REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 289 OF 2014

GHK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against Conviction of Sentence in Molo Chief Magistrate's Criminal Case Number 2256 of 2012 by Hon. A. Towett (Ag. Senior Resident Magistrate).

J U D G M E N T

On 30th September 2012 Kenneth Kiprop Korir, the Assistant Chief Cheptangulbei Location, Londiani District was in his office at 9.00 a.m. There were homes near his office. One of them was that of the appellant herein GHK. He saw a young girl sweeping outside GHK's house and that made him suspicious. He went there and found GHK in the company of the young girl, the complainant herein CC who appeared to be a minor. He took both the appellant and the girl to the police station. He knew both of them as they were from his location, and the girl was at that time schooling at [Particulars withheld] Primary School.

At the police station they found a Corporal Akinyi. By 29th April 2014 when she was required to testify she Cpl Akinyi had been transferred to Mombasa and PW4 No. 58535 PC Ibrahim Chunju had taken over the case.

His testimony was that he only bonded witnesses. He did not conduct any investigations, that the complainant and the accused were not known to him but that she was thirteen (13) years old and she and the appellant were boyfriend and girlfriend. On cross examination he said that he read in the witness statements that the complainant and the appellant were girlfriend and boyfriend.

Be that as it may, on 30th September 2012, PW5 MKK the father to the complainant received a call that his daughter had been defiled. He travelled home and found her locked up at the police station. At that time the accused had escaped. He said that the accused was his neighbor and it was said he had taken his daughter to his house and defiled her.

On cross examination he said on the material day he did not know where his daughter was.

On the same 30th September 2012 CC was taken to Olenguruone District Hospital where PW3 Monica Komen, a clinical officer examined her. She said CC was 12 years then, and was taken to the facility by her parents.

That on examination her vagina was normal, no lacerations or tears, but hymen was broken. There was a whitish foul smell discharge. High Vaginal swab revealed epithelial cells which she said were an indication of an infection. That her urine had yeast cells. She formed the opinion that complainant was defiled.

On 30th May 2014, PW4 was recalled to produce the complainant's original clinic card. He testified that it indicated she was born on 20th August, 1999 and it was produced as P. Exhibit 2.

CC testified on 30th October 2012. The trial court conducted a *voire dire* exam where CC said she was 14 years old. That she had dropped out of school in class 5 in 2nd term in 2011. The court formed the opinion that the complainant was *"intelligent and clearly understands the meaning of taking an oath. She will give sworn evidence."*

In her sworn evidence CC testified that she was born in 1998 and had left school in 2011. That in January 2012 she met the appellant who was a boda boda cyclist. He requested her to be his girlfriend. She did not accept then, but the appellant began to appear at her home almost every day. She accepted his proposal in March 2012. After that they began to have sex.

On 29th September 2012 she had gone to appellant's home. They had sex that night and until 11.00 a.m. the following day 30th September 2012.

The chief arrested them while they were in the appellant's house. She stated, *"The chief beat us and took us to the police station. We were taken to Kedowa Police Station. I was taken to Londiani District Hospital."*

After her testimony the appellant sought time to digest her testimony before he could cross examine her. In his own words; *"I pray for another date. I have not understood the witness statements."*

From that day the record shows that the CC disappeared from home and could not be traced for cross examination. A warrant of arrest was issued on 8th May 2013 for her father, but he showed up later and reported that the complainant kept disappearing from home.

She was brought on the warrant of arrest on 22nd July 2013 where she stated; *"I was afraid to come to court. GHK was my boyfriend. I had wanted the case to be dismissed."*

The record shows that the court responded: -

> ***"Complainant warned and instructed to appear in court on the hearing date."***

She testified afresh on 28th August 2013 where she reiterated that the appellant became her boyfriend after she had accepted his request, and that they had sex severally. On cross examination she said she was sixteen (16) years old.

On this evidence the trial court found the accused had a case to answer. In fact, upon the prosecution closing its case the trial court simply recorded: ***"Case to answer"***

The appellant herein was charged with **Defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act,** and in the alternative **Indecent Act with a Child Contrary to Section 11(1) of the same act**.

It was alleged that on 29th September 2012 in Kipkelion District within Rift Valley intentionally and unlawfully caused his penis to come into contact with the breast of CC a girl aged thirteen (13) years old.

Upon the court's determination of case to answer, the appellant chose to make an unsworn statement of defence.

He told the court on 30th September 2012 at 6.20 p.m. he met a police officer by the name David Mutai near his home. The officer arrested him, but refused to tell him why. He escorted him to the police station where he kept him in custody till 2/10/2012 when he was brought to court. He denied the offence.

By a judgment dated 4th December 2014 the trial court found the appellant guilt stating; ***"It is my considered opinion that the prosecution has proved its case beyond reasonable doubt and I can only proceed to convict the accused under Section 8(1) of the Sexual Offences Act, 2006."***

On 5th December 2014 the accused was ***"in accordance with Section 8(3) of the Sexual Offences Act 2006 sentenced to serve twenty (20) years imprisonment."***

The appellant was aggrieved and filed the Petition of Appeal on 18th December 2014 accompanied by what was termed Grounds for Mitigation viz:

> ***1. THAT I am a young male person aged twenty years.***
>
> ***2. THAT at the time of arrest I was pursuing my secondary education and therefore need to pursue my education.***
>
> ***3. THAT the sentence was too harsh and I beg the honourable court to consider my age.***
>
> ***4. THAT I am an orphan from a family that was affected by the post-election violence of 2007.***
>
> ***5. THAT I promise to abide to whatever the decision the court deems favorable and if it is a non-custodial sentence, I promise to abide to all regulations.***
>
> ***6. THAT for genuine reasons that I cannot remember all that went on in court; I pray to be supplied with original copy of court proceedings to enable me raise more grounds of appeal.***

In 2019 he filed Amended Grounds of Appeal.

> ***1. THAT the learned trial magistrate erred in law and facts thus age was not conclusively proved as these were contradicting statement from the prosecution witnesses.***

2. THAT the trial magistrate erred in law and facts by convicting the appellant on the strength of the medical evidence that did not link the appellant.

3. THAT the trial magistrate erred in law and facts by misapprehending the facts of the case.

Generally, that the trial court had misapprehended the facts of the case, that age was not proved conclusively and there was contradictory evidence, and in any even the medical evidence did not connect him. Regarding the sentence, he filed further grounds.

1. THAT the trial learned magistrate did not appreciate the merit in the case of FRANCIS KARIOKO MUTUATETU AND WILSON THIRIMBU MWANGI Petition No. 15 of 2015 which removed the fetter that bound both trial magistrates and learned judges from following statutory mandatory sentences rather than gave them power to exercise their discretion when it comes to sentencing.

2. THAT the learned trial magistrate made a fundamental error in law by sentencing the appellant to serve 20 years but failed to note that under article 260. The appellant was a child and further under articles 53(1) f (i) (ii) and (2) the appellant being a child was to be detained as a last resort and to the best interest of the child.

3. THAT while in prison the appellant has taken full advantage of the rehabilitative programmes offered in the said correctional facility.

4. THAT the trial court failed to consider my mitigation which proved that I was remorseful and repentant.

5. THAT am a young man with a bright future a head and used to work hard to sustain my siblings and extended family given that my parents were killed during post-election violence.

6. THAT prison life is hard, I have developed ulcers due to stress thus humbly beg leave of the honourable court to have mercy on me and remit the remaining part of my sentence to that of non-custodial.

7. THAT the honourable court be pleased to be guided by provisions of article 50(2) (p) (q) as well as considering the time I have already spend in custody while deciding on an appropriate sentence.

8. THAT I pray to present during the hearing and determination of this appeal.

He also filed further submissions.

At the hearing of the appeal the appellant submitted that he relied wholly on the written submissions.

Ms. Wambui prosecuting counsel opposed the appeal on behalf of the state and made oral submissions.

This being the first appeal the appellant is entitled to a fresh re-assessment of the evidence on record, and for this court to draw its own conclusions in line with **Okeno vs Republic**.

I have carefully considered the evidence and the appellant's submissions. The issues for determination are;

1) Whether the prosecution proved all the ingredients of the offence of defilement.

2) Whether the trial court misapprehended the evidence.

3) If the appeal is sustained what sentence would be appropriate in this case.

The first thing to note in this case is that it was not clear which of the two offences the appellant was being put on his defence. This is because upon the closure of the case from the prosecution the court simply stated "case to answer". Was it on the charge of defilement or the charge of indecent act? That the court did not clarify. In making his defence, the appellant ought to have been informed by the court which offence he was being placed on the defence. The main charge or the alternative charge.

Coming to the offence he was found guilty of; defilement of a girl aged thirteen (13) years old, the prosecution had obligation to prove age. The charge sheet says she was thirteen (13) years old as on 29th September 2012. When she testified in 2013 she said she was sixteen (16) years old. The investigating officer who came to produce the clinic card said she was born on 20th August 1999 however I did not see the clinic card in the original court file but a copy was filed. It showed Date of Birth as 20th August 1999. The P3 filed on 1st October 2012 indicated she was twelve (12) years.

When she testified on 26th August 2013 she said she was sixteen (16) years old. The father was not asked when his daughter was born. From the foregoing it is evident that the age of the complainant was not conclusively proved, was she twelve (12), thirteen (13) or fifteen (15) at the time of the offence?

Faced with the conflicting evidence the trial court ought to have sought an age assessment report or sought other evidence to satisfy itself as to the age of the complainant because at that time, it would make a difference of five (5) years in the sentence that could be meted to the

accused person.

However, the mere fact that age was not conclusively proved would not per se render the charge not proved if the act of penetration is proved. This is because the fact of age determines the sentence while the fact of penetration whether the actual offence, or the actus reus was committed

Was penetration proved?

The case for the prosecution lies in the testimony of PW1. She did not complaint but the chief who saw her at appellant's and house took necessary action as is required by law on suspicion that the complainant sweeping outside the appellant's house at that time was a sign of bad things. The girl told the court what had happened. The appellant was her boyfriend and they had sex several times, and this was just one of those days. Her story is believable, why, because she even tried to protect her boyfriend by disappearing, hoping that the case would disappear as well. She did not want to testify against him. She did not want to hurt him, because according to her, she was the one who accepted his friendship when he made the request, that she was the one who took herself to his house.

In his submissions the appellant relied on **Hillary Nyongesa v Republic [2016] eKLR,** on the proposition that age of the victim must be proved; on the Ugandan case of **Francis Omurani v State, Criminal Application 2 of 2000** that age assessment ought to have been carried out.

According to him the complainant's conduct led him to believe that she was an adult, the fact that upon making his request for friendship in January, she took time to consider the same and returned an affirmative response in March. To him, this was not the action of a child but a person whose understanding was sufficient to warrant consideration. That she did not respond like a child but like an adult.

Further, that her conduct during her trial betrayed her further, that act of disappearing from home was further evidence that she was not a child under the control of her father. The appellant has a point in so far as the complainant sought time to consider the gravity of what she would be getting into if she agreed to have a relationship with the appellant. She did not tell the court what she was thinking about between the time of the appellant's request and the time she conceded to his request. That would have been helpful in the application of provisions of **Section 33**, taking into consideration the circumstances of the offence.

Although the trial court did not say so, it is clear that the complainant's testimony was convincing. She was not forced to have sex with the complainant. She believed he was truly her boyfriend and that it was within her powers to decide whether to be in a relationship or not. From the appellant's documents, he was twenty (20) years old at the time, and if the complainant was fifteen (15) years, and had dropped out of school, she may have considered that it was ok to be in a relationship.

Hence, even though the medical evidence simply indicated a broken hymen, that could be expected because the complainant had been having sex regularly with the appellant, without coercion for at least 6 months before the chief caught them. Hence, on the strength of the complainant's testimony and her efforts to protect the appellant I am not in any doubt that the 2 were having sex regularly.

Here I must speak about the manner in which the chief arrested the complainant and the accused person, her being locked up and the court's reaction to the complainant's disappearance.

It is the complainant's testimony on oath that the chief beat up both of them and escorted them to the police station where both were locked up. It is a contradiction. That he noticed she was a minor. She was living with an adult male. Hence his was an action in rescue, as is expected by the Children Act which defines the chief among authorised officers. As at that time she was a child in need of care and protection. He needed to speak with her to find out what was happening and why. Similarly, at the police station she was treated like an offender yet, as our law stands, she was a minor who needed guidance and counselling not beating and locking up. It is no wonder that those children who are molested find it hard to report. There is a real chance of being punished for reporting. Why would the chief "rescue" the complainant and proceed to treat her like a criminal? Why beat her, yet he himself say he noticed she was a minor.

It is unfortunate that sometimes in cases where the accused and his victim are caught 'red handed" the victim is 'paraded' for the whole village to see as she is escorted to the police station. One can only imagine the trauma this causes her, despite the fact that her rescuer is acting to safeguard her interests. Chiefs, Police and members of the public must always bear in mind that the most important thing is to act in the best interest of the child victim, safeguard her welfare and her rights at all times. The fact that she was a minor found having sex or in an early marriage relationship which a male person does not strip her of her dignity and rights, beating her, parading her in the village and calling the while world to "come and see" only adds to the trauma, and it is no wonder that some of the victims refuse to report for fear of this traumatizing embarrassment.

The court and the prosecution too missed out on a chance to make a referral for guidance and counselling and for follow up to ensure that she went back to school.

In this case it is not clear why the appellant was also not taken for medical examination yet both were arrested together, the alleged infections found by the Clinical Officer should have been sought from the appellant as well. This is the reason for the appellant's submissions that the complainant's torn hymen was not sufficient to connect him to the offence, more examinations ought to have been done, and I agree. (*See **Michael Odhiambo v Republic** at High Court of Kenya at Nakuru Criminal Appeal Number 28 of 2004*). The appellant made a jab the evidence given by the Clinical Officer, that the officer had not given her qualifications that her evidence could not be relied upon.

In addition, that the trial magistrate had drawn inferences that were not supported by the evidence.

Nevertheless, the testimony of the complainant was persuasive as to what had transpired between her and the appellant.

Hence, penetration by the appellant was established.

This is one of the cases that speaks to the need to re-look at the Sexual Offences Act. There surely must be a difference between the man who grabs a child and defiles her, and one in the circumstances of the present case.

This is where the second set of the appellant's submissions come in. that that **Muruatetu** Principle ought to be applied to his case, and that has already been done by the Court of Appeal in **Dismas Kilwake** case.

The appellant also submitted that at the time of the offence he was seventeen (17) years old having been born in 1995 as per the clinic card he attached to his submissions.

I have perused that clinic card, I am not certain of its geniuses as it does not bear the names of the appellant's parents and the same ought to have been produced at the hearing so as to have it subjected to cross examination.

Having said the foregoing, the appellant succeeds in part;

- I find that penetration was established beyond a reasonable doubt.
- I find that the age of the complainant was not conclusively proved, and the appellant was entitled the least sentence available in the circumstances, and in my view that would be under **Section 8(4) of the Sexual Offences Act,** 15 years imprisonment.

So what sentence?

Having considered the circumstances of the offence, I find that the appellant has been in custody since 2012, and reduce the sentence to period already served.

He is to be set at liberty unless otherwise legally held.

Delivered and Signed at Nakuru this 2nd September, 2020.

In the presence of: VIA ZOOM

Court Assistant Edna

For state Ms. Kibiriu

Appellant present

Mumbua T. Matheka

Judge

2nd September, 2020.