REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 5 OF 2019

SAMUEL MBEKA AYIERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. B. Ochieng' – Ag.

SPM dated 12th April 2013 at the Principal Magistrate's Court at Kilgoris in Criminal Case No. 821 of 2012)

JUDGEMENT

1. The appellant herein, **Samuel Mbeka Nyiera** was charged with **defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 19/10/2012 in Transmara West District within Narok County intentionally caused his penis to penetrate the vagina of ANN a girl aged 8 years.

2. He faced an alternative count of **indecent assault** of a girl child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** That on the 18/10/2012 in Transmara West District within Narok County did intentionally and unlawfully caused his penis to come into contact with the vagina of ANN a girl aged 8 years.

3. In a judgement dated 12/4/2013, the appellant was found guilty as charged on the count of defilement and sentencing to 30 years imprisonment.

4. Aggrieved by the conviction and sentence, the appellant lodged this appeal vide the petition of appeal dated 24/1/2019 where he raised the following grounds;

a. That no medical evidence adduced in court linked me to the said offence as I was not medically examined.

b. That the trial magistrate erred in law by relying on the sole evidence of the complainant without noting that no other witness corroborated her evidence.

c. That the trial magistrate failed to observe that there was no medical evidence linking me with the alleged offence.

d. That the trial court failed to observe that the prosecution failed to produce any inventory form to prove any recovery.

e. That the trial magistrate erred in law and facts by not considering that the age of the complainant was not proved beyond reasonable doubts.

5. The gist of the grounds is that the evidence on record was not enough to sustain a conviction and that the sentence of 30 years was harsh.

6. Briefly, the evidence on record is that PW 1 (8 years old) was in company of her younger brother L at home when the appellant came and sent the brother to buy mandazi. The appellant took PW 1 to her father's bed. He lay on her, pulled her skirt and tore her inner pant. He held her mouth. The appellant touched her vagina using his penis. She felt pain around the crouch area. She could not walk properly. The brother came back and the appellant ran away. PW 1 confirmed that the appellant inserted his penis.

7. PW 1 went to S and reported to the mother. Matter was also reported to her father. She was taken to Kilgoris hospital and examined.

8. The appellant was known to PW 1. She said he used to go daily to their home working with her father. They could farm. She added that he had done *"tabia mbaya"* to her three times. She could not remember the other days. She never reported the earlier incidents.

9. She narrated that in the first instance the penis did not penetrate. This happened in the house. The second time it happened in the maize plantation. She reported to her mother but the mother kept quiet.

10. On cross examination, she said it was 1.00pm and she was with Lekakeny. She had been sent away from school.

11. PW 2 examined the complainant on 19/10/2012. He found that the genetalia had bruises and hyperdemic reddening. Hymen was broken but not freshly broken. He observed some waterly discharge from the genetalia. An X-ray test showed the girl was 8 years old.

12. PW 3, the mother to the complainant observed some whitish fluids at the complainant's sexual organ.

13. LE testified that on the material day he was at home with the complainant. The appellant gave him money to buy mandazi. When he returned he found the accused on top of the complainant in bed.

14. JN is the father of the complainant. On the material day, the incident was reported to him. The next morning he sought neighbours and they went to appellant's home. The appellant slipped away running into the cane plantation. The appellant was spotted the next day and was arrested and taken to the police station. The appellant used to work with J and they were friends. J confirmed that earlier on the appellant had been appointed a village elder in place of himself.

15. PC James Ngunjiri produced a torn pant as an exhibit.

16. On being placed on his defence the appellant stated that he spent his day on 18/10/2012 working. The manager of Cereals gave him work to load fertilizer. He accompanied her to Sholen. In the evening he was dropped at Oldorosho where he slept. The next day he learnt he was accused of raping the girl. On cross examination, he said he has had no differences with the complainant's father. They used to work together. There was some differences over the post of village elder which the appellant took from the father of the complainant.

17. The appeal was canvassed by way of written submissions on the part of the appellant and which he highlighted at the hearing and by oral response by the DPP.

18. I have considered the petition of appeal, the record of the trial court and submissions by the appellant and the DPP. The issues for determination are whether the evidence adduced was sufficient to sustain a conviction and secondly whether, based on the finding on issue 1, the sentence passed was harsh and/or excessive.

19. This being a first appeal, this court is bound to re-evaluate the evidence and reach its own conclusions thereon, all along alive to the fact that it did not see nor hear the witnesses and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972]EA 32**.)

20. The evidence of PW 1 is that the appellant came to their home, sent PW 1's younger brother to buy mandazi and proceeded to defile her on a bed. The brother, L, returned and found the appellant lying on PW 1. It is noteworthy that PW 1 gave an unsworn statement. It is a well established principle of Law that the unsworn testimony of a child of tender years must be corroborated. The other eye witness account in this matter is that of LE who also gave an unsworn testimony. This evidence was incapable of corroborating the evidence of PW 1 as it is as per the law needed to be corroborated.

21. S.124 of the **Evidence Act** provides;

> *"Section 124 Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*
>
> *Provided that where in a criminal case involving a sexual offence the only*
>
> *evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*

22. The exception under S. 124 does away with the requirement for corroboration of the unsworn evidence of a child of tender years and allows a court to receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

23. In **Sahali Omar –vs- Republic [2017]eKLR**, the Court of Appeal stated;

> *"In addition, the provision to section 124 of the Evidence Act affords an exception to the general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW 1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless, rely on it provide it recorded its reasons.*

In this case the trial court is seen to have addressed itself thus;

> *"The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW 1, PW 2, PW 3 and PW 4. The appellant has not taken any issue with the reasons recorded by the trial court … the ground corroboration should fail."*

24. In our instant case the trial court in reference to the evidence of PW 1 stated;

> *"On the identity, I find the 2 subjects knew the accused so well. Accused gave account how he used to be at the complainant's home rest (sic) of the time. The incident occurred in broad daylight and therefore I find there is no way the subject could have mistaken the accused."*

25. The evidence of PW 1 that she was defiled is fortified by the evidence of PW 3 her mother who on receiving the report found a whitish substance on her genetalia and further affirmed by the medical report which showed there was partial penetration of the complainant's vagina.

26. In answer to this evidence the appellant gave an alibi evidence stating that he had been given some work by the Manager of Cereals Board. This alibi is not corroborated. The assertion by the appellant that he was denied a chance to call his witness is not truthful as the record shows he was indulged by the court in this respect.

27. The attempt by the appellant to blame his predicament on a supposed grudge over the post of a village elder in my view cannot stand in light of the evidence on record. The medical evidence availed proves there was penetration of the victim. The victim herself is categorical it is the appellant who defiled her. She had no reason to lie against the appellant. The medical officer who examined the victim is an independent witness with nothing to gain from the outcome of this case.

28. The medical officer confirmed there was partial penetration. **Section 2** of the **Sexual Offences Act** defined penetration as ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

29. In the case of **Mark Ouiruri Mose vs R 2013 eKLR**, the Court of Appeal stated;

> ***"…****. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ ……"*

30. In view of the foregoing and on the basis of the evidence on record, the conclusions reached by the trial court were sound and the conviction of the appellant safe.

31. As regards sentence, the appellant was sentenced to 30 years imprisonment. The sentence provided for in law is life imprisonment. The sentence passed is not harsh or excessive.

32. I find this appeal lacking in merit and dismiss it.

Dated and delivered at Kisii this 19th day of February, 2020.

A.K NDUNG'U

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person