REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 19 OF 2018

DANIEL WAMBUGU NYAWIRA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of defilement contrary to ***Section 8 (1) and 8 (2) of the Sexual Offences Act No.3 of 2006***. The particulars of which were that on Tuesday 15th September 2015 in Nyandarua West District within Nyandarua County, the Appellant caused his penis to penetrate the vagina of HMW a child aged 8 years. He was also charged with an alternative charge of committing an indecent act with a minor (child) contrary to ***Section 11(1) of the Sexual Offences Act***.

2. The Appellant was tried, convicted of the offence of defilement and sentenced to serve life imprisonment. The Appellant being dissatisfied by the trial court's decision, appealed against the conviction and sentence on the grounds set out in the petition of appeal as follows: -

i. He pleaded not guilty to the charge.

ii. That the trial magistrate erred in law and fact by failing to find that the prosecution evidence did not prove that the Appellant caused his genital organ to penetrate the genital organ of the complainant.

iii. That the trial magistrate erred in law and fact by failing to find that the medical evidence did not positively connect the Appellant to the offence. The report stated that the hymen was intact and that the doctor told the court that the complainant had an infection of which I was tested and had no such infection.

iv. That the trial magistrate erred in fact and in law by failing to find that the prosecution evidence was full of glaring contradiction and discrepancies that could not sustain the charge facing the accused.

v. That the trial magistrate erred in law and in fact by failing to find that the prosecution had not medically connected the Appellant to the offence.

vi. That the trial magistrate erred in law and fact by finding that the prosecution had proven the charge of defilement beyond reasonable doubt.

vii. That the trail magistrate erred in law and fact in finding a conviction that was against the weight of evidence.

viii. That trial magistrate erred in law and fact by passing a harsh sentence under the circumstances and not considering that the Appellant was a first offender and did not consider to seek presentence report

ix. That the sentence is too harsh and he prays that it be quashed and set aside.

3. The brief summary of the prosecution case before the trial court was as follows: **PW1** the complainant testified that on 15/09/15 she was at home with her brother K, her sister and the Appellant was cutting grass near her home. She stated that the Appellant asked her if she wanted to do the act – the bad manners. She replied yes. She stated that that day was not 15th September, because 15th September was the 2nd act. That was on a Sunday.

4. That the Appellant showed her where to go which she did towards a forest or bush. The Appellant followed her there and they did bad manners. She stated that "He removed his trouser and underwear. He used his thing that he used to urinate. He put his thing in mine (while pointing at her pelvis part). He put his thing in my thing I use to urinate. He put inside. He inserted in my thing I use to urinate. He did me. He gave me ten shillings. He told me not to tell anyone. After that I went home. I did not tell anyone."

5. She continued to testify that on Tuesday the Appellant was clearing the bush near her grandmother's home when he asked her if she wanted again. She said yes. She stated that "I went to the bathroom I removed my panty and he removed his panty. That K found them and the Appellant told her to go outside the bathroom.

6. She stated that *"...In the bathroom he was lying on me. He had removed his clothes and then removed my clothes. We were in the act. When K found us in the bathroom I was lying in the bathroom and Wambugu was lying on me. He had inserted his thing he uses to urinate. K found us in the act."*

7. **PW2 A Minor – GKM** stated that on 15/09/15 he was looking for his sister (PW1) when he peeped through the bathroom and saw his sister (PW1) and Wambugu (Appellant) holding each other. That they were standing facing each other. He stated that *"...I don't know what they were doing. M (complainant) had raised her clothes up. M was wearing a green skirt and she had raised it up. When she saw me she returned the cloth and came out of the bathroom. I saw M's pants lowered to the thighs and the skirt raised up."*

8. **PW3 EWK** in her evidence stated that the complainant is her grandchild. She testified that on 18/09/15 at about 4.00 pm she was at home washing clothes when she heard PW2 telling the complainant that he will tell their grandmother what they do. She called him and asked him about it then PW2 told her that he had found PW1 and the Appellant in the bathroom. She stated that she asked PW1 about it who told her that the Appellant was raping her and that even the previous Sunday on 6th September she was with the Appellant who was raping her. She then took the complainant to Ngano Health Centre on 18th September, 2015. That she reported the matter to the police at Ngano who issued a P3 form. That she went with the P3 form to Ngano Health Centre. At the hospital she was given another document and was told to take the child to take X-ray.

9. She stated that PW1 was complaining of pain when urinating so she took her to a private hospital whereby an ultra sound was done. She stated that the complainant was aged 8 years at that time. That she knew the Appellant as a neighbor for about 7 years prior to the alleged incident. It was her testimony that on Tuesday 15th September, she left while the Appellant was cutting holes or furrows for planting potatoes. She stated that she had no differences with the Appellant person prior to the incidence and that when PW1 was examined at Ngano Hospital the doctor told her that the child had been raped.

10. **PW4 Mr. Danson Maina** – a Clinical Officer from J.M. Hospital Olkalou but had previously worked in Ngano Health Centre produced the P3 form. He stated that PW1 was treated at Ngano Health Centre as outpatient No. 4850/2015. She was aged 8 years. History was defilement. That on vaginal examination on the labia manora she had bruises, she also had redness on the vulva and he hymen was broken. She had no discharge of bleeding during examination. That a high vaginal swab performed on the complainant showed red blood cells, no spermatozoa and is showed pus cells. Also UDLR test was done to test for syphilis but it was negative. HIV test was negative, pregnancy test was negative, urinalysis test showed pus cells and leucocytes.

11. He further stated that from this examination there was penetration. He also produced a Post Rape Care Form (PRC) filled on 18/09/15 in Ngano Health Centre which also indicated that there was penetration of the vagina. It showed that the hymen was broken and there were bruises on the vaginal wall and redness on the viruses of the Vulva. That she was a minor aged about 8 years old and she had inflamed genitals. The vagina had bruises and redness, the hymen was broken.

12. The last prosecution witness to testify was **No. 74664 Corporal David Muruki (PW5)** who was based at Ngano Police Station and was assigned this case to investigate. He was not the original investigating officer. He took over from one police constable Leonard Ngeno. He stated that when the grandmother of the complainant reported the matter he was present and that the report was that the victim herein had been defiled by a neighbor. His evidence was that the complainant was defiled by the Appellant.

13. At the close of the prosecution case, there was submissions on no case to answer. However, the court ruled that the Appellant person had a case to answer.

14. The Appellant in his defence stated that he knew the complainant, her brother (PW2) and her grandmother (PW3). He stated that he heard on 28th September 2015 that he had held a child- being the complainant and village elders were looking for him. He was arrested and was taken to Ngano Police Station. He was taken to hospital at Ngano on 25/9/2015 and was examined on 28th September 2015. Thereafter he was charged and he was brought to court. He stated that on 15/9/2015 he was not available as he was doing work in the forest where he was carrying potatoes.

15. He denied the charges and stated that he did not know why they were making false allegations but that the complainant's grandmother wanted him to marry her daughter who is the complainant and PW2's mother but he refused. He reiterated that he had never worked in the complainant's home or near there.

16. A doctor was called as **DW2 namely Dr Jerry Dennis Nganga** was called to testify on the complainant's ultra sound pictures and results, the outpatient card and lab tests concerning the Appellant person. He stated that according to the ultra sound results, fluid had accumulated in the pelvic which is a space between the pelvis and the abdomen. That the fluid comes about when there is inflammation of the pelvic organs.

17. That the patient was found to have pelvic inflammatory disease but the Appellant was not examined for the same. That he was examined for VDRL, HIV and urinalysis which were all negative. He stated that PID is virtually caused through sexual transmission and it is a bacterial infection of the pelvic organs.

18. At the close of the defence case, the defence counsel made submissions to the effect that the prosecution had not proved the charges beyond reasonable doubt. It was submitted that the Appellant was never interrogated by the police. That the investigating officer failed to explain why he never recorded any statement from the Appellant. That the Appellant testified to the officer that he was never at the scene of crime on the material date and time alleged on the charge sheet. The Appellant also raised the defence of alibi and the burden rests on the

prosecution to disprove or displace it and that the Appellant was not examined medically and found to have a PID like the complainant.

19. Thereafter the trial court rendered its judgment finding the Appellant guilty of the offence of defilement and was convicted. He was sentenced to life imprisonment.

ANALYSIS AND DETERMINATION

20. In making its determination, this court shall be guided by ***Okeno vs Republic (1972) EA 372*** where it was stated that;

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). 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 courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."***

21. Therefore, this Court in determining this appeal ought to satisfy itself that the ingredients of the offence of defilement were proved and as so required in law; beyond any reasonable doubt. The key ingredients of the offence of defilement include the proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. Therefore, I will consider if each of them were proved.

On the age of the Complainant

22. The age of the Complainant is a question of fact to be proved by available evidence. The complainant's grandmother testified that she was 8 years Further, The Complainant's age was proved by the Age Assessment Report produced in court which confirmed her age to be at 8 years of age at the time the alleged offence took place.

23. The Appellant was charged under **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act.** It provides: -

> ***"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

24. The complainant was eight years old at the time of the commission of the offence therefore the prosecution discharged the burden to prove the age of the victim.

On proof of penetration

25. ***Section 2 of the Sexual Offences Act*** defines "penetration" as:

> ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

26. With regard to penetration, it was the victim's testimony that:

> *"On Tuesday he was clearing the ditches on my grandmother's farm. Wambugu (the Appellant) was clearing the ditch. He asked me if I wanted again. I said yes. I went to our bathroom. I removed my panty and he removed his panty. K (PW2) – my brother found us. Saw the victim and the Appellant in the bathroom.*
>
> *……... When K found us we were in the act. When K found us in the bathroom I was lying in the bathroom and Wambugu was lying on me. He had inserted his thing he uses to urinate and placed in mine I use to urinate. K found us in the act when Wambugu was doing bad manners."*

27. PW2 stated in the trial court that: -

> *"…I saw Wambugu had removed his long trouser. It had been lowered to the knees. Hellen had lifted her skirt up. Both of them were standing."*

28. Furthermore, the medical report produced by PW4 indicated that on vaginal examination on the victim's labia manora she had bruises, she also had redness on the vulva and the hymen was broken. It was his evidence that from this examination there were evidence of penetration given history and examination of the patient.

29. He also produced the Post Care Rape form which indicated that the victim's examination showed inflamed genitals and the hymen was broken. It is clear from the above that PW1 stated that the accused person inserted his thing he used to urinate into her thing she uses to urinate indicating penetration as supported by the medical examination conducted on her.

30. With regard to the identity of the defiler, the Appellant was a person who was well known to the victim and the victims' family. The Appellant himself confirmed he knew the victims' family though asserting that he was framed on account that the victim's grandmother wanted him to marry her daughter. I find this claim unsubstantiated and a mere suspicion which even the Appellant couldn't confirm and in

my view such was an afterthought. Also, the trial court properly considered and rejected the Appellant's alibi defence as an afterthought. I agree with the learned trial magistrate's assertion that the Appellant was well known to the complainant PW1, PW2 and PW3 thus his identity cannot be mis-stated.

31. The Appellant in the petition of appeal stated that the trial magistrate erred in law and fact by failing to find that the medical evidence did not positively connect the Appellant to the offence. That the report stated that the hymen was intact and that the doctor told the court that the complainant had an infection of which he was tested and had no such infection. However, the evidence in place disproves his assertions.

32. PW4 clearly stated that the victim's hymen was broken and that there was evidence of penetration. He testified that the child was indeed defiled. The issue of PID – meaning pelvic inflammatory disease arose during the trial. The victim was found to have PID which is virtually caused through sexual transmission and it is a bacterial infection of the pelvic organs as per DW2'S testimony. The Appellant was not tested if he had the PID or not as He was only tested for HIV and syphilis.

33. DW2 went on to state that even if you have sex with a person who has PID it is not automatic that you get infected- meaning that even if the Appellant had sex with an infected person he would not automatically test positive for it as well but it is also highly likely that you get the disease. There is therefore no way of ascertaining for sure whether the Appellant had PID or not and the case against him was proven beyond reasonable doubt by the prosecution despite him not being tested for PID.

34. All in all, I conclude that all the ingredients of the offence for which the Appellant was convicted and sentenced were proved to the required standard. I have no basis for interfering with the same.

35. Having revaluated the evidence adduced before the trail court, I find that the Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

36. On the issue of sentencing, the Appellant has urged this court to exercise its discretion and review the Appellant sentence. ***Section 8(2) of the Sexual Offences Act*** states as follows: -

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment"***

The Supreme court case of Muruatetu PETITION CASE NO 15 OF 015 has now clarified the extent of its application which is;

> ***"The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;***

This was with reference to its holding that;

> ***The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.***
>
> ***Unless and until the mandatory aspect of life sentence in the provisions of section 8(2) of the sexual offences Act are not declared unconstitutional or amended, the provisions remain the law. A constitutional case will have to be instituted challenging the constitutionality of the same provisions, thus this court has no mandate to interfere with the sentence imposed by the trial court."***

37. This is so because there is a rebuttable presumption of law of statute or a provision thereof legality/constitutionality until it is declared invalid /unconstitutional. See ***Mount Kenya Bottlers Limited & 3 Others vs. A.G & Others, [2012] eKLR)***. Thus being so appellant appeal on sentence also fails. Thus the court makes the following orders;

> ***(i) The appeal is dismissed, conviction upheld and sentence affirmed.***

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 5TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE