REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 40 OF 2017

DOMINIC KIHARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the senior principal Magistrate Hon. N. Makau delivered on 4th May 2017 in Nakuru S.O.A No. 274 of 2014.)

JUDGMENT

1. The appellant was charged with three counts of **Defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence are that on 8th December 2014, at [Particulars withheld] Village in Gilgil District within Nakuru County, the accused intentionally and unlawfully caused his male genital organ namely penis to penetrate the genital organ namely vagina of **ZP** a girl aged 15 years.

2. The appellant was also charged with alternative count of **indecent act with a child contrary to section 11 (1) of the sexual offences Act.** particulars are that on 8th December 2014, at [Particulars withheld] Village in Gilgil District within Nakuru County, the accused intentionally and unlawfully accused committed indecent act with **ZP** a girl aged 15 years by touching her private part namely vagina with his fingers and genital organ namely penis.

3. Count 2 is the offence of **sexual assault contrary to section 5 (1) as read with section 5 (2) of the sexual offences Act**. Particulars are that on the 1st day of December 2014 at [Particulars withheld] Village in Gilgil District within Nakuru County, the accused intentionally and unlawfully sexually assaulted **VW** a child aged 13 years by inserting his fingers into her private genital organ namely vagina

4. Alternative charge to count 2 is the offence of **indecent act with a child contrary to section 11 (1) of the sexual offences Act**. Particulars are that on 1st December 2014, at [Particulars withheld] Village in Gilgil District within Nakuru County, the accused intentionally and unlawfully committed indecent act with **VW** a child aged 13 years by inserting his fingers into her private genital organ namely vagina.

5. The appellant denied the two counts and alternative charge to each count and the case proceeded for hearing with the prosecution calling 5 witnesses in support of their case while the appellant adduced sworn statement and never called any witness.

6. By the judgment delivered on 4th May 2014, the trial magistrate found the appellant guilty of the two main counts and sentenced him to 20 years imprisonment for count 1 and 10 years imprisonment for count 2. 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 allow the appellant start the case denovo as provided under section 200 of the Criminal procedure Code.

ii. The learned trial magistrate erred in law and in facts convicting the appellant where the prosecution failed to prove the age of the minor.

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 convicting the appellant on evidence of penetration given by a single witness (PW1).

v. That the learned trial magistrate erred in law and in fact by failing to critically analyse his defence.

vi. That the learned trial magistrate erred in law and in fact by failing to note that the sentence was coached in mandatory minimum sentence.

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

APPELLANT'S CASE

8. The appellant submitted that the age assessment report indicated that the age of 1st complainant **ZP** was between 15 and 16 years and he should have therefore been charged under **section 8 (1) as read with section 8 (4)**; that while sentencing the trial magistrate quoted **section 8 (3)**. He further submitted that the trial magistrate did not use her discretion granted by the constitution to weigh the circumstances and the appellants mitigation to award appropriate sentence contrary to the Supreme Court's decision in the case of **Francis Karioko Muruatetu [2017]eKLR**

9. On compliance with **section 200 of the CPC**, the appellant submitted that this case was presided over by **Hon F. Muguongo RM** and **Hon. Makau** took over and the accused requested for the case to start *denovo* but the request was turned down; thus failing to comply with provisions of **section 200 of the CPC**. That the section is intended to allow the succeeding magistrate to personally asses the demeanour and credibility of the witnesses and to weigh evidence adduced.

10. On age he submitted that PW3 told the court that the victim was 16 years but did not produce any document to prove her age. Further that PRC form and P3 form were produced by PW4 on behalf of the maker yet application was made under **section 33 of the penal code**; and from PW4's evidence, the girl was 15 years old. He stated that age assessment report indicate that the age of complainant was between 15 to 16 years. The question he raised is why use **section 8 (3) yet section 8 (4)** was also applicable.

11. The appellant also submitted that penetration was not proved. He submitted that the trial magistrate relied on sole evidence of PW1; further she said the accused did not unzip his trouser. He stated that the complainant was not specific on the act of penetration. He submitted that broken hymen is wrong assumption of penetration as vigorous physical activities can also tear the hymen.

12. Appellant further submitted that his defence was not considered. He submitted that there was a grudge between him and PW3 caused by PW3's failure to pay appellant for building her house together with his brother; that the trial magistrate did not critically analyse the appellant's defence.

13. He concluded that the conviction was based on unfounded evidence and urged Court set aside conviction and sentence.

PROSECUTION'S CASE

14. The state counsel, **Ms. Rita Rotich** submitted that the complainant stated that she was 15 years old and assessment report produced by PW3 confirmed that she was 15 years old; that PW2's age was also assessed. She submitted that the appellant was known to the complainants and they knew him by the name **Kihara** and 1st complainant stated that he was her mother's boyfriend and had lived with him for 2 years; and accused confirmed that he was the boyfriend of PW1's mother. On penetration, she submitted that PW1 testified that the appellant defiled her and had previously inserted his fingers into her vagina. She added that PW3 noticed that PW1 had difficulties walking and examination by PW4 confirmed broken hymen and inflammation on her private parts and presence of pus a confirmation of penetration. She urged the Court to dismiss the appeal.

ANALYSIS AND DETERMINATION

15. 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 demeanor. 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 Vs. 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.)"**

16. 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."

17. 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.

(i) compliance with section 200 of criminal procedure code

18**. Section 200 (1) Subject to sub-section (3),** where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) …..

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) ….."

19. **Section 200(4)** provides that:

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

20. I take note of the fact that **Section 200 of Criminal Procedure Code** is not coached in mandatory terms. Its states; "the succeeding magistrate may". The succeeding magistrate can therefore deny that opportunity depending on the circumstances of the case. In my view, the key test is whether the accused will be prejudiced by failure to recall or rehear the witnesses who testified before the judicial officer who has left the jurisdiction.

21. Record show that, at the time the succeeding magistrate took over this matter, the prosecution had closed their case. The succeeding magistrate explained to the appellant his right to recall witnesses as provided by **Section 200 of the Criminal Procedure Code**. The reason the appellant gave for wanting the witnesses to be recalled to testify again before the succeeding magistrate they adduced evidence contrary to what they recorded at the police station. In my view the reason for recall of the witnesses is for the succeeding trial officer to be able to make observation on demeanour of witness. The reason however given by appellant for recall doesn't relate to demeanour of witnesses. Record show that the appellant fully participated in the proceedings when the 5 prosecution witnesses testified.

(ii) Whether the prosecution proved their case beyond reasonable doubt.

22. There is no doubt that the appellant was known to the complainant as he had lived with them as their mother's boyfriend. In respect to penetration. The 2 incidences in respect to both complainants were during the day. The appellant was known to the 2 complainants and the medical record produced confirmed that PW1 was defiled and PW2's report also confirmed inflammation. The two complainants testified that prior to defilement of PW1 the appellant had inserted his fingers when their mother had gone away to her home. PW2 testified that he inserted his finger again when she was alone after she stepped on a chick. This incident was during the day.

23. In respect of reliance on evidence of the two complainant's **Section 124 of the Evidence Act** is very clear that no corroboration is necessary in criminal cases involving a sexual offence; in fact, 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 PW1 and PW2 did not have any reason to frame the appellant. Evidence adduced by the two complainants was consistent and was corroborated by evidence of PW3 and PW4.**

(iii) Whether appellant's defence was considered

24. Record show that in his defence, the complainant denied living with PW3 as husband and wife and later said he lived with complainants' mother. He also denied knowing PW1 and PW2. He confirmed that him and his brother built a house for PW3 but failed to avail his brother to confirm his allegation that PW3 never paid them therefore creating a grudge between them. From the record the appellant did not raise plausible defence. He contradicted himself. His ground that his defence was not considered cannot therefore stand

(iv) **Whether the appellant sentence was harsh and unreasonable.**

25. 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 provide as follows: -

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

26. The appellant's argument is that the complainant's age was estimated between 15 and 16 years and he should have therefore been charged under section 8 (4) which provide for minimum sentence of 20 years' imprisonment. He was sentenced to 20 years' imprisonment for count 1 and 10 years' imprisonment for count. These are minimum mandatory sentence provided by statute.

27. However mandatory nature of sentences was however declared unconstitutional by the Supreme Court in **Muruatetu c**ase. 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.

28. I take note of the circumstances herein, the age of the minors and the fact that the appellant whom the children looked up to as a step father took advantage of the vulnerability of the children in view of absence of their biological father in their upbringing.

29. FINAL ORDERS

1. Appeal on conviction dismissed

2. Appeal on sentence is hereby allowed

3. Sentence reduced to 15 years' imprisonment for count 1 and 5 years' imprisonment for count 2

4. Sentences for count1 and 2 to run concurrently from the date the appellant was sentenced by the trial magistrate.

Judgment dated, signed and delivered via zoom at Nakuru

This 21st day of July, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person present