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REPUBLIC OF KENYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 55 OF 2020

JOHN MUSANGA..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal arising from the original conviction and sentence by Hon I. G Ruhu (R.M)

in Kimilili S.P.M Sexual Offence, Criminal Case No. 04/2019 delivered on 28/2/2020)

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**. The particulars were that on the 4th day of February, 2019 at [Particulars withheld] Village, Kimilili Sub County within Bungoma County, he unlawfully and intentionally caused his penis to penetrate the vagina of MJ (*name reducted*) a child aged 14 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act, 2006**. The particulars were that on the 4th day of February, 2019 at [Particulars withheld] area, Kimilili Sub County within Bungoma County, he unlawfully and intentionally caused his penis to come into contact with the vagina of MJ a child aged 14 years.

3. A summary of the prosecution case was that on the material day, at around 5.00 p.m. the Complainant, while on her way to Bituyu from Malewa, in the company by her friend MW, came across the Appellant. They asked the Appellant to help them with some water to quench their thirst so that they could continue on their journey. The Appellant offered to host them in his house for the night stating that they still had a long way to journey and it was already late in the evening, an offer they accepted. At around 9.00 p.m. the Appellant's friend Moses, who was also his co-accused, joined them. It was however later after they had gone to sleep that they were woken up by the Appellant who threatened to beat them if they dared to scream. It was then that the Appellant defiled the Complainant, while his friend Moses defiled the Complainant's friend MW. The Prosecution called six (6) witnesses to prove its case.

4. In his defence, the Appellant gave sworn testimony without calling any witness. He admitted to having assisted the Complainant and her friend with some drinking water and stated that he also offered them food and that they left soon after the meal, which they themselves had prepared. That the Complainant and her friend returned later that night at around 8.00 p.m. and it was then that he offered them a place to sleep since his mother who lives nearby had refused to host them. He however denied defiling the Complainant insisting that it was his neighbor, one M who visited his home the morning after the incident who told the Complainant and her friend to claim that they had been defiled.

5. Following a full trial, the Appellant and his co-accused person were found guilty and convicted on the main count of defilement. They were subsequently sentenced to the statutory minimum sentence of twenty (20) years' imprisonment.

6. Being dissatisfied, the Appellant preffered the instant appeal which is anchored on the grounds that the evidence tendered by the Prosecution was inconsistent and uncorroborated and could not warrant a conviction; the trial magistrate relied on speculative and circumstantial evidence; the age of the minor was not proved; his defence which rebutted the prosecution case was not considered and that the twenty (20) years' imprisonment term was excessive.

7. The appeal was disposed of by way of written submissions. Both parties filed their respective submissions which I have carefully considered.

8. This being the first appeal, the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter. It must however always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give due allowance for that. (See - **Mark Oiruri Mose vs. R [2013] eKLR).**

9. The Appellant in his submissions has raised an issue that the charge sheet was defective for the reason that the charge sheet indicates that he was arrested on 18th March, 2019 when he was in fact arraigned in court on 7th February, 2019. That this would in effect mean that he was brought to court forty (40) days before the date of his arrest.

10. An examination of the record demonstrates that the charge sheet was amended after plea taking. The Appellant and his co-accused had previously been charged separately. Upon consolidation of the charges, the charge sheet was duly amended. The record further shows that the consolidated charges were read out afresh on 11th March, 2019 and that the Appellant and his co-accused pleaded guilty. On 18th March, 2021 the court proceeded to consolidate the respective court files in which the Appellant and his co-accused had been individually charged. It therefore appears that the date indicated on the amended charge sheet as the date of the arrest was in fact the date upon which the files were duly consolidated. In any event, the initial charge sheet under which the Appellant was individually charged indicates that he was arrested on 5th February, 2019 and arraigned in court on 7th February, 2019.

11. The Appellant further contended that the charge sheet had not been duly stamped or signed. From the record it is evident that what the Appellant was supplied with are typed proceedings of the trial court, including a typed copy of the charge sheet. The record does however bear the original amended charge sheet duly stamped and signed. The Appellant's argument in this respect is therefore without basis.

12. In a charge of defilement, the ingredients to be proved are the age of the complainant, proof of penetration and that the Appellant was the perpetrator of the offence as held in **G O A vs. Republic [2018] eKLR**.

13. While the Appellant alleged that the age of the Complainant was not proved, the record demonstrates otherwise. In her *voire dire* examination, the Complainant MJ stated that she was aged fourteen (14) years and was a class 6 pupil at [Particulars withheld] Primary School. Her testimony found support in the testimony of PW3 Kipsang Masai, the Clinical Officer who examined her at Kimilili Sub-County Hospital. PW3 stated that the Complainant was aged 13 years when he examined her. He noted that the Complainant did not have a Certificate of Birth and was therefore subjected to age assessment. He produced an age assessment report dated 7th February, 2019 which had been prepared by Pius Situma, a Physician who previously worked with him at the hospital. The report established that the Complainant was aged thirteen (13) years at the time.

14. I find guidance in the decision in **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** where Ngugi, J observed thus:

> ***…conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases***.

15. In **Daniel Kamau vs. Republic [2019] eKLR**, Kiarie Waweru Kiarie, J while echoing the sentiments by Ngugi, J above stated thus:

> ***I subscribe to this school of thought. This is informed by the fact that in some rural areas and informal settlements in urban areas the importance of birth certificates has not been appreciated and insistence on the same may result in untold injustice.***

16. In the instant case, whilst there was no Certificate of Birth, there was in fact an age assessment report which showed that the Complainant MJ was aged thirteen (13) years. I note that the Appellant did not object to the production of the age assessment report. He cannot therefore at this stage purport that it was not demonstrated what procedure was employed to arrive at the Complainant's age. In any case, the report clearly states that the assessment was based on the "*fusion of epiphyseal growth plates*" of the Complainant. In view of the age assessment report, which is an accepted mode of proof of age, I am convinced that the age of the Complainant was conclusively proved to the required standard.

17. On penetration, I make reference to **section 2** of the **Sexual Offences Act** which defines 'penetration' as constituting the partial or complete insertion of the genital organs of a person into the genital organs of another person. The Complainant while narrating the ordeal stated as follows:

> "*John alinifanyia tabia mbaya. Aliweka kitu yake ya kukojoa kwa kitu yangu ya kukojoa. He then threatened to beat me if I scream. He had sex with me for three rounds."*

18. Her testimony found support in the Clinical Officer PW3 who testified that her hymen was missing and filled the P3 form to this effect. Whereas the Appellant stated that it was curious that the P3 form indicated that the Complainant did not exhibit any bruises or lacerations on her genitalia, I note from both the P3 form and the testimony of PW3, that on the material date when the Complainant was examined and the P3 form filled, seven (7) days had lapsed from the date of the offence.

19. It is however settled that penetration need not be proved by way of medical evidence. I am persuaded by the holding in **Daniel Maina Wambugu vs. Republic [2018] eKLR**, where Nyakundi, J stated that:

> ***…but my conceded view is that sexual intercourse can be proved without expert medical evidence. What the court requires is proof of facts that the offence was committed even without medical evidence. There is equally in my judgment adequate provisions in the law of evidence under the proviso of section 124 of Cap 80 to rely on to convict the accused on non-corroboration evidence on sexual offences. In this case the sexual ordeal was laid bare by the complainant VWK she describes on how she was undressed out of her clothes by the appellant and inappropriately penetrated her.***

20. In the instant case, the sexual ordeal was laid bare by the minor who narrated to the trial court how the ordeal was perpetrated by the Appellant. Her testimony was corroborated by that of her friend and co-complainant MW (*name reducted*) who was defiled by the Appellant's friend on the material date and time. The trial court found both testimonies believable. As such, the evidence on this limb was sufficient. This disposes off the grounds of appeal that the prosecution evidence was inconsistent and uncorroborated, that the Appellant was convicted on speculative and circumstantial evidence, and that the Appellant's defence was not considered. These grounds are therefore hereby dismissed.

21. On identification, there is no doubt that the Appellant was properly identified as the perpetrator of the offence. There was sufficient evidence to link him to the offence. The minors were found in the home of the Appellant, and the Appellant himself told the court that he had hosted the Complainant and her friend in his house on the material night. The Complainant described the Appellant's physique and stated that he was crippled on his arm and leg. She noted that he was crippled on only one arm and that during the ordeal, he had held the Complainant down with his good arm. The Complainant first met the Appellant at 5.00 p.m. and was in his company until the next morning. Additionally, the Appellant's house was well lit, and she was therefore able to clearly see and identify the Appellant as they sat down for supper at around 9.00 p.m. and during the ordeal later that night. It is therefore evident that the Complainant spent ample time with the Appellant, during which time there was sufficient lighting to enable her to identify him and note his descriptive features.

22. In respect of sentence, the Appellant argued that the sentence imposed on him was excessive. The trial court, in imposing the 20 years' imprisonment term upon the Appellant noted that it was the statutory minimum sentence. Indeed, **section 8(3)** of the **Sexual Offences Act** provides that upon conviction for the offence of defilement where the child is aged between twelve (12) and fifteen (15) years, as in the present case, one is liable to imprisonment for a term of not less than twenty (20) years.

23. In any event, prior to imposing the sentence, the trial court took into account the Appellant's mitigation and the pre-sentencing report which was not favourable. On 12th March, 2020 when the trial court imposed the sentence upon the Appellant (1st accused) and his co-accused person, it observed thus:

> *I have considered the accused persons' mitigation that they both have dependants who rely on them for a living.*
>
> *I have also considered the pre-sentence inquiry report which is not favourable to the accused persons. I note that the accused persons, despite being persons living with disabilities, are elderly people, the first accused being 59 years old and the 2nd being 48 years old while their victims were 13 years and 14 years old. From the age disparity, the victims counted on the accused persons to protect them when they were lost while on their way from school. However the accused persons had no sympathy on the children and committed the heinous act.*
>
> *For the above reasons I sentence each accused to the statutory minimum sentence of twenty years' imprisonment.*

24. It is therefore evident that the trial court took into account the mitigation of the Appellant, the pre-sentencing report and the circumstances surrounding the incident before arriving at the sentence. It appears that the sentence was deterrent and was geared at ensuring that elderly persons in whom minors often bestow their trust, do not take advantage of such trust when they are relied upon for protection. I also take cognizance of the trauma that the ordeal may have caused to the minor.

25. I make reference to the Pre-Sentence Report in respect of the Appellant, in particular the summary section which states in part:

> "*According to our social inquiry into the matter, the offender took advantage of the minors when they sought refuge at his home to hatch a plan that resulted in the defilement of the girls…It is worth noting that the age difference of the victim and the offender are worlds apart and it is evidently clear that at this tender age the minor had no capacity for informed consent. This inhumane act in total disregard to the naivety of the victim should be condemned and punished accordingly.*
>
> *…His disability notwithstanding, he ought to take responsibility of the offence which the community vehemently condemns. This should further be looked under the lenses of the psychological and emotional torture the victim has suffered.*"

26. Whereas the Appellant is physically disabled with a lame left leg and right arm, his handicap was not a license to commit heinous deeds expecting the court to treat him leniently. I must take cognizance of the psychological trauma occasioned upon the Complainant. On this premise, it is my considered view that the sentence was proper and within the limits prescribed by the law and hereby affirm it.

27. Having subjected the entire proceedings to a fresh scrutiny, and considered the Appellant's grounds of appeal, I find that the trial court, directing itself to the evidence before it and the law applicable, reached the correct conclusion. I find that the appeal is lacking in merit and hereby dismiss it in its entirety. Both the conviction and sentence are found to have been properly founded on the evidence and are left to stand.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF NOVEMBER, 2021.

....

L. A. ACHODE

HIGH COURT JUDGE

In the presence of..Appellant in Person.

In the presence of...State Counsel.