REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.148 OF 2019

JAMES BUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Stephen Jalang'o PM delivered on 3rd May 2019 in Makadara CM Cr. Case (S/O) No. 131 of 2017)

JUDGMENT

The Appellant, James Bundi, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the offence were that on 15th July 2017 at Kayole Estate in Embakasi within Nairobi County, the Appellant unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of I.B.W., a child aged 15 years old. In the alternative charge, the Appellant was charged with the offence of **committing an indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that on 15th July 2017 at Kayole Estate in Embakasi within Nairobi County, the Appellant unlawfully and intentionally touched the vagina of I.B.W., a child aged 15 years with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of **defilement** and sentenced to serve twenty (20) years imprisonment.

He was aggrieved by his conviction and sentence. He filed an appeal to this court. In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He took issue with his conviction stating that the elements of penetration and identification were not established by the prosecution to the required standard of proof beyond any reasonable doubt. He faulted the trial court for failing to acknowledge that crucial exhibits were not produced by the prosecution. He was of the view that the investigations conducted in the present case was shoddy and inconclusive. He was aggrieved by his conviction stating that his mode of arrest was questionable. He faulted the trial court for failing to properly evaluate his defence in arriving at its decision. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant filed written submission before this court in support of his appeal. This court also heard oral submission from the Appellant and Ms. Chege for the State. The Appellant submitted that the prosecution failed to avail crucial exhibits necessary to prove its case. He stated that the complainant claimed that she was taken to a lodging known as Tetu Lodging on 6th June 2017 and 15th July 2017. However, the prosecution failed to avail any documentary evidence to establish that the lodging was ever hired on those days. The Appellant further stated that the testimony by the prosecution witnesses was not credible. He stated that the sexual assault incident was alleged to have been reported on 25th July 2017. However, the complainant's medical examination occurred two months later after the alleged incident. He was of the view that the charges brought against him were fabricated and that the complainant's testimony was not truthful. He further submitted that he was in the custody of the police for a week prior to being arraigned before the trial court. He faulted the police for failing to visit the crime scene and conduct proper investigations. In the premises, he urged this court to allow his appeal.

Ms. Chege for the State opposed the appeal. She submitted that the elements of the offence of defilement were established by the prosecution. She averred that the prosecution availed the complainant's birth certificate which established that the complainant was a minor. She was of the view that the evidence by the complainant, as well as that of PW4 and PW5 established that the complainant was penetrated. She asserted that prior to the commencement of the proceedings before the trial court, the parties tried to negotiate an out of court settlement. She averred that the fact that the investigating officer failed to visit the scene of crime did not negate the fact that the crime did occur.

With regard to the Appellant's identification, Learned State Counsel submitted that the Appellant was well known to the complainant prior to the sexual assault. She stated that complainant was found in possession of a Safaricom SIM card which was linked to the Appellant. The Appellant was a driver in the school where the complainant was a student. She opined that his identification was by recognition. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, I.B.M., was the complainant. She stated that she was born on 31st December 2002 and was 16 years of age at the time she testified before the trial court. At the time the offence is alleged to have been committed, she attended [Particulars Withheld] Secondary School where the Appellant was employed as a driver. It was her testimony that she met the Appellant at the said school sometime in January 2017. They became friends. The Appellant gave her his mobile phone number. However, since she did not have a mobile phone, she used her friend's phone to communicate with the Appellant. The Appellant told her that he was in love with her. She stated that he often gave her advice on how to deal with her parents who were very strict and tough on her. She became fond of him. Sometime in June 2017, the Appellant asked her to meet him. He took her to a lodging in Kayole. They sat and talked. Afterwards, the Appellant undressed her. They had sex. She stated that it was her first sexual experience. She afterwards went home and did not tell anyone about the incident.

The complainant testified that the Appellant bought her a Safaricom SIM card which she used to communicate with him. He had registered the line in his name. He occasionally bought her lunch and books. One day, her mother went through her bag and found the Safaricom SIM card that the Appellant had bought for her. She lied to her mother that the SIM card did not belong to her. However, her mother discovered that the SIM card was registered in the Appellant's name. Her parents took her to the Chief's Camp. She finally told the police officers that the Safaricom line belonged to the Appellant. When she went back to school, she informed the Appellant that her parents had found the SIM card in her possession.

The complainant was later called to the School Director's office where one of the school drivers revealed to her father that the complainant had been having a relationship with the Appellant. She finally told her father what had transpired between her and the Appellant. Her father reported the matter to the police. He got in touch with the Appellant and asked him to come to their house. The Appellant went to their house on 8th September 2017. He confessed that he indeed had a sexual relationship with the complainant. Her father called the police who arrested the Appellant. She was angry at her father for having the Appellant arrested, since he had promised to forgive him. The complainant testified that the Appellant did not force her to have sex with him. He however knew that she was a minor. On cross-examination, the complainant stated that the Appellant took her to a motel known as Tetu Lodging on two occasions, i.e. 9th June 2017 and 15th July 2017. They had sexual relations on both occasions.

PW2, GM, is the complainant's father. PW3, JW, is her mother. They told the court that the complainant was born in December 2002, and was in Form Two at [Particulars Withheld] Secondary School when the sexual assault incident occurred. It was their testimony that sometime in July 2017, they discovered that the complainant had a Safaricom SIM card. PW2 visited a Safaricom office and discovered that the Appellant was the registered owner of the said Safaricom line. They asked the complainant who the Appellant was. She told them that the Appellant was a driver at her school. PW3 further stated that the complainant told her that the Appellant was her lover. PW2 reported the incident to the police. He also visited the complainant's school.

The school's director confirmed that the Appellant was employed by the school as a driver, but had recently been sacked. As he was leaving the school, one of the school drivers known as Paul Muhoro informed him that the Appellant had once used his phone to communicate with the complainant. He gave him the Appellant's phone number. PW2 got in touch with the Appellant and they agreed to meet. The Appellant came to his house later that week on 8th September 2017. The complainant, PW3 and PW2's cousin, SM, were also present for the meeting. PW2 jokingly suggested that the Appellant and complainant ought to get married. That was when the Appellant confessed to having taken the complainant to a lodging and had sexual intercourse with her. PW2 immediately alerted the Chief of the situation. The Appellant was arrested while at PW2's home. He was escorted to the police station. The complainant was taken to MSF clinic for medical examination.

PW4, Maureen Asembo, was a Clinical Officer at MSF clinic in Mathare. She adduced evidence on behalf of her colleague, Selina Nyambu, who examined the complainant, but was unable to appear before the trial court. She told the court that the complainant was examined at the clinic on 9th September 2017. Upon genital examination, the complainant's external genitals was normal. Her hymen was broken with old tears. There was presence of hymenal remnants. She produced the complainant's Post Rape Care Form into evidence. PW5, Dr. Joseph Maundu, from the Police Surgery examined the complainant on 14th September 2017. He testified that the complainant's hymen was broken with old tears. He produced her P3 form into evidence.

PW6, PC Winfred Mutheu, based at Kayole Police Station investigated this case. She stated that she took over the case from PC Francis Wekesa. PC Wekesa was assigned the case on 9th September 2017. The Appellant was already in custody. A report of the alleged sexual assault incident was made on 25th July 2017. PC Wekesa interviewed the witnesses and recorded their statements. After concluding his investigations, he preferred the present charges against the Appellant. PW6 stated that PC Wekesa did not visit the scene of crime to establish whether the Appellant took the complainant to a lodging in Kayole. PW6 produced the complainant's birth certificate into evidence.

The Appellant was put on his defence. He gave a sworn statement. He stated that he was employed as a driver at [Particulars Withheld] Primary School from January 2017 to August 2017. On 2nd June 2017, he drove several students, including the complainant, to a swimming event in Buruburu. When he dropped them back to school, he discovered that the students had been taking alcohol in the school bus. He reported the issue to the school's management. The Appellant further testified that on 15th July 2017, he was at the school when he heard someone screaming. He called the school guard. They ran to the toilet where the screams were emanating from. They pushed the door opened and found one of the school's teachers with the complainant. The complainant was undressed. She told them that the teacher had attempted to sexually assault her.

The Appellant called the head teacher and informed him about the incident. He also reported the matter to the Director of the school. At the end of that school term, the complainant was expelled from the school. The offending teacher was fired. The Director asked him to remain silent on the issue since it would ruin the school's reputation. The Appellant decided to resign from his job at the school. On 6th September 2017, the Appellant received a call from a stranger who offered him a job. When he met the stranger at Kayole, he discovered that the caller was the complainant's father (PW2). As they were going to PW2's house, they met two men, one of who was the arresting officer. They accused him of having sexually assaulted the complainant. They slapped him and took him to PW2's house.

At the house, they forced him to admit that he had defiled the complainant. He was then escorted to Mugedi Administration Police Post and

later to Kayole Police Station. The complainant's family demanded Kshs.300,000/- to drop the case. He declined the offer. He was released after paying the police cash bail. The OCS called him and demanded Kshs.50,000/- to terminate the case. He told him that he was not able to pay the said amount of money. He was later arraigned before the trial court. Upon cross-examination, the Appellant denied buying the complainant a SIM card or communicating with her.

DW2, Nancy Nyawira, is the Appellant's mother. On 9th September 2017, she received a call from the Appellant's wife who informed her that the Appellant had been arrested. She went to Kayole Police Station and met with the investigating officer. The investigating officer told her that the Appellant was being charged with sexually assaulting a minor. He however advised her to meet with the complainant's family and explore the option of settling the matter out of court. The complainant's family demanded for Kshs.300,000/- as compensation. She however did not have the amount of money. The Appellant was later arraigned before the trial court.

This being a first appeal, this Court is mandated to re-evaluate the evidence adduced before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge vs Republic [1987] eKLR** stated this on the duty of the 1st Appellate court;

> ***"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."***

In the present appeal, the issue for determination is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** brought against the Appellant, to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case. Section 8(1) of the Sexual Offences Act provides that:-

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

The prosecution is required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator. In defilement cases, it is imperative that the prosecution establishes the age of the complainant to the required standard of proof beyond any reasonable doubt. In the present appeal, the complainant stated that she was born on 31st December 2002, and was fifteen (15) years of age at the time of the alleged sexual assault. Her parents (PW2 and PW3) told the court that the complainant was born in December 2002. Her birth certificate which was produced into evidence established that she was born on the said date. The complainant was therefore fifteen (15) years of age at the time the alleged sexual assault occurred. This evidence was not challenged or controverted by the Appellant on cross-examination or in his defence statement. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the **Children Act.**

This court now turns to the ingredient of penetration. **Section 2(1)** of the **Sexual Offences Act** defines penetration as:

> ***"the partial or complete insertion of the genital organ of a person into the genital organs of another person."***

The complainant testified that on two occasions i.e. 9th June 2017 and 15th July 2017, the complainant took her to a lodging known as Tetu Lodging where he had sexual intercourse with her. It was her testimony that she first met the Appellant in January 2017, at school where he was employed as a driver. They became friends. The Appellant gave her his mobile phone number. However, since she did not have a mobile phone, she used her friend's phone to communicate with the Appellant. He occasionally bought her lunch. He also bought her books. The Appellant told her that he was in love with her. She stated that he often gave her advice on how to deal with her parents who were very strict and tough on her.

Sometime in June 2017, the Appellant asked her to meet with him. He took her to Tetu lodging in Kayole. They sat and talked. Afterwards, the Appellant undressed her and had sex with her. She stated that it was her first sexual experience. She afterwards went home and did not tell anyone about the incident. The Appellant took her to the same lodging in July 2017 and had sexual intercourse with her. Her mother found the SIM card that the Appellant bought her in her bag. Her parents discovered that it was registered in the Appellant's name. When she went back to school, she informed the Appellant that her parents had found the SIM card in her possession. She was later called to the School Director's office where one of the school drivers revealed that the complainant was having a sexual relationship with the Appellant.

The complainant finally told her father what had transpired between her and the Appellant. Her father reported the matter to the police station. He called the Appellant and asked to meet him. The Appellant came to their house on 8th September 2017. He confessed to having had a sexual relationship with the complainant. Her father called the police. They arrested the Appellant. The complainant was angry at her father for having had the Appellant arrested, since he had promised to forgive him. The complainant testified that the Appellant did not force her to have sex with him. He however knew that she was a minor.

The complainant was examined by PW4 and PW5 approximately two and a half ($2^1/_2$) months after the incident had occurred. The medical evidence tendered established that indeed the complainant's vagina was penetrated. PW4 stated that the complainant was examined at MSF Clinic in Mathare on 9th September 2017. There were no visible injuries on her external genitalia. However, her hymen was broken with old tears. There was presence of hymenal remnants. She produced a Post Rape Care Form as well as a medical report into evidence.

PW5, who also examined the complainant, told the court that the complainant's hymen was torn with old tears. The medical evidence of the old hymenal tears corroborated the element of penetration as narrated by the complainant. Since the complainant was examined two and half ($2^1/_2$) months after the incident occurred, any bruises or lacerations would have obviously by then healed and the tears in her hymen could not be fresh. The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The third issue is whether penetration was perpetrated by the Appellant. From the evidence on record, the Appellant was well known to the complainant. He was employed as a driver at the school where the complainant was a student. The Appellant admitted to the same in his defence. The complainant stated that she met him in January 2017 at the said school. They became friends. She testified that he bought her gifts and gave advice on how to relate to her strict parents. She stated that she grew fond of him. The Appellant also told her that he loved her. Even after she came clean to her parents regarding her sexual relationship with the Appellant, she made her father promise that he would forgive the Appellant. She told the trial court that the Appellant did not force her to have sex with her. It is clear to this court that the complainant was affectionate towards the Appellant and did not want him to get into trouble. This court is of the opinion that the complainant was telling the truth. Her evidence as well as that of her parents PW2 and PW3 clearly implicated the Appellant as the perpetrator of the sexual assault. PW2 and PW3 told the court that when the Appellant came to their house, he admitted to having had sexual relationship with the complainant. That's when they informed the police who came and arrested the Appellant at their house.

The Appellant in his defence admitted that he was employed as a driver at [Particulars Withheld] Primary School and that the complainant was known to him. He stated that on the material day of 15th July 2017, he was at the school when he heard screams emanating from a toilet. He rushed and opened the door. He saw the complainant who was undressed with one of the school's teachers. The complainant told him that the said teacher had attempted to sexually assault her. He reported the incident to the school's management. As a result, the said teacher was fired. The complainant was also expelled from the school. The school's director urged him to keep silent on the matter as it would ruin the school's reputation. The Appellant felt sidelined and made the decision to resign from his job at the school.

He was in Chuka on 6th September 2017, when he received a call from a stranger who wanted to hire him as a driver. They agreed to meet on 8th September 2017. When they met, he discovered that the caller was the complainant's father (PW2). They proceeded to his house. On their way, they met two men, one of who was the arresting officer. They slapped him and accused him of sexually assaulting the complainant. They took him to PW2's house where they forced him to admit to the accusations. He was then escorted to Mugedi Police Post and later to Kayole Police Station.

This court notes that the Appellant's assertion that he came to the complainant's rescue after she screamed for help since a teacher tried to sexually assault her was not brought out during cross-examination of the complainant. This court is therefore of the view that the Appellant's defence was a mere afterthought and meant to exonerate himself from the charge. It did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant. The trial court also noted the demeanour of the complainant as one of a truthful and sincere witness. The complainant stood to gain nothing by stating that the Appellant sexually assaulted her if no such incident occurred. She stated that she loved him and did not want him to get into any trouble. She was actually angry when her father reported the incident to the police. The **Proviso** to **Section 124** of the **Evidence Act** is applicable in this case. The Appellant was well known to the complainant and therefore this was not a case of mistaken identity. This court is of the view that the Appellant was positively identified as the perpetrator of the sexual assault occasioned on the complainant.

The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. This court, having re-evaluated the evidence adduced before the trial court and the submission made by parties to this appeal, cannot see any reason to disagree with the finding reached by the trial court. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

As regards sentence, **Section 8(3)** of the **Sexual Offences Act** provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. The trial court failed to acknowledge that the issue of mandatory minimum sentences in the **Sexual Offence Act** had been outlawed by various decisions by superior courts following the Supreme Court decision in ***Francis Karioko Muruatetu & another vs Republic [2017] eKLR*** **(See Christopher Ochieng vs R [2018] eKLR** and **Jared Koita Injiri vs R [2019] eKLR).** The trial court did not therefore consider the Appellant's mitigation in meting out his sentence. The Appellant was sentenced to serve a custodial sentence of twenty (20) years.

This court notes that the Appellant was a first offender. He also spent close to two years in custody before he was convicted and sentenced by the trial court. In the premises, this court sets aside the twenty (20) years imprisonment sentence meted by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from the date he was sentenced by the trial court i.e. 3rd May 2019. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2020

L. KIMARU

JUDGE