REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 56 OF 2018

SAMSON MAINA NYAGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal against conviction and sentence from the judgment of the Hon.B.M.Ekhubi (SRM), Othaya delivered on 5/12/2018 in Criminal Case No.1 of 2018)

JUDGMENT

1. The Appellant **SAMSON MAINA NYAGA**, was charged with the offence of rape contrary to **Section 3 (1)(a)**of the **Sexual Offences Act.** The particulars of the charge are that on the 2nddday of November, 2018 in Nyeri South District within Nyeri County, the appellant unlawfully caused his member to penetrate the anus of EWK a woman aged 36 years by use of force;

2. The alternative charge was the offence of committing an Indecent Act with an adult contrary to Section 2(A) of the Sexual Offences Act; the particulars are that on the above date he appellant intentionally touched the breasts of EWK a woman aged 36 years with his hand and against her will;

3. After the trial, the Appellant was found guilty and was convicted on the main charge and was sentenced to a term of ten (10) years imprisonment.

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed five (5) grounds of appeal which are summarized inter alia;

(i) The Charge Sheet was defective;

(ii) The evidence of **PW1** was insufficient; and the evidence of **PW1** and that of **PW3** was contradictory;

(iii) No DNA medical evidence was tendered into court by the prosecution;

(iv) The trial magistrate disregarded his statement of defence without giving cogent reasons.

5. At the hearing hereof the appellant was unrepresented and relied on his written submissions; whereas Ms Gicheha represented the State and responded by making oral submissions; hereunder is a summary of rival submissions made;

APPELLANTS CASE

6.

RESPONDENTS CASE

7. In response to the ground that there was insufficient evidence tendered by PW1 counsel for the respondent stated that the prosecution had proved the three (3) key elements of the offence of defilement which elements are identification, penetration and age;

8. **On identification**; **PW1's** evidence was that she was in the company of the appellant on that material date and he took her to his friend's house; and that they spent a night there; Stanley Waithaka (**PW3**) the friend confirmed and corroborated the evidence of **PW1**; the appellant did not deny being at the scene with the complainant; nor did he deny knowing the complainant; he was properly identified and this was not a case of mistaken identity;

9. **On penetration**: this was proved by the P3Form presented by **PW6** whose testimony was that upon examination of the minor he found a broken hymen, whitish substance, spermatozoa and yeast cells; the doctor's opinion was the presence of spermatozoa confirmed that there was penetration; and that this element was proved beyond reasonable;

10. **On age**; the age of the victim was stated in the particulars of the Charge Sheet; the Birth Certificate was produced in court and demonstrated that she was born on the 24/02/2003; this was also proved by the prosecution to the desired threshold;

11. Counsel submitted that the three (3) elements of the offence of defilement were proved beyond reasonable doubt.

12. The next ground of appeal was the contention by the appellant that the Charge Sheet was fatally defective; in that the charge read c/s 8(1)(3) instead of c/s 8(1) as read with 8(3); Counsel submitted that this omission it did not go to the root of the charge and was curable by invoking the provision of Section 382 of the Criminal Procedure Code; the Charge as drawn was properly admitted and it did not controvert the evidence before the court;

13. The third ground of appeal was that his defence on deception of age was not considered by the trial court; the appellant had believed at all material times that the complainant was an adult; that when the complainant testified she stated that she told him was that she was a pupil and was of 15 years of age; the appellant never raised this at the trial and therefore the court could not have made assumptions of his defence; the appellant only denied having committed the offence and instead tried to frame and implicate his friend Stanley (**PW2**);

14. On ground number (4) the appellant contends that samples had been taken from him and submitted to the Government Chemist for analysis; that as no DNA report was availed therefore the evidence was insufficient;

15. In response counsel submitted that the prosecution at trial told the trial court that it would not rely on the results as the results were taking too long to be availed; but the absence of the DNA results was not fatal to the prosecution's case as it did not controvert the fact that the appellant had been positively identified and that the complainant had been defiled;

16. The last ground of appeal was that the sentence was excessive; the conviction was not wrongful as the prosecution had proved its case beyond reasonable doubt; the sentence of twenty (20) years was clearly stated under the provisions of Section 8(3) of the Act; that the appellant had been given the minimum sentence provided;

17. In conclusion counsel submitted that the appeal had no merit and that it should be dismissed; and the trial courts conviction and sentence be upheld.

REJOINDER

18. The appellant reiterated that the sentence was excessive as he was a first offender.

ISSUES FOR DETERMINATION;

19. After taking into consideration the submissions of both the Appellant and Respondent this court has framed the following issues for determination;

(i) Whether the Charge Sheet was fatally defective;

(ii) Whether the prosecution proved its case to the desired threshold;

(iii) Whether the trial court erred in convicting and sentencing the appellant without considering the circumstances surrounding the case.;

ANALYSIS

20. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether the Charge Sheet was fatally defective;

21. The Appellant had contended that with the omission of the words ***"as read with"*** the Charge Sheet was rendered defective; that Section 8(1)(3) does not exist in the Sexual Offences Act;

22. The record indeed shows that the Charge Sheet reads that the Appellant was charged under Section 8(1) (3) of the Sexual Offences Act; but the omission of the words **"as read with"** in between the two sections does not mean that the offence that the Appellant was charged with was not disclosed; the Charge and the contents of Statement of Facts were set out in clear and unambiguous terms and sufficiently disclosed and established the nature of the offence that the Appellant was faced with as required by Section 134 of the Criminal Procedure Code; the Appellant knew the exact offence that he was alleged to have committed and faced with; the record also shows that the Appellant followed the entire proceedings and appreciated the evidence tendered against him; and that he was able to cross-examine all the prosecution witnesses; and was able to ably defend himself;

23. This court is satisfied that the particulars on the Charge Sheet clearly stated that the child was aged fifteen (15) years which places it within the provisions of Section 8(3) of the Sexual Offences Act; and finds that the omission of the words **"as read with"** did not occasion any miscarriage of justice as the Appellant was always aware of the charge against him and the particulars and the essential elements of the offence had been disclosed to him.

24. The ground of appeal on the charge sheet being defective is found lacking in merit and is disallowed;

Whether the prosecution proved its case to the desired threshold;

25. The key ingredients for the offence of defilement are identification, penetration and age;

26. **On age**; the age of the complainant was proved by the production of the Birth Certificate (**P.Exh.1**) by the complainant's mother **PW3**; it indicates that **PW1** was born on the 24/02/2003 hence she was a minor within the meaning of the Act.

27. **On identification**; the**PW1's** evidence was that she was in the company of the appellant on that material date at his friend's house and that they spent a night there; Stanley Waithaka (**PW3**) the friend confirmed and corroborated the evidence of **PW1**; the appellant does not deny having had sexual encounters with the complainant inside PW3's house;

28. After carefully re-evaluating the prosecution evidence on identification this court is satisfied that the trial court properly analyzed the evidence on identification and this court finds no justifiable reason to interfere with the trial court's finding that the appellant was the person who had defiled her;

29. This court is satisfied that the Appellant was positively identified by way of recognition; and that the prosecution proved the ingredient of identification to the desired threshold;

30. **On penetration;** the complainant clearly described how she met the appellant on the 7/06/18 and was asked to visit him at Thunguri, which she did; she gave a detailed account on how the appellant defiled her on two occasions; the record reflects that these facts were not denied by the appellant;

31. The P3Form presented by the clinical officer (**PW6)** whose testimony was that upon examination of the minor he found a broken hymen, whitish substance, spermatozoa and yeast cells; the doctor's opinion was the presence of spermatozoa confirmed that there was penetration;

32. Penetration is defined under the provisions of Section 2 of the Act and it reads as follows;

> **……**type it in……..

33. This court is satisfied that this hat this element was proved by the prosecution to the desired threshold.

Whether the trial court erred in convicting and sentencing the appellant without considering the circumstances surrounding the case.

34. The appellant argued that the trial court did not consider the fact that the complainant held out to the appellant as being of age and that there was deception of age;

35. Indeed, the record reflects that the appellant never raised this defence at the trial, but it was incumbent upon the trial court to have taken into consideration the circumstances surrounding the incident so as to determine whether there could have been deception of age;

36. In dealing with this issue this court shall revert to the evidence on record; and will re-evaluate two aspects of the evidence on record; one being whether there was deception of age; and whether the trial court considered the fact that the complainant consented to the sexual encounter;

37. In as much as consent to the sexual encounter may not have been considered by the trial court as a defence what was readily available to the appellant was the conduct of the complainant whether this may have led him to believe that the complainant was an adult; the trial court ought to have considered the fact that the complainant may have held out as of being of age; therefore the provisions of Section 8(5) would have afforded him a defence;

38. Section 8(5) reads as follows;

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39. Upon perusal of the court record it is noted that the only communication given by the complainant to the appellant on her on age was under cross examination; and the record reads as follows;

> ***" …… I told you that I am a pupil. You asked for a shop. I asked you and Stanley to keep my bag. You did not ask for an identity card.'***

40. Under re-examination the complainant reiterated that the appellant never asked her for an identity card;

41. It is this courts considered view that the term "**pupil**' is vague and open ended as it has no predetermined limit as it has a selection of various possibilities; which could have been that the complainant was either in high school or college or university; there was no evidence that at any material time this fact was clearly expounded to the appellant;

42. Further the evidence of the complainant was that she was going to Nyeri to look for employment at the appellant's sister's salon; the questions that arise is why would a minor be ready and willing to go and seek for employment and to accompany a person she barely knew; and whether the appellant was led to believe that she was of employable age;

43. The record reflects that prosecution never proved that at any material time that the complainants age was within the appellant's knowledge; and the appellant may have been deceived by the complainant that she was of employable age;

44. This court is satisfied that the trial court did not take these factors into consideration and convicted the appellant against the weight of such evidence; despite the fact that it is trite law that where there is a gap in the prosecution's case that raises any doubt then the appellant must be given the benefit of the doubt;

45. On the second limb; At the trial the complainant told the court that she agreed to accompany the appellant to Nyeri; that he had assured her of employment at his sister's salon in Nyeri; she then packed her bags and left home at around 6.40pm and went to Thunguri;she went looking around and asking for the house where they had agreed to meet up; her exact words as captured by the trial court on the record are;

> ***"The boy had asked me to find him in a compound which had a brown gate but I did not get him in that compound. I went to the second gate but I was told that he was not there. I went to a second gate but I was told that he was not there. I found a certain lady who asked me who I was looking for. The lady promised to take me to the boy but on leaving the gate I saw the boy and his friend Stanley."***

46. When she managed to find the appellant her evidence was that they headed to **PW3's** house together;the evidence on record demonstrates that there wasn't any form of coercion or the use of force upon her; a pointer to the fact that she had willingly and on her own accord accompanied the appellant to his friend's (**PW3**);

47. The evidence of Charles Githuka Gachunga (**PW9**) was that he met the complainant carrying her luggage and she told him that she was headed to meet with a young man at Thunguri and that they would then head to Nyeri together; he had tried to dissuade her but she declined; the complainants mother (**PW2**) confirmed that on the material date the complainant had escaped from home at 6.40am and had been seen leaving home with a bag; and together with her husband (**PW4**) they mounted a search for her to no avail; the evidence of PW9 was that after arresting and coercing him the parents of the complainant managed to get him to coax her into disclosing her location and that she was traced and found at **PW3's** house;

48. Her further evidence was that the appellant and **PW3** went out to carry out some chores and they left her in the house alone; after twenty minutes later the appellant came back alone and that was when he forced to have sex with him; he then left the house and left her alone again and returned after ten minutes with fruits which they ate; the appellant then had sex with her for the second time; that the chief came calling and again the appellant and **PW3** left the house and she was left alone for the third time;

49. The record reflects that that there was no cry for help made by the complainant when the chief came calling in at **PW3's** house and indeed throughout that material day the complainant had three opportunities to escape from **PW3's** house when she had been left alone but she did not take advantage of the situation but instead opted to remain in **PW3's** house; even when she called **PW9** using **PW3's** cell phone **PW9's** evidence was that it was not a distress call and that he had continued communicating with her throughout in order to persuade her into divulging to him her location;

50. Going further the medical evidence could have afforded the appellant the defence that the consented to the sexual encounter; the clinical officer **(PW6)** who examined the complainant confirmed that the complainant's hymen was '**not freshly broken**'; the report also does not demonstrate that there were any signs of physical force or violence; there were no injuries supportive of the fact that the vaginal penetration was forceful in the form of visible bruises, cuts or lacerations on the complainant's private parts which are normally associated with non-consensual sex;

51. After re-evaluating the evidence on record this courts is satisfied that there was no evidence of distress or trauma and finds that the encounter whether sexual or otherwise was not forced and all evidence points to the fact that it was consensual; and finds that the trial court erred in failing to considerthe surrounding evidence ondistress or trauma that would have demonstrated thatthe encounterwas indeedforced or non-consensual;

52. The charge sheet may have been defective; the prosecution may have established the key elements of the offence of defilement; but this court finds that the trial court erred in convicting and sentencing the appellant without considering the circumstances surrounding the case, particularly the circumstances relating to the complainant's conduct and her holding out to be of age; against this background this court is satisfied that the conviction was improper;

53. The upshot is that this court finds that there is merit in the appeal;

FINDINGS& DETERMINATION

54. In the light of the forgoing this court makes the following findings and determination;

(i) The appeal is found lacking in merit and it is hereby dismissed;

(ii) The conviction and sentence are upheld;

Orders accordingly.

Dated, Delivered and Signed at Nyeri this 16th day of July, 2020.

HON.A.MSHILA

JUDGE