REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 198 OF 2017

NBN.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Resident Magistrate Hon. E.M. Muiru dated 30/09/2016 in Makindu PMCR No. 167 of 2016.)

JUDGMENT

1. **NBN** the Appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. He was thereafter sentenced to life imprisonment.

2. Aggrieved by the judgment he filed this appeal through Mr. Mwangangi on the following grounds:

*a) **That,** the learned Magistrate erred in both law and fact when she convicted the Appellant against the weight of evidence.*

*b) **That,** the learned Magistrate erred in both law and facts when she found that the prosecution had proved the case beyond any reasonable doubt.*

*c) **That,** the learned Magistrate erred in both law and fact when she failed to consider material inconsistencies in evidence tendered by witnesses.*

*d) **That**, the learned Magistrate erred in both law and fact when she failed to find that the documentary evidence tendered in court was vague inaccurate and was to some extent contradictory.*

e) That the learned Magistrate erred in both law and fact when she failed to consider mitigation by the Appellant.

f) That the sentence is harsh and excessive in the circumstances of the case.

3. A summary of the case before the trial court is that Pw1 (AMK) then aged seven years was at home with her younger siblings, Pw2 and another on 10th February, 2016 at 4:00 pm sleeping on the bed when one Nzioka came. He knocked and opened the door. He removed his clothes and inserted his penis in her vagina.

4. She screamed when he did that. Her two siblings did not see what happened as they were asleep. She was crying when her mother came and she informed her what Nzioka had done to her. Nzioka was not there. Her mother (Pw3) reported the matter and she was taken to the police then to hospital.

5. Pw1 identified the Appellant as the Nzioka who defiled her. She said he is a relative and a neighbor. She bled as a result of the defilement. The pant she wore on that day was white and was blood stained. She identified it in court (EXB1).

6. Pw2 (MK) then aged six years was with Pw1 on the date in question. Pw1, herself and their brother were sleeping when the Appellant came. He removed his clothes and defiled Pw1. She said she had not known the Appellant before.

7. Pw3 **MM** is Pw1's mother. It is her testimony that on 10th February, 2016 she left Pw1 and her siblings home as she went to the river. Upon her return she found Pw1 crying. On inquiry she told her she had been defiled in the house by Nzioka. She checked her private parts and saw blood there. She reported the matter to the chief who referred her to the police. Pw1 was treated (EXB2) and a P3 form (EXB3) and PRC form (EXB4) filled. In cross examination, she said she believed Pw1 who even knew the Appellant and identified him.

8. Pw4 **KN** is Pw1's father. He was not at home when the incident took place. He therefore received the report from the other children.

9. Pw5 **Dr. Muia** examined Pw1 and using the treatment notes (EXB2) PRC form (EXB4), and filled the P3 form (EXB3). His findings were as follows: -

- Inflamed outer vagina
- A little blood discharge
- Specimen contained sperms

10. Pw6 **PC Obed Kosgey** testified that he received a complaint of defilement from Pw4. Together with PC Kagenda they escorted Pw1 to Sultan Hamud district hospital for treatment and examination. She received Pw1's pant that was blood stained (EXB1). The Appellant was rearrested on 12th February 2016 by A.P officers from Mulala. He took Pw1 for age assessment and the report (EXB5) showed she was 8 – 8 ½ years old then. In cross examination, he said he did not take the Appellant for examination because it took time before he was arrested.

11. When placed on his defence the Appellant opted to remain silent.

12. When the appeal came for hearing the Appellant elected to rely on the written submissions by Mr. Mwangangi his former advocate. Mr. Mwangangi had indicated to the court that the court could still look at the submissions filed by them.

13. The Appellant submits that he should have been taken for medical examination as he was arrested on the 2nd day after the incident. He also questions his identification as no identification parade was conducted yet there are very many Nziokas.

14. It is his contention that the source of the blood on the Pw1's pant and the sperms was doubtful. He argues that Pw3's delay in taking Pw1 to hospital left a lot to be desired. Further he points out contradictions in the evidence of Pw1 and Pw2. Referring to the **article "Avi Sadeh, DSC**, **consequences of sleep loss or sleep disruption in children, sleep med clin 2(2007)513-520** he submits that Pw1, Pw2 and another being children and who were asleep could not be clear on what they actually saw. It is his submission that the prosecution case was not proved to the required standards.

15. The Respondent filed written submissions through learned counsel Mrs. Owenga opposing the appeal on the ground that the evidence adduced sufficiently linked the Appellant to the offence for which he was charged and convicted. On sentence counsel submits that the same is lawful and should not be interfered with. She referred to the Court of Appeal case of **M.M.M –vs- Rep Criminal Appeal No. 55 of 2015 (vor) where** the court while referring to the case of **Alister –vs- State of Mahara** stated that in an incest case

> ***" ..... Irrespective of the age of the victim a trial Magistrate can met upon an accused person a minimum sentence and if the circumstances so require up to life imprisonment in a case where the victim is below 18 years".***

Analysis and determination

16. This is a first appeal and this court has a duty to re-examine and re-consider the evidence on record and arrive at its own conclusion. It must bear in mind that unlike the trial court, it did not see or hear the witnesses and should therefore give room for that. In the case of **Kiilu & Another –vs- Republic (2005) IKLR 174** the Court of Appeal held thus:

> ***(1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***(2) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.***

17. Later in **David Njuguna Wairimu –vs- R (2010) eKLR** the Court of Appeal held that:

> ***"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

18. I am duly guided by the above decisions. I have considered the evidence on record, grounds of appeal, submissions and cited authorities. I find the main issue for determination to be whether the case against the Appellant was proved beyond reasonable doubt. The areas for consideration in a case of this nature are:

a) Age of the complainant.

b) Whether there was penetration of the complainant's female organ.

c) Whether the Appellant was identified as the person who caused the penetration.

(a) Age of the complainant

19. The charge sheet shows that Pw1 was aged eight years as at the time of the commission of this offence on 10th February, 2016. Pw3 and Pw4 who are Pw1's parents seemed not to know her age. Pw3 was silent on the issue but Pw4 was clear that he did not know the year she was born. Pw3 took Pw1 for the age assessment at Makindu sub-county hospital. She was assessed by Dr. Charles Macharia a dental officer and found to be aged between 8 – 8 ½ years as at 26th May 2016 (EXB5). EXB5 is an official document from the Ministry of health. And it confirms the age of Pw1. I therefore find that age was proved.

(b)Whether there was penetration of the complainant's female organ.

20. Penetration is defined under the Sexual Offences Act 2006 as:

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

The Court of Appeal in the case of **Sahali Omar –vs- R (2017) eKLR held that:**

> ***"……. penetration whether by use of fingers, penis any other gadget is still penetration as provided for under the Sexual Offences Act.***

21. Pw1 in her evidence stated that a male organ was placed in hers. She was able to demonstrate to the court which part of her body was affected. Pw2 found blood in the pant the child was wearing. The blood stained pant (EXB1) was seen by the court. The doctor's (Pw5) findings confirm that Pw1 was indeed defiled. She was therefore sexually penetrated.

c) Whether the Appellant was identified as the perpetrator

22. The Appellant has submitted on the inconsistency in the evidence by the prosecution witnesses. He wonders why he was not taken for medical examination. Pw1 and Pw2 who are sisters and minors are the eye witnesses for the prosecution. Their common evidence is that they were at their house sleeping with their younger brother. The door was not locked and they were the only ones at home. Nzioka who they identified as the Appellant knocked and opened the door and defiled Pw1.

23. In her evidence, Pw2 who is younger than Pw1 explained what she allegedly heard and saw. Her evidence is very brief. This is what she states at page 8 lines 10-15 of the Record of Appeal.

> ***"On 10/02/2016, I saw Nzioka enter our house and fell AMK down and defiled her. We were sleeping at that time. I saw Nzioka remove his clothes and did "tabia mbaya" to AMK. We were sleeping with AMK and our brother M2. Our mother was at the river. Nzioka is before court today. (minor points at the accused in the dock). I did not know the accused before; I knew he is called Nzioka nobody told me".***

24. From this statement its clear Pw2 did not know Nzioka before. At what point did she come to know him since nobody told her? About what she heard or saw, the answer is in Pw1's own evidence at page 6 lines 17-18 Record of Appeal. This is what she states:

> ***"I screamed when Nzioka did that to me. M1 and M2 did not see they were asleep."***

25. M1 is Pw2. She could therefore not have seen what she claims she did see if she was asleep as stated by Pw1. My finding is that Pw2 was asleep and did not see what she claims to have seen. She did not hear anything on this day, and she did not know the Appellant prior to this day. Somebody must have told her what to come and say. I find her evidence to be of no corroborative value in this case, save for the fact that on this afternoon the three (3) children were asleep in one room.

26. The main issue here is whether the Appellant was identified as the perpetrator in this case. The Appellant has submitted that there was no proper identification of himself among other Nziokas. He claims that there is nothing that linked him to the offence since even the arresting officers from Mulala AP post never testified to give an account of their investigation.

27. This incident is said to have occurred in broad day light at around 4:00 pm. In her evidence, Pw1 explained that she knew Nzioka before the incident and that they are related. She added that he is also a neighbor. She also stated that when her mother (Pw3) returned home she right away informed her of Nzioka's visit and what he had done to her.

28. Pw3 confirmed to the court what Pw1 had told her about the incident. When her husband (Pw4) returned home from work she informed him. It is the evidence of Pw3 and Pw4 that when the children told them it is Nzioka who had done this to Pw1 they knew who they were talking about. The reason being that he is a neighbor and a relative and Pw1 knew him before the incident. Pw3 and Pw4 with their children reported the matter to the chief who referred them to the police.

29. Pw6 after receiving the report and after recording witness statements did write to the Mulala AP post to assist in the arrest of Nzioka.

Such writing could not have been done without full particulars. The said particulars could only have been obtained from the reportee and witnesses. In such a case, there would have been no need for an identification parade as suggested by the Appellant.

30. Another issue raised by the Appellant is on medical examination and DNA. This incident occurred on 10th February, 2016 and it's obvious that by the time of his arrest 24 hours had lapsed and so the sperms found on Pw1 were no longer of any use. On the issue of a DNA test not having been done, section 36 of the Sexual Offences Act provides that:

> ***(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.***
>
> ***(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.***
>
> ***(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.***
>
> ***(4) The dangerous sexual offender's databank referred to in a subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the minister.***
>
> ***(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.***

31. In **Evans Wamalwa simiyu –vs- R (2016) eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> ***"……section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the Appellant, DNA testing was not necessary. This is because the minor (complainant) identified the Appellant who was known to her as the person who sexually violated her. The trial Magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the Appellant who violated her. Moreover, the trial court found material corroboration of the complainant's evidence in the evidence of doctor Mayande a medical doctor (Pw4) who examined the and confirmed that vaginal swab taken was from her and had spermatozoa …".***

32. Further in **Anil –vs- R (2012) eKLR** the court expressed the view that:

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

This was further affirmed in the case of **Kassim Ali –vs- R Criminal Appeal No. 84 of 2005 (Mombasa)** where the court stated:

> ***"…. [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."***

My finding is that the failure to carry out a DNA test was not fatal to the prosecution case.

33. The Appellant has also raised issue with Pw1's blood stained pant (EXB1). He submits that the pant (EXB1) cannot be the one she was wearing because it had been removed before the alleged act. That she had removed her clothes including her pant. The record nowhere mentions removal of Pw1's clothes including her pant.

34. Pw1 states that the Appellant removed his clothes and defiled her. Even if her clothes were removed there is nothing that stopped her from wearing them again. That is how the pant got stained considering that Pw3 upon examining Pw1's private parts saw blood. Pw5 the doctor also found blood in Pw1's vagina.

35. Can Pw1's evidence be relied on to confirm the conviction herein? The Appellant referred to an article by Avi Sadeh DSC (supra) suggesting that sleep inhibited Pw1's recall of things. It must be noted that Pw1 then aged eight years was a minor. The person who defiled her was a full grown adult who must have forced himself inside of her causing her untold pain and anguish. Even if she had been asleep that action in itself woke her up. The contents of the said article are therefore not applicable here.

36. Section 124 of the Evidence Act provides

> ***"Notwithstanding the provisions of sections 19 of the Oaths and Statutory Declarations Act, 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."

37. The learned trial Magistrate who saw and heard Pw1 testify found her to be a credible witness who remained consistent throughout her testimony. She was not shaken in cross examination by the Appellant. She made this observation in compliance with the proviso to section 124 of the Evidence Act.

38. Upon considering all the evidence and the arguments raised by the Appellant, I am convinced that Pw1's evidence was unshaken. There was no reason at all that would have made her lie against Nzioka the Appellant whom she identified. She even told the court in her evidence in chief that there was no grudge between her family and that of the Appellant.

39. My finding is that the conviction is well founded and I confirm it.

40. In his grounds of appeal, he says the sentence is harsh and excessive and his mitigation was not considered. This is what he said in mitigation;

"I beg for forgiveness though I did not commit the offence."

The court thereafter sentenced him to life imprisonment after considering his mitigation. He was sentenced on 30th August, 2016, when life imprisonment was the mandatory minimum sentence for such an offence. Due to a change in the jurisprudence on mandatory minimum sentences courtesy of the Supreme court decision in **Francis Karioko Muruatetu and Anor –vs- Republic (2017) eKLR** sentencing courts now have discretion in sentencing upon hearing and considering mitigation where the sentence is a mandatory minimum one.

41. Having considered the Appellant's mitigation, circumstances of the case, age of the complainant among others, I will reduce the sentence. The appeal therefore succeeds on sentence **only**.

42. I therefore make the following orders: -

a) Conviction is confirmed

b) Life imprisonment sentence is set aside and substituted with a sentence of twenty-five (25) years imprisonment from date of conviction.

Orders accordingly.

Delivered, signed & dated this 8th day of May 2020, in open court at Makueni.

……

H. I. Ong'udi

Judge