REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 89 OF 2018

WILLY KIRUI KOECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. E SOITA (RM)

DATED 9TH OCTOBER 2019 IN CRIMINAL CASE NO. 3007 OF 2015 AT MOLO.)

JUDGEMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8(1), (3) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 25th day of September 2015 at [Particulars Withheld] area in Kuresoi district within Nakuru county intentionally caused his penis to penetrate the vagina of CKK a child aged 13 years.

2. The alternative count was Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 25th day of September 2015 at [Particulars Withheld] area in Kuresoi district within Nakuru county intentionally touched the vagina of CKK a child aged 13 years.

3. The appellant was convicted and sentence to 50 years' imprisonment hence this appeal. The appellant has raised several grounds of appeal challenging the judgement. The grounds are that the trial court failed to appreciate the fact that the age of the complainant was not proved; he was not provided with witness statements and that the medical evidence produced could not corroborate the charge.

4. Before looking at the merits or otherwise of the appeal it shall be worthwhile to summarise the evidence as presented during trial.

5. **PW1** the complainant testified in her unsworn evidence testified that she was at home on the material day with the appellant who was her father. Her mother was at the farm and her siblings were not there. The appellant wanted to touch her and he took her to the bed but he did not do anything. She testified that the appellant at some other time had defiled her.

6. She went on to state that her mother found them in the bed and she screamed. People came and arrested the appellant. She was taken to Olenguruone hospital where she was examined and a P3 form filed. She also identified the medical sheet from the said hospital. She said that she did not tell her mother due to fear as the appellant had threatened to kill her.

7. **PW2 MM** the complainant's mother testified but on the midway she was declared to be a hostile witness. She was alleged to be in cahoots with the appellant, her husband and she was protecting him.

8. **PW3 JOEL MOKOMBA** a clinical officer from Olenguruone hospital examined the complainant on 25th September 2015 and filled the p3 form. He said that there was no penetration and no abnormality detected in the complainant's private parts.

9. **PW4 PC MILTON OTENYA** the investigating officer testified that he received the file from on PC Wako who was the original investigator. He said that the appellant was found by the members of the public defiling the minor. He was arrested, the minor taken to the hospital and later charged.

10. He went on to accuse PW2 of obstructing investigation and the case by moving away with the complainant during the pendency of the case. She was charged with the offence of conspiracy. The matter was still pending.

11. The witness did produce the age assessment report of the complainant which indicated that she was around 15 years old as at the time of carrying out the assessment. He also produced the statement made by PW2 which indicated that she was holding crucial evidence and that is why she was declared a hostile witness.

12. When placed on his defence the appellant denied the charge and gave unsworn evidence and did not call any witness. He said that he worked at a quarry and that on the material day he was at work till 6pm. He passed through the bar and bought alcohol and *nyumba kumi* people came and started assaulting him. The police came and he was arrested.

13. The court directed that the matter be disposed of by way of written submissions which the parties have complied. The appellant reiterated his grounds of appeal mentioned above adding that the charge sheet was fatally defective as it did not establish the charge. That it was the complainant's evidence that the appellant did nothing to her.

14. The appellant went on to state that his fundamental rights were violated when he was not given the witness statements so that he could prepare himself for the case. This was **Contrary to Article 50 of the Constitution.**

15. He also laid great emphasis on the sentence meted against him namely that it was excessive and unconstitutional for the reason that the minimum and maximum period given by the Act was very clear and the court exceeded itself.

16. The learned state counsel on the other hand supported the findings by the trial court. She said that the grounds raised by the appellant were weak and could not oust the evidence presented against him at the trial. She said for instance that the complainant's age was proved by the production of the age assessment report which was not challenged.

17. On the issue of witness statements, it was clear that the same were later provided and in any case all along the appellant had been ready to proceed.

18. On the issue of the charge sheet she stated that the date of the offence was well known and there was evidence that the appellant had done *tabia mbaya* against the complainant. She therefore urges the court to dismiss the said appeal.

ANALYSIS AND DETERMINATION.

19. Having perused the entire record herein, the proceedings and the two rival submissions, the duty of the court was clearly spelt out in the case of **OKENO V.REP 1972 E.A. 32**. The Court of Appeal stated that;

20. ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [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 conclusions (Shantilal M Ruwala v R [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."***

21. There are three now accepted grounds which ought to be satisfied for sexual offences to be proved, namely, the age of the victim, the identity of the perpetrator as well as penetration.

22. In **DOMINIC KIBET MWARENG VS. REPUBLIC [2013] eKLR** the court reinforced the same when it stated that -

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

23. In the instant matter the age of the complainant was contrary to the submissions by the applicant established by the production of the age assessment report. At the time of assessing she was proved to be 15 years while at the period of the incident she was 13 years old. That report though produced by the investigating officer was not challenged.

24. As to the identity of the perpetrator, the minor said that the appellant was her father and the incident took place during the day. Again this was never challenged by the appellant or at all.

25. Was the offence of defilement proved? The evidence of the minor was unsworn, meaning therefore that it ought to be corroborated. It appears from her evidence that the appellant was unable to defile her because her mother appeared at the scene.

26. She went on to testify that;

> ***"He did take me to bed, he told me to remove the clothes but my mother came before he did anything."***

27. She went on to explain another date when he did *tabia mbaya* to her. She narrated how the appellant removed her clothes and proceeded to defile her. However, on this material day her mother screamed and people came and arrested him.

28. That fact that she was not defiled on the **25th September 2015** was in my view corroborated by the evidence of PW3, the clinical officer

who concluded that;

> ***" ...on physical appearance patient was okay, on genitalia outside genitalia was okay, hymen was absent, no sign of forced trauma and no discharge. On investigation, urinalysis there was nothing abnormal detected, that all; offence occurred on 25th September 2015, I did see the patient the same date. ...there was no penetration, trauma means force but if there was no force, there could be lacerations."***

29. That accords well with what PW1 stated. There was in my view perhaps another occasion when she may have been defiled by the appellant. This date was not stated. No evidence was let to suggest any such date.

30. In the absence of any cogent material evidence, I do not see respectfully any iota of evidence indicating that she was defiled on 25th September 2015. It must be remembered that it was the evidence that there were other people involved in arresting the appellant. Who were those people and why were they not called to record their statements? If indeed PW2 was shielding the husband, then it was incumbent upon the respondent to tighten its case by calling independent witnesses who responded to PW2 distress call.

31. For now, there is no evidence, whether direct or otherwise to link the appellant with committing the offence on 25th September 2015. There might have been another day but not this specific day. The period in the charge sheet was specific and left no room for ambiguity or speculation. The minor it appeared dwelt so much on what happened on the other time when he did *tabia mbaya* to her and not the date mentioned in the charge sheet.

32. Failing to bring in the specific period becomes problematic for the appellant as it is not possible to cross examine or litigate over an amorphous period in an offence. The challenge here is compounded by the fact that the minor did not give sworn testimony.

33. Looking at the *voir dire* evidence by the minor, this court respectfully does not see any reason why she was not sworn. She answered the questions paused by the trial court very soberly, at least from the proceedings. Be it as it may this is an area where the courts latitude and discretion is allowed.

34. The court in the premises does not see the reasons to expend more energy on the other grounds raised by the appellant which in my view are not strong enough to oust the trial courts findings. The appellant for instance was given time to cross examine the witnesses but he chose not to. There was evidence that he was supplied with the witness's statements. Nothing at all showed that he suffered any impediment or prejudice during the hearing of the case.

35. **For the forgoing reasons, the court does find merit in the appeal and the same is hereby allowed, the appellant set free unless lawfully held.**

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 23RD DAY OF SEPTEMBER 2021

H K CHEMITEI.

JUDGE