REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 60 OF 2019

STEPHEN MWITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(an Appeal from original conviction and sentence (Hon. A.K Ithuku, CM) dated 15th August 2019 in criminal case No. 4 of 2017 in the Chief Magistrate's Court at Ngong')

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, No. 3 of 2006. Particulars were that on the 12th day of February, 2017 at [Particulars Withheld] village within Kajiado West Sub-County in Kajiado County, he intentionally and unlawfully caused his private organ to penetrate the private organ of NHN a minor aged 15 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. Particulars being that on the same day at the same place, he intentionally touched the private parts of NHN, a minor aged about 15 years.

3. The appellant denied both counts and after a trial in which the prosecution called 6 witnesses and his unsworn defence, he was convicted and sentenced to twenty (20) years imprisonment. He was aggrieved with both conviction and sentence and filed this appeal raising grounds that mainly challenged sentence, citing decisions in ***Evans Wanjala Wanyonyi v Republic*** (Criminal Appeal No. 312 of 2018); ***Christopher Ochieng v Republic*** [2018] eKLR (Kisumu Criminal Appeal No. 202 of 2011) *and* ***Jared Koita Injiri v Republic*** (Kisumu Criminal Appeal No. 93 of 2014).

4. The appellant filed supplementary grounds of appeal together with his written submissions as follows:

> ***1. THAT, the learned trial magistrate erred in law and fact by failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by law.***
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> *2.* ***THAT, the learned trial magistrate erred in law and fact by failing to find that the Prosecution witnesses' narrations of evidence were unbelievable and illogical.***
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> *3.* ***THAT the court failed to record the reasons for believing that the complainant was telling the truth contrary to the provisions of section 124 of the Evidence Act;***
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> *4.* ***The learned trial magistrate erred in fact ad law when he failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong decision that he (appellant) had defiled Princess Ekatrina Lucky Liz;(sic)***
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> *5.* ***THAT, the trial magistrate erred in law by failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice.***

5. When this appeal came up for hearing, both the appellant and prosecution counsel relied on their written submissions to dispose of this appeal.

6. In his written submissions, the appellant submitted that amendment to section 124 of the Evidence Act was because a child's power of observation and memory is less reliable; children are prone to live in a make believe world; they are very egocentric; they are gullible and can be manipulated by adults and other children and they have a little notion of the duty to speak the truth. He therefore argued that an

appellate court could reverse a decision of the trial court depending on the material facts in question and, more so, if the trial court misdirected itself on the law.

7. The appellant submitted that the prosecution did not prove the elements of the offence. He relied on ***R v sims (*****1946) KB 531,** that whenever there is a plea of guilty, everything is in issue and the prosecution has to prove the whole of its case, including identity of the accused, the nature of the act and existent of any necessary knowledge or intent. He also relied on ***Sekitolo v Uganda*** (1967) EA 53 for the argument that the prosecution had a duty to prove all elements of an offence beyond reasonable doubt.

8. According to the appellant, the prosecution must prove three elements for the offence of defilement; that the victim was a minor, there was penetration and that the accused was the one responsible for the penetration. He submitted that the prosecution did not conclusively prove that he defiled the complainant.

9. The appellant argued that PW1's evidence was that she on her was from fetching water at 8am when she met him coming from the shop; that he pulled her to his house where he defiled her and later locked her inside the house and left. At about 3pm, she screamed and her father heard the scream and opened for her. According to the appellant, PW1 had stated in cross examination, that he accosted and took her to his house about 3 km away. and that it was her first time to see him.

10. The appellant faulted PW1's evidence that he defiled her. In his view, it was impossible for PW1 to be locked inside a house from 8am to 3pm on a plot with many people without being noticed and without raising an alarm. He also argued that it was impossible to have walked with PW1 for 3 km without her raising alarm to attract passersby. He again doubted how PW2 knew where PW1 was.

11. According to the appellant, whereas PW1 testified that PW2 heard her screams and came to her rescue, PW2 did not say so. He also argued that whereas PW1 testified that he was not in the house when PW2 opened for her, PW2 testified that he found him with PW1 in the house and that he (appellant) was smoking. He therefore argued that the witnesses' evidence was inconsistent and contradictory.

12. The appellant further argued that whereas PW1 also testified that the door was closed and that it is her father who opened for her, she later stated that it was his (appellant's) brother who opened the door for her father. According to the appellant, the contradictions in the testimonies of PW1 and PW2 went to the root of the prosecution case. He therefore faulted the trial magistrate for believing that evidence. He relied on ***John Mutua Munyoki v Republic*** (2017), eKLR (CRIM APP. No. 11 of 2016)**; *Philip Nzaka Watu v Republic*** [2016] eKLR; ***Mohamed Swale Kaeze v Republic*** (Criminal Appeal No. 445 of 2003) and ***Punjab v Jagir Singh*** (1974) 3 SCC 277, on credibility of witnesses.

13. The appellant submitted that identification of the perpetrator was not proved beyond reasonable doubt as he was neither examined nor was DNA test done to link him to the spermatozoa found in PW1's private parts. He relied on ***Eliud Ouma Agwara*** (High Court Criminal Appeal No. 16 of 2016-Siaya) and ***Amos Kinyua Kugi v Republic*** [2015] eKLR.

14. The appellant again submitted that age of PW1 was not proved. It was his case that amending the charge sheet to indicate that PW1 was 15 years prejudiced him bearing in mind that since PW1 was born on 12th July, 2001, she was 15 years 7 months. According to him, there is a difference in legal effect where one is charged for defiling a 15-year-old minor or a 16 years old in terms of the sentence to be meted out. He relied on ***Martin Mutua Kamende*** (Criminal Appeal No. 4 of 2019 High Court-Kiambu). He therefore submitted that based on PW1's evidence as well as the medical evidence it had not been proved that he committed the offence.

15. Regarding corroboration, the appellant argued that the trial court was entitled to convict on the evidence of a victim of sexual offence if, for reasons to be recorded, it believed that the victim was telling the truth about the commission of the offence. According to the appellant, PW1 was not truthful so as to justify his conviction because the medical examination report did not prove that he was the one who was involved; the medical report did not corroborate PW1's testimony and, therefore, it could not independently implicate him. He blamed the trial court for not establishing the truth of PW1's testimony. He relied on ***Jacob Mumo v Republic*** [2015] eKLR; ***Geoffrey Kioji v REP*** (CR APP No. 270 of 2010 (Nyeri) and ***John Mutua Munyoki vs Republic*** [2017] eKLR.

16. It was the appellant's further argument that the case was poorly investigated and relied on ***Erick Cheruiyot Bii v Republic,*** (CR. APP No. 71 of 2009 (Nakuru CA); that PW1 was an unreliable witness since she could not be traced for further cross examination and that no age assessment was done on him to confirm that he was 17 years old hence the prosecution case was not watertight. He prayed that the appeal be allowed, conviction quashed, sentence set aside.

17. The prosecution counsel opposed the appeal and supported conviction and sentencing. It was submitted that PW1 testified on how the appellant defiled her; that PW4 confirmed that the complainant's clothes were torn and that the opening of her private parts had deep lacerations and brown discharge; that lab tests showed the presence of spermatozoa and that the hymen was missing.

18. Regarding age, it was submitted PW5 testified that PW1's age was 15 years and 7 months at the time of the incident and that a birth certificate was produced to prove her age.

19. On the identity of the perpetrator, the prosecution counsel submitted that PW1 had sufficient time to see the appellant to facilitate positive identification. It was also submitted that PW2 found PW1 with the appellant in his house. It was similarly argued that PW1 testified that the appellant gave her another skirt to wear after he tore hers which was corroborated by PW2 that she was wearing a different skirt. PW2 and PW3 also identified the appellant as the one they found with the complainant. Prosecution counsel argued that they proved the case beyond reasonable doubt and prayed that the appeal be dismissed.

20. I have considered this appeal; submissions by parties and the authorities relied on. I have also read the record and the judgment of the trial court. This being a first appeal, it is the duty of this court as the first appellate court, to reexamine reevaluate and reconsider the evidence afresh and make its own conclusions on it. The court should however bear in mind that it did not see the witnesses testify and give due

allowance for that.

21. In ***Okeno v Republic*** [1972] EA 32, the Court of Appeal held that:

> ***An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and to the appellate Court's own decision on the evidence. 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).***

22. **PW1** NH testified that on 12th February, 2017 she went to fetch water and on her way home at 8am, she met the appellant coming from the shop. He held her hand and pulled her to his house where he tore her skirt, undressed her and defiled her. It was her first time to have sex with and she felt a lot of pain. The appellant later gave her another skirt to wear because he had thrown her skirt and pants away. The appellant later left and locked her inside the house. She screamed and her father(PW2) heard her screams and came and opened the door for her. A village elder was called and they took her to the Administration Police Camp. The AP officers called police officers from Magadi Police Station who came and rearrested the appellant and took him to the police station. She was treated at Magadi Hospital the same day. She identified the appellant in the dock as the person who had defiled her and that it was her first time to see him.

23. **PW2 DON,** step father to PW1, testified that on 12th February, 2017 they left PW1 with a small child at home and went to the farm. When they came back she was not at home. The went looking for her and managed to locate her at the appellant's house at about 4p.m. with the appellant. He asked what had happened and she told him that the appellant had pulled her to his house and defiled her. He called PW3, a village elder, who came and apprehended the appellant. They took him to AP Camp at Magadi and he was later handed over the police. PW1 who was 16 years old was treated at Magadi hospital. The witness testified that he married the complaint's mother after PW1 had been born and that PW1 was born on 12th July 2001. He stated that he used to see the appellant prior to that the incident and did not have any grudge against him. He also stated that when he found PW1 she was wearing a different skirt from the one she had before.

24. **PW3 MON** testified that on 12th February, 2017 at around 3.00. p.m., PW2 called and informed him that the appellant had defiled his daughter. He went apprehended the appellant and took him to the AP Camp from where he was handed over to police officers from Magadi police station. He stated that the appellant used to sell in a bar within Magadi area where he defiled PW1. He testified that he did not find PW1 in the appellant's house because her parents had already taken her away. He, however, saw PW1's dress in the house and it was recovered by police as an exhibit.

25. **PW4 Dr. Dickson Omanga** examined PW1 a 16-year-old girl at Magadi Hospital after she was taken to the facility with a history of defilement by a known person. Her clothes were torn but not stained. She was of fair general appearance. Her lower side of the vagina had deep lacerations with brown watery discharge. There was and presence of spermatozoa. Lab tests showed she had bacterial infections. The hymen was missing. The appellant was not examined and he did not see any PVRC form. He was of the opinion that DNA was necessary to establish to whom the spermatozoa belonged.

26. **PW5 NO. 102092 PC Peter Okello Ogengo,** the investigation officer, testified that on 12th February, 2017, he was on patrol with colleagues at Ensotopia town when PW3 informed them that a girl had been defiled and the suspect had been taken to a nearby administration AP post. PW3 had been informed by PW2 PW1 had been held in the appellant's house. She was examined at Magadi Sub County Hospital where it was confirmed that she had been defiled. He did not, however, take samples of the spermatozoa for DNA to establish whether they were from the appellant. The victim was 15 years and 7 months old at the time of the incident. She identified the clothes he had brought to court as the ones she was wearing during the incident.

27. **PW6 JO,** mother to PW1, testified that the complainant is also known as **NM** and that PW1's biological father is known as DA who is deceased while PW2 is her husband and step father to PW1. She testified that she was present when the matter was reported at Magadi police station. She also told the court that PW1's names were different from those in Birth certificate because her birth certificate was issued after the death of her biological father.

28. **PW2** was recalled and testified that he found PW1 in the appellant's bar; that PW1's other name was **NH** while his wife's name is JAA (PW6). He stated that the complainant had since disappeared from home and they were still looking for her.

29. The appellant gave unsworn testimony that on 12th February, 2017, he woke up at 10.00 a.m. and went on with his business. He went to Lopia at 5 p.m. and started selling miraa. At about 5.15 p.m., he saw a girl passing by his shop in the company of her father. After a few minutes a Maasai man called him and asked him to accompany him to the chief's office where they found AP officers. He was later handed over to police officers from Magadi police station. On 13th February, 2017 he was taken Ngong Law courts and charged with defilement.

30. The trial court considered the above evidence and concluded that the prosecution had proved its case beyond reasonable doubt. It convicted the appellant and sentenced him prompting this appeal. The appellant has faulted the trial court's decision on several grounds as contained in his grounds of appeal. The main issues that arise for determination in this appeal are: whether the prosecution proved the ingredients of the offence; whether the prosecution evidence was contradictory, inconsistent and unbelievable and whether the prosecution proved its case beyond reasonable doubt.

31. In a criminal trial, the prosecution has a duty to prove its case against the accused beyond reasonable doubt. In ***Richard Munene v Republic*** [2018] eKLR, the Court of Appeal state:

In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction.

32. The appellant was charged with defilement. The charge required the prosecution to prove three ingredients beyond reasonable doubt, namely; age, penetration and identity of the perpetrator.

33. Regarding age, the charge sheet stated that the complainant was 16 years at the time she was defiled. The charge was later amended to show that she was 15 years. This was because a copy of her birth certificate produced indicated that she was born on 12th July 2001. The appellant argued that the complainant's age was not proved. This argument is not correct. PW1 testified that she was born in 2001 but she could not remember the dated. She also told the trial court that she was 15 years. A birth certificate was produced showing her date of birth. I note that the names in the birth certificate though different from those in the charge sheet, PW6 explained why and the trial court accepted her explanation. I also note that the appellant did not raise that issue in his appeal and, therefore, I do not agree with the appellant that PW1's age was not proved. The fact is that from evidence on record, the victim was below 18 years which met the requirements of the law.

34. The prosecution was also required to prove penetration. To do so, it led the evidence of PW1, the complainant and PW4, the doctor who examined her. PW1 testified how the appellant dragged her to his house, tore her dress and defiled her. He later gave her another dress and locked her in the room and left. She was found there and taken to hospital. At the hospital PW4 examined her and found deep lacerations with brown watery discharge on the lower part of her vagina. The hymen was missing. He also found presence of spermatozoa. He concluded that she had been defiled.

35. Section 2 of the Sexual Offences Act defines penetration as the partial or complete insertion of the genital organ of a person into the genital organ of another person. The evidence of PW1 was clear that she had sex which means there was penetration; that it was her first time to engage in sex and that she felt a lot of pain. The doctor's evidence corroborated PW1's evidence that there was penetration and therefore defilement. The prosecution evidence established that there was penetration and therefore, this ingredient was satisfactorily proved.

36. The last ingredient is that of identity of the attacker. The appellant submitted that the prosecution evidence did not prove that he was the person who defiled the complainant. He argued that the evidence of PW1 and PW2 could not be believed and, therefore, the prosecution did not prove the identity of the attacker. The prosecution on its part argued that PW1 had sufficient time to see the appellant to enable her identify him as the person who defiled her. The prosecution counsel also submitted that PW1 testified that the appellant gave her a skirt to wear after he tore the dress she was wearing, a fact that was confirmed by PW2 that she was wearing a different skirt. Further, that PW2 found the complainant in the appellant's house.

37. I have considered the arguments on this issue and perused the record of the trial court. PW1 told the court that she met the appellant as she was going home at about 8am. The appellant held her hand and led her to his house where he defiled her. He was with her in the house for a significant part of the day. He later locked her in the house and left. She was rescued by her father (PW2) at about 4pm. PW2 also stated that he found PW1 locked in the appellant's house.

38. PW1 had no illusion in her evidence who defiled her. She told the trial court how the appellant accosted her in broad day light, took her to his house and defiled her. She also was clear that the appellant tore her skirt and later threw it and her pants away and gave her a different dress to wear. According to PW1 the appellant's house was about 3km away from where they met. PW1 indeed had sufficient time to identify the appellant as the person who defiled her.

39. PW2, the complainant's father also testified that he found PW1 locked in the appellant's house and he was the one who opened for her in that house and took her to the police station and later to hospital. The appellant tried to argue that it was not him who defiled PW1. He did not however explain why and how PW1 ended up in his house and why she was locked up in the house. He did not allege that either PW1 or PW2 had a grudge with him to frame him up for the offence. The appellant's defence was that he saw PW1 and PW2 pass by and he was later called to the chief's office and arrested. That defence did not add up. It could not be true that he would just be arrested without any reason. I am therefore satisfied that the appellant was properly identified as the perpetrator of the crime and that he was the one who defiled PW1.

40. The appellant again submitted that evidence of the prosecution witnesses was contradictory; inconsistent and therefore unbelievable. He argued that PW1 stated that the appellant had left when PW2 opened for her while PW2 stated that he found the appellant with PW1. He also argued that at one time it was stated that PW2 opened for PW1 and at another that it was the appellant's brother who opened for PW2. The appellant argued that these contradictions rendered the prosecution evidence unbelievable.

41. In any criminal trial where several witnesses testify, there is bound to be contradictions or some inconsistencies. Such inconsistencies and contradictions may be ignored if they do not go to the root of the prosecution case, otherwise they should be resolved in favour of the accused.

42. In ***Richard Munene v Republic*** (supra), the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and

fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

43. In ***Dickson Elia Nsamba Shapwata & Another v The Republic*****,** *(Criminal. Appeal. No. 92 of 2007), the Court of Appeal of Tanzania addressed the same issue of discrepancies and stated;*

In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.

44. Similarly, in ***Erick Onyango Ondeng' v Republic*** [2014] eKLR, the Court of Appeal cited ***Twehangane Alfred v Uganda,*** (Crim. App. No 139 of 2001, [2003] UGCA, 6 in which the Court of Appeal of Uganda stated:

With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

45. What the appellant called contradictions, namely; whether the appellant was with PW1 or who opened the door were not in, my view, fundamental contradictions or inconsistencies that went to the root of the prosecution case as to render that evidence worthless. The fact remained that PW1 was found in the appellant's house and she had been defiled. She identified the appellant as the person who defiled her and, therefore, that evidence alone would be sufficient to prove the prosecution case in terms of the proviso to section 124 of the Evidence Act even if the other witnesses' evidence was to be rejected or disqualified. The trial court was fully aware of the dangers of convicting on uncorroborated evidence and referred to both section 124 of the Evidence Act and the decision of ***Chila v Republic*** [1967] EA 772 on the issue.

46. I have reconsidered the evidence on record and reevaluated it myself. I am satisfied that the prosecution proved its case against the appellant beyond reasonable doubt. I find no reason to fault its conclusion that the appellant defiled PW1.

47. The prosecution amended the charge changing PW1's age from 16 to 15 years but PW1 was not traced for purposes of cross examination after that amendment. The appellant complained that amending the charge to replace the PW1's age of 16 with that of 15 was prejudicial to him as it affected sentence.

48. I have perused the record of the trial court. The list of prosecution exhibits shows that a birth certificate was produced as exhibit 1 but this court could not trace it on record. The trial court stated in its judgment that the birth certificate produced showed that PW1 was born on 12th July 2001. The offence was committed on 12th February 2017 which meant PW1 was 15 years and 7 months. This was approximately 16 years and, therefore, there was no need to amend the charge to reflect that PW1 was 15 years. I agree with the appellant that amending the charge to show that PW1 was 15 years instead of 16 years, prejudiced him as it affected the sentence that would be imposed on conviction. The appellant should have been sentenced under section 8(4) and instead of section 8(3) of the Act.

49. The appellant was arrested on 12th February 2017 and was charged on 13th February 2017. According to the record, he was in remand throughout trial until he was sentenced on 15th August 2019, about two and a half years after arrest. The trial court did not take this period into account when sentencing him. The court did not also take into account the appellant's mitigation that he was 17 years when he was arrested and charged although no age assessment was done on him to determine his age.

50. Having considered the appeal and the arguments by parties, the appeal on conviction is dismissed. The sentence of 20 years under section 8(3) of the Sexual Offences Act is hereby set aside and replaced with a sentence under section 8(4) of the Act. Taking into account the appellant's mitigation and age, the appellant is hereby sentenced to ten (10) years imprisonment. The sentence shall run from 12th February 2017 when he was first arrested.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 9TH DAY OF JULY 2021.

E C MWITA

JUDGE