REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 35 OF 2018

NAFTALI THURANIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Garsen Criminal Case No. 173 of 2014 by Hon. J.M. Macharia (PM) dated 25th June 2015)

JUDGEMENT

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates in the months of May and August 2014 at Garsen Town in Tana Delta District within Tana River County, the Appellant intentionally caused his penis to penetrate the vagina of KHK a child of 13 years.

2. The prosecution called five witnesses in support of their case. PW1 KHK, the victim, told the court that she was 13 years old and she knew the Appellant. That on the 5th August 2014 at around 6pm in the evening, she was returning home after buying flour when the Appellant approached her and told her he wanted to have sex and then she would be his wife and he would give her some money. She agreed and the Appellant took her to an unoccupied house where he removed her skirt and underwear. The Appellant then removed his trouser and his underwear and inserted his penis in her and they had sex. That after he finished, the Appellant ran away and left the victim in the house. Since it was late the victim went to one D, a neighbour, and informed her that she feared going home as her mother would beat her as it was late and that she had had sex with the Appellant.

3. The next morning, the victim's mother (PW2) came for her in the morning and the victim informed her that she had had sex with the Appellant. They went to Garsen Police Station and later she was examined by a doctor who issued her with treatment notes and informed her that she was pregnant. She told the court that she had slept with the Appellant over 8 times in the same house but she had never informed her parents before.

4. ZYZ (PW2) was the victim's mother. She told the court that the victim was 13 years old having been born on 4th August 2001. She also said that she knew the Appellant and that he resided at Gabe. She told the court that on 5th August 2014 at around 6:00 pm she sent her other daughter to look for PW1 but she did not find her. It was getting late as it was already 7:00pm so she reported the matter to the police. The next day she went to her neighbour's (PW3) house who informed her that PW1 had gone to her house very late at night. That she asked PW1 where she was when PW1 told her that she was having sex with the Appellant who had promised to give her money and to marry her. She went and reported the matter at the police station and then she took her to a doctor who examined her and assessed her age. That doctor informed her that PW1 was pregnant. The doctor then filed the P3 and age assessment. She stated that she did not know of PW1's relationship with the Appellant.

5. DK, PW3, told the court that she used to give PW2's children a place to sleep when they were displaced while PW2 lived in the neighbourhood. That later PW2 informed her that she had found another place for the children to sleep. That on the 5th August 2014, at around 1:00 am PW1 went to her house and asked her to open the door. That she opened the door and PW1 slept. The following day PW2 came to her house and asked PW1 where she had been. PW1 stated that she was in the Appellant's house and that she had been sleeping with him. That PW2 took PW1 and reported the matter. She told the court that she knew the Appellant well as he used to be PW2's neighbour and she had no grudge with him.

6. P.C Damaris Wendo (PW4) was attached to Garsen Police Station. She told the court that on 5th August 2014 at around midnight PW2 informed her that PW1 had not reported back home. She advised her to come back the next day. That the next day PW2 came with PW1 and told her that PW1 was at another person's house. She interrogated PW1 who told her that she was with the Appellant who was her neighbour and they had sex, and thereafter the Appellant took her to PW3's house. She told the court that PW1 was examined by a doctor and an age assessment done which showed that PW1 was 13 years old.

7. Abuya Shan (PW5) was the clinical officer at Garsen. He produced the P3 form (P.Exh 1) which was prepared by Dr. Ribe. He stated that Dr. Ribe went back to school for further studies but he had worked with him for 1 year and he knew his handwriting. He stated that the there was no vaginal discharge but the hymen had been broken. PW1 was found to be less than 3 months pregnant and concluded that there was defilement. He also produced the treatment notes (P.Exh 2).

8. The trial court found that the Appellant had a case to answer and the Appellant was put on his defence. The Appellant gave an unsworn statement that he was a businessman and he operated a hotel. That on the 6th August 2014 he received a report that he was wanted by the police so he went to the police station where he was told to wait. That he saw a lady he knew with a police officer. That the lady pointed at him and said that she had a problem with him. He said that he had Ksh. 10,000 which belonged to the victim and that the lady was demanding it from him. That he told her to wait but the lady fabricated the case against him.

9. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to imprisonment for 20 years.

10. The Appellant being aggrieved by the conviction and sentence lodged his homemade amended petition of appeal on the 11th July 2019. His seven grounds of appeal were that the charge sheet did not disclose an offence; the complainant was not a reliable witness; that penetration and the age of the complainant was never proved beyond reasonable doubt; that the medical evidence did not prove that he defiled the victim and impregnated her and; that his defence was not considered.

11. During hearing on the 24th October 2019, the Appellant relied on his written submissions filed on the 11th June 2019 in support of his appeal. His submissions were to the effect that the charge sheet did not disclose the dates the offence occurred and that the term unlawful was not in the charge sheet and therefore it was defective. He placed reliance on the case of **Albert Oyondi v Rep CRA 4040 of 2010.**

12. Secondly, it was his submission that the victim was not a straightforward person as she agreed to have sex because she was promised money, she had had sex severally and that she chose not to inform her parents about it until she became pregnant. He further submitted that the medical evidence did not link him to the offence. He argued that due to the victim's behaviour, penetration could not be attributed to him and that the court should have ordered for a D.N.A test to prove the pregnancy was his. He quoted the case of **Joesph Kinyua Nyaga vs Rep CRA 42 of 2016** and **Woolmington vs DPP (1935) UKHLI**.

13. Further, the Appellant submitted that there was contradictions in the evidence of the medical doctor who said that the pregnancy test was done conducted on the 6th May 2014 while the P3 form indicated that the test was conducted on the 6th August 2014. He urged that he did not defile the victim as the tests were conducted three months before he was arrested. In addition, he submitted that the age of the victim was not proved there was no documentary evidence produced in court. Finally, it was Appellant submission that he had a reliable defence which was not considered and relied on the case of **Essentale vs Uganda (1986) E.A.C.A.**

14. The Respondent opposed the appeal in its entirety through oral submissions. Mr. Mwangi, learned counsel for the Respondent, submitted that the dates of the offence were diverse therefore the charge sheet was not defective and further; that the omission of the word unlawful did not make the charge sheet defective as defilement itself was unlawful. He relied on the case of **Daniel Oduya Oloo vs R (2018) eKLR.**

15. On issue of the DNA test, Mr. Mwangi submitted that only penetration needed to be proved which was done through the P3 form and that conducting a DNA test on the child was not necessary and it would be in contravention of Article 50 of the Constitution which provides for an expeditious trial. Lastly, Mr. Mwangi submitted that the defence was a mere denial and that the Appellant had lived with the victim.

16. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

17. I have considered the grounds of appeal, the respective submissions, and the record. The only issues for determination in this appeal is whether the charge sheet was defective and if the prosecution proved its case beyond reasonable doubt.

18. The first issue is whether the charge sheet was defective for failure to indicate the exact dates that the offence took place.

19. Section 134 of the Criminal Procedure Code provides that:-

> ***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

20. The pertinent question is whether the information in the charge was sufficient for the Appellant to know the offence he was charged with. The charge sheet indicated that the offence took place on different dates in the month of May and August specifically. This is supported by the evidence of the victim who said that she had had sex with the Appellant more than 8 times before. I find that the information was sufficient for the Appellant to know he had been charged with defiling the victim severally in the month of May and August of the year 2014. I am fortified in making this finding by the Court of Appeal in **Benard Ombuna v Republic [2019] eKLR** whence it pronounced itself thus:-

> ***"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."***

21. The Appellant further contended that the charge sheet was defective for its failure to include the term 'unlawfully'.

22. Dealing with the issue of the omission of the term unlawful in the charge sheet in **Daniel Oduya Oloo v Republic [2018] eKLR** Ngenye-Macharia J held that:-

> ***"On the same issue the Appellant submitted that the particulars of the offence were fatally defective as they failed to disclose that the act of defilement was unlawful. It is true that the word unlawful was not included in the particulars of the offence. The offence of defilement represents a situation in which the key elements requiring proof are age of the victim, identification of the perpetrator and penetration. It is an offence perpetrated to children. Given the fact that children cannot consent to the acts that form the basis of the offence implies that as long as the elements of the offence are proved, the offence itself is deemed unlawful. Therefore, the mere omission of the word "unlawful" does not, in the circumstances, render the charge sheet defective."***

23. Guided by the above decisions, I find that the Appellant was not prejudiced by the omission of the term unlawful from the charge sheet as he was aware of the charges against him and was able to put an appropriate defence. I must also state that the mere omission of the word 'unlawful' cannot convert an unlawful activity into a lawful one. Additionally, during the trial in the lower court, the court deemed that the elements of the offence were proved in the trial court and therefore the offence was unlawful. I find that this ground fails.

24. On whether the case was proved beyond reasonable doubt, with respect to the law, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

25. It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

26. On the age of the complainant, the Sexual Offences Rules of Court 2014 **Rule 4** provides that:-

> ***"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."***

27. In the present case, the PW2, the victim's mother, told the court that she had the victim's birth certificate. However it was never produced. Similarly, PW4 informed the court that the victim had been taken for age assessment but the same was also not produced before court. However, the court is alive to the fact that age is not proved strictly by documentary evidence but can also be proved through the victim's parents or observation.

28. In the case of in **Thomas Mwambu Wenyi v Republic Criminal Appeal NO. 21 OF 2015 [2017] eKLR** the Court of Appeal cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that:-

> ***"…Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."(Emphasis mine)***

29. In **Richard Wahome Chege v Republic [2014] eKLR** the Court of Appeal sitting in Nyeri pronounced itself thus:-

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."***

30. In the trial court, the victim stated that she was 13 years old which was corroborated by her mother, PW2, who stated that PW1 was 13 years old having been born on 4th August 2001. Similarly, the P3 form (P.Exh 1) indicated that the estimated age of the victim was 13 years old. Guided by the above precedents, I find that the age of the victim was satisfactorily proved.

31. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

> ***"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."***

32. In this case, the victim (PW1) gave evidence that on the 5th August 2014 the Appellant approached her on her way home and told her that he wanted to have sex with her and lured her with a promise of marriage and money. The victim accepted and the Appellant took her to a deserted house where he removed her skirt and underwear before removing his trousers and underwear and then he proceeded to "*insert his penis inside me."* PW1 told the court that it was not the first time she had had sex with the Appellant but that it had happened 8 times before.

33. PW5, Abuya Shan, the clinical officer at Garsen produced the medical evidence in place of Dr. Ribe who had gone to pursue further studies. The P3 (Exh 1) indicated that the victim had no injuries on her genitalia, her hymen was broken long time ago and that she was less

than 3 months pregnant. He concluded that the victim had been defiled. In view of the evidence produced, I find that penetration was achieved.

34. The Appellant also faulted the trial magistrate for failing to order a DNA test to be conducted to ascertain that he was the father of the child. However, it is well established principle of law that a DNA test is not necessary to establish the offence of defilement or rape.

35. In **AML v Republic [2012] eKLR** the Court of Appeal succinctly held that:-

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

36. Further, the court in the case of **Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)** affirmed the decision and stated that:-

> ***"… [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

37. In addition, Section 36 of the SOA is not mandatory as it is couched in permissive terms. Faced with a similar argument, in **Williamson Sowa Mbwanga v Republic [2016] eKLR,** the Court of Appeal pronounced itself thus:

> ***"...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001)."***
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> **It is partly for this reason that section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."**

38. I am guided by the above authority to find that it was not necessary in this case for the court to order a DNA test as the same was not necessary to prove to prove penetration. The Appellant's contention in this regard therefore fails.

39. On the issue of identification, it is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in **Francis Muchiri Joseph – V- Republic [2014] eKLR** where it stated that:

> ***"In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…."***

40. In the present case, PW1 stated that he knew the Appellant and that he had a sexual relationship for over 8 times. PW2 also told the court that she knew the Appellant as he resided in Gabe, while PW3 stated that he knew the Appellant well and that he used to PW2's neighbour. The Appellant on his part admitted that he knew PW2 when he saw her in the police station. I find that this was a case of recognition and therefore the Appellant was properly identified.

41. The Appellant contended that his defence was not considered. It was his contention that the complainant had fabricated the case against him because he failed to pay back KSh. 10,000/- which he owed her when she demanded it from him. The trial magistrate in his judgment considered the Appellant's defence and found it to be unbelievable and an afterthought as the issues were never raised during cross-examination. I have looked at the evidence on record and I agree with the trial magistrate that the defence was an afterthought. I believe the Appellant meant that he owed PW2, the victim's mother, KSh. 10,000/-. The Appellant had an opportunity to cross-examine the witnesses but he failed to raise the issue of the money owed during cross-examination. His evidence did not shake the prosecution's case. I find that this ground fails.

42. The Appellant contended that there was material contradictions in the evidence produced by PW5. He argued that PW5 stated that the pregnancy test was conducted on 6th May 2014 while the P3 form (P.Exh 1) indicated that the test was conducted on 6th August 2014. I have taken time to peruse both the typed proceedings and the handwritten proceedings from the trial court. In the written proceedings, it is quite clear that PW5 stated that the pregnancy test was conducted on 6/08/14. From this, I can only conclude that the difference in the date in the written proceedings and the typed proceedings was a typographical error.

43. On the sentence, the Appellant was sentenced to 20 years imprisonment as it was the mandatory sentence under the SOA. However, the mandatory nature of sentences under the SOA has been brought to question through various decisions from the Court of Appeal which have found that it takes away judicial discretion in meting out an appropriate sentence.

44. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where is stated thus:-

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the***

mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the sexual offences act, which do exactly the same thing."

45. I have taken into consideration the circumstances of this case. The complainant admitted that she had an on-going secret relationship in which she had had sexual intercourse with the Appellant over 8 times and had not told anyone including her parents about it. On his part, the Appellant was remorseful and asked for leniency in mitigation. I also note that he was a first offender. I find that the sentence was harsh and excessive in the circumstances. I set aside the sentence of 20 years imprisonment.

46. In the final analysis, I confirm the conviction and allow the appeal on sentence only. The Appellant shall serve 10 years imprisonment from date of conviction and sentence.

47. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 17th day of February, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

T. Maro Court Assistant

The Appellant in person

Mr. Mwangi for the Respondent