOEL IRUNGU GITHINJI…………………APPELLANT

VERSUS

REPUBLIC……….................……………RESPONDENT

JUDGMENT

The appellant herein was charged with the offence of **defilement** contrary to **section 8(1) of the Sexual Offences Act (No. 6 of 2006)** as read with **section 8(2)** of the said Act. He faced an alternative charge of **indecent act on a female** contrary to **section 6(a)** of the same Act. He was tried before the Hon. T. Matheka, Senior Resident Magistrate, Nakuru and was convicted on the main charge. He was sentenced to life imprisonment.

Being dissatisfied with the conviction and sentence he filed this appeal citing 9 grounds of appeal as stated in a memorandum of appeal dated 8th March 2008. He was represented by the learned counsel Mr. Maragia who, at the hearing of the appeal abandoned the first ground and argued the rest of the grounds of appeal under four heads as follows:

1) That the appellant was wrongly convicted on the uncorroborated evidence of the child complainant.

2) That the learned trial magistrate erred in law and fact in importing extraneous issues and relying on the same when making her finding of guilt.

3) That the prosecution's evidence was riddled with material contradictions in the face of which the appellants defence ought not to have been rejected.

4) That the sentence of life imprisonment was harsh, excessive and illegal.

The State has opposed this appeal on the grounds that the complainant's evidence needed no corroboration, that the act of defilement was proved by medical evidence and that the alleged contradictions have not been demonstrated. Regarding the sentence the State had submitted that the same is legal and mandatory and cannot be interfered with.

The charge facing the appellant was that on the 28th day of October 2006 at Ponda-Mali estate in Nakuru District of the Rift Valley Province the appellant intentionally and unlawfully had carnal knowledge of BW, a girl aged 11 years without her consent. The alternative charge as stated in the charge sheet was that on the same date and at the same place the appellant unlawfully and indecently assaulted B W by touching her private parts *(vagina).*

Submitting on behalf of the appellant Mr. Maragia asked this court to note that the manner in which the minor complainant's evidence was taken was improper for reasons that the learned trial magistrate failed to set out the question posed to the minor complainant to enable the court consider her capacity to testify under affirmation as she did. Counsel submitted that the court failed to observe the principles laid down in the Court of Appeal decision in **JOHNSON MUIRURI vs. REP [1983] KLR 445** and that in convicting the appellant on the minor victim's evidence in the absence of corroboration, the provisions of **section 124** of the **Evidence Act** were violated.

Further, learned counsel Mr. Maragia submitted that the learned trial magistrate misinterpreted the medical examiner's evidence as to when the offence herein was committed when she stated in her judgment that the injury would not have been more than 2 weeks old leading the court to arrive at a wrong decision. He also pointed out to certain contradictions in the evidence of the victim, in particular, the mention by the complainant of a Njeri and Shiku saying that she was with Njeri when she went to the house where she met the appellant and that she told Shiku of the defilement. Mr. Maragia asked the court to find that the complainant's credibility was doubtful in those circumstances. Regarding the sentence learned counsel submitted that the appellant, having not been given an opportunity to mitigate, then the sentence was illegal, harsh and excessive.

The evidence of the minor victim was taken under affirmation, the court having examined and accordingly recording what is referred to as a "cross-examination by court". She stated her name was B W. That she was 11 years old and attended SM Primary School where she was in class 5. That she also went to a catholic church. She stated that she knew she was in court and also that she must tell the truth in court. Mr maragia takes issue with the recording of the learned trial magistrate as she did, expressing the view that the inquiry as to the minor's capacity to testify ought to have been recorded in question and answer form as held in the case of **Johnson Muiruri vs. Republic [1983] KLR 445**.

I have carefully studied the said Court of Appeal judgment which clearly states that the purpose of conducting a *voire dire* examination is to establish whether a child understands the nature of the oath in which any evidence taken on oath may be received. The complainant herein having not been examined on oath I am of the view that the said authority does not support Mr. Maragia's submission that the provisions of Section 124 of the Evidence Act were violated. The issue for this court to determine as regards the complainant's testimony is whether the same was corroborated, since it was not given on oath. The minor testified as PW2. She stated that on the 28th October 2006 she visited a neighbour by the name Alice Wanjiru who lived across the road from her home. There she found the appellant who asked her to visit him at his house. His house was near the minor's home. She visited him on the same day, whereupon he asked her to remove all her clothes and took her to his bed. He did to her what she termed as *tabia mbaya* adding that he raped her. She testified that she had gone to his house at around 4.00 p.m. and that he detained her until 6.00 p.m. She went home and bathed and did not tell anyone what had happened. She was later asked by her mother to say who Joel was. She replied that Joel was another man who lives "up there". She did not tell her anything else at that time. Later her father told her to go to hospital where she was examined. The appellant was arrested after Police came and asked the complainant '*who it was'* and she took them to Joel's house and pointed him out. She testified further that apart from the Police and her mother she also told Alice what Joel had done to her. Under cross-examination by the appellant the complainant stated quite clearly that he simply asked her to go to his house and that he did not tear her clothes. Instead she herself removed them at his request. She stated that she did not tell Alice until after three days because she feared she would tell her mother. She stated also that she feared that her mother would beat her if she knew what had happened.

Alice Wanjiru Kiarie the neighbour, testified as PW3. She told the court that the complainant had visited her. She confirmed PW2's testimony that indeed she visited her at her house where she found the appellant who was then taking care of PW3's shop at the request of her husband. The appellant asked B to go with him to weigh rice and they left. The appellant locked the shop at 3.00 p.m. B remained at PW3's house for a while and then left to return later at around 5.00p.m. Asked where she had been PW2 said that she had gone to the stadium. However the following day she was again asked about the event and she said that she was with Shiku at the stadium. Shiku however denied having gone to the stadium with B and told PW3 that B had told her that she had been to Joel's house. Upon PW3's insistence the

complainant owned up and said that she had gone to Joel who had asked her to remove her clothes and get into bed. PW3 told this to Esther Gathoni who then told the complainant's mother.

The complainant's mother **M W** testified as **PW4.** She told the court that she was told '*about Joel and B* by **Esther Gathoni (PW3)**, the sister of PW3**.** She sought to confirm from B if what she was told is true. The complainant told her that Joel had bought her a soda. She went with him to his house and he defiled her. PW4 then reported to Bondeni police station in the company of the minor they were issued with a P3 form with which they proceeded to the hospital where B was examined by a doctor. Under cross-examination, by the appellant PW4 stated that the complainant feared she would beat her particularly since she had on the material date told her not to go to Alice's place. **PC Christopher Kariuki** of Bondeni Police Station testified that on the 8th November 2006 at Midnight while on patrol duties Ponda Mali estate they were approached by a complainant who was with the father at the (bus) stage. They were informed that the complainant had reported a case of rape and had a P3 form completed. Investigations were conducted and the complainant pointed out the appellant who was arrested and charged with the offence of defilement. Under cross-examination, PW5 testified that the complaint was reported on 4th November but the defilement was stated to have occurred on 28th October 2006. I find that the evidence as to when the offence was reported is consistence with the minor's testimony that she did not tell anyone of the offence until after three days.

The examining doctor one **Dr. Philip Wainaina Kamau** testified as **PW1** and produced the P3 form which he had completed in respect of the complainant aged 11 years. She had been sent to him from Bondeni police station with a complaint of having been defiled. The offence was alleged to have been committed on 28th October 2006 and she was examined on 7th November 2006. The doctor testified that upon examining the appellant he found that her hymen was broken with healing margins and that there was evidence of penetration of not less than two weeks. As the complainant was late for diagnostic examination there was no evidence of spermatozoa. The doctor was clear in his evidence that the minor had been penetrated. During cross-examination by the appellant he reiterated that he saw an injury on her ear and the private parts of the complainant.

In his defence, the appellant merely denied having done anything to the complainant. He did not dispute that he was with her at PW3's house on the material date and that he was looking after PW3's shop that day. Indeed he says he left her in the house of the shop owner. He seems to have been aware of the plan by the complainant and her friend to go to the stadium hence his telling the court that "she was coming, B and her friend to the stadium". The appellant said that it was after a week that he heard through another boy that he had defiled the minor herein.

As earlier stated, counsel for the appellant submitted also, as a ground of appeal, that the learned trial magistrate imported extraneous issues not arising from the evidence before her by stating in her judgment that the appellant may have assumed that since "*she did not scream or resist it was okay*" and proceeding to find that "*but it was not okay because she is a child. He ought not to have had sex with her.*" Mr. Maragia stated also that the learned trial magistrate misinterpreted the doctor's evidence in regard to the period that had lapsed from the time of the injury to the time of the medical examination. I find nothing prejudicial from the learned trial magistrate's comment as to what the appellant may or may not have assumed. Those comments do not in my view have any bearing on the learned trial magistrate's decision which, on the whole is based on the evidence adduced at the trial. If anything the learned trial magistrate was, in my view applying the principle that the element of consent does not arise in a defilement charge. This clearly must have been due to the reference of 'rape' by the minor and the line of cross-examination by the appellant which suggested that the minor consented to the act by voluntarily removing her clothes. I note that the charge as appearing in the charge sheet also introduces the element of consent. In a defilement charge, penetration is the key element. The learned trial magistrate considered that the doctor's evidence confirmed that the minor complainant had a broken hymen and formed the opinion that penetration had occurred. Although the learned trial magistrate stated in her judgment that penetration had occurred '*not more than two weeks'* prior to the medical examination, whereas the doctor's evidence was that '*evidence of recent penetration of not less than two weeks'* I do not find this a material contradiction particularly since no suggestion has been made that the minor could have been defiled by someone else or at a different date from the 28th November 2006. The purpose of the medical

examination was to confirm if indeed there was injury of such nature as would prove the offence of defilement. The medical evidence adduced at the trial did in my view satisfy that requirement.

After evaluating the entire evidence I find that the minor victim's evidence was adequately corroborated by the testimonies of other witnesses. Minor contradictions as regards dates or who told who what or what happened in what sequence are not material enough to create doubt or defeat the prosecution's case which I find to have been proved to the required standards. The submission by counsel for the appellant that the appellant ought not to have been sentenced to a life imprisonment on the basis that he was not given an opportunity to mitigate the offence cannot hold. The record shows that after the prosecution stated that he may be treated as a first offender and the court taking note of that, the learned trial magistrate proceeded to record that "*he has nothing to say in mitigation*". This is a clear indication that the appellant was accorded an opportunity to mitigate. The learned trial magistrate was right in imposing the life sentence which is the only sentence available under section 8(2) of the Sexual Offences Act. It is a mandatory sentence and this court has no discretion to interfere with the same. In view of the above I find that this appeal must fail and the same is hereby dismissed.

Dated, signed and delivered at Nakuru this 10th day of July 2009

M. G. MUGO

JUDGE

In the presence of:

N/A - For State

Appellant in person