REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 23 OF 2018

JOHN GATERO MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in the Chief Magistrate's Court at Murangá

Cr. Case No 7 of 2017 delivered by Hon. M. Wachira (CM) on 6th February, 2018).

JUDGMENT

1. The Appellant was in trial Court charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2008. It was alleged that on diverse dates between 13th and 14th of June 2011 at unknown time at [Particulars Withheld] village Gikandu location in Muranga County intentionally caused his penis to penetrate the vigina of BWK, a child aged 16 years. In the alternative he was charged with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. Upon a full trial the lower Court found the Appellant guilty of the main charge and convicted him accordingly. He was sentenced to serve 15 years imprisonment. Dissatisfied with both the conviction and the sentence he proffered the instant Appeal to this Court. He filed a Petition of Appeal on the 13th March, 2018 in which he raised two grounds of Appeal namely; that the learned trial magistrate was biased as he only relied on the evidence of the prosecution witnesses without considering his defence and that he was implicated purely on allegations premised on a domestic misunderstanding between himself and the complainant.

3. The Appeal was canvassed before me on the 3rd of September, 2020. The Appellant who was in person did not adduce submissions stating that he shall purely rely on the grounds of Appeal raised in the Petition of Appeal. Learned State Counsel Ms. Gichuru for the Respondent opposed the Appeal. She submitted that the prosecution adduced cogent and consistent evidence which advanced a water tight case for the prosecution. She submitted that the age of the complainant was properly established by the way of a birth certificate adduced as exhibit No. 3 and penetration by way of the oral evidence of the victim and PW4 who was a Clinical Officer who examined PW1 and adduced medical report to the effect that the victim had been defiled. Finally, Counsel submitted that the identification of the Appellant was not in issue as he was well known not only to the complainant, PW1, but also to other witness namely PW2, 3, and 4. It was the Counsel's submissions that the Appellant having failed to advance defence had not rebutted the prosecution's case. She thus urged the Court to uphold both the conviction and the sentence and accordingly dismiss the Appeal in its eternity.

SUMMARY OF EVIDENCE

4. This being the first Appeal, the Court is charged with the duty of re-evaluating and re analysing the evidence adduced before the trial Court and come up with its independent conclusion. In so doing, the Court must take into account that it has neither heard nor seen the witnesses and give due regard for that. See: **Okeno vs Republic (1972) EA 32.**

5. The prosecution called a total of 5 witnesses whose brief evidence can be summarised as follows: On the 13th of June, 2017 PW1 who was the complainant then aged 16 years and in Form 1 left her home at about 10.00 a.m. for [Particulars Withheld] Shopping Centre to go and pick her school uniform from a tailor. She waited for the tailor until about 5.00 pm and after picking the uniform boarded a motor cycle to go home. Incidentally, another motor cyclist approached her and told her he would take her home instead. She boarded the latter's motor cycle which had another passenger. The cyclist unfortunately refused to stop when she arrived at her destination and instead rode her and the other passenger to where the passenger lived. It turned out from the evidence of PW1 that where they alighted was at rental house into which the passenger, now the Appellant led her in. He pushed her into the house, undressed her and defiled her. At some point the Appellant left the house leaving PW1 inside and locked the house from outside. When he returned he informed PW1 that her mother had been looking for her but he was not ready to release her until he had cooked for him food and tea. According to PW1 when the motor cycle did not stop at their home she screamed but no one paid attention to her screams. It was her further evidence that she knew the Appellant by her his two names

and a nick name.

6. Back at home, PW1's mother **LWK** who testified as **PW2** had been worried why her daughter had not returned home. She informed her husband **BK** who testified as **PW3.** He worked as a watchman at [Particulars Withheld] Murang'a and had on that evening at about 3.00 pm for leave for work. He was again informed that 7.00 and 10.00 pm that their daughter had not returned home. He picked up the issue after checking out from the work the following day.

7. PW2 on the other had suspected that PW1 could be with the Appellant because she had heard the Appellant talk something about her daughter. She thus approached a friend who knew the Appellant and enquired whether the Appellant was with PW1. When this friend called the Appellant the Appellant confirmed that he indeed was with PW1 but was not going to let her go until she cooked for him food and tea. She gave this information to PW3 and in return both went and reported the matter at Ndikwe Police Patrol Base. Thereafter, they were referred to Murang'a Police Station and hospital for treatment of PW1.

8. PW1 was examined at Murang'a County Hospital 15th June, 2017 by **PW4, DAVID MWANGI GITHININJI,** a Clinical Officer in the hospital. The result of the examination were that she had lacerations on the libia majora and libia minora and on the vagina and that she was also bleeding. There was absence of hymen indicating penetration of vagina thus defilement. He completed and filed the P3 Form as well as a Post Rape Care (PRC) Form which he produced as Exhibit 2 and 1 respectively.

9. The case was investigated by **PW5, PC ABIGAEL KARU** of Ndikwe Patrol Base. She confirmed that she received the information of the incident on 15th June, 2017 after which she commenced investigations. The report made was that PW1 had gone missing and was found a day after in the house of the Appellant who was known by the nick name Wakembo". She issued the complainant with a treatment letter and recorded necessary statements. She also adduced in evidence PW1's Birth Certificate as Exhibit 3.

10. After the close of the prosecution case, the Court ruled that the prosecution had established a *prima facie* case to warrant the Appellant to tender a defence. Upon being explained to the implication of Section 211of the Criminal Produce Code he opted to remain silent and not call any witness. In the judgment of the learned trial magistrate, the Court found that the prosecution had duly discharged its burden and convicted Appellant of the main count.

DETERMINATION.

11. I have accordingly considered the evidence adduced before the trial Court as well as the submissions by the Respondent and have arrived at a conclusion that only one issue arises for the determination namely whether the prosecution proved his case beyond a reasonable doubt.

12. In a case of defilement, it is incumbent upon the prosecution to proof the three main ingredients of the offence of defilement, that is to say proof of age of the victim, proof of penetration and proof of identification of the perpetrator of the offence.

13. As regard the age of the victim PW1 candidly testified that she was aged 16 years at the time of the incident. Her mother, PW2 echoed the same evidence and in addition identified PW1's Birth Certificate which was produced in evidence by PW5. The same shows that the complainant was born on 17th January, 2001. The offence took place on 13th and 14th June, 2017. This capped the age of PW1 at 16 years as at the time of incident. This then proved the first element of the offence of the defilement.

14. As regards penetration, again PW1 was candid that the Appellant forcefully took her into his house where he defiled her against her wish. That evidence was collaborated by the testimony of PW4, the Clinical Officer who examined and treated her. In his evidence he testified that she had lacerations on both the labia majora and labia minora as well as on the vagina. He further stated that the hymen was missing. The Medical Examination Report (P3 Form) adduced as exhibit 2 did vindicate the evidence of PW4 and additionally showed that PW1 was bleeding from her vagina.

15. Although PW4 testified that he also filled a PRC Form the same cannot be traced both in the original record of proceedings of the trial Court and the record of Appeal. Nevertheless, it is doubtless that the P3 Form did not differ in findings from the testimony of PW4. Accordingly, I do also find and hold that the second element of the offence of defilement was established.

16. I finally grapple with the question as to whether the Appellant was identified as the person who defiled PW1. There is no doubt that PW1 knew the Appellant both by his name and nick name, evidence that was also echoed by PW2, the mother to PW1. There is also no doubt that when PW1 was requested to release PW1, he declined until she had cooked for him. To this extent, I find that there is no doubt it was the Appellant who defiled PW1.

17. Although the Appellant has raised as a second ground of Appeal that he was implicated because he had a grudge with the complainant, it is not an issue that came up when he cross-examined the complainant and all the other prosecution witnesses. Furthermore, he failed to make an attempt to rebut the prosecution evidence by tendering no defence.

18. It follows that this is a case which the prosecution adduced cogent, consistence and collaborative evidence. The evidence was not dislodged at all thus the conviction of the Appellant was save. I uphold it accordingly.

19. As regards to the sentence, Section 8(4) of the Sexual Offences Act No. 3 of 2006 provides that;

> ***"A person who commits an offence of defilement with a child between the age of 16 and 18 years is liable upon conviction to imprisonment for a term of not less than 15 years."***

20. Although this provision is couched in mandatory terms the evolving jurisprudence arising from the Supreme Court decision in the case of **Francis Kariokor Muruatetu & Another (2017) eKLR** is that a provision of a minimum mandatory sentence is unconstitutional. The rationale accorded to this is because a trial Court is denied the discretion to impose an appropriate sentence based on the circumstances of the case, more so upon considering both the aggravating and mitigating factors. However, this is not to say that the Court cannot impose the minimum mandatory sentence spelled out under a statute. What is important is that the Court must accord the reasoning of upholding the minimum mandatory sentence.

21. A look at the sentencing proceedings of the learned trial magistrate attest that no reasoning or justification was accorded to the imposition of the minimum mandatory sentence provided under Section 8(4) of Sexual Offences Act. On the part of this Court and on evaluating the entire evidence on record the Appellant, upon being given an opportunity to mitigate only requested for proceedings. The facts of the case speak for themselves that he unwillingly took the complainant to his house where he not only defiled her but caused injuries to her private parts. Taking into account that defilement is a serious offence that offends the dignity of a woman, that leaves her with trauma for the rest of her life, I find no reason to upset the sentence imposed by the trial Court.

22. Accordingly, I find that the prosecution proved its case beyond a reasonable doubt. I find the Appeal without merit and dismiss it in its entirety. Conversely, I uphold the conviction and sentence.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 8TH DAY OF SEPTEMBER, 2020.

G.W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2. *Miss Gichuru for the Respondent.*