REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CR. APPEAL NO. 3 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 87 of 2014

of the Principal Magistrate's Court at Wang'uru D. NYABOKE –R.M.

ISSA NJOROGE MURAU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant Issa Njoroge Murau was charged with the offence of defilement contrary to **Section 8(1) and 8(2) of the Sexual Offences Act No.3/2006** before the Principal Magistrate's Court at Baricho Criminal Case No. 87/2014. It was alleged that on 9/2/2014 at [particulars withheld] Village in Mwea East District within Kirinyaga County, unlawfully and intentionally caused his penis to penetrate into the vagina of RWW a child aged Eleven years.

2. The appellant pleaded not guilty and after a full trial he was found guilty and was sentenced to imprisonment for Twenty years. The appellant was aggrieved by both the conviction and sentence and filed this appeal which initially raised Six grounds. He subsequently filed amended grounds raising the following four grounds:-

> **1. That the learned Magistrate fell into error in failing to note that there was doubt on the actual age of PW-1- and further the original source of birth documentation was not proved to the desired threshold.**
>
> **2. That the pundit Magistrate equally fell into error in failing to observe that the alleged identification by PW-1- was insufficient and PW-1- failed to divulge my identity to PW-2-.**
>
> **3. That the Learned Magistrate erred in law and facts in failing to hold that the descriptions by PW1 and PW4 pertaining the attires worn by the assailant are at variance and further there was no documentary evidence of the same produced in court.**
>
> **5. That the learned Magistrate erred in law and facts in failing to find that the medical evidence by PW-3- exonerated 1, the appellant from the blame and further the opinion of PW-3- was inconsistent with the evidence of PW1 and PW2.**

He prays that the conviction be quashed. The sentence be set aside.

3. The State opposed the appeal and filed submissions. They urge the court to find that the appeal lacks merits and dismiss it.

4. The facts of this case are that on 9/2/14 at around 7.00 Pm the complainant was sent by her mother to a nearby shop to buy salt. On the way at a place where there is Calvary Church she met a person who approached her and held her hand. She was dragged into a maize plantation when the man removed her clothes. She started screaming. The person threatened to kill her. He then removed his clothes and put his penis in her vagina and defiled her. The man left her lying there.

5 The complainant decided to go home and on the way she met with her mother and told her what happened. The next day the matter was reported to the police and the complainant was referred to hospital. The complainant identified the appellant as the person who defiled her as there was electricity light from a video shop and he was a person she knew before.

6. The complainant was examined by Doctor Denis Seneto (PW-3-) on 10/2/14. The Doctor found that as per the immunization card she was

Twelve (12) years old. The vagina was gapping. She had lacerations on the vagina canal, the hymen was broken. She had an infection and was put on PEP (Post Exposure Propilaxes) and antibiotics. He concluded that there was sexual penetration. He filled a P3 form, treatment notes, PRC form, Laboratory results – Exhibit 1-4. The appellant was arrested for a different offence and was taken to the police station as the investigations in this case were ongoing.

7. Police Constable Wilson Juma who was the Investigating Officer visited the scene and found that there was a video shop next to Calvary Church which could sufficiently light the whole compound. The offence was committed near the video shop, about 20 metres away. A skirt which the complainant was wearing was soiled and was handed over to the police, Exhibit -7-. The pant had been washed and was produced as exhibit 8(a) and biker which had not been washed, exhibit 8(b). The jacket which accused was wearing was recovered from his house, exhibit -9-.

8. The appellant did not give any defence, he opted to keep quiet which was within his right.

9. I have considered the appeal, the proceeding before the trial court and the submissions. This is a 1st appellate court and the court has jurisdiction to adjudicate on factual and legal matters. The court has a duty to re-evaluate the evidence adduced at the trial and came up with its own independent finding but bearing in mind that it never had the benefit of seeing the witnesses when they testified and leave room for that, refer to **Okeno –v- R(1972) E. A 32**.

10. I have considered the evidence and re-evaluated it. The appellant submits that there was doubt on the age of the complainant. The appellant submits that there were contradictions as to whether the complainant was Eleven or Twelve years old.

11. The age of the complainant in offences of defilement under the **Sexual Offences Act** is crucial and must be proved beyond any reasonable doubts. This is because the age determines the subsection under **Section -8- of the Act** which a person will be charged and the sentence. The prosecution must therefore prove the age of the complainant beyond any reasonable doubts. The complainant testified that on 6/5/2014 and stated that she was Eleven years old. PW-2- J. W. who is the complainant's mother also testified that the complainant was aged Eleven years.

12. PW-3- relied on Immunization Card and testified that the complainant was aged Twelve years. He produced the Immunization card as **Exhibit -5-.** The card gives the date of birth as 9/3/2002. Going by this card, on 9/2/2002 when the offence was committed, the complainant was Eleven years old. Her birthday of Twelve years falls on 9/3/14. I find that there was no contradiction on the age of the complainant. The Immunization is a valid and acceptable to prove the age of the complainant. Insistence of prove of age with a Birth certificate would denies justice to minor victims of sexual assault as not all the people in the rural areas obtain Birth Certificates. The trial Magistrate relied on the Immunization as sufficient to prove age. Under **Section 8(1)(2) of the Sexual Offences Act** it is provided:-

> ***"A person who commits an offence of defilement with a child aged Eleven years or less shall upon conviction be sentenced to imprisonment for life."***

13. There are no contradictions on the age of the complainant as the prosecution proved that at the time the offence was committed the complainant was Eleven years. The Court of Appeal in the case of **Erick Onyango Ondeng –v- Republic** stated that minor contradictions and inconsistences which are not deliberate and which do not show that the witnesses were not telling the truth are ignored.

14. The Court of Appeal cited the decision of the Court of Appeal in **Twehangane Alfred –v- Uganda Cr. Appeal No. 139/2001 (2003) UGCA 6** where it was stated:-

> ***"that it is not every contradiction that warrants rejection of evidence -.***
>
> ***With regard to contradiction in the prosecutions case the law as set out in numerous authorities is that grave contradiction unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."***

15. The complainant and her mother testified that she was Eleven years. There is no material contradiction to warrant the court to reject the evidence. The age of the complainant and the offence of defilement were proved beyond any reasonable doubts.

16. The prosecution was required to prove the age of the complainant at the time the offence was committed. This was proved by cogent evidence, exhibits which proved the date of birth and the age of the complainant beyond any reasonable doubts. The ground is without merits.

17. The appellant faults the conviction on the ground that his identification by the complainant was insufficient. The complainant testified that she knew the accused before by name Issa. At Page 10 of the record line 20 the complainant stated there was electricity and she could see the man – she stated: -

> ***"there was electricity and I could see him. It was Issa. I knew him before."*** The testimony of the complainant that there was light at the scene was corroborated by her mother PW-2- who testified that there was security light from a video shop and PW-4- the Police Officer who visited the scene and confirmed that there was a video shop and there were security light in the building. He testified that the light could sufficiently light the whole compound and it was easy to identify anything without difficulties. He drew a sketch plan **Exhibit -6-.** The sketch plan shows that the video shop was just next to the road where the appellant held the complainant before he led her to the maize. It was at 7.00 Pm in the night. The light from the video was close to the road and the complainant could not have failed to recognise the appellant.

18. The law on identification is that the court has to make inquiry as to whether the circumstances favoured a positive identification. In this case it is proved beyond any reasonable doubts that there was security light from electricity. This is not in dispute. The trial Magistrate found that the appellant was positively identified. The law requires that the court must satisfy itself that, in all circumstances it is safe to act on the testimony of a single witness. The Court of Appeal in **Charles O. Maitanyi –v- Republic (1986) KLR 198** stated:-

> ***"Although it is trite law that a fact maybe proved by the testimony of a single witness, this does not lessen the need for testing the evidence of a single witness respecting identification."***

19. This burden was discharged since it was proved that the kind of lighting at the scene favoured positive identification. Furthermore in a case involving sexual offence the provision of **Section 124 of the Evidence Act** states as follows:_

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim 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."***

20. I am satisfied that there was no possibility of mistake. The complainant identified the clothes the appellant was wearing. The next day the black jacket with hood which accused was wearing was recovered. This piece of evidence was not denied. The trial Magistrate found that the complainant was telling. Her evidence was therefore reliable and the trial Magistrate was entitled to rely on her evidence to convict.

21. The appellant has raised the issue of contradictions on the clothes of the complainant. This contradictions are minor. I have addressed the issue of contradictions at length above and I need not repeat.

22. Finally, the appellant submits that the medical evidence has exonerated him from blame and that the evidence inconsistent with that of PW-1- & 2. The appellant submits that the complainant was infected and the Doctor did not say whether it was as a result of sexual penetration. It is also submitted that there was no blood though PW-3- found that her hymen was broken. The complainant testified that the appellant defiled her. Medical evidence corroborated the evidence of the complainant that she was defiled. The trial Magistrate found that penetration was proved beyond any reasonable doubt. The finding of the trial Magistrate was based on cogent evidence. The submission by the appellant that there was no conclusive evidence of penetration was a sham. The Doctor, Denis Seneto (PW-3-) stated:- On examination

- The vaginal carnal – gaping
- Lacerations on the vagina carnal
- Hymen not intact, it was broken.
- She had infectious – pus cells found in vagina canal, yeast cells.
- H.I.V negative
- We put her on Pep and antibiotics.
- Conclusion – Sexual penetration.

23. In cross – examination he testified that she had changed and bathed. Hymen was broken so her virginity was lost. She had forceful entry. She had been defiled.

24. This evidence on penetration is water tight. These was prove of penetration beyond any reasonable doubts. The ground must fail.

25. Having evaluated the evidence in its entirety I find that there was sufficient evidence to base the conviction. The conviction was safe. The appellant had no defence. I find that the appeal is without merits and is dismissed.

Dated at Kerugoya this 8th day of May 2020.

L. W. GITARI

JUDGE