REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MERU

CRIMINAL APPEAL NO.50 OF 2019

(Being and appeal from the judgement of Hon. H.N. Ndung'u (Ms)Chief

Magistrate delivered on 12th March 2019 in Meru CM Court S.O Case No.15 of 2018)

PMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act no.3 of 2006 and convicted to serve 20 years imprisonment.

2. The Appellant was aggrieved by the conviction and sentence and he brought the appeal herein on 13th March 2019 seeking that his sentence be set aside on the grounds that:

a. The learned trial Magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent contradictory and conflicting testimonies

b. That the learned trial Magistrate erred in both law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt

c. That the learned trial Magistrate erred in both law and fact by failing to note that the prosecution did not call any independent witness to support the complainant's allegations

d. That the learned trial Magistrate erred in both law and fact in failing to note that this is a frame up case since he has a grudge with PW2

e. That the learned trial Magistrate erred in both law and fact by failing to note that the doctor's report does not support the allegations adduced by the witnesses.

f. That the learned trial Magistrate erred in both law and fact by rejecting the Appellant's defence without giving cogent reasons.

g. The Appellant asked the court to furnish him with the proceedings and judgement of the trial court to enable him draft more cogent grounds of the appeal.

3. In amended supplementary grounds of appeal filed together with submissions, the Appellant stated that:

a. The trial Magistrate failed to observe that the mandatory sentence of 20 years failed to conform to the tenet of fair trial that accrues to the Appellant under Article 25(c) of the Constitution.

b. The other ground he raised was that the sentence of 20 years was passed without considering the facts before the court and that the prosecution did not prove their case to the required standard as required by the law and failed to call vital witnesses.

c. He also argued that the trial Magistrate failed to note that the investigations were shoddy and that the medical report did not link him to the said offence.

4. Directions were taken on 25th November 2019 that the appeal herein will be canvassed by way of written submissions.

5. In his submission the Appellant argued that the penalties under the Sexual Offences Act should not be interpreted as minimum as was held in the case of **David Kinyua Vs Republic** as well as **Evans Wanjala Wanyonyi Vs Republic** and **Gideon Majau Gitire alias Kombo in Meru HCCR Appeal No.131 of 2018 .**He argued that the sentence of 20 years did not consider the facts adduced before the court and that the investigating officer did not visit the scene to recover vital exhibits to ensure justice is done to both parties. He said that the clothes that the complainant alleged she was forced to throw in the toilet should have been retrieved by the Investigating Officer.

6. The Appellant claimed that since the complainant described the house where the offence was committed as one room divided by curtains, the step mother to the complainant who lived with them was a vital witness who should have been called to shed light on what transpired on the particular night.

7. He said that another witness who ought to have been called was EN but she did not testify. He relied on the holding of **JMN Vs Republic Criminal Appeal No 139,140 and 141 at Embu High Court** in which Justice Ongudi held that failure by the prosecution to call vital witnesses mentioned in various trial records leaves no doubt that the Prosecution did not prove this case beyond reasonable doubt.

8. The Appellant submitted that the evidence of PW2 was inconsistent with that of the complainant and that this raised doubt in the course of the trial which should be resolved in his favour.

9. The Appellant further argued that the age of the complainant was not established and it was unlawful to send him to serve 20 years' imprisonment without proving the age of the complainant which is a mandatory requirement.

10. The Appellant further submitted that the medical expert PW4 did not point to him as the perpetrator of the said defilement and the fact that the absence of hymen is not proof of a charge of defilement.

11. The Respondents on the other hand submitted that the age of the complainant was proved as 13 years from her testimony and from the medical report and the Appellant did not dispute that age.

12. It was also submitted that the complainant , the daughter of the Appellant was left by her mother in custody of the Appellant who forcefully defiled her one night and he then threatened her in the morning and forced her to throw the torn clothes in the latrine,, that the Appellant subsequently defiled the complainant severally telling her that the act of defilement would make her intelligent and that if she told anyone she would be a fool.

13. It was submitted that the complainant reported to the chief on 26th March 2018 that the Appellant had defiled her on the night of 25th March 2018 and when the chief failed to take action she went to the church where PW2 a pastor and his family were residing and that is when PW2 informed the police and action was taken.

14. The Prosecution submitted that upon examination of the complainant by PW5, it was found that her hymen had been broken. A p3 form to that effect was filed and therefore the issue of penetration was proved beyond reasonable doubt.

15. The Prosecution submitted further that the complainant was the daughter of the Appellant who testified that she had been defiled severally by the Appellant and that there was no margin of error as to the identity of the assailant as he was very well known to the victim.

16. The court was therefore urged by the Prosecution to dismiss the appeal in its entirety and uphold the conviction and the sentence.

17. This being the first appellant court its duty as was stated in the case of **Kiilu & Another vs. Republic [2005]1 KLR 174,** by the Court of Appeal is:

> **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; 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.**

18. The brief history of this matter is that the complainant was left in custody of the Appellant when the mother left and she testified that the Appellant started abusing her sexually prior and more specifically in the month of November 2016 when he returned from Isiolo and found her at home alone and defiled her and sodomised her. That the following morning he forced her to throw her torn clothes into the toilet and he asked her to accompany him to Isiolo where he had left the step mother of the complainant one JK. She said that before she left for Isiolo she reported to EN the mother of her step mother but she did not take any action.

19. That on 25th March 2018 the Appellant attempted to defile the complainant and gave her Ksh.500 telling her to go buy panties and when the complainant said she would report to her step mother the Appellant threatened to slaughter her. The following day on 26th March 2018 she reported to the Chief that the Appellant had defiled her on the night of 25th March 2018 but the Chief did not take action and she reported to the local Pastor of her church PW2.PW2 said that when the complainant went to his house in the evening at 7.00 p.m she was crying and she wanted to go and become a street child as her father had defiled her and had threatened her. He said he had known the complainant since

she was 3 years. She had been attending his church and reported that she had problems that she did not specify until in 2018 when she went to the house at night and reports sexual abuse.PW2 took action and reported to the AP camp and the Appellant was arrested.

20. PW3 testified that that the complainant had been defiling her since she was 9 years of age and they effected arrest of the Appellant.

21. The complainant also informed PW4 who was in company of PW3 of the defilement committed by the Appellant her father

22. When PW5 examined the complainant he said the history given was that the chid had been assaulted sexually over a long period of time by her father the Appellant herein. He said the child was scared during examination and that they found her hymen was broken and given the history of habitual defilement it was concluded that the complainant had been defiled.

23. PC Mark Bundi PW6 of Subuiga Police Station rearrested the Apellant from PW3 and PW4 and escorted him to Subuiga Police Station on allegations of repeated defilement of his 13-year-old daughter. He testified that on interrogation of the complainant, she said that the Appellant had defiled her first on November 2017 on a date she could not recall and that the last time he defiled her was on 25th March 2018.He said that the complainant had reported to her step mother and grandmother but they did not take any action. The Appellant in his sworn statement said that he did not defile his daughter and she escaped when he said he would beat her.

24. From the evidence on record in the trial court and the judgement of the trial Magistrate as well as the grounds of appeal and the submissions by the Appellant and the Respondent this court is to determine whether the grounds of appeal herein are merited.

25. On the issue of the age of the complainant it is shown in the charge sheet that she was aged 13 years by the time the Appellant was brought to court and the medical examination report filled upon her examination also indicates that she was aged 13 years. Although her age was not medically assessed, the trial Magistrate addressed her mind to the issue by relying in the authority of the High Court in Criminal Appeal No.129 of 2009 where Lady Justice Mwilu as she was then being held that other modes of proof of age are accurate and can be used.

26. The trial Magistrate confirms that she saw the complainant in court and she was able to assess and believe that she was aged 13 years. The Appellant who is the father of the complainant and who is presumed to know the age of his child did not controvert the fact that the complainant was 13 years.

27. The charge against the Appellant was therefore properly framed under Section 8(1) and 8(3) of the Sexual Offences Act.

28. The Appellant argued that there were vital witnesses whom the Prosecution failed to call mainly JK and EN to corroborate the claims that he habitually defiled his daughter and therefore the doubt raised should be resolved in his favour.PW1 testified that she had reported to her step mother but she did not take any action. That on 25th March 2018 when the Appellant defiled her the step mother was actually in the house and the following day when she reported to the Chief and the Chief failed to take action she decided to go to the Pastor of her local church PW2.She also said that in 2017 when the Appellant came from Isiolo and defiled her she reported to her grandmother (the mother of JK) but she also did not take action. The witnesses that the Appellant claimed should have been called were therefore not interested in the welfare of the complainant and the prosecution could not have been forced to bring witnesses who had no interest in its case.

29. The complainant had been defiled habitually over a long period of time prior to November 2018 and specifically on 25th March 2018.There are contradictions as to dates when the defilements occurred but the prosecution witnesses have explained that the complainant was abused over a long span of time.

30. The Appellant also argued that the broken hymen of the complainant was not sufficient to prove that she had been defiled and relied on the case of **P.K W Vs Republic [2012] Eklr** but the fact of defilement of the complainant has been supported by her evidence that the Appellant had abused her over a long period of time and when she finally resolved to go and live in the streets and went to PW2 while crying at night, PW2 involved the police and she gave the history of habitual defilement by her biological father. The Appellant in his defence said that the child escaped when he told her he would beat her. He did not say the reason why he wanted to beat the child but the child told PW2 that she escaped because the Appellant had defiled her and was threatening her. It is not therefore merely that the complainant's hymen was broken. She reported to her step-mother, to her grandmother and to the chief that her biological father had been defiling her but they did not take any action to protect her from the abusive father from when she was of tender age of 9 years until she turned 13 years when she was able to speak up for herself.

31. The trial Magistrate observed that although there was no independent witness to the offence the complainant gave a sworn testimony and was cross examined by the Appellant and according to the Magistrate assessed her to be truthful and honest.

32. Whether the imprisonment of 20 years was excessive Section 8(3) of the Sexual Offences Act provides that:

> **A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

33. I have looked at the wording of the trial Magistrate while sentencing the Appellant and noted that she sentenced the Appellant to serve 20 years' imprisonment for the reason that the offence is grave and not that it is the minimum sentence.

34. The upshot of the re-evaluation of the evidence in the trial court and the judgement of the trial Magistrate is that the appeal lacks merit and the same is dismissed.

HON.A. ONGINJO

JUDGE

JUDGEMENT DATED AND DELIVERED AT MERU VIA SKYPE THIS 21ST DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONGINJO

JUDGE