REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 15 OF 2020

DAVID NDEGE NYAKUNDI.....APPELLANT

-VRS-

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Judgement of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 30th day of June, 2020 in the original Nyamira Chief Magistrate's Court Criminal Case No. 65 of 2019}

JUDGEMENT

The appellant was tried, found guilty, convicted and sentenced to a term of imprisonment for ten (10) years for the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The particulars of the offence were that on the 28th day of July 2019 within Nyamira South Sub-county, the appellant intentionally and unlawfully caused his genital organ, to penetrate the genital organ of GNO a child aged 16 years. His appeal is premised on grounds that: -

> **"1. The learned trial Magistrate erred in law and fact when he convicted the appellant on evidence that was not sufficient, including medical, short of the required standard of proof i.e. beyond reasonable doubt.**
>
> **2. The learned trial Magistrate erred in law and fact when he shifted the burden of proof to the appellant, when such burden properly lies entirely on the prosecution.**
>
> **3. The learned trial Magistrate erred in law and fact when he failed to give deserving consideration to the defense of the appellant.**
>
> **4. The learned trial Magistrate erred in law and in fact when he ignored material contradictions in the evidence of the prosecution, instead of resolving such contradictions in favour of the appellant.**
>
> **5. The learned trial Magistrate erred in law and fact by relying on extraneous matters to convict the appellant.**
>
> **6. The learned trial Magistrate erred in law and fact he failed to advise the appellant on his rights under the law while on a trial and proceeded to conduct the trial oblivious of the standard requirements of the law.**
>
> **6. The learned trial Magistrate erred in law when he imposed a sentence that was extreme in harshness and failed to consider the mitigating circumstances peculiar to the case."**

By the appeal this court is urged to quash the conviction and set aside the sentence.

The appeal was canvassed by way of written submissions. Those of appellant were filed by Omagwa Angima & Co., Advocates and those of the respondent by Desmond Majale, Senior Prosecution Counsel.

Counsel for the appellant invited this court to consider and apply the law strictly and to reject any evidence that falls short of the standard of proof required of the prosecution. Counsel then submitted that while it is common ground that the appellant had an encounter of some sort with the complainant on the date in question, there is evidence to suggest that the encounter was a friendly rather than a hostile one. Counsel submitted that the complainant is on record as saying that she knew the appellant as he used to visit their home and was friends with the brother, that apparently he got to be acquainted with the complainant too and it explains why he came to find her in the kitchen before carrying her to her mother's bedroom. Counsel stated that the complainant could not possibly be expected to admit that the appellant was her boyfriend although the evidence on record suggests that he was. Counsel submitted that while we have no idea how far the kitchen was from her mother's bedroom, it is normal that her mother would be sleeping in the main house, usually detached from the kitchen, probably some distance away and that this is evidence that the prosecution should have put before the court, seeing the accused was acting in person.

Counsel contended that the fact that it was not should be construed against the prosecution. Counsel also contended that it would not be possible to carry a 16 year old person who is struggling and resisting all the way to the alleged bedroom while at the same time covering her mouth. He submitted that if she was struggling to free herself, the appellant needed to use both hands to carry her up and he would have had no extra hand to cover her mouth and she clearly had every opportunity to scream and attract the attention of other people within the home or in the neighbourhood but she did not. Counsel submitted that therefore it does not make sense to say that the appellant covered her mouth as he had sex with her yet he had not blocked her screams when carrying her from the kitchen with the clear intention of having sex with her. Counsel stated that in fact she does not allege that he covered her mouth while carrying her to the bedroom and that clearly therefore she did not resist the advances of the appellant and something happened which upset the romantic encounter. Counsel invited the court to note that the complainant told her sister in law only when the latter came by, that she did not go out to inform and seek help and that it is not even known how long it took for the sister in law to come by for she just happened. Counsel further submitted that the 'something' that triggered the unease leading to informing her sister in law was the unfortunate breaking up of her mother's bed. Counsel stated that this is something that must have weighed heavily on the complainant as a serious problem she had in her hands and she may not have intended to reveal the incident but now she had no choice. Counsel stated that contrary to the conclusion of the learned trial magistrate that the bed broke because of the struggle between the two, it is more likely that it broke up out of the haphazard encounter of the two lovers while in the process of each other's passionate embrace. Counsel urged this court to conclude that a witness who is driven by the need to absolve herself of blame is a witness with conflicted interest and under heavy temptation to lie to escape the blame and her testimony should therefore be treated with extreme caution. Counsel further contended that although consent is not an ingredient of this offense, yet everything points to a consensual encounter between the two and that the complainant is a young lady quite capable of understanding the consequences of agreeing to advances from a man who may himself be under the impression that she is capable of consenting. Counsel further submitted that the medical evidence was clear that there was no spermatozoa and while its presence is not necessary to prove the offence the circumstances of the case may point to its importance. He stated that the breaking up of the bed may have happened so early in the encounter that the two got so completely dissolutioned by the development as not to be in the mood to carry on with their enterprise and that in any case, the absence of the sperms strongly suggests that there may never have been any penetration at all and it is possible that the presence of epithelial cells and other substances could have been due to other activities not related with the alleged defilement. Counsel pointed out that it is pertinent to note at this stage that the there is no evidence of related medical examination of the appellant although that would have made perfect sense in the circumstances, at least, as one way of corroborating the evidence of the complainant and asserted there is nothing to connect what was found in her private parts with the appellant. Counsel further stated that the evidence tendered by PW3 was not properly received by the learned trial Magistrate. He averred that the first thing to note is that there was no attempt to introduce the witness as one competent to produce the evidence as apart from saying that he was a clinical officer, there was nothing more from him to prove that he was indeed qualified to tender such evidence as would be required of an expert. That worse still he never gave any evidence on the qualifications of the said Hosea Mweresa on whose behalf he had come to testify and yet it was necessary. Counsel contended that knowing the doctor’s handwriting cannot be the qualifying factor for him to testify on his behalf at all. Counsel urged that these are not matters to be taken for granted for they are relevant particularly where one is facing a possible life sentence of 15 years and the court ought to have insisted that the officer who examined the complainant appears to testify in person. Counsel stated that no ground was laid to justify calling a substitute witness who had openly admitted his incompetence and it is not enough to just say that the concerned witness was at the time not available. Counsel further submitted that the problem gets compounded when the substitute witness on cross examination states. ***"I did not say that the accused defiled the complainant. I did not examine the complainant. The findings by Hosea proved that there was penetration ",*** which leaves the whole thing in total confusion. Counsel stated that there were questions which the witness could not answer since he did not examine the complainant.

On the age of the complainant Counsel submitted that a 16-year-old is not taken to be as vulnerable as a 10-year-old because she is at least at a stage in life where she can make decisions like those of an adult. Counsel stated that in fact there are judgements by our own Court of Appeal that suggest that it is high time the law was changed to reflect this reality. He contended that there are proposals some of which have been placed before the National Assembly to lower the age of majority to 16 years from 18 so that 16 year olds are treated as adults. Counsel submitted that strictly speaking the law just fixed the majority age at over 18 without necessarily being guided by any logical biological criteria and it is that fact, which informed the legislature to give the court wide discretion to consider the circumstances of each case in sentencing to avoid the uniform application of a sentencing regime that would look ridiculously absurd. Counsel suggested that a man who defiles a 9 year old cannot surely be treated the same way as another who defiles a 16 year old simply because in some cases 16 year olds are women in truth capable of making decisions, as opposed to the other category.

In regard to the sentence imposed by the trial magistrate. Counsel cited the decision of the Court of Appeal in the case of **Eliud Waweru Wambui v Republic [2019] e KLR** and contended that although the appellant did not say much about his relationship with the complainant either by way of cross examination or in his defence there is evidence to suggest that he and the complainant were friends and probably even lovers. Counsel urged this court to bear in mind that the appellant did not have an advocate and was at a loss on how to go about prosecuting his case. In summing up Counsel invited this court to find that it cannot be concluded with any certainty that the accused penetrated the complainant and hence give the benefit of doubt to the appellant. Counsel further submitted that the available evidence could possibly support the alternative charge of indecent assault but even then there is also reasonable doubt that the appellant committed this offence. Counsel urged this court to resolve the doubt in the appellant’s favour and acquit him.

On his part Counsel for the respondent submitted that all the key ingredients of the offence of defilement were proved beyond reasonable doubt and the trial Magistrate did not base his findings on extraneous matters as contended by Counsel for the appellant. On the sentence Counsel for the respondent submitted that the trial Magistrate considered the victim impact statement, the gravity of the offence, the appellant’s plea in mitigation and the jurisprudence in the *Muruatetu case* and the sentence was therefore reasonable. Counsel urged this court to find the appeal lacks merit and dismiss it in its entirety.

As the first appellate court my duty is to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses who gave evidence ***(See the case of Okeno v Republic [1972] EA 32).***

From the submissions of Counsel for the appellant it is clear that it is not disputed that at the material time the complainant was sixteen (16) years old. After all a birth certificate was produced to confirm that she was. It is also conceded that on the material day ***“something”*** happened between the appellant and the complainant. According to the complainant the appellant found her in their kitchen and carried her to her mother’s bedroom, placed her on the bed and had sex with her and in the process broke the bed. She stated that she could not scream because the appellant had covered her mouth with his hands. Pictures of the broken bed were produced in evidence by Inspector David

Marucha (Pw2) and Police Constable Margaret Nzai (Pw4) confirmed that the complainant and her brother reported the incident to Nyamira Police Station on 29th July 2019. PC Margaret Nzai (Pw4) stated that the complainant told her she was sixteen years old and that the appellant found her in the kitchen and took her to her parents' bedroom, forced her to lie on the bed and then defiled her and in the process broke the bed. Pw4 stated that she visited the scene and confirmed the bed was broken and that signified there was a struggle. While I agree with Counsel for the appellant that the medical evidence (P3 Form, treatment notes and PRC Form) do not reveal there was penetration, the law is that the evidence of the complainant in a sexual offence does not require corroboration ***(see proviso to Section 124 of the Evidence Act).*** It is enough that the court believes the complainant and records its reasons for doing so. Personally I believe the complainant. This is because she was consistent and did not exaggerate or understate to Pw4 what the appellant did to her. She remained consistent even during her testimony in court and this is further confirmed by the admission of the appellant through his advocate's submissions that something happened between him and the complainant. I do find it a fact therefore that the appellant defiled the complainant. Even partial penetration is penetration (***see definition of penetration in Section 2 of the Sexual Offences Act).*** The appellant is therefore mistaken in saying that there was no penetration simply because of the absence of spermatozoa or because there was no medical evidence. It is my finding that penetration was proved beyond reasonable doubt. Unlike rape sexual intercourse with a child is a statutory offence and it matters not that the child consented. It is apparent from his own submissions that the appellant had sexual intercourse with the complainant. That was unlawful. A child under the age of eighteen years is presumed by the law to be incapable of consenting to sexual relations of any nature. The only defence to this offence arises where the child deceives the perpetrator that she is over the age of eighteen years. **(see Section 8 (5) of the Sexual Offences Act)**. In this case the appellant did not allege to have been deceived by the complainant that she was over the age of eighteen years. The case of **Eliud Waweru Wambui v Republic (supra)** cited by Counsel for the appellant is therefore of no relevance. I find therefore that the appeal on conviction has no merit and dismiss it.

In regard to the sentence the trial Magistrate correctly applied the principles of sentencing and imposed a sentence which was less than the minimum prescribed but which matches the crime committed. In the premises I am not persuaded that the sentence was either harsh or excessive and the appeal is dismissed in its entirety. It is so ordered.

Signed, dated and delivered electronically at Nyamira this 4th day of February 2021.

E. N. MAINA

JUDGE