REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.110 OF 2019

HENRY MUNGUTI WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. A.R. Kithinji SPM delivered on 8th February 2019 in Makadara CM Cr. Case (S/O) No. 3118 of 2015)

JUDGMENT

The Appellant, Henry Munguti Wambui, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 7th October 2015 at [particulars withheld] Estate within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of SM a child aged 9 years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 7th October 2015 at [particulars withheld] Estate within Nairobi County, the Appellant intentionally touched the vagina of SM a child aged 9 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of defilement and sentenced to serve twenty (21) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his conviction was based on a defective charge sheet since there was a variance between the particulars of the charge and the evidence adduced before the trial court. He faulted the trial court for failing to conduct a *voire dire* before the complainant adduced evidence. He took issue with the fact that his conviction was solely based on the uncorroborated evidence of a minor. He asserted that the trial court failed to properly evaluate the medical evidence adduced in arriving at its decision. He was further aggrieved that the trial court improperly applied provisions of Section 214 of the Evidence Act by failing to give reasons as to why it concluded that the complainant was a truthful witness. He faulted the trial court for improperly admitting the evidence of PW8 in contravention of Sections 77(1), 50 and 33 of the Evidence Act. He complained that the trial court failed to consider his defence in arriving at its decision. He was of the view that the prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Akunja for the State opposed the appeal. She made oral submission to the effect that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She asserted that the complainant narrated how she was on her way from the toilet when the Appellant intercepted her and forced her to enter his house. He undressed her and inserted his penis in her vagina. The complainant informed her mother who took her to the hospital. Learned State Counsel further averred that the medical evidence adduced by PW3 and PW5 established the element of penetration. She submitted that PW4 produced in evidence the complainant's birth certificate which proved that she was a minor. She was of the view that the complainant positively identified the Appellant as the person who sexually assaulted her. She opined that the sentence meted by the trial court was not excessive in the circumstances. In the premises, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, SOM, is the complainant. She stated that she was eight (8) years old at the time of the alleged sexual assault. It was her testimony that the Appellant was her neighbour. On 7th October 2015, she had gone to use the washrooms. On her way back, she met the Appellant who forced her into his house. She was wearing a pair of shorts which he removed. He also undressed. He threatened to kill her if she made any noise. He then inserted his penis in her vagina. She later informed her mother what the Appellant had done. Her mother took her to the hospital and later reported the matter to the police.

PW2, LA, is the complainant's mother. On 7th October 2015, she had attended her sister's burial and left the children alone in the house. She came back to the house the following morning. She woke the children up. When the complainant got from her bed, she noticed that her clothes were blood stained. She interrogated the complainant. She told her that the Appellant took her to his house, placed her on a bed and inserted his penis in her vagina. PW2 reported the incident to the police. She also took the complainant to MSF Clinic.

PW3, Maureen Akela, was a clinical officer from MSF Clinic. She applied to adduce evidence on behalf of her colleague, Irene Nyagwachi, who was no longer working at the said clinic. She produced into evidence the complainant's medical report and Post Rape Care form which indicated that the complainant's hymen was torn with fresh tears at six o'clock. She also had a tear from the vestibule to the posterior fourchette. Her vaginal walls were reddened. Her anal region was normal.

The complainant was also examined by PW5, Dr. Maundu, based at Nairobi Police Surgery on 12th October 2015. PW5 stated that the complainant had a bruise on the left side of her forehead and on her left leg. On genital examination, the complainant had a tear on the upper and lower part of her vaginal walls. Her hymen was torn with fresh tears and her vaginal walls were hyperemic. On the same day, PW5 also examined the Appellant. He had a bruise on the left side of his face. His genital and anal regions were normal. PW5 produced the complainant's and Appellant's P3 forms into evidence.

PW4, Richard Ratemo, from Kariobangi Police Station investigated this case. He was on duty on 8th October 2013 when the complainant and PW2 came to the police station. PW2 reported that the complainant had been sexually assaulted by a neighbour. The complainant was taken to MSF Clinic for medical examination. The Appellant was arrested and brought to the station the following day by members of the public. He also visited the scene of crime and established that the Appellant was PW2's neighbour. After his investigations, he preferred the present charges against the Appellant.

The Appellant was put on his defence. He gave a sworn statement. He stated that on the material day of 7th October 2015, he left his house in the morning and went to work. He received a call from his wife. She informed him that she had an argument with PW2 after they differed over clothes hanging lines. He rushed back home and confronted PW2. The confrontation led to a fight between them. He afterwards went back to work. The following day, PW2 came to his house and informed him that he was required at the Chief's Office. He went to the Chief's Office and explained what had transpired. He was later escorted to Kariobangi Police Station by members of the public. He denied sexually assaulting the complainant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses (See David Agwata Achira vs. Republic [2003] eKLR). In the present appeal, the issue for determination is whether the prosecution established the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case, as well as rival submission made by parties to the Appeal. Section 8(1) of the Sexual Offences Act provides that:-

> "*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

The prosecution is required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator. In defilement cases, it is imperative that the prosecution establishes the age of the complainant to the required standard of proof beyond any reasonable doubt. In the present appeal, the complainant stated that she was eight (8) years old at the material time. PW4 produced into evidence her birth notification which indicated that she was born on 11th October 2007. This established that the complainant was indeed eight (8) years of age at the time of the alleged sexual assault. This evidence was not challenged by the Appellant during cross-examination or in his defence. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.

This court now turns to the ingredient of penetration. Section 2(1) of the Sexual Offences Act defines penetration as:

> "*the partial or complete insertion of the genital organ of a person into the genital organs of another person*."

In the present appeal, it was the complainant's testimony that as she was coming from the toilet, the Appellant intercepted her and pushed her into his house, undressed her and inserted his penis in her vagina. The Appellant was her neighbour. She informed her mother (PW2) who reported the incident to the police. She also took her to the hospital for medical attention. PW2 averred that the complainant's clothes were bloodstained. The medical evidence adduced by PW3 and PW5 established that indeed the complainant's vagina was penetrated. PW3 averred that the complainant was examined at their clinic on 8th October 2015. Her hymen was broken with fresh tears at 6 o'clock. She also had a tear from the vestibule to the posterior fourchette. Her vaginal walls were reddened.

This evidence was confirmed by PW5 who examined the complainant on 12th October 2015. PW5 stated that the complainant had a bruise on the left side of her forehead and on her left leg. On genital examination, the complainant had a tear on the upper and lower part of her vaginal walls. Her hymen was torn with fresh tears. Her vaginal walls were hyperemic. The medical evidence of the fresh hymenal tears, reddened vaginal walls and inflamed labia corroborated the element of penetration as narrated by the complainant. The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The third issue was whether penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. He was their neighbour. She stated that he lived in the opposite house facing theirs. The Appellant admitted that PW2 was his neighbour in his defence. The investigating officer visited the scene and confirmed that PW2 and the Appellant lived in the same plot. The complainant informed her

mother that the Appellant forced her into his house and sexually assaulted her. The incident happened in broad daylight. There was therefore no chance of mistaken identity as the Appellant was well known to the complainant. The Appellant in his defence claimed that the charges were fabricated since he had a disagreement with PW2. He raised the existence of a grudge. He testified that on the material day, PW2 and his wife got into argument over the clothes hanging lines. He was at work. His wife called him and informed him of the argument. He went home and confronted PW2. They had a heated argument which ended up in a fight. As a result, PW2 framed him of the present charges.

Having considered the evidence on record, this court is of the view that the complainant was telling the truth. She was only eight years old and had no reason to implicate the Appellant. The Appellant took advantage of the absence of the complainant's mother to sexually assault her. This court is of the view that the Appellant's version of events seemed unlikely. His defence was merely evasive and did not dent the otherwise strong culpatory evidence that was adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant. It was properly dismissed as being of no evidential value. The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt.

The Appellant in his grounds of appeal contended that the prosecution's case stood vitiated since the trial magistrate failed to conduct a *voire dire* before taking down the complainant's testimony. The complainant was about eight years old. She gave an unsworn statement. The trial court failed to record whether a *voire dire* was conducted before the complainant testified. The trial magistrate observed thus;

> *"Witness is eight years appearing to be tender age, can give unsworn statement."*

This court is of the view that the complainant was a child of tender years and her evidence should have been preceded by a *voire dire* examination to confirm her competency to testify. However, *did failure by the trial court to conduct a voire dire prior to taking down the complainant's testimony vitiate the Appellant's trial?*

The Court of Appeal in Patrick Kathurima vs.Republic Nyeri CRA 137 of 2014 observed thus:-

> *"It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Compell (Times) December 20, 1982 and Republic versus Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."*

Further, the Court of Appeal in *Maripett Loonkomok v R [2016] eKLR*, stated thus;

> *"It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that, "In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction." See Athumani Ali Mwinyi v R Cr.Appeal No.11 of 2015.*
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> *On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voir dire examination. The complainant's evidence was cogent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."*

In the present appeal, this court is of the view that the Appellant's trial was not vitiated by the trial court's failure to conduct a *voire dire* examination. The evidence of the complainant in its entirety shows that she was intelligent enough to testify. Her evidence was cogent. The Appellant was indeed given an opportunity to cross-examine the complainant, who answered the Appellant's questions. In addition, PW2 noticed that the complainant's clothes were blood stained. On inquiring what had happened, she informed her that the Appellant had sexually assaulted her. The medical evidence established that there was penetration. This court has also established that the Appellant was positively identified as he was well known to the complainant, and the incident occurred in broad daylight. Even if the complainant's testimony was to be totally excluded, there is other evidence adduced by the prosecution which points to the Appellant's guilt to the required standard of proof beyond any reasonable doubt. This ground of appeal must therefore fail.

The Appellant was of the view that his conviction was based on a defective charge sheet. He submitted that the charge sheet was defective since the name that appeared on the charge sheet was not his. He further asserted that failure to include the word 'unlawfully' deemed the charge sheet fatally defective. With regard to the Appellant's name, he averred that 'John Maina Ngugi' is not his name, and that his name is 'Henry Muguti Wambui'. This court has perused the trial court record. The charge sheet indicates the name 'Henry Muguti Wambui' alias 'John Maina Ngugi'. The Appellant's assertion that the charge sheet did not contain his name is therefore misleading. The substance and particulars of the charge were read to the Appellant to which he pleaded not guilty. He therefore understood the nature of the charges against him. The omission of the word *'unlawful'* from the particulars of the charge did not render the charge sheet fatally defective since the complainant was a minor, and therefore did not have any capacity to grant consent to any sexual activity.

This court, having re-evaluated the evidence adduced before the trial court and the submission made by parties to this appeal, cannot see any reason to disagree with the finding reached by the trial court. **The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.**

Section 8(2) of the Sexual Offences Act provides a mandatory sentence of life imprisonment for any person convicted of defiling a child aged eleven (11) years or less. However, the courts now have jurisdiction to relook at the sentence of the Appellant to determine whether the

life imprisonment sentence is deserved or another sentence ought to be imposed (See Christopher Ochieng vs R [2018] eKLR and Jared Koita Injiri vs R [2019] eKLR). In the present appeal, the Appellant was sentenced to serve a custodial sentence of twenty-one (21) years. The Appellant in his mitigation stated that he was remorseful. He has a family that depends on him. The trial court observed that the offence committed was heinous as the victim was a nine year old girl. This court is of the view that the sentence meted out by the trial court was legal and neither harsh or excessive in the circumstances. This court however notes that the Appellant was in remand custody for about three (3) years prior to his conviction by the trial court. That period is taken into account as a result of which the Appellant's custodial sentence is hereby reduced to seventeen (17) years. This sentence is to run from the date of his conviction *i.e.* 8th February 2019. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE