REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 21 OF 2019

JAPHET KIREMA KINYUA..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. M NYAGA

(S.R.M) in the Principal Magistrate's Court at Marimanti Law Courts

in Criminal Case No.SOA 11of 2019 dated 27th August 2019)

J U D G M E N T

1. **JAPHET KIREMA KINYUA**, the Appellant herein was charged with the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act.** He also faced an alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars as per the charge sheet presented are that on 7th May 2018 in Tharaka South within Tharaka Nithi he defiled a girl (name withheld) aged 12 years.

2. The Appellant was convicted of the main charge after trial and sentenced to serve 50 years imprisonment. He felt aggrieved and lodged this appeal.

3. The prosecution's case at the trial mainly hinged on the evidence of the minor(PW2) and the medical evidence. The minor's evidence indicated that she was waylaid when she was walking in the bush from school looking for wild fruits. She knew the assailant well and identified him as the person who pushed her down and defiled her. Her evidence was corroborated by Lilian Wahu PW1) a clinical officer who testified and tendered P3 form as P. Exhibit 1. According to medical evidence tendered there was evidence of penetration as the hymen was freshly broken when the minor was examined. She was examined the same day she reported to have been raped.

4. The mother of the victim (PW3) tendered a birth certificate No. S. No.[….] indicating that the victim was born on 17th March 2006.

5. When placed on his defence the Appellant stated that on the material date he was at home the whole day and never ventured out. He denied committing the offence. He accused the victim's mother of framing him arguing that she was angry because he had borrowed her some money and had not repaid. His evidence that he was at home the whole day was supported by his wife Alice Kanono (DW2) who stated that she was with the Appellant the whole day on the material date save from 5pm to 6 pm, when she went out to do some shopping.

6. The trial court in evaluating the evidence tendered found that the Appellant was positively identified by the victims who knew him well. The trial court further found that the incident was immediately reported to the police and the victim was taken for medical checkup the same day and there was no time to plan for the frame up charges as claimed by the Appellant. The court found that no valid defence had been raised and found the evidence tendered by the prosecution sufficient to render a conviction which he entered and sentenced the Appellant to 50 years to send a clear warning in the community.

7. The Appellant was dissatisfied with the findings of the trial court and lodged this appeal listing the following grounds namely:-

> ***i) That the magistrate erred in law when he failed to note that there were inconsistencies and contradictions in the prosecution's case and that the same was not proved beyond reasonable doubt.***
>
> ***ii) That the learned magistrate erred in law by failing to note that the Appellant was not provided with witness statements.***

iii) That the clinical examination did not link him with the ordeal.

iv) That the learned trial magistrate rejected his defence without cogent reasons.

8. The Appellant in his written submissions added further new grounds but in view of the fact that the same were raised without leave of this court pursuant to **Section 350** of the **Criminal Procedure Code** the new grounds shall not be considered.

9. In his written submissions the Appellant termed his 50 years sentence as harsh and excessive. He added that 3 vital witnesses Kelvin Kirimi, Ken Mwiti and Felix were not called as witnesses. He relies the case of ***JMN -vs-Republic*** (citation not given) in his contention that the prosecution was under an obligation summon all the important witnesses.

10. The Appellant contends that the issue he raised about a grudge between him and the victim's mother was not an afterthought and the issue should be treated seriously because it can lead to his acquittal.

11. The Respondent through the Office of the Director of Public Prosecution opposes this appeal but concedes that the sentence meted out by the trial court was too severe.

12. The Director of Public Prosecution submits that the prosecution proved all the elements of defilement namely that the appellant had sexual contact with the minor, that the victim was aged between 12 to 15 years and that the appellant was positively identified. It contends that the recollection of events by the victim was clear and the trial court also noted the consistency of the victim's evidence as well as her intelligence. It also restate the evidence as per theInvestigating Officer who visited the scene and found evidence of struggle on the sorghum, something that was also said by PW3, who also went to the scene and found flattened sorghum. The prosecution also submits that the victim was examined some few hours after the offence and penetration was confirmed and the presence of a freshly broken hymen was noted by the clinical officer.

13. It further submits that the identity of the appellant was not an issue as there was identification by recognition because the victim and the appellant's homes are just 150 metres apart and they are close relatives therefore the victim knew the appellant very well prior to the commission of the offence. Based on the foregoing, the prosecution avers that there was no need for DNA evidence as the evidence on record was already sufficient. On the ground that certain persons did not testify, the prosecution points out that there is a tradition called ***"Mwiriga"*** which bars persons from testifying against each other and the same is common in Tharaka where the parties come from and therefore this made it difficult to secure the named witnesses i.e. Kelvin Kirimi, Ken Mureti and Felix. It asks the court take judicial notice of the practice. Notwithstanding the above, it also contends that as per section 124 of the Evidence Act, , the evidence of a victim alone does not require corroboration if the court is satisfied that the victim is telling the truth.

14. It lastly submits that the defense of a debt between PW3 and the appellant was considered by the trial court and found wanting. The prosecution urges the court to find that the elements of the offence were proven and the appeal on conviction should be dismissed. However, they urge this court to interfere with the sentence as it was manifestly too harsh.

Analysis and Determination

The Appellant seeks to question his conviction and sentence for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act.** The Section reads;

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

(3) 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.

15. The Appellant has faulted the trial court for failing to note what he terms ***"inconsistencies"*** and ***"contradictions"*** but I have gone through the evidence tendered and I have not found any inconsistency or contradictions in the evidence tendered by the prosecution. The Appellant has also not pointed out in his written submissions. That ground by the Appellant lacks any basis.

16. I have re-evaluated the evidence tendered and find that the prosecution's case was overwhelming. The victim narrated clearly what befell her and the mother told the trial court the steps she took upon learning about the incident and how she escorted her daughter to the police to report and eventually to the hospital for medical checkup and treatment. The medical evidence in my re-assessment clearly corroborates the fact that the young girl was defiled. There was prove that penetration had occurred and that the victim was aged 12 years as per the P3 (P. Exhibit 1) and birth certificate (P Exhibit 2) respectively. The lack of DNA tests does not negate the medical evidence tendered in anyway. In the case of ***Geoffrey Kionji -vs- Republic (HCRA 270 of 2010)***

> **"In Geoffrey Kionji –Vs- Republic Criminal Appeal No. 270 of 2010 the Court of Appeal applied a principle earlier stated in a rape case (Kassim Ali –Vs- Republic Criminal Appeal 84 of 2005 MSA) to a defilement case and stated inter alia:**
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> > **"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that the defilement was perpetrated by the accused person. Indeed under the proviso of Section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim is telling the truth and records the reasons for such**

belief. What the Court of Appeal had sated in Kassim –Vs- Republic is that:

> **"[The] absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."**

17. This court is satisfied that the trial court duly considered the defence put forward by the Appellant. I have re-evaluated the same and find that the Appellant had the opportunity and the chance to commit the offence notwithstanding the spirited defence put up by the wife (DW2) that she was with him the whole day save for between 5 pm and 6pm. In my view that window was sufficient for the Appellant to commit the offence and did commit the said offence for which he was duly charged and convicted. His allegations that there was a grudge between him and the victim's mother did not add any weight to his defence because even his own wife (DW2) did not even know about existence of a debt belonging to the victim's mother. The Appellant himself did not bring up the issue when cross-examining the victim's mother (PW3) or even the victim's father (PW4). That shows that the issue of existence of a grudge was an afterthought by the Appellant. There was no substance in the allegations made.

18. This court is satisfied that the evidence tendered by the prosecution in totality proved beyond doubt that the Appellant had defiled the minor as charged. His conviction was safe and I find no basis to interfere with it.

19. On sentence, just as the Respondent has conceded, the same was indeed harsh. The law (**section 8(3)** of **Sexual Offences Act)** provides for a minimum sentence of 20 years because in this instance the victim was 12 years old. However the trial court imposed a sentence of 50 years against the Appellant as the trial court thought the sentence ***"must be enhanced to a longer sentence so as to serve a clear warning to beasts who want to have sex with our small girls or even boys that is our future generation."***

In my considered view though the learned trial magistrate meant well he somehow went overboard by sentencing the Appellant to 50 years imprisonment when the minimum sentence prescribed is 20 years imprisonment.

In the end, this court finds no merit in this appeal on conviction. The conviction is upheld. However on sentence, this court for the aforestated reasons sets aside the sentence and in its place, I hereby impose a sentence of 20 years less the period the Appellant has already served in custody.

Dated, signed and delivered at Chuka this 20th day of July 2020.

R. K. LIMO

JUDGE

20/7/2020

Judgement signed, dated and delivered via zoom in presence of Appellant and Momanyi for Respondent.

R. K. LIMO

JUDGE

20/7/2020