REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.138 OF 2014

(Appeal Originating from Eldoret CM's Court Cr.No.4138 of 2017 by: Hon. M. Njagi – P.M.)

NKK.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

NKK, the appellant, was convicted for the offence of *defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act*.

The particulars of charge are that on 12/5/2012, at [Particulars Withheld] in Keiyo South District, unlawfully and intentionally caused his genital organ to penetrate the genital organ of FJK a girl aged 13 years.

In the alternative, he was charged with an offence of *committing an indecent act contrary to Section 11(1) of the Sexual Offences Act*. No finding was made on the alternative charge.

He was sentenced to serve 20 years imprisonment.

The appellant is aggrieved by the whole Judgment of the trial court. He filed this appeal on 1/9/2014 citing the following grounds:

(1) That the trial magistrate failed to consider the material contradictions in the evidence;

(2) That there was no medical evidence that linked him to the offence;

(3) That the conviction went against the weight of the evidence;

(4) That the court failed to consider that he was a minor at the time of alleged commission of the offence;

(5) That the defence was not considered and the burden of proof was shifted onto the appellant;

(6) That his mitigation was not considered.

(7) That the sentence was harsh and excessive.

The appellant therefore prays that the conviction be quashed and the sentence be set aside.

This is a first appeal and it is the duty of this court to re-examine and re-evaluate all the evidence that was tendered before the trial court. This court will give some allowance due to the fact that it did not see or hear the witnesses testify, whereas the trial court had that opportunity. I am guided by the decision in *Okeno v Republic (1972) EA 32*.

In the trial court, five witnesses testified for the prosecution. PW1, FJ, a child aged 14 years testified after undergoing a voire dire examination and found fit to testify on oath. PW1 recalled the 12/5/2012 about 6.00 p.m. when she was sent to get Medicine (herbs) from the home of one B. On her way back home, she met the appellant and A (PW4). A greeted her and passed but the appellant held her hand and told her that he loves her, fell her down near the church, removed her pant and unzipped his trouser and defiled her. A came back escorted her home, she informed her mother (PW3) who took her to hospital. PW1 knew the appellant before.

PW2 Dr. Joseph Imbenzi produced a P3 form which had been filled by Dr. Cynthia Kibet who examined PW1 on 14/5/2012. Upon examination, the doctor found that PW1 had two tears on her hymen at position 9.00 and 12.00 O'clock, the private area had extra ordinary redness known as frictional injury. The Doctor concluded that there was evidence of vaginal penetration.

PW3 JCK, the mother of PW1 confirmed that on 12/5/2012, she sent PW1 to the home of B; that PW1 came back crying and reported that she had been raped by KK.

PW3 Checked PW1's private parts and found them to be reddish PW1 was taken to hospital on the same date and treated. They reported to police and were issued with a P3 form which was filled.

PW3 knew KK and his family. She denied that there was any bad blood between the two families.

PW4 AKK recalled 12/5/2012 about 6.00 p.m. He was with Kipsang, the appellant, and on the way back from the shop, met the complainant. They greeted each other and he passed but K stopped to talk to PW1. He walked for a few paces, heard the complainant scream and he walked back and found them lying down with K lying on top of the complainant. He enquired what they were doing but the appellant warned him to leave and he left. PW4 later found PW3; she was crying and on enquiring why she was crying, she said that K had raped her. He escorted her home and told her to report to her mother.

PW5 PC Aggrey Nyongesa was the investigating officer in this matter. A report was made to him on14/5/2012 by the complainant and her parents, recorded their statements and that the appellant was arrested on 5/11/2012.

After the close of the prosecution case, the appellant was called upon to defend himself and he stated on oath that on 22/3/2012, somebody borrowed a cow from the father and was to return it after 2 – 3 years. When the father went to ask for it, the person insisted on having it for one more year. The father died and he went to ask for the cow in 2017 because he did not have fees but shortly after, he was told that he defiled PW1; that the cow was given to the complainant's father which he refused to return. He said that there existed a grudge because he used to go and ask for the cow.

The appellant filed written submissions. On the issue of contradictions, the appellant submitted that there were contradictions as regards the age of the complainant, 13 or 14 years. That there was contradiction between PW1 and PW4 as to what exactly happened when the appellant met the complainant. He also submitted that he was not examined and hence no medical evidence to connect him to the offence. The appellant said that there was no spermatozoa nor was there DNA done.

The appellant also submitted that his rights were violated because his age was not assessed. It was also the appellant's case that no investigations were carried out and he was wrongly charged.

The appeal was opposed and learned counsel for the State, Mr. Onkoba submitted that PW3 was informed of the offence and the complainant was taken to hospital; that PW2, the Doctor confirmed that there was evidence of penetration; that PW4 found the complainant and appellant in the act; that PW1's age was proved and the complainant knew the appellant well and the incident was at about 6.00 p.m.

Counsel urged that the appellant's defence was considered and the court found nothing in it to controvert the prosecution case.

As regards the appellant's age, counsel argued that he never indicated to the court that he was a minor.

In reply, the appellant claimed to have left his birth certificate in school and the court allowed him to send his relatives to get it. What was produced in court was a letter from the head teacher of [Particulars Withheld]Primary School in which the HeadMaster confirmed that the appellant went to school there, and the records indicated that he was born in 1995.

I have now given due consideration to the grounds of appeal and the rival submissions.

This being a charge of defilement, the prosecution has to prove beyond reasonable doubt the following elements:

1. *That the victim was a minor;*

2. *That there was penetration;*

3. *The identity of the perpetrator is disclosed.*

Whether age of complainant was proved:

PW1 testified that she was born on 28/4/1999. PW1's evidence was corroborated by her mother's evidence and her health card that was issued at birth, which was produced in evidence as P.Ex.No.2. The court also observed that the complainant and took her through a *voire dire* examination which is evidence that she was a child of tender age. The age of the complainant was satisfactorily proved to be 13 years.

Whether penetration was proved:

PW1 told the court that when the appellant accosted her, he fell her down, removed her pant, unzipped his trouser and that he defiled her. She did not explain to the court exactly what the appellant did to her after he removed her pant and unzipped his trouser. PW4 who had been with the appellant said that when he heard PW1 screaming, he went back and found the appellant lying on PW1. He did not tell the court whether

there was penetration. The term defilement is a legal term whose elements must be proven. Section 2 Sexual Offences Act defines penetration:

> *"Penetration is defined as the complete or partial insertion of a person's genital organs into the genital organs of another."*

Although PW2 said that she examined PW1 and saw redness on her genitalia which was corroborated by the findings of the Doctor (PW2) that there was redness called frictional injury there is no evidence that these injuries were caused by the penetration of PW1's genitalia by the appellant's genital organs. In the end, I find that penetration was not proved.

The appellant was charged with an alternative charge of committing an indecent act with a child. An indecent act is defined as:

> *"indecent act" means an unlawful intentional act which causes:-*
>
> *(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;*
>
> *(b) Exposure or display of any pornographic material to any person against his or her will."*

In this case, PW1 told the court that the appellant removed her pant, unzipped his trouser and PW4 saw him lying on PW1. PW1 was found with injuries to her genitalia. The particulars of the alternative are that the appellant's genitalia came into contact with PW1's. Even if PW1 did not specifically say so, the appellant's actions of removing PW1's pant, clearly points to the fact that the genitalia of the two came into contact. I find that an offence of indecent act was committed.

The appellant was not a stranger to PW1, in fact, the appellant alleged that he was framed because of an existing grudge between him and PW1's father which was denied but the fact is that they knew each other well. PW4 who had been in company of the appellant confirmed having left the appellant with PW1 and only to hear PW1 screaming and on going back, the appellant ordered him to leave them alone. The incident happened about 6.00 p.m.

I find that the identity of the appellant was proved and there was no possibility of mistaken identity. Both PW1 and 4 knew him well. The appellant had gone to the shop with PW4 and both met PW1.

The appellant alleged that there were contradictions in the prosecution evidence. What he pointed to as contradictions were so minor that they could not invalidate the prosecution's case, for example, that PW1 said she was 14 years yet the other evidence was that she was 13 years. PW1 must have assumed that since her birthday had passed, she was now going into her 14th year. The contradiction on the age is not material because there were documents to prove the age.

The appellant also complained that he was not taken for treatment and hence there was no medical evidence to link them to the offence. The law is settled that an offence of defilement or rape is not necessarily proved by medical evidence or by DNA. It can be proved by direct or circumstantial evidence. In any event, the court finds the appellant guilty of the lesser charge of committing an indecent act.

The appellant complained that his rights were breached by the court which failed to take him for medical assessment to determine his age and yet he was a child as of May, 2015 when the alleged offence was committed. On 14/1/2013, the appellant told the court that he goes to [Particulars Witheld] High School. The surety repeated the same. The court ordered the appellant to produce documents from the school as proof that he goes to school. At no time did the appellant allege that he was a minor or that he should be taken for age assessment. That notwithstanding, once the appellant stated that he was a student in form 2, the court's antennae should have been raised so that the appellant could be taken for age assessment. If he was a child, then he should have been tried as a child. At the appeal, hearing, the appellant was allowed to send his brother to his former school to get documents to prove the appellant's age. A letter from the appellant's former school in its letterhead and dated 6/9/2019, indicated that their records indicated that the appellant was born in 1995. It means that the appellant was 17 years old in 2012 and should have been tried as a minor which was not the case. I find that the court erred in that regard. As a child, the court should not have sentenced the appellant to prison unless circumstances were exceptional. No exceptional circumstances have been alluded to by the court.

Whether the defence of the appellant was considered:

The court considered the appellant's defence that there was a grudge between the two families. However, during cross examination of witnesses, the appellant never specified what kind of grudge existed. It is not until his defence that he talked of the father giving a cow to the complainant's father which he refused to return till his father died. This allegation was an afterthought. Even the investigating officer denied that any grudge had been alleged at the time of arrest. PW3 denied that there existed any grudge between the two families. In any event there was overwhelming evidence from PW1, 2 and 4, an independent witness, that indeed he witnessed the appellant lying on PW1 as she screamed. The prosecution evidence was watertight and credible and was never shaken by the defence.

In the end, I quash the conviction on the principle charge. Instead, I find the appellant guilty of an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of Sexual Offences Act.

In view of the finding that the appellant was a child and was erroneously sent to prison, the court will sentence the appellant under Section 191 of the Children's Act.

I therefore set aside the sentence of 20 years. The appellant has been in prison since 21/4/2014, a period of 5 years. The sentence was illegal.

I therefore sentence the appellant to 6 months Probation to enable him to be counseled and integrated into society by the probation officer. The appeal succeeds to that extent.

Dated and Signed at Nyahururu this 20th day of December, 2019.

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R.P.V. Wendoh

JUDGE

Delivered by Justice H. Omondi (Mrs) at Eldoret this 22nd day of January, 2020.

PRESENT:

Busienei – prosecution counsel

Ngalomoi – court assistant

Appellant - present