



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL APPEAL 101 OF 2019**

**(CORAM: F. M. GIKONYO J.)**

*From the conviction and sentence by Hon. W. Juma Chief Magistrate in Narok CMCCRC No. 1271 of 2015 on 3<sup>rd</sup> August 2017*

**BENSON NTAIYA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Substituted Charge**

[1] The initial main charge the appellant faced was one of rape contrary to section 3(1) (a) (b) and 3(3) of the sexual offences Act No. 3 of 2006. It was substituted on 3<sup>rd</sup> November, 2016 with a charge of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act. The particulars of the offence are; that on 23<sup>rd</sup> July 2014 at [Particulars withheld] area in Narok North Sub County of Narok County, unlawfully and intentionally caused his penis to penetrate the vagina of MMS a child of 14 years.

[2] He was also charged in the alternative with committing an indecent act with a child contrary to section 11(1) of the sexual offences act no. 3 of 2006.the particulars are that on 23<sup>rd</sup> July 2014 at [Particulars withheld] area in Narok north sub county of Narok county, unlawfully, and intentionally touched the vagina of MMS a child aged 14 years old.

**The appeal**

[3] Being dissatisfied with the said conviction and sentence he preferred an appeal as set out in his mitigation grounds of appeal.

**Appellant's Submissions**

[3] The appellant relied entirely on the mitigation submissions he filed. The major points gathered from these submissions is that; (1) the sentence of 10 years is excessive; (2) he has learnt his lesson and is reformed; (3) he is the sole bread winner of his family; and (4) prison life has given him blood pressure; and (5) he is first offender. He prays for another chance in life and to be forgiven.

**Respondent's submission**

[5] M/S. Torosi, the prosecution counsel, submitted that age of the complainant was given by PW4 who interrogated the complainant and produced her Certificate of Birth produced as **Exh.3**. The Certificate of Birth show that the complainant was born on 4<sup>th</sup> June 2000.

[6] PW1 examined the complainant and corroborated her evidence that she was defiled. PW1 further confirmed that at the time of filing the P3 form the complainant had conceived and delivered and her baby was three months' old. Blood samples were collected of the appellant. Blood samples were taken from the Complainant, the baby and the accused and submitted to the government chemist for analysis; the results confirmed that the appellant is the biological father of the complainant's baby. DNA report and exhibit memo form were produced as **Exh. 2(b)** and **2 (a)** respectively.

[7] The complainant positively identified the Appellant as the person who defiled her; the event occurred in a broad day light.

[8] The Appellant gave mitigation and the trial court noted the same before sentencing the Appellant to 10 years' imprisonment.

[9] She argued that, according to Section 137 N of the Criminal Procedure Code reconciliation or settlement of sexual offences is not allowed.

[10] She did not forget to state that prison welfare department takes care of prisoner's issues such as health and food.

[11] The respondent's counsel therefore submitted that the sentence meted by the trial magistrate court was legal and in accordance with the law and thus the grounds of appeal lack merit and ought to be dismissed.

## **ANALYSIS AND DETERMINATION**

### **Court's duty**

[12] The duty of first appellate court is to evaluate the evidence afresh and come to own conclusions, except, it must give allowance of the fact that it neither saw nor heard the witnesses. See: **R vs. OKENO [1977] EALR 32**. This exercise does not, however, beholden or compel the court to adopt or any particular style. Nonetheless, the court must avoid mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

### **Issues**

[13] From the grounds of appeal in the petition of appeal and submissions presented, this appeal is against conviction and sentence. Accordingly, the court should determine: -

- 1. Whether the prosecution proved the guilt of the accused beyond reasonable doubt; and**
- 2. Whether the sentence of 10 years' imprisonment was harsh or excessive in the circumstances.**

### **Elements of offence of defilement**

[14] The appellant was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act** which provides:

*8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

*8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.*

[15] The specific elements of the offence defilement arising from **Section 8 (1) of the Sexual Offences Act** which the prosecution must prove beyond reasonable doubt are:

- 1) Age of the complainant;**
- 2) Proof of penetration** in accordance with section 2(1) of the Sexual Offences Act; and
- 3) Positive identification of the assailant.**

[16] See the case of *Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013* where it was stated that:

***“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”***

[17] What does the evidence portend?

### **Age of the complainant**

[18] Age of the complainant is important in defilement as the offence is committed only to children; persons below the age of 18 years. Secondly, the age of the victim determines the sentence to be imposed.

[19] On age of the complainant, **PW2** stated that she was 14 years old when the incident occurred. **PW4** interrogated the complainant when the matter was reported and established she was aged 14 years at the time of the commission of the offence. **PW4** produced the Certificate of Birth of the complainant (**Exh 3**) which confirmed that the complainant was born on 4<sup>th</sup> June 2000. The Certificate of Birth is the best

evidence to ascertain the child's age. Accordingly, I make a finding and hold that, at the time the offence was committed the complainant was 14 years old and therefore a child.

[20] Therefore, the trial magistrate did not error when she found that the complainant is a child aged 14 years.

### **Penetration and perpetrator thereof**

[21] Section 2(1) of the Sexual Offences Act defines penetration as:

***“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”***

[22] In the case of **Mark Oiruri Mose v R [2013] eKLR** the Court of Appeal stated that:

***“Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.”*** (Emphasis added).

[23] PW2 told the court that the appellant followed her to the forest where she was going to pick firewood, and when she turned down his request for sexual favour, he held her and knocked her into the ground; removed her pants and skirt, removed his trouser and penetrated her. The evidence by PW1 show that as a result of the penetration, a child was born. PW1 was categorical that the said child at the time he filled the P3 FORM, i.e. on 29<sup>TH</sup> July 2015 was three months old. This evidence, given the normal cycle of pregnancy, takes us back to the time the complainant was penetrated by the appellant. PW2 told the court that as a result of the sexual intercourse herein she gave birth to a child. The blood samples were taken from the complainant, the child and the appellant and upon scientific analysis for DNA by the Government Chemist, it was established that the appellant and the complainant are biological father and mother of the child, respectively. See the report by the Government Chemist (EXH. 2B). P3 form and treatment card produced by PW1 show that on vaginal examination of PW1 the hymen was not intact This piece of evidence proves beyond reasonable doubt that there was penetration of PW1. I so find.

### **Was Appellant the assailant?**

[24] Positive identification that the appellant was the assailant is crucial element of the offence. For that reason, I will state her evidence in *extenso*.

[25] PW2 BG testified that on 23/7/2014 she was going to collect firewood at 1.00 p.m. at the forest. She passed by the canteen. She passed the accused. As she went to pick the firewood, she looked behind and saw the appellant following her. He reached her and asked her to be his friend. She declined the invitation. The appellant offered that if she accepted to be his friend he would give her money. She again declined. He held and knocked her down. She screamed but he covered her mouth. He proceeded to remove her pant and skirt. He then removed his trouser and had carnal knowledge of her. He threatened to kill her or carry her on a motor bike and throw her in the river. After three months she realized she was pregnant. She gave birth to a child as a result. The DNA analysis by Government Chemist proved the appellant was the biological father of the child. This evidence is of corroborative value to the evidence by PW1 on identity of the assailant.

[26] From the foregoing, there was sufficient evidence that the Appellant is the person who caused penetration with PW2. PW2 identified the appellant as the assailant. This was identification by recognition. Her evidence on identification alone may even found a conviction as long as the court records reasons for believing the truth of the evidence in accordance with **Section 124 of the Evidence Act** which provides as follows:

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***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.”***

[27] The account of the events; how they occurred and by who caused- by PW2 created a vivid picture in the mind of the court. The evidence leaves no room for speculation or possibility of delusion or mistaken identity as to the person who defiled her on the fateful day. I do not find anything to show that she was under any delusion or of mistaken identity, for she knew the appellant well. Her evidence was cogent, gave a picturesque of the incident with such succinct details of the manner it happened and the identity of the assailant. The evidence leaves no doubt that the appellant caused penetration of her.

[28] Accordingly, I make a finding that the elements of defilement namely, penetration and minority age of the victim was proved beyond doubt. The conviction was therefore proper.

[29] In the upshot, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

### **On sentence**

[30] The appellant argued that the sentence is manifestly excessive in the circumstances of this case. According to Section 8 (3) of the Sexual Offences:

***“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”***

[31] The Muruatetu decision untied the hands of the Court in cases from the shackles of mandatory sentences prescribed by legislation; courts have discretion to mete out appropriate sentences in each case depending on the circumstances of the case. However, minimum sentence whenever prescribed depicts the legislative expression that the offence is serious.

[32] In this case, the victim was a child aged 14 years. The appellant sexually assaulted her. She became pregnant and now she has had to bring up the child. Such are unnecessary burdens on innocent souls and adds to the hurt the sexual attack inflicted on the child. When I take all factors into consideration, this is a case that may warrant enhancement of sentence. See the case of **Joshua Alube Gilbert v Republic [2012] eKLR**, the court of appeal at Kisumu expressed itself that

“Enhancement arises when the court, considering the circumstances of a case finds that the sentence imposed is lenient and increases it. In this case the sentence of 10 years’ imprisonment that the trial court had imposed was illegal.

[33] Nonetheless, I will only dismiss the appeal. The appeal is therefore dismissed. Right of appeal 14 days.

Right of appeal 14 days.

**Dated, signed and delivered at Narok through Microsoft Teams Online Application this 10<sup>th</sup> day of February 2021**

**F. GIKONYO**

**JUDGE**

**In the Presence of:**

1. Ms. Koima for DPP
2. The appellant
3. Mr. Kasaso – Court Assistant

**F. GIKONYO**

**JUDGE**