REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEAL NO. 18 OF 2020

ROBERT WEKESA NALIANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 17 of 2019 in the

Principal Magistrates Court at Kimilili by Hon G.A. Ollimo – Resident Magistrate

on 31st January 2020)

JUDGEMENT

1. The Appellant, Robert Wekesa Nalianya, was convicted for the offence of defilement contrary to **Section 8(1)(2) of the Sexual Offences Act, No. 3 of 2006**. The particulars of the offence were that on 11th January 2016 at [Particulars withheld] village in Tongaren location, in Bungoma North Sub-county within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of WWB (name redacted on account of her being a minor), a girl aged 10 years.

2. The prosecution's case briefly stated that on 11th January 2016 the minor was at her home when the Appellant emerged and forcefully dragged her to his workshop. There, he undressed her removed his trousers and purple T-shirt, made her bend and penetrated her vagina using his penis.

3. The next day, the Appellant gave WNB Kshs. 500/= in an envelop and a packet of sanitary pads. WNB placed the envelop under her suitcase where it was found by PW2, her elder sister. Upon inquiry, WNB reported that the Appellant had defiled her and given her the money. PW2 took her to Tongaren Police Station and to hospital where it was confirmed that WNB had been defiled and a P3 form was filled in her respect. The Appellant was subsequently arrested and charged as earlier stated.

4. When placed on his defence, the Appellant denied that he did any of the things attributed to him. He testified that he had worked for the Complainant's brother-in-law with whom they had fallen out due to monies owed to him. He attributed the charges to the bad blood existing between him and the Complainant's brother in-law.

5. Upon being convicted and sentenced to a term of life imprisonment, the Appellant filed an appeal on grounds that the trial magistrate failed to consider his evidence: that the sentence was harsh and excessive: that the prosecution's evidence was uncorroborated, inconsistent, speculative and circumstantial and did not warrant any conviction. He also argued that the age of the child was not properly proved.

6. The parties filed their respective submissions to the appeal which have been considered. A summary of the Appellant's submissions were that the incident occurred at night when visibility was not conducive and therefore WNB could not have seen and identified her assailant. He relied on the case of **Wamunga v. R (1989) eKLR 424** in which the court held that it had to be satisfied that the circumstances of recognition were favourable and free from possibility of error before it can make it a basis of conviction. He also submitted that the conviction was made following the evidence of a single identifying witness.

7. Further that penetration had not been proven since absence of the WNB's hymen could have been as a result of cycling, physical training or horse riding. On the age of the WNB, the Appellant submitted that this was not properly established. Lastly, it was his submission that the guardians of WNB fabricated the crime due to unpaid carpentry work and that the evidence of the alleged defilement was distorted and inadequate.

8. The State through learned Counsel MS J Kiptanui, filed their submissions on 23rd July 2021. M/S Kiptanui opposed the appeal on the

grounds that the Appellant was convicted based on factual evidence and that the sentence of life imprisonment was proper in accordance with the law. Counsel also urged that the prosecution witnesses were consistent in their testimonies.

9. This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of **George Opondo Olunga v Republic [2016] eKLR,** it was stated that the ingredients of an offence of defilement are*; **identification or recognition of the offender, penetration** and **the age of the victim***. The main issues for determination therefore are whether the prosecution proved beyond reasonable doubt that the Complainant was defiled, that she was below the age of majority and it was the Appellant who defiled the complainant.

10. On the question of the age of the victim, the Appellant submitted that the age of the minor had not been proved. He attributed this to WNB describing her age as "approaching 12". The trial court on 4/9/19 conducted a voire dire examination where WNB told the court that she was approaching 12 years old at the time and concluded that she was intelligent in the manner in which she answered questions but was too young to understand the nature of an oath. The birth certificate produced in evidence indicates that WNB was born on 6th November 2008. Both the P3 form and medical notes indicate that WNB was 10 years old. This court notes the inconsistency as to the actual age of the minor but non-the less takes cognizes of the minority of WNB as evinced by the birth certificate produced in court. (see Ugandan Court of Appeal decision **Francis Omuroni Vs Uganda, Criminal Appeal No 2 of 2000**)

11. It is therefore clear that the complainant was a child of tender years. In the circumstances, I find that the age of the complainant was proved to the required standard.

12. The next element is proof of penetration. "*Penetration*" is defined under Section 2 of the Act to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person".* The Appellant contended that penetration had not been proved beyond reasonable doubt because the prosecution only based their assertion on a missing hymen, which could have been caused by riding a bicycle, physical training or horse riding.

13. In the case of **Badi Hamadi Hamisi Vs. Republic Criminal Appeal No 19 of 2017 (2018) eKLR**, Nyamweya J deliberated on the importance of proving penetration in a defilement case and stated thus:

> *It is my view that the evidence by PW1 was sufficient to sustain a conviction of the Appellant. In particular, no evidence was given as to any penetration by the Appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as to whether defilement occurred or not. Blacks Law Dictionary, Ninth edition pages 1498-1499 defines sex as the structures and functions that distinguish a male from a female; sexual intercourse, or sexual relations. In addition, sexual relations is defined either to be sexual intercourse or physical sexual activity that does not necessarily culminate in sexual intercourse. Therefore, it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by section 2 of the sexual offences act, which is required to be proved beyond reasonable doubt.*

14. The Key evidence relied on by courts in rape and defilement cases in order to prove penetration is the complainant's testimony which is usually corroborated by the medical report presented by the medical examiner. (**See John Mutua Munyoki Vs Republic (2017) eKLR**). A similar holding was enunciated by, the Court of appeal in **Kioko Kivuva Vs Republic (2015) eklr** which held as follows regarding the specificity required in the proof of penetration:

> *"Evidence of sensory details, such as what a victim heard, saw, felt and even smelled is highly relevant evidence to prove penetration, as a victims testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness' testimony and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."*

15. The record before me shows that the complainant told the court that "he made me bend *akaniingiza kitu yake kwa kitu yangu ya kukojolea*" (he made me bend and inserted his thing into my thing for urinating). This testimony was corroborated by that of PW5, a clinical officer, who examined the complainant. PW5 testified that at the time of examination the complainant had normal external genitalia, a missing hymen and foul smelling vaginal discharge. It was also his testimony that there was presence of epithelial cells in the complainant's urine, which indicated that there was friction in the vagina.

16. The appellant was also subjected to medical examination and a medical examination report was produced in court. The report shows that no injuries were noted on his person during examination.

17. The sum of the foregoing analysis points to the conclusion that the minor was defiled. I am satisfied that penetration was proved beyond reasonable doubt.

18. The last issue for determination is whether the penetration was done by the Appellant herein, it was the evidence of PW1 that at around 7pm on the fateful day, the Appellant who is known to her, grabbed and dragged her in into his workshop, removed her panty and his clothes and proceeded to defile her. He then gave her Kshs. 500/= and a pack of always sanitary pads the next day. The Complainant said the security lights outside their kitchen were on so that she could see the Appellant and also note the colour of his clothes.

19. The Appellant denied committing the offence and blamed the charges on bad blood existing between him and PW3. He also faulted the trial court for relying on the evidence of a single witness without corroboration.

20. The provisio to **Section 124 of the Evidence Act** allows the court to base a conviction on the evidence of a single witness, if the court believes it to be true. I am alive to the dangers of putting reliance on the evidence of identification from a single identifying witness who is also a minor of tender years. It was however not in dispute that the minor and the Appellant were known to each other.

21. The incident occurred at night and the means by which the Appellant was identified was recognition. The court in **Anjononi and others Vs Republic (1980) KLR** in differentiating between identification and recognition expressed itself as follows;

> ***…****this, however was a case of recognition not identification of the assailants; recognition of an assailant is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. Republic (unreported)*

22. The Court of appeal in **John Muriithi Nyagah Vs. Republic (2014) eKLR** held;

> *"In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances of the light, the strength of the light, its size, its position relative to the suspect etc."*

23. The court record shows that the learned trial magistrate held that the Appellant was known to the complainant and identified him by security lights at the scene. The trial court however, did not evaluate the nature of the light, its strength of light, its size and its position relative to the Appellant to test the reliability of the evidence of identification at night. Be that as it may, in this case the complainant knew the Appellant as he was a neighbour and she also testified that the next day the Appellant gave her money and pads and also intimated that he would take chicken to her parents as dowry for her hand in marriage. In the circumstances, I find that this was not a case mistaken identity.

24. The Appellant alleged that he had previously worked with PW3 and that they fell out because PW3 owed him money, which he refused to pay. The record shows that the Appellant cross-examined PW2 and PW3 about the alleged monies owed. Both PW2 and PW3 denied knowledge of monies owed to the Appellant and rebutted this claim.

25. On the issue of sentencing, the Appellant contended that the sentence of life imprisonment was harsh and excessive. The Appellant was charged under **Section 8 (1)(2) of the Sexual Offences Act**, which provides for a mandatory sentence of life imprisonment. Having already established that the complainant was 10 years old at the time of the offence, this court is satisfied the sentence should apply. This is a straitjacket penalty meaning that the sentence provided under the law cannot be varied.

26. This being the first appellate court, I have scrutinized and reassessed the evidence to make my own findings and draw my own conclusions. In doing so, I gave allowance for the fact that I neither saw nor heard the witnesses' testimonies. In **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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…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; 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."***

27. Having carefully perused the record and re-evaluated the evidence as highlighted in the foregoing paragraphs, I find no reason to interfere with the conviction and sentence. The appeal therefore fails and is consequently dismissed.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 1st DAY OF DECEMBER 2021.

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L.A. ACHODE

HIGH COURT JUDGE

In the presence of .....Appellant in person

In the presence of .....State Counsel