REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.22 OF 2020

KAGORI KABOI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. L.K. Gatheru SRM delivered on 13th December 2019 in Makadara CM Cr. Case (S/O) No. 42 of 2018)

JUDGMENT

The Appellant, Kagori Kaboi was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that on 12th January 2018 within Nairobi County, the Appellant intentionally and unlawfully committed an act which caused penetration with his male genital organ namely penis into female genital organ namely vagina of JD, a child aged 13 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 12th January 2018 within Nairobi County, the Appellant intentionally and unlawfully committed an indecent act with JD, a child aged 13 years by touching her private parts, namely vagina and breast. 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 ten (10) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the trial court failed to accord him a fair trial. He faulted the trial magistrate for failing to adhere to the provisions of Section 19 of the Oaths and Statutory Declarations Act before taking down the evidence of the minor. He was aggrieved that the trial court failed to properly evaluate his defence before arriving at its decision. He took issue with the fact that the trial magistrate improperly shifted the burden of proof from the prosecution to the defence. He opined that the prosecution's case was inconsistent and full of contradictions, hence insufficient to sustain a conviction. 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, this court heard oral submission from Mr. Michuki for the Appellant and Ms. Kimaru for the State. Counsel for the Appellant submitted that with regard to the evidence of PW1, PW4 and DW2, the trial court failed to conduct a *voire dire* examination in accordance with Section 19 of Oaths and Statutory Declaration Act. He stated that the trial court failed to establish whether the minors understood the nature of an oath before taking down their sworn evidence. He submitted that the trial court improperly shifted the burden of proof to the Appellant by stating that the Appellant failed to explain why the complainant made such specific allegations against him. He pointed out that there was inconsistent evidence as to when the complainant informed her mother of the alleged sexual assault. PW2 stated that she was informed of the incident on 4th March 2018, yet the initial report was made on 3rd March 2018. In addition, PW1 stated that the offence occurred on 12th January 2018 yet PW2 stated that the offence occurred on 16th January 2018.

Counsel for the Appellant further submitted that PW1 and PW2 did not testify as to the presence of PW4 at the Appellant's house. He averred that the evidence by PW4 that the Appellant came to school, gave the complainant money and asked her to go see him later was uncorroborated by the complainant. He asserted that the complainant testified that she was sexually assaulted once by the Appellant. On the other hand, PW2 alleged that the complainant was sexually assaulted by the Appellant on several occasions. PW6 stated that the complainant informed her that the Appellant defiled her when she was in class 5. He maintained that the evidence by the prosecution witnesses was inconsistent. Mr. Michuki submitted that the Appellant's evidence was consistent and was not properly evaluated by the trial magistrate. In the premises, he urged this court to allow the Appellant's appeal.

Ms. Kimaru for the State opposed the appeal. She submitted that the trial court properly conducted *voire dire* examination and established that the minors were intelligent and understood the nature of an oath before the court took down their evidence. She asserted that the

Appellant was accorded a fair trial by the trial court. The trial court granted him cash bail since he was an ailing old man. In addition Section 200 of the Criminal Procedure Code was complied with when the initial magistrate who was handling the matter was transferred. The trial was also conducted expeditiously. Learned State Counsel was of the view that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She stated that the Appellant was well known to the complainant. He was their landlord. The medical evidence adduced by the prosecution established the element of penetration. She opined that the inconsistencies in the prosecution's case were minor and that the evidence on record was sufficient to sustain a conviction. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, JD, is the complainant. She told the court that she was 14 years old. It was her testimony that on the material day of 12th January 2018, she came back from school at about 7.00 pm. She went to the Appellant's house where she used to watch the television and also wash the Appellant's utensils. The Appellant afterwards asked her to remove her clothes. She declined. He went ahead and undressed her. She was wearing her school uniform. It was a dress and a sweater. The Appellant undressed her and inserted his penis in her vagina. She stated that she felt pain but she kept quiet as the Appellant sexually assaulted her. After he was done, he warned her against telling anyone what had transpired. She put on her clothes and went back home. She did not immediately inform her mother what had happened, and only told her about the incident two months later, on 4th March 2018. PW1 stated that the incident only happened that one time.

PW2, FM, is the complainant's mother. She stated that the complainant was born on 19th May 2004. She testified that the Appellant was her landlord. On the material day, she stated that the complainant went to school and came back home in the evening. The complainant informed her that she was going to see the Appellant. The complainant told her that the Appellant had requested her to wash his utensils and bought her chips. She left the house at about 7.00 pm and came back at 8.00pm. The complainant did not tell her what the Appellant had done to her. On 4th March 2018, the complainant came home from school and got into a fight with her sibling. The complainant was very rude when PW2 asked her what the problem was. PW2 canned her. That's when the complainant opened up and told her that the Appellant had been sexually assaulting her each time she went to his place. PW2 reported the matter to the police. She also took the complainant to Lavender Hospital for medical examination.

PW4, SA, was the complainant's brother. He was 13 years of age. He told the court that on the material day, he was in school with the complainant. During break time, the Appellant passed by their school and gave the complainant Ksh.20 and asked her to go and clean his utensils. Later that evening, he was at home with his mother (PW2) and his younger sister. The complainant was not at home. PW2 sent him to go and look for her. He looked for her at her friend's house but she was not there. He afterwards went to the Appellant's house where he found the complainant. He stated that he knew where the Appellant lived since the Appellant's grandson, M, was his friend. When he got to the Appellant's house, the Appellant sent him and M to buy book covers. They left the complainant alone with the Appellant at his house. When they came back, they found the Appellant's door locked from inside. They knocked the door. The Appellant opened the door. PW4 afterwards went back home with the complainant.

PW5, Penninah Angwenyi, was a clinical officer from MSF Clinic. She testified that the complainant was examined at the clinic by her colleague SN on 4th March 2018. This was two months after the alleged incident occurred. She had no visible physical injuries. Her hymen was broken with old tears that had healed. There was presence of a brownish discharge with an odour. Her anal region was normal. She produced the complainant's Post Rape Care form and medical report in evidence. The complainant was also examined by PW3, Dr. Shako, who was based at Police Surgery. This was on 12th March 2018. PW3 stated that her external genitalia was normal. Her hymen was broken with old tears at 8 and 4 o'clock. On the same date, she also examined the Appellant. He did not have any visible physical injuries. She produced the complainant's and Appellant's P3 form into evidence.

PW6, Nancy Kemboi, based at Soweto Police Station investigated the case. She interviewed the witnesses and recorded their statements. The complainant told her that the Appellant invited her to his house to wash utensils. When she got there, he sent away a child who was in his house. He then undressed her and inserted his penis in her vagina. She was 13 years old when the incident occurred. The complainant also told her that prior to that incident, the Appellant had sexually assaulted her when she was in class 5. PW6 arrested the Appellant at his house on 9th March 2018.

The Appellant was put on his defence. He gave a sworn statement. He stated that on 9th March 2018 he was arrested by police officers and taken to the police station without being informed of the reason for his arrest. When he was arraigned before the trial court, he was informed of the present charges. He denied sexually assaulting the complainant. He testified that on the material day of 12th January 2018, PW2 sent two girls to her house to borrow ointment for rubbing her feet and 10 litres of water. After sometime, PW4 came to check on the girls who had delayed at his house. The girls left and PW4 stayed behind watching television with the Appellant's grandson. He stated that he gave PW4 Ksh.10 to buy a book cover. PW4 left with his grandson to go buy the book cover. Later, his grandson came back to the house.

DW2, JM, stated that the Appellant was his uncle. It was his testimony that on the material day of 12th January 2018, two girls came to the house and found him and the Appellant. The girls said that they had been sent by their mother to pick some medicine for her swollen foot. They also wanted 10 litres of water. The girls sat down and watched the television till late in the evening. As they were about to leave, PW4 came to the house. He asked the Appellant for Ksh.10 to buy book covers. The Appellant gave him the money. DW2 and PW4 went to look for the book covers. They afterwards parted ways and DW2 went back home. He stated that by this time the girls had already left the Appellant's house.

This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1987] eKLR** stated this on the duty of the 1st Appellate court;

> **"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."**

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(3) 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. 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 def*ilement.***

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 fourteen (14) years of age at the time she testified before court. She was born in year 2004. Her mother (PW2) told the court that the complainant was born on 19th May 2004. Her birth notification which was produced in evidence established that she was born on the said date. The complainant was therefore thirteen (13) years of age at the time of the alleged sexual assault occurred. This evidence was not challenged by the Appellant on 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."**

The complainant testified that on the material day of 12th January 2018, she went to school and later came back home in the evening. At about 7.00 p.m., she went to the Appellant's house. He had asked her to wash his utensils. It appeared that this was a task the complainant performed with the approval of her mother. After she was done with the chores, the Appellant asked her to remove her clothes. She declined. The Appellant however undressed her and inserted his penis in her vagina. She stated that she felt pain. He warned her against telling anyone about the ordeal. The complainant did not immediately inform her mother what had happened. On 4th March 2018, she got into a fight with her sister. Her mum asked her what the problem was. That was when she told her mother how the Appellant had been sexually assaulting her. Her mother took her to the hospital for medical examination and they afterwards reported the incident to the police.

The complainant was examined by PW3 and PW5 approximately two months after the incident had occurred. The medical evidence adduced established that indeed the complainant's vagina was penetrated. PW5 stated that the complainant was examined at MSF Clinic on 4th March 2018. There were no visible injuries on her external genitalia. However, her hymen was torn with old tears that had healed. **She produced a Post Rape Care Form as well as a medical report into evidence.** PW3, who also examined the complainant, told the court that the complainant's hymen was torn with old tears at 8 and 4 o'clock. **The medical evidence of the old hymenal tears corroborated the element of penetration as narrated by the complainant.** Since the complainant was examined two months after the incident occurred, any bruises or lacerations would have obviously by then healed and the tears in her hymen could not be fresh. **The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.**

The third issue is whether the penetration was perpetrated by the Appellant. From the evidence on record, the Appellant was well known to the complainant. The complainant stated that she visited the Appellant's house on several occasions. The complainant's mother, PW2, told the court that the Appellant was her landlord. The complainant informed her mother that the Appellant had sexually assaulted her. Evidence by the complainant, PW2 and PW4 established that the complainant was at the Appellant's house on the material day of 12th January 2018. PW4, who was the complainant's step brother, testified that on the said date he was at home when his mother sent him to look for the complainant. PW4 stated that he found her at the Appellant's house together with the Appellant and his grandson, M (DW2). The Appellant sent him and DW2 to the shop to buy book covers. The Appellant was left alone in the house with the complainant. When they came back, they found the Appellant's door had been locked from the inside. They knocked. The Appellant opened the door. PW4 and the complainant left the house and went home. The complainant's evidence as well as that of PW4 clearly implicated the Appellant as the perpetrator of the sexual assault. The Appellant was placed at the scene of crime and had the opportunity to commit the offence since he was left alone with complainant in his house.

The Appellant in his defence did not deny that the complainant was at his house on the material day of the alleged sexual assault. It was his testimony that the complainant accompanied by another girl were sent to his house to borrow ointment and 10 litres of water. At about 7.00 pm, PW4 came to his house to check on the girls since they had delayed at his house. The two girls left and PW4 was left behind watching television with his grandson (DW2). PW4 informed him that he needed money to buy book covers. The Appellant gave him Ksh.10. PW4 went to the shop accompanied by DW2. He denied sexually assaulting the complainant. His version of events was corroborated by his grandson (DW2).

This court notes that the Appellant's assertion that the complainant came to his house accompanied by another girl was not brought out during cross examination of PW1, PW2 and PW4. This court is therefore of the view that the Appellant's defence was merely an afterthought and meant to exonerate himself. It did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant. The trial court also noted the demeanour of the complainant as one of a truthful and sincere witness. There was no evidence of existence of any grudge between the Appellant and the complainant or any of the prosecution witnesses. The complainant therefore stood to gain nothing by stating that the Appellant sexually assaulted her if no such incident occurred. This court is of the view that the Appellant was positively identified as the perpetrator of the sexual assault occasioned on the complainant.

The Appellant in his grounds of appeal argued that the trial court failed to properly conduct *voire dire* examination before the minors adduced evidence. The Appellant submitted that the trial court failed to ensure that the minors understood the nature of an oath before giving sworn evidence. This court has perused the trial court record. There were three minors who adduced evidence before the trial court *i.e.* PW1, PW4 and DW2 who were 14 years, 13 years and 14 years of age respectively at the time of giving

evidence. The trial magistrate conducted a *voire dire* examination before each one of them testified. After asking each one of them a series of questions, he noted in each case that they understood the duty of telling the truth and appreciated the nature of an oath and could give sworn evidence. This court also notes that the evidence PW1 and PW4 was coherent and consistent. The Appellant was given a chance to cross examine them. This ground of appeal must therefore fail.

The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. 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.**

As regards the sentence, Section 8(3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. The trial court noted that the issue of mandatory minimum sentences in the Sexual Offence Act had been outlawed by various decisions by superior courts following the Supreme Court decision in *Francis Karioko Muruatetu & another vs Republic [2017] eKLR* (See Christopher Ochieng vs R [2018] eKLR and **Jared Koita Injiri vs R [2019] eKLR). The Appellant was sentence to serve a custodial sentence of 10 years.**

This court however notes that the Appellant was 73 years old at the time of sentencing. He stated in his mitigation that he was diabetic. He was also a first offender. In the premises, this court sets aside the ten (10) years imprisonment sentence meted by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve seven (7) years imprisonment with effect from the date he was sentenced before the trial court i.e. 13th December 2019. **It is so ordered.**

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE