REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 93 OF 2018

BRIAN WAFULA WANYAMA……..…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the senior principal Magistrate Hon. Liza Gicheha delivered on 31st of October 2018 in Nakuru S.O.A No. 72 of 2018.)

JUDGMENT

1. The appellant was charged with three counts of **Defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 30th April 2018 [*particulars withheld*] area he intentionally and unlawfully caused his male genital organ namely penis to penetrate the anus of **EM** aged 7 years, **KI** aged 7 years and **RE** aged 8 years.

2. The appellant denied the charges and the case proceeded for hearing with the prosecution calling eight (8) witnesses in support of their case while the appellant in his defence chose to remain silent. By the judgment delivered on 31st of October 2018, the lower court found the appellant guilty of the offence charged and convicted and sentenced to life imprisonment.

3. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, filed this appeal on the following grounds: -

i. The learned trial magistrate erred in law and in fact by failing to appreciate that the victims' age was not proved as required by law.

ii. The learned trial magistrate erred in law and in facts by failing to find that identification was not properly done.

iii. The learned trial magistrate in law and in fact by failing to find that the prosecution evidence adduced was contradictory and inconsistent.

iv. That the learned trial magistrate erred in law and in facts by failing to find the medical evidence adduced was insufficient to corroborate the charge or safely sustain a conviction.

v. That the learned trial magistrate erred in law and in fact by failing to appreciate that his defence was cogent and believable.

4. The state opposed the appeal on both conviction and sentence. On 26th of May 2020 the appeal proceeded for oral hearing.

APPELLANT'S CASE

5. The appellant orally submitted that complainant's family are his neighbours as they live in the same plot though he worked at [*particulars withheld*]and used to leave the plot in the morning and arrive home at 9:00 pm and even on the day of the arrest, he was arrested at his work place. He submitted that if the parents of the minor knew he had defiled his children they would have arrested him on the same day.

6. He prayed to the Court to consider both sides of the case and prayed to be set free as his health is deteriorating in custody.

PROSECUTION'S CASE

7. The state counsel, **Ms. Rita Rotich** submitted that the appellant had been sentence to life imprisonment after being found guilty of defiling children of tender age. She submitted that the complainant, who testified as PW1, said she was 7 years old and his testimony was

corroborated by that of PW2 who was his father and his birth certificate confirmed her age. Further that PW3 the 2nd complainant testified that she was 8 years and his evidence was corroborated by PW5 his mother and her birth certificate was produced as evidence. As for 3rd complainant though no birth certificate was produced age was proved by the mother PW5 who stated the minor was 8 years old the same was corroborated by the P3 form which indicated he was 8 years.

8. The state counsel further submitted that the appellant was positively identified by the 3 complainants in the dock who testified the appellant was their neighbour; that they had seen him on several occasions and he had on several occasion defiled them. She submitted that the complainants were familiar with the appellant as he used to buy them sweets and they used to go to his house. PW8, the investigating officer, arrested the appellant upon identification by the 3 complainants; and PW5 and PW6 further stated they knew accused by the name **Wafula** and they identified him in the dock as the person who had been arrested by PW8 the investigation officer.

9. PW7, the medical officer produced P3 forms as exhibits; he stated that on examination of the 1st complainant, he observed some injuries in the anus consistent with sodomy and his stool had blood. On examination of the 2nd complainant, he was in pain in the anal and the 3rd complainant he noted the anal opening was painful due to penetration of a blunt object thus it was inconsistence with sodomy and it is thereafter he filled the P3 forms and issued PRC forms.

10. She further submitted that the 9 witnesses called by the prosecution proved beyond reasonable doubt that the complainant had defiled the 3 complainants. She urged the Court to dismiss the appeal and uphold the trial Court's decision.

ANALYSIS AND DETERMINATION

11. This being the first appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate Court are set out in the case of **Okeno Vs Republic [1972] EA *32*** where it was stated as follows:-

> **"The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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, (See Peters v. Sunday Post, [1958] EA 424.)"**

12. Further in the **Court of Appeal for Eastern Africa in Pandya -Vs- Republic [1957] EA 336** the Court stated as follows: -

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate Court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a Court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

13. In view of the above, I have considered evidence adduced by the trial Court and submissions by the appellant and the state through the state counsel. Evidence show that the birth certificates for the 1st complainant showed that he was born on 9th February 2010 and in respect to 2nd complainant, PW8, the investigation officer, produced his immunization card as exhibit 5 which indicates he was born on 1st of September 2008 were produced in Court. The authenticity of 1st complainant's birth certificate and 2nd complainant's immunisation card was not questioned. There is therefore no doubt that the 1st and 2nd complainants were 7 and 8 years respectively. PW5 who is 3rd complainant's mother stated that he was born in January 2013 therefore he was 6 years old. The Post Rape Care form indicates he was born on 5th March 2013. In the P3 form indicates the estimated age of the appellant was 5 years at the time the same was being filled.

14. Further the trial Court which had an opportunity to see and interact with the complainants established that the complainants were children of tender age and needed to conduct a *voire dire* to determine if they are fit to testify and take oath. It was the Court's finding the children were of tender age and even though they were intelligent they would not understand the importance of an oath because of their tender age.

15. Whereas many Courts have held the best evidence to establish age of a victim is by production of a birth certificate, birth notification, age assessment report, clinic card or baptism card it has also been held that that the prosecution may establish the age of the victim by medical examination through age assessment or in the medical reports produced before Court. Some cases have also been decided that the Court can also determine the age of the complainant by observance or use of common sense. From the foregoing, there is no doubt that the three complainants were minors.

16. In respect to penetration PW4 **Doctor Patrick Kariuki** confirmed that the 3 boys were soodmised; they were penetrated through the anal opening; they all had injuries on the anus; he produced P3 form in respect of each minor to confirm that they were defiled.

17. Having found that the complainants were minors and the prosecution proved that they were defiled, the question that follow is whether it is the appellant who defiled them. The complainants testified that they were defiled severally by the appellant who used to entice them to his house with sweets. They all said the appellant was a neighbour and in his submissions; the appellant confirmed that the childrens'families

were his neighbours. There is therefore no doubt that the appellant was identified. There is no reason from evidence that the 3 children could frame up accusations against the appellant.

18. From the foregoing I find that the prosecution proved the three charges against the appellant beyond reasonable doubt.

19. However **Section 124 of the Evidence Act** is very clear that no corroboration is necessary in criminal cases involving a sexual offence, Infact a Court can even convict on the sole evidence of the victim if the Court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth. From the analysis above it is my finding that PW2 did not have any reason to frame the appellant, penetration was proved beyond reasonable doubt and medical documents produced to support the same.

Whether the appellant sentence was harsh and unreasonable.

20. The appellant was charged for **defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006** which provides as follows;

Section 8. (1) of the Sexual Offences Act No. 3 of 2006 states;

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

While **Section 8. (2) of the Sexual Offences Act No. 3 of 2006** provides as follows: -

> **"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."**

21. The Appellant was convicted for the offence of defilement and sentenced to life imprisonment since the complainants were all below 11years of age. The section under which he was charged provides for mandatory life imprisonment.

22. However mandatory nature of sentences was however declared unconstitutional by the Supreme Court in **Muruatetu** case. In the absence of discretion, the mitigating factors raised by an accused person are rendered superfluous. In this case the appellant said he had no parents in his mitigation, the prosecutor also said he was a first offender.

23. I however take note of the fact that the complainants were aged 6, 7 and 8 years quite innocent children whom he took advantage and robbed them of their innocence. The three boys sustained serious injuries as forceful penetration through the anus. The appellant deserved deterrent sentence; however, in view of the Supreme Court's decision in **Muruatetu** case I am inclined to reduce the life sentence to 25 years' imprisonment.

24. **FINAL ORDERS**

1. Appeal on conviction dismissed

2. Appeal on sentence is hereby allowed

3. Life sentence is reduced to 25 years' imprisonment.

Judgment dated, signed and delivered via zoom at Nakuru This 14th day of July, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Appellant in person

Rita for State