REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.14 OF 2019

AG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and Sentence of Hon. E.K. TOO Principal Magistrate Moyale in Cr. Case (SOA)No.12 of 2018)

J U D G M E N T

The appellant was charged with the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence are that the appellant on the 13th day of September, 2018 at Anona location in Sololo Sub-County within Marsabit County, intentionally caused his penis to penetrate the vagina of BW a child aged 9 years.

The trial Court convicted the appellant and sentenced him to life imprisonment. The grounds of appeal are:-

1. That the appellant pleaded not guilty to all charges.

2. That the learned trial Magistrate erred in law and fact by failing to note that the appellant was accused of false allegation and meant to spoil his reputation.

3. That the learned trial Magistrate erred in both law and fact when he failed to note that the appellant expressed himself to the court that he was assaulted by people well known to him and Police officers. There was no action taken against them to that effect.

4. That the learned trial Magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.

5. That the learned trial Magistrate erred in both law and fact by failing to note that the investigators of the this case failed to investigate the case to the standard required by law.

6. ***That the learned trial Magistrate erred in matters of law and facts by failing to note tha*****t*** ***the appellant was not accorded a fair trial from Police station up to Court****.*

7. That the learned trial Magistrate erred in both law and fact by failing to note that the interpreter misinterpreting words of the complainant whereby the learned magistrate stressed the words.

8. That the learned trial Magistrate erred in both law and fact by considering doctors evidence that he only received the appellant's health status profile from Sololo hospital, but never did medical examination to that effect, kindly noting he cannot truly tell whether the appellant defiled the complainant as alleged or whether he his positive or negative as he claimed.

9. That the learned trial Magistrate failed to consider the appellant's mitigation

10. That the learned trial Magistrate erred in matters of law and fact by failing to consider the appellant's defence.

11. That the learned trial Magistrate erred in matters of law and fact by failing to note that the appellant was intoxicated during

the act.

12. That the learned trial Magistrate erred in both matters of law and fact by failing to judiciously evaluate the witnesses testimonies and draw an inference that it was a frame up.

13. That the learned trial Magistrate erred in both matters of law and fact by failing to invoke Muruatetu case during sentencing in this instant matter and prefer a definite sentence to the appellant.

14. That may this Court be duty bound to by our constitution and review the sentence.

15. That the learned trial magistrate erred in matters of law and fact by failing to note that the appellant was intoxicated during the act.

16. That the learned trial magistrate erred in both matters of law and fact by failing to judiciously evaluate the witnesses testimonies and draw an inference that it was a frame up.

17. That the learned trial magistrate erred in both matters of law and fact by failing to invoke Muruatetu case during sentencing in this instant matter and prefer a definite sentence to the appellant.

The appellant relied on his grounds of appeal and written submissions. He submitted that he was denied bond by the trial Court. Although the complainant testified that she was 9 years old, she also told the court that she was born in 2004 meaning that she was 14 years old. It is further submitted that the prosecution evidence is contradictory. Whereas some witnesses testified that the appellant threatened the victim with a stick and stones, others referred to a stick and wire. Other witnesses referred to a knife. The medical evidence is suspicious. The incident occurred on 13th September at 5.00pm at Sololo. The Medical Doctor was based in Moyale. There is no indication when the complainant was referred to Moyale and later Nairobi. The time of examination at Moyale is not given. It is not clear at what time the complainant was taken to the Police station. The investigation officer testified that she was taken at 6.40pm but on cross-examination testified that she was taken at 12.00pm.

The appellant further maintain that he was arrested at Walda while carrying on his normal duties. Two different hospital notes were produced without explanation. The doctor from Sololo did not testify. The appellant is married with three children and is a musician. He composes election songs. It is the appellant's position that the case was not proved to the required standard.

In his written submissions the appellant maintain that the trial Court failed to take into account the fact that he was intoxicated at the time the offence was committed. Section 13(2) of the Penal Code provides for the defence of intoxication. It is submitted that PW2 testified that the appellant was drunk. Further, the medical officer testified that he examined the appellant and found him to be HIV positive. The appellant's mitigation including his HIV status was not taken into account. The appellant is a first offender. The appellant relies on the case of **FRANCIS KERIAKO MURUATETU & ANOTHER –V- REPUBLIC (2017) eKLR** where the Supreme Court states as follows:-

> **"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the court of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenents of fair trial that accrue to the accused person under Article 25 of the Constitution, an absolute right ……..having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the Penal Code, it becomes clear that the section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically Articles 25(c) 27, 28, 48 and 50(1) and 2(9)."**

Mr. Ochieng, learned Prosecution counsel opposed the appeal. Counsel submitted that all the ingredients of defilement were established. A birth certificate was produced and the complainant's age was established. PW1, PW2 and PW3 are eye witness and therefore the appellant was properly identified. The incident occurred during the day. A P3 form was produced.

This being a first appeal this Court is required to evaluate the evidence afresh before drawing its own conclusion. **PW1** was the complainant. She testified that she was 9 years old and that she was born in 2004. On 13.09.2018 she went to school and later went to attend to their cows. She was with Q. The appellant went there and told her that he knew her brother. He held a knife and defiled her. He knew him very well by the name Toto. The appellant held her neck and threw her on the ground. He removed her pants, pulled up her dress and defiled her. She bled and felt pain. She screamed and people went to the scene. The appellant ran away. She was taken to the Police station and later to hospital. Her clothes were blood stained.

It is PW1's further evidence that she used to see the appellant during campaigns. The appellant was arrested at Walda. G (PW3) saw her screaming. Her sister(PW2) also screamed. PW1 told her father that it was the appellant who had defiled her.

PW2 QW is PW1's sister. She was a class three (3) pupil. On 13.9.2018 at 5.00pm they were grazing cattle. The appellant approached them and asked who was the eldest among the two. PW1 told him that PW2 was the first born. The appellant called her but she ran away. She told PW1 to run away. The appellant took PW1 to the bush. She did not witness the actual defilement incident. She screamed and people went to the scene. She did not know the appellant. She had in the past seen the appellant campaigning for one Roba. PW2 also testified that she saw the appellant assaulting G (PW2) with a wire and stones. She followed the appellant to the bush. the appellant had taken alcohol.

PW3 GK testified that on 13.9.2018 at 5.30pm he was herding goats. He was with PW1 and PW2. The appellant went there and started asking PW1 and PW2 questions. He asked the appellant not to interrupt the little kids. The appellant attacked him with a stick and threw

some stones at him. PW3 went to report to the appellant's mother who was close by. The appellant took PW1 while PW2 ran away. People went to the scene. The appellant took PW1 to the bush and when people saw him he left PW1 and ran away. He found pW1 unconscious and bleeding. The appellant was later found at Walda. It is PW3's evidence that the appellant was his classmate in class 4. The appellant's mother was also herding goats.

PW4 Dr. Ibrahim Mohamed is a medical Doctor. He examined PW1 on 13.9.2018. PW1 was 9 years old. Her clothes were soaked in blood. PW1 had bruises on the back and right eye. PW1 had lacerations on the labia majora and was bleeding from the vagina. She had penis tear towards the anus. PW4 examined the appellant and found him to be HIV positive. The appellant had been examined at Sololo hospital first. PW1 was found to be HIV negative.

PW5 PC SAMMY YAA was based at Sololo Police Station. He investigated the case. PW1 was taken to the station at 6.40pm and was taken to Sololo Mission hospital where she was admitted. The appellant was arrested by members of the public at Walda. The following day and was rescued by Kenya Police Reserve (KPR) and taken to Walda Police Post. He was later taken to Sololo Police station. Members of public wanted to kill the appellant. The appellant was taken to Moyale Police station where he was admitted as he had been assaulted by members of the public. PW1 was 9 years old. The appellant was later charged with the offence.

The appellant tendered unsworn evidence. He testified that he was a barber at Sololo. He is also a musician. On 14.09.2018 at about 1.00pm he was at Walda having gone there to shoot a video for his music. He saw many motor cyclist approaching him. He was assaulted by member of public. A KPR officer pointed a gun at him and told him that he had defiled someone. He lost consciousness and later found himself in hospital. He was taken to Walda Police post. Members of public wanted to burn the Police post. He was taken to Sololo Police Station and later Moyale Police station. He was taken to Moyale General hospital where he was admitted for one day.

It is the appellant's evidence that he was framed. He has a wife and three children. He had not gone to Anona since 2005. He was beaten up due to campaign music. Due to threats he had moved to Butiye in Moyale.

The issues for determination is whether PW1 was defiled and if so whether it is the appellant who defiled her. PW1 and PW2 were grazing their cattle on 13.9.2018 at about 5.00pm. PW3 was also at the grazing field. According to PW1, the appellant held her by the neck, pushed her to the ground, undressed her and then defiled her. PW2 testified that the appellant called her and she ran away. PW2 did not witness the appellant defiling PW1. PW3 saw the appellant take away PW1. It is PW3's evidence that they found PW1 unconscious and bleeding. The medical evidence of PW4 is that PW1 was bleeding from her vagina. PW1 also had tear towards the anus which would have been caused by a penis. Her hymen was broken.

From the evidence of PW1, PW2, PW3 and PW4, I do find that the prosecution did establish that PW1 was indeed defiled. The medial evidence does corroborate PW1's contention that she was defiled. PW1 was found unconscious bleeding. Before the incident PW1 was with PW2 attending to their cattle. I am satisfied that there was a defilement incident which occurred on the 13th of September, 2018.

The next issue is whether the prosecution's contention that it is the appellant who defiled the complainant was proved. According to PW1 she knew the appellant as "**Toto**" as he used to see him during the campaigns. I believe these are the 2017 campaigns. The appellant testified that he used to compose songs during the campaigns. There is the evidence of PW3 who testified that he was the appellant's classmate in primary school. PW3 knows the appellant very well. The incident occurred at around 5.30pm. The appellant was arrested the following day. There is no mistaken identity as pW3 does confirm that the person who was disturbing PW1 and PW2 on 13.9.2018 was the appellant. PW3 even went to report the appellant with his mother.

The appellant's defence does not raise any doubt on the prosecution case. It is the appellant's contention that he left Anona in 2005 and went to Sololo. PW1, PW2 and PW3 saw the appellant at Anona on 13th August, 2018 and it is their evidence that it is the appellant who defiled PW1. PW3 knew the appellant very well and the issue of mistaken identity does not arise. I am satisfied that it is the appellant who defiled PW1. The appellant was arrested at Walda and was free to move to any part of Kenya. He was not barred from going to Anona. PW3 testified that the appellant's mother was at Anona on the material day.

The appellant also raised the issue of the complainant's age. PW1 testified that she was 9 years old and was born in 2004. The appellant contend that if the complainant was born in 2004 then she was 14 years old in 2018. The original birth certificate was produced and is part of the record. According to the birth certificate, PW1 was born on 19.8.2009. The birth certificate was issued on 25.6.2018 before the incident. I have counter checked with the handwritten record and it is not clear whether the year of birth is written as 2004 or 2009. I am satisfied that PW1 was a minor. Her elder sister was in class three. The birth certificate was obtained before the offence was committed and proves the complainant's age.

The appellant further maintains that if indeed he committed the offence then he was intoxicated. PW2 testified that the appellant seemed to have taken alcohol. The appellant further contends that he informed the Court that he may not know what he did because he was drunk. The record shows that when each of the two counts was read to the appellant, his response was that he may not know what he did because he was drunk. The plea was taken on 17.9.2018.

Section 13 of the Penal Code states as follows:

13.Intoxication

> **(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**
>
> **(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—**

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

(**4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**

(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs.

Apart from PW2's evidence that the appellant appeared to have taken alcohol, there is no other evidence to the effect that the appellant was so intoxicated as not to have known what he was doing was unlawful. He had the capacity to throw stones aimed at PW3 so as to chase him away. He managed to put questions to PW1 and PW2 and held PW1 by the neck and led her to the bush. While intoxicated he was able to undress PW1, remove his genitalia and defile PW1. That form of stupor cannot be explained by the evidence on record. It could be true that the appellant had taken alcohol but that aspect per se does not prove intoxication. The appellant knew what he was doing. He knew he was committing an offence and that is why he pulled PW1 to the bush. He even had the guts to enquire who was the eldest between PW1 and pW2. Upon being told PW2 was the eldest he decided to chase her. That is how sober the appellant was. He went after the eldest child but PW2 managed to ran away. I do find that the defence of intoxication is not available to the appellant. The appellant was not temporarily insane. He knew what he was doing.

The appellant contend that he notified the trial Court that he was assaulted by members of the public but the trial Court never took any action. The evidence establishes that the appellant was rescued and taken to Walda Police post. Members of public wanted to burn the Police post. The appellant was then moved to Sololo police station and once again members of public tried to invade the station and administer mob justice on the appellant. The events by members of the public do not disprove the prosecution case that PW1 was defiled by the appellant. This contention that the appellant was assaulted by members of the public cannot be a ground for acquittal.

Lastly, the appellant contend that his mitigation was not considered as well as his defence. The defence did not raise any doubt on the prosecution case. It mainly dwelt on how the appellant was arrested. The trial was fair. There is no issue relating to interpretation during the hearing. The appellant followed the proceedings and cross examined witnesses.

The appellant was examined and found to be HIV positive. PW1 was found to be HIV negative. According to PW4, PW1 was handed over to the HIV coordinator for purposes of follow up. The fact that PW1 was found to be HIV negative does not absolve the appellant from the offence.

The evidence on record did prove the offence. PW1's age was proved through the production of the birth certificate. The evidence established that pW1 was penetrated. The incident occurred during the day and the appellant was properly identified as the perpetrator.

Section 8(2) of the Sexual Offences Act provides for life imprisonment where the victim of the sexual offence is below 11 years old. PW1 was 9 years old. The appellant relies on the **Muruatetu case (Supra**). I am of the view that the Muruatetu case cuts across all mandatory and minimum sentences imposed by statutes as such provisions ignores the mitigation by the convict and excludes the court from considering the circumstances under which the offence was committed. Not all cases are committed under similar circumstances.

Given the circumstances of the case and the appellant's mitigation that he pleaded for leniency, he has a family and the fact that he is HIV positive, I do set aside the life imprisonment sentence and replace it with twenty five (25) years imprisonment.

In the end the appeal on conviction lacks merit and is hereby disallowed. The life imprisonment sentence is set aside and replaced with twenty five (25) yeas imprisonment. The appellant was denied bond as his life was in danger. Under section 333 of the Criminal Procedure Code, the remand period has to be taken into account as part of the sentence. The imprisonment period to be computed from 17.9.2018 when the appellant took the plea.

Dated, Signed and Delivered at Marsabit this 8th day of July 2020

S. CHITEMBWE

JUDGE