REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 82 OF 2019

GEOFFREY KIPKEMOI KISANG.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction in Criminal Case No. 1889 of 2012

Delivered on 23rd May 2019 in the Senior Principal Magistrate's Court

at Kapsabet by Hon. P. W. Wasike (Senior Resident Magistrate)

JUDGMENT

1. The appellant was tried and convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act (SOA) No. 3 of 2006. It had been alleged that on 5th of January, 2018 at about 12 noon within Elgeyo Marakwet County, he intentionally caused his penis to penetrate the vagina of AJ (name withheld), a child aged 13 years. In the alternative he had faced a charge of committing an indecent act with the said child by intentionally touching her vagina with his penis contrary to section 11(1) of the SOA.

2. The complainant´s testimony was that she went to the appellant who was their close neighbour to have her shoe mended. Instead, the appellant took her inside his house and defiled her and admonished her not to tell anyone. She told her mother what had happened and she was taken to hospital and later to Tot Police station where a report was made. The appellant was subsequently arrested and charged.

3. In his defence the appellant gave unsworn testimony in which he denied the offence. He blamed the charges on a land dispute he said exists between himself and the family of the complainant who are his relatives. At the close of the trial the appellant was found guilty and sentenced to serve 25 years in prison. Being aggrieved, the appellant moved to the High court and filed this appeal impugning both the conviction and sentence meted out by the lower court.

4. The appellant raised grounds of appeal which, in the main, faulted the manner in which the trial court evaluated the evidence before it. He contended that he was convicted on evidence that was inconsistent, contradictory, and uncorroborated. He also urged that the trial court disregarded his defence. He urged the court to allow the appeal.

5. Learned counsel Miss Okok opposed the appeal on behalf of the state. She urged that the appellant was a neighbour and was well known to the family of the complainant; that the issue of a land dispute was never raised at any time during cross examination; that the age of the child was proved by her birth certificate and penetration by her evidence supported by that of the medical witness. Counsel urged the court to uphold the conviction but reduce the sentence to the minimum 20 years, provided by law since the appellant was treated as a first offender.

6. I have assessed and considered the evidence tendered in the trial court afresh, to draw my own conclusions and make my own findings, as is expected of me as the first appellate court. I am also cognisant of the fact that I neither heard nor saw the witnesses, as they testified in the trial court and have given due allowance.

7. The first issue for determination in a case of defilement is the age of the complainant. The complainant was aged 13 years at the time of the incident as is evinced by exhibit no2, her birth certificate. Her date of birth in the birth certificate was indicated as 28th February 2004. She was therefore aged 13 years and was due to turn 14 in a month's time when she was attacked. In any case the appellant did not dispute her age.

8. The second issue for determination is the identification of the complainant's assailant. The minor identified the appellant as her assailant. Both the complainant and her parents testified to the fact that the appellant was well known to them as a neighbour. The complainant testified

that the appellant set upon her when she took her shoe to him to mend.

9. Her evidence was supported by that of PW2 her father, whose evidence placed the minor at the appellant's residence at the pertinent time just like the minor had stated. PW2 noticed that the minor had gone missing from among her friends, with whom she had been sitting outside her father's kiosk. Upon calling out her name he saw her emerge from the appellant's compound. In his own words "**she appeared scared and confused**". She told her father that the appellant had asked her to accompany him to his house so that he could mend her shoe.

10. The third issue for determination is whether there was proof of penetration. The minor testified as PW4 narrated what befell her when she took her shoe to the appellant to be repaired. In her own words she stated as follows:

> **I had left home and the accused got hold of me near his house while I had taken my shoe to him to mend. He touched my breasts and stomach. He took me inside the house and did ''Tabia mbaya". He told me not to inform anybody. He removed my inner cloth and pushed me to the wall and had sex with me.**

On cross examination she was categorical that the appellant inserted his male organ into her vagina as he held her against the wall and that he did penetrate her.

11. This was what she recounted to PW1 her mother, who arrived shortly after the minor emerged from the appellant's house. The mother checked her genitals and noted a discharge. She took the minor to Tot Sub- county hospital where it was confirmed that she had been defiled.

12. Pw3 Dr Joan Chebii, who attended to the minor at the hospital testified that upon examination, she found the minor's external genitalia to be normal. She however noted: scanty bleeding from the vaginal opening, torn hymen, lacerations, and the vaginal wall and cervix were swollen and reddish. The doctor made a finding that there had been penetration and she produced the P3 form she filed in evidence.

13. I assessed the appellant's testimony in the context of the foregoing evidence. This being a criminal trial the onus lay with the prosecution to prove their case against the appellant, beyond reasonable doubt. It was not the duty of the appellant to prove his innocence. He denied the offence and stated that the witnesses are his relatives and that there is a pending land dispute between them at the area D.C.'s office. He wanted the court to believe that his relatives framed him to get him out of the way, so that they could access his land.

14. I note however, that the issue of the existence of a land dispute was raised at the tail end of the trial in the appellant's own defence. It was not raised in cross examination to be tested. I find that to accept the appellant's explanation would leave the injuries on the minor unexplained. It is not conceivable that these parents injured their own child to that extent just to fix the appellant. It is my considered view that it was an afterthought intended only to exculpate the appellant and is discarded as such.

15. I am satisfied that the prosecution proved their case against the appellant to the required standard and the appellant's own defence did not manage to dislodge the prosecution case, or to cast a reasonable doubt whose benefit the appellant could reap.

16. On the issue of sentence, it is imperative to note that sentence must depend on the facts of each case. The appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

17. Even where the appellate court is of the opinion that the sentence imposed by the trial court is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court, unless anyone of the matters stated above exist. (see **Court of Appeal** in **Bernard Kimani Gacheru vs Republic (2002) Eklr.)**

18. The foregoing notwithstanding, it is the court which is seized with a matter that will judge whether or not, the circumstances of any particular case are such as to justify a departure from the sentence. In the matter before me I note that the appellant was treated as a first offender and that the prosecution is not opposed to his sentence being reviewed downwards. Reasons wherefore his sentence is hereby reviewed downwards to the minimum provide by law.

19. The appeal on conviction is therefore, found to lack merit and is dismissed. The appellant's sentence be and is hereby reduced to 20 years in prison.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this **8th day** of **SEPT. 2020**

L. A. ACHODE

JUDGE