REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 91 OF 2019

JOHN MIRURI NDEGWA ...…………….……………………. APPELLANT

VERSUS

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

(An appeal on sentence from the judgment, conviction and sentence of Honourable Eunice Kelly (P.M) dated at Nakuru Chief Magistrates Court Adult Criminal Case No. 134 of 2012 on 3rd April 2018)

JUDGMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on the 11th day of June 2012 at [particulars witheld] farm in Subukia District of the Rift Valley Province accused intentionally and unlawfully committed an act by inserting his male genital organ namely penis into the genital organ namely vagina of **AM** a child aged 8 years' old which caused penetration.

2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on the on the 11th day of June 2012 at [particulars witheld] in Subukia District of the Rift Valley Province the accused intentionally and unlawfully committed an indecent act with **AM** a girl aged 8 years by touching her vagina with his penis.

3. The Appellant denied both the main and alternative charge and the case proceeded for full trial. The prosecution called 5 witnesses in support of its case and accused gave a sworn testimony on his defence and did not call a witness.

4. By the judgment delivered on 3rd October 2012, the lower Court found the appellant guilty of the main charge, convicted and sentenced him to life imprisonment.

5. The Appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal through a Petition of Appeal dated 13 th of November 2017 challenging the conviction and sentence on the following amended grounds: -

i. THAT, the learned trial magistrate erred in law and fact by failing to appreciate that the complainant's age was not proved as provided for in law.

ii. THAT, the learned trial magistrate erred in law and fact by relying on the prosecution evidence yet failed to find that it was marred with inconsistencies and contradictions.

iii. THAT, the learned trial magistrate erred in law and in fact by failing to find that the medical evidence adduced was not sufficient enough to corroborate the charges.

iv. THAT the learned trial magistrate erred in law and in facts by failing to appreciate that the nature of his arrest was consistent with innocence.

6. The Appellant filed amended grounds of appeal as follows: -

i. That the learned trial magistrate erred in law and in fact in convicting the appellant while relying on PWI AM identification by recognition evidence whereas no names of the appellant mention initial report to police and or any leading to arrest the appellant

made thus doubtful.

ii. That the learned trial magistrate erred in law and in fact in admitting documentary evidence Ex. P3 Form and Ex. 3 treatment note whereas the same were inadmissible in law.

iii. That the learned trial magistrate erred in law and facts in failing to appreciate that the prosecution had failed to prove its case to the standard required in law that is, proof beyond reasonable doubt.

iv. That the learned trial magistrate erred in law and facts in accepting the Complainant evidence as safe whereas the same were insufficient and incredible.

v. That the learned trial magistrate erred in law and facts in admitting medical officer PW5 Dr. Isaac Gitonga's evidence whereas the doctor who treated the Complainant was never heard thus doubtful.

vi. That the learned trial magistrate erred in law and in fact in failing to take into account and or failed to consider the love triangle existing between PW2 and or failed to give serious consideration, the appellant's plausible defense.

7. The state opposed the appeal on both conviction and sentence. The defence counsel filed written submissions while the state counsel opted to make oral submissions.

APPELLANT'S SUBMISSIONS

8. On the issue of identification, the Appellant submitted that it is not in dispute that PW1, PW2 and PW3 knew him as he was their neighbour as shown in the proceedings.

9. He submitted that the record reveals the name **"JOHN"** which might not have been his name because it is only mentioned to PW3 who had interest in having a love affair with him and not PW2 who is PW1's mother. He submitted that that PW1 stated that she knew " **John"** which begs the question why did PW3 fail to give his name to her mother immediately after she got the alleged report from the complaint. He submitted that there is doubt as to whether the Complainant recognized him and submitted that the trial magistrate failed to exercise the rule of natural justice. He submitted that PW1 and PW3 should have mobilized the neighbours to arrest him or led the police to " **John's"** home and more so give the name "**John"** to the police initial report.

10. On the issue of the victim's age, the Appellant submitted that the birth certificate produced in court specified the date of the birth of PW1 as 14th January, 2005 and hence she was about 7 years and a half on the 11th June, 2012 when the offence was committed and hence the prosecution failed to prove an essential ingredient under Sexual Offences Act, that is the age of the victim. And further submitted that the complainant said in her evidence that she was 8 years old at the time of commission of the offence, while her mother PW2 and sister PW3 mentioned 10 years and further submitted that the birth certificate was 25th June, 2012 that is eleven days after he was arraigned in court on 14th June, 2012 and the prosecutor therefore manufactured the said document.

11. The Appellant further submitted that in the birth certificates the name of complainant's mother is **SKO** and not **SK** and the surname "**O"** appearing on the birth certificate does not appear on records. He further submitted that the said document did not bear any official stamp or seal as required under the **Births and Deaths Registration Act (Cap 149).**

12. He submitted that the prosecution produced in court a photocopy of the birth certificate as exhibit contrary to **section 67** as read with **section 68** of the **Evidence Act** which provide as follows: -

> **"…….Documents must be proved by primary evidence except in the cases hereinafter mentioned; …….**
>
> **1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases**
>
> **(a) when the original is shown or appears to be in the possession or power of;**
>
> **(i) the person against whom the document is sought to be proved; or**
>
> **(ii) a person out of reach of, or not subject to, the process of the court; or**
>
> **(iii) any person legally bound to produce it,"**

13. He submitted that the said birth certificate was not certified by the maker to confirm that it was a copy of the original, thus the document produced in court as Exhibit 1 is unacceptable and inadmissible in law.

14. In respect to penetration, the Appellant submitted that the learned trial magistrate erred in accepting PW2 and PW3's evidence. He referred to page 5 paragraph 3, lines 7-22 where she made findings that the testimonies of the prosecution witnesses were consistent and credible; that at the time of examination of the Complainant the hymen was not intact, that she walked in unusual gait and the same was noted by PW2 and PW3 and she therefore found that indeed there was vaginal penetration of the child.

15. The Appellant submitted that from the entire recorded evidence there is no evidence from the alleged medical officer who is said to have treated and examined the Complainant nor any statement recorded at Police Station before filling the P3 Exhibit 1; he referred to page 13 lines 20-21 of the typed proceedings. He submitted that the P3 form produced in court as Exhibit No. 1 was not supported by oral evidence as **Dr. Lydia Wainaina** who is alleged to have filled the P3 never tendered evidence in court.

16. The Appellant submitted that there is no indication that that indeed PW5 **Dr. Gitonga** knew or was acquainted with **Dr. Lydia Wainaina's** handwriting and quoted **Section 50 (1) (2) of Evidence Act Cap 80 Law of Kenya** which provides as follows: -

> **"When the court has to form an opinion as to the person by whom any Document was written or signed, the opinion of any person acquainted with the Handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible……2) for the purposes of subsection (I) of this section and without prejudice to another means of determining the question a person is said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person or when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him"**

17. The Appellant submitted that the P3 produced in court as Exhibit No. 2 and treatment notes Exhibit No. 3 respectively were inadmissible because from the entire records, nowhere did the prosecution tender the PRC form which must have been the genesis of the P3 form produced in court as Exhibit No.2 and in the absence of PRC form in evidence, the source of the content of document P3 produced in court as Exhibit 2 remains questionable, inadmissible in law and submitted that an essential element of penetration remains unproved.

18. In conclusion, the Appellant submitted that his defence was ignored for no reason that it was very remote, inferior which occasioned a great miscarriage of justice. He urged the court to allow the appeal, the conviction be quashed and the sentence be set aside forthwith.

SUBMISSIONS BY RESPONDENT

19. The state counsel **Ms. Rita Rotich** submitted that the age of the complainant was proved as the complainant's evidence was corroborated by PW2 complainant's mother and the birth certificate produced in court by PW4 who was the investigating officer and the birth certificate indicated that the minor was 8 years.

20. The state counsel further submitted that PW1 stated that the Appellant (accused) was known to her as a neighbor and on the material day she saw the Appellant who was herding cattle ambush and defile her. She further submitted that the complainant identified the accused (appellant) in court as called John and PW3 a sister to complainant confirmed that the accused was known as John the son of Ndegwa.

21. In respect to penetration, the state counsel submitted that PW1 stated she had been defiled by accused and that PW2 and PW3 had noticed that the Complainant had difficulty walking and was fatigued. She submitted that the doctor found that the Complainant had broken hymen, the vagina walls were red with a tear, had bled and concluded that the same was due to penetration.

22. The state counsel further submitted that the underpants had dried stains, she had foully discharge. She submitted that the accused admitted that he was grazing cows on the material day and was a neighbor with complainant's family and allegations of grudge with PW3 was never proved and PW1, PW2 and PW3 said they had no grudge with accused. She urged this court to dismiss this appeal.

ANALYSIS AND DETERMINATION

23. This being the first Appellate Court, I am aware that I am expected to reevaluate evidence adduced before the trial court and make an independent determination. This I do knowing that that unlike the trial court I never got the opportunity to take evidence first hand and observe the demeanor of witnesses. For this, I give due allowance. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

24. These principles were restated by the Court of Appeal in the case of David **Njuguna Wairimu V – Republic [2010] eKLR** as follows: -

> **"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those 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 decisions."**

25. In view of the above, I have perused proceedings before the trial court and also considered submissions and find the following as issues for determination: -

a) Whether ingredients for the offence of defilement were proved

b) Whether the sentence imposed is harsh and excessive.

26. It is undoubted that for an offence of defilement to be proved, three ingredients have to be proved beyond reasonable doubt; there being prove of age, penetration and identification of the assailant.

(i) Whether ingredients for the offence of defilement were proved

(a)AGE

27. The complainants birth certificate was produced in court by PW4 shows that the complainant was seven years five months at the time of defilement which properly fall under **Defilement'** under **Section 8(1) and the punishment within Section 8(2) of the Sexual Offences Act.**

28. The issue of prove of age was restated by the Court of Appeal **Maurice Wegesa Wambura v Republic [2020] eKLR** while quoting the case of **Edwin Nyambogo Onsongo v Republic [2016] e KLR** as follows: -

> **"... the question of proof of age has finally been settled by recent decisions of this court to the effect that <u>it can</u> <u>be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.</u>" ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (Emphasis supplied)**

29. In my view the fact that the birth certificate was issued on 25th June, 2012 that is eleven days unless proved does not make it unauthentic unless there is prove to that effect. There is no evidence shown to court that any of the parties fraudulently obtained a fake birth certificate. Its authenticity was not challenged. This being an official government document, I find it proper document to demonstrate the age of the complainant.

b) PENETRATION

30. In the instance case and from the evidence on record PW1 stated she had been defiled by accused. Further, PW2 and PW3 noted that complainant had difficulty walking and she was fatigued. The doctor examined the minor and noted a broken hymen, the vagina walls were red with a tear and there had been bleeding and concluded that the same was due to penetration.

31. Further the underpants had dried stains and a foully discharge from the minor's private parts P3 form and the treatment notes were produced in court. As concern argument that the author of the said documents did not testify in court, **Section 33** of the **Evidence Act Cap 80 Laws of Kenya** provides:

> **"Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible ……."**

32. From the foregoing, it is evident that the prosecution was able to prove penetration as shown by P3 form dated 12th June 2012 which bears the stamp of Kabazi Health Centre with signature of the medical officer/ practitioner and treatment notes produced in the trial court being authentic and admissible in evidence.

33. On identification of the assailant**,** the fact that the appellant was the complainant's neighbor was not disputed neighbor. The appellant confirmed in his defence that he knew PW1 and they were neighbors. He also confirmed in his evidence that indeed on 11th June 2012, he was herding cattle confirming the complainant evidence to the effect that appellant was herding cattle at the time he defiled her. The complainant's evidence is evidence of recognition which stand unchallenged, and therefore in the circumstances the appellant was not only positively identified but also placed at the scene of crime by the complainant. I would therefore find no merit in the appellant's appeal on both conviction and sentence and dismiss it in its entirety.

(ii)Whether the sentence imposed is harsh and excessive.

34. The Appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The Act provides for minimum sentence of life imprisonment for defilement of a child aged 8 years. The trial court imposed the sentence provided by statute. I take note of the Supreme Court directions issued on 6th July 2021 which clarified that the decision in **Muruatetetu** case which declared mandatory nature of sentence unconstitutional is applicable to Murder cases only.

35. In view of the said directives by Supreme Court in **Muruartetu** case, my hands are tied in so far as sentence is concerned. I will not therefore interfere with the sentence imposed by the trial court.

36. <u>FINAL ORDER</u>

1) Appeal is hereby dismissed on both conviction and sentence.

Judgment dated, signed and delivered via zoom at Nakuru This **7th** day of **July**, 2021

……………….......……

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person