REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 170 OF 2019

JOHN MUTETHIA MIRITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of the Hon. G. Sogomo PM. made on 24/9/2019 in Tigania PM SO 22 of 2018)

J U D G M E N T

1. **JOHN MUTETHIA MIRITI ("the appellant"),** was charged with the offence of defilement contrary to ***section 8(1) as read with sub-section (2) of the Sexual Offences Act, No. 3 of 2006.*** It was alleged that on 22/7/2018 at about 18hrs at [Particulars Withheld], Mikinduri East Location, in Tigania East Location (sic) within Meru County, the appellant intentionally caused his penis to penetrate the vagina of VK, a child aged 9 years old.

2. There was an alternative charge of committing an indecent act with a child contrary to ***section 11(1) of the Sexual Offences Act, No. 3 of 2006.*** The allegations were that on the same date and time at the same [Particulars Withheld] in Tigania East sub county within Meru County, the appellant intentionally touched and rubbed his penis against the vagina of VK a child aged 9 years.

3. The appellant denied the charge and the prosecution paraded 4 witnesses in support of its case. After trial, the appellant was found guilty and sentenced to 30 years imprisonment. It is against that conviction and sentence that the appellant has appealed to this Court raising the following 5 grounds: -

a) That the trial Court erred in convicting the appellant yet the age of the complainant was not proved to the required standard.

b) That the trial Court erred in convicting the appellant yet penetration had not been proved to the required standard.

c) The trial Court erred in finding the appellant of being of doubtful character for choosing to remain silent.

d) The trial Court erred in finding that the appellant had been positively identified as the perpetrator without interrogating whether the circumstances were favourable.

e) The trial Court erred in failing to warn itself of the danger of convicting the appellant on the identification of a single witness.

4. The parties filed and argued the appeal vide written submissions which the Court has carefully considered.

5. This being a first appeal, the Court is enjoined to review and re-evaluate the evidence afresh with a view to making its own independent findings and conclusions. In so doing, the Court must give regard to the fact that the trial Court had the advantage of seeing the witnesses testify. **See Ekeno v. Republic [1972] EA 32.**

6. The prosecution case was that on the material day at about 6.00pm, **Pw1 (the Complainant)** was sent by her mother **PM (Pw2)** to go to buy milk from a neighbour's homestead. On the way back, she met the accused who pulled her to his house and defiled her. He then escorted her home whereby she told **Pw2** about the incident.

7. **Pw2** took the complainant to Mikinduri Police Station where they were referred to **Miathene Hospital** the following day. **Geoffrey Muthomi Murithi (Pw4)** examined the complainant and confirmed that the labia majora and minora were intact but the hymen was torn. He concluded that the complainant had been defiled.

8. **APC Gladys Njoki (Pw3)** investigated the case. She recalled the complainant coming to the station accompanied with the mother on 22/3/2018 where she made a report of being defiled. She referred them to Miathene sub-county Hospital. After the P3 form was filled, it was

confirmed that the complainant had been defiled. She then charged the appellant.

9. The first ground was that the trial Court erred in convicting the appellant yet the age of the complainant was not proved to the required standard. **Mr. Kaberia, Learned Counsel** for the appellant submitted that the only evidence of the age of the victim was that of the complainant herself and **Pw4** who produced a P3 form which showed that the complainant was 9 years. Counsel submitted that the age should have been proved by medical evidence which was not. He cited the cases of **Denis Abuya v. R [2010] Eklr** and **Alfayo Gombe Okello v. R [2010] Eklr** in support of those submissions.

10. On her part, **Brenda Nandwa, Learned Prosecution Counsel** submitted that the evidence of the complainant herself that she was 10 years and the P3 form was sufficient proof. She relied on the cases of **Richard Wahome Chege v. R [2014] Eklr**, **Jon Gordon Warner v. R [2010] Eklr** and **Joseph Kieti Seet v. R [2014] eKLR** in support of her submission that the age of a complainant may be proved by way of medical evidence or by any other way.

11. The evidence of the age of the complainant in this case as correctly submitted by **Mr. Kaberia** was that of the complainant and the P3 form that was produced. The trial Court relied on the Ugandan Court of Appeal Case of **Francis Omuroni v. Uganda CA Cr. A. No 2 of 2000** and held that the age of the complainant had been proved. In that case, the Ugandan Court of Appeal held: -

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …".***

12. In her testimony, the complainant stated: -

> ***"I am a class 4 pupil in academy. I am 10 years old my 10th anniversary having been last Sunday. …".***

13. Then **Pw4** referred to the P3 form as evidence of the age of the complainant. In the cases relied on by the appellant of **Denis Abuya v. R [2010] Eklr** and **Alfayo Gombe Okello v. R [2010] Eklr,** the Court of Appeal was of the view that in order to prove age beyond reasonable doubt, more was required than mere reference to the age noted in the P3 form. However, the said cases were decided on the basis of their own peculiar circumstances. One concerned the use of the term *'estimated age'* and the other the term *'below the age of sixteen'*.

14. However, in the cases referred to by **Ms. Nandwa** of **Richard Wahome Chege v. R [2014] Eklr**, **Jon Gordon Warner v. R [2010] Eklr** and **Joseph Kieti Seet v. R [2014] Eklr,** the courts accepted the evidence of age vide the P3 form

15. I note that the mother of the complainant who testified and who should have been in a better position to know the actual age of the complainant did not testify on that aspect. However, the complainant seems to have been very clear of what her age was. When she testified in court, she had just celebrated her 10th anniversary. The trial Court found her to be possessed of sufficient intellect.

16. In this regard, the P3 form only corroborated her evidence as to her age. The cases of that were relied on by the appellant are not applicable. They were on borderline as opposed to the present case where the complainant was obviously less than 11 years old. Accordingly, that ground fails.

17. The second ground was that the trial Court erred in convicting the appellant yet penetration had not been proved beyond reasonable doubt and for convicting the appellant on the evidence of a single identifying witness. It was submitted for the appellant that the medical evidence was inconclusive. That **Pw4** neither told the Court the basis of his conclusion nor that the tear in the hymen was fresh. The case of **PKW v. R [2012] Eklr** was cited in reliance of that submission.

18. It was submitted for the prosecution that the complainant gave graphic description of how she was defiled. That the trial Court had believed her. That **Pw4** had sufficiently corroborated her testimony. The case of **P.M.M v. R [2014] Eklr** was cited in support of that submission.

19. Penetration is defined in ***section 2 of the Sexual Offences Act*** as the insertion of the genital organs of a person into the genital organs of another. The complainant testified that the appellant pulled her forcefully to his house, removed her dress and under pant and removed his clothes. He then put his urinating thing into her urinating thing.

20. The P3 form that was produced showed that; the complainant was examined on 23/7/2018. Her clothing had no blood stains, Labia Majora and Minora were intact, there was no spermatozoa but the hymen was torn. The **PRC (Post Rape Care Form)** showed that, she was examined at 9.00am of 23/7/2018. She had not changed her clothes at the time and that the clothes had no blood stains. The hymen was torn but there were no lacerations.

21. When **Pw4** testified, he told the Court that he had a P3 form which he had filled. That the labia majora and minora were intact but the hymen torn. That he formed the opinion that the complainant had been defiled.

22. The Court notes that, **Pw4** did not tell the trial Court that he is the one who examined the complainant. In **Section C 2(b)** of the P3 Form, he only indicated that the Majora and Minora were intact and the hymen broken. He concluded that there was defilement. He neither stated therein nor in **Section C (6)** the basis for his said conclusion. **Section c (6)** is ordinarily set out for the doctors explained for the basis of his conclusion. This he did not.

23. In **PKW v. R [2012] Eklr,** the Court of Appeal held: -

"In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?

Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. The scientific and medical evidence has proved that some girls are not even born with the hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury or medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of <u>The Queen vs. Manual Vincent Quintanilla, 1999 ABQB 769".</u>

24. In the present case, although the Clinician **(Pw4)** did not tell the Court the basis for his opinion that the complainant had been defiled, he must have based his opinion on the fact that the hymen was torn. He however, did not state both in the **PRC Form** or **P3 Form** or in his testimony, whether the tear of the hymen was fresh. Since all other indicators ie. absence of blood stains in the clothing, absence of lacerations in the vagina and with the majora and minora being intact, the torn hymen, cannot be held to be the basis for holding that there had been penetration.

25. This Court is aware of the case of **<u>P.M.M. v. R (supra)</u>** and the provisions of ***section 124 of the Evidence Act, Cap 80*** that the Court can convict on the evidence of the complainant alone if the Court is convinced that the complainant is telling the truth. I note that the trial Court observed that it had observed the demeanour of the prosecution witnesses, the complainant included, and was impressed that they were both candid and forthright.

26. The foregoing notwithstanding, the testimony of the complainant as to penetration was scanty. She is recorded as stating: -

"I told MUTETHIA to leave me alone but he then pulled by force (sic) into his nearby house. He requested that we do bad manners but I told him that I did not want. MUTETHIA removed my dress and under pant by force and he also removed his clothes. He put his urinating thing into my urinating thing before he escorted me up to the background of home whereafter he went back".

27. This Court is not able to conclude from the foregoing evidence whether the perpetrator did actually insert his genital organs into the complainant's genital organs. The complainant would have probably stated that she felt pain or that, notwithstanding her having refused to do bad manners, the perpetrator did go ahead and did bad manners to her after removing her clothing and his.

28. Accordingly, this Court finds it unsafe to conclude that the act of penetration had not been proved to the required standard.

29.The third ground of appeal was that, the trial Court erred in finding that the appellant had been positively identified as the perpetrator without interrogating whether the circumstances were favourable. It was submitted for the appellant that the perpetrator had introduced himself to her as **Mutwiri.** However, her aunt one **K** gave her the actual name of the perpetrator as **Muteithia.**

30. It was further submitted that apart from the complainant, there was no other witness who was present at the time. That the incident having happened at night, the circumstances were not conducive for positive identification of the appellant. The cases of **<u>Wamunga v. R [1989] KLR 424</u>** and **<u>Michael Kerue Wanjiru v. R [2019] Eklr,</u>** were relied on in support of those submissions.

31. For the prosecution, it was submitted that the appellant was well known to the complainant. That she had been seeing him for 3 years when going to fetch milk. That although the incident occurred at about 7 pm, there was sufficient moonlight that enabled the complainant to recognise the appellant.

32. The law regarding identification and recognition is well settled. In **<u>Nzaro v. R [1991] KAR 212,</u>** the Court of Appeal held that, evidence of identification/recognition at night must be watertight to justify or sustain a conviction.

33. In **<u>Wamunga v. R [1989] KLR 426,</u>** the Court of Appeal held as follows: -

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of conviction".

34. Then there is the decision in **<u>R V. Turnbull & Others [1976] 3 ALL ER 549</u>** wherein it was stated: -

"The Judge should direct the jury to examine the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? At what light? Was the observation impeded in any way …? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long time had elapsed between the original observation and the subsequent identification to the police? …

Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes of recognition of close relatives and friends are sometimes made".

35. In the present case, the incident is alleged to have occurred at about 7.00pm. The identifying witness was only the complainant. She told the Court that there was moonlight. She did not explain the intensity of the light from the moon that enabled her to recognize the appellant. It was not established whether it was full moon, half-moon or otherwise.

36. The prosecution submitted that the appellant was known to the appellant for 3 years prior to the incident. The complainant's testimony was contrary to that assertion. She told the Court that she used to occasionally see him as she went to fetch milk. That she had seen him occasionally for a few months before the incident. She further told the Court that the appellant had introduced himself to her as **Mutwiri** and that it is only her Aunt who clarified to her that his real name was **Muteithia.**

37. From the complainant's testimony, it was not clear what occasionally seeing the appellant meant. How many times was it? Was it at close range? Had the two spoken to each other before the incident for deep knowledge of the appellant? If she had been seeing him, did she actually know his name? This she did not as she testified that the appellant told her that his name was **Mutwiri.**

38. The trial Court does not seem to have dealt with the fact that the complainant stated that the person who accosted her told her that he was known as **Mutwiri.** The appellant's name, **Mutethia** was given to her by her Aunt **K.** When did **K**inform the complainant the appellant's name and in what circumstances? Why was **K** not called to testify?

39. The incident occurred at night. When the complainant reached home, she informed her mother of the incident. The mother told the Court that it is **John Mutethia** who had defiled her. Then at what stage did **K** disclose to the complainant that the person who had defiled her was not **Mutwiri** but **John Mutethia** for the complainant to have told the mother that it was **John Mutethia?**

40. In the circumstances of this case, the complainant having given a different name than that of the appellant, it would have been safe if an identification parade would have been conducted. In this regard, this Court is not satisfied that the identity of the appellant as the one who committed the act was proved to the required standard. That ground succeeds.

41. The other ground was that the trial Court erred in finding the appellant of being of doubtful character for choosing to remain silent. The trial Court stated that the prosecution evidence was cogent, fluid, candid and forthright. That it could not be compared to the appellant who remained mute. In this Court's view, that was prejudicial to the appellant. It was his right to remain quiet or give a defence. It was not for him to prove anything. It was for the prosecution to prove every ingredient to the required standard. In remaining silent, it did not mean that the case had been proved.

42. The totality of the foregoing is that, this Court finds the conviction to be unsafe and cannot stand. Accordingly, the appeal on both the conviction and sentence has merit and is allowed. The conviction is hereby quashed and the sentence set aside. The appellant is to be forthwith set at liberty unless otherwise lawfully held.

DATED and DELIVERED at Meru this 3rd day of June, 2020.

A. MABEYA

JUDGE