REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 101 OF 2015

LESIIT, J

ISAAC MAKORI NYAGERA...........................APPELLANT

-VERSUS -

REPUBLIC..RESPONDENT

(Appeal from the original conviction and sentence in Kibera Chief Magistrate's Court Criminal Case No. 2112 of 2013 by Hon. Wanjala - CM)

JUDGEMENT

1. The Appellant, **ISSAC MAKORI NYAGERA**, hereinafter the Appellant, was charged with **Defilement** contrary to **section (1)** as read with **section 8(3)** of the **Sexual Offences Act**. The particulars of the offence are:

> **"On the 20th day of June 2013 at Southlands slum in Langata within Nairobi County intentionally and unlawfully caused his male genital organ (penis) into the female genial organ (vagina) of LBA a girl aged 13 years old."**

2. The Appellant was charged with an alternative charge of **indecent act** with a girl contrary to **section 11 (1)** of the **Sexual Offences Act**. The particulars are:

> "**On the 20th June 2013 at Southlands slum in Langata within Nairobi County intentionally and unlawfully caused his male genital organ to come into contact with the female genital organ of LBA a girl of 13 years old**".

3. After a full trial, the Learned trial magistrate found him guilty of the main ground of D**efilement** contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act**. He was sentenced to serve 20 years imprisonment effective from the first date that he was remanded in custody (24/6/13).

4. The Appellant was aggrieved by the conviction and sentence and so filed this appeal. He raises 7 grounds of appeal on this memorandum of appeal filed in court on 29th June 2015. He has however filed new grounds together with his written submissions filed on 5th October 2020. There isn't much difference in both sets of grounds except that the latter ones are more detailed and are as follows:

> **(1) That the learned trial magistrate erred in both law and fact by failing to find that a key ingredient of the offence i.e. penetration, was not established against the Appellant.**
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> **(2) That the trial magistrate erred in both law and fact by basing the conviction on the evidence of a single witness whose testimony was obtained by coercion and threats contrary to the safeguards of the constitution and decided cases.**
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> **(3) That the Learned trial magistrate erred in both law and fact by holding that PW1 and PW2 were credible witnesses worth of belief whereas the evidence was greatly uncorroborated and full of explicit inconsistencies and contradictions that impugned on the overall burden of proof.**
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> **(4) That the learned trial magistrate erred both in law and fact by failing to find that necessary witness meant to corroborate the prosecution's case was not procured thereby leaving hanging gaps in the evidence therein.**
>
> **(5) That the learned trial magistrate erred both in law and fact by failing to meet the overall burden of prove that was**

expected in a case of such magnitude thereby leaving the accused persons defence unrebutted.

5. The brief facts of the prosecution case were that the complainant PW1, a child of 13 years was left at home alone by her mother PW2. The day before PW2 returned, PW2 was inside the house preparing to cook food when the Appellant entered. He held her mouth by his hand undressed her forcefully, removed his trousers and defiled the complainant. After threatening the complainant with death to her and her mother if she told her mother of the incident, the Appellant ran out of the home.

6. When PW2 returned the next day, she found the complainant walking with difficult. On checking her private parts, she saw bleeding. She reported to PW3, a village elder and eventually after reporting to the police, to MSF (Doctors without Frontiers) at Kibra. PW1 was examined and treated. PW2 produced the birth certificate of the complainant which shows that she was born on 16th April 1995, and was 13 years at the time of incident.

7. PW6 was the first medical personnel to examine the complainant 2 days after the incident. PW6 testified that she treated the complainant a child of 13 years on 22nd June 2013 at around 10.00a.m. After examination, she noted bacterial infection which could be a sexually transmitted infection (STI), abrasions on the majora and minora and painful bruised hymen with foul smell and whitish substance. PW6 started the complainant on STI treatment for six months.

8. The accused gave an unsworn defence in which he denied the charge. He stated that he was a security guard and that he lived in Southlands during the time in question. He also said that he knew the complainant. He said he left early to go to his work where he was required to report at 5.45 p.m. That during the day he did construction work to supplement the poor pay of a guard which he earned. He denied the charge.

9. In support of his appeal, the Appellant relied on the written submissions from which I obtained the above grounds of appeal. Mr. Momanyi for the State made oral submissions opposing this appeal. I have considered the submissions by both the Appellant and the State. I have also considered the cases cited, especially by the Appellant.

10. This is a first appellate court and that being the case, I have the duty to analyze and evaluate afresh all the evidence that was adduced before the lower court, and draw my own conclusions of the matter, while giving an allowance for not having had the benefit of observing the witnesses. I am guided by the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic**, Criminal Appeal No. 272 of 2005 where it was stated as follows:

> **"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of** *Okeno vs Republic [1972] EA 32* **will suffice. In this case, the predecessor of this court stated:**

'The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.' **"**

11. The first ground of appeal raised by the Appellant in his submissions challenged the issue of penetration. The Appellant raises issue with the failure by the prosecution to prove the key ingredients of the offence. The Appellant urged that penetration was not proved because the evidence of PW4 who examined the complainant on 25/6/13 said that the complainant did not give any history of bleeding. The Appellant urged that PW4's evidence dispels PW2's evidence who said she examined her daughter and found she was bleeding. The Appellant urged that the complainant did not say anywhere that she was bleeding. He urged that forensic examination of complainant swabs and clothes yielded no semen and thus there was no proof of the Appellant ever coming into contact with the complainant.

12. The Appellant invoked the case of **Stephen Munyao vs. Republic [2019] e KLR** where the High Court discounted the prosecution's narrative that the Appellant had infected the complainant with an STI on grounds the prosecution did not carry proper investigations to link the Appellant with the offence in order to leave no room for speculation that the minor may not have been infected by anyone else.

13. Mr. Momanyi represented the State in this appeal. Learned Counsel opposed the appeal. After giving a summary of the facts of the case counsel submitted that there were three issues for determination in this case, one the age of the minor; two whether there was penetration, and three, the issue of identification. Age was not an issue and was not raised by the App as one of his grounds of appeal. There is no need to go into it.

14. On the issue of penetration, the learned prosecution counsel urged that the P.exh.2, the document from MSF (Doctors Without Frontiers), a PCF (Post Rape Care Form) proved that there had been penetration of the minor. He referred to page 42 of the proceedings where PW6 referred to the PCF and said that the child was bleeding at the time of examination on both the labia and majora on right side, and that the hymen was pink in colour and painful to touch and was broken.

15. The issue whether there was penetration or not is a matter of fact. It can be proved by oral, not necessarily scientific evidence. The evidence adduced by the complainant was that she was forcefully held by the App, who undressed her with one hand, undressed himself then defiled her by inserting his male organ into her female organ. The complainant's evidence was that she felt pain during the ordeal. The mother who saw her two days after the incident saw bleeding in her private parts. That was indicative that there had been a sexual activity.

16. There was medical confirmation of penetration from the evidence of PW6 who said that upon examining the Complainant she found bleeding on the majora and minora of the Complainant's female organ, with abrasion and broken and painful hymen. There was also whitish discharge on the top of her organ which was evidence of a sexually transmitted infection, for which the MSF treated her for six months.

17. There was other evidence which also supported the Complainant's evidence of penetration. PW2 her mother saw the Appellant walking with difficulty, while PW6 stated that the child felt pain on her private parts when touched, which was not normal.

18. The Appellant was relying on the findings by PW4, the Police Surgeon who said that when he examined the Complainant, she did not complain of bleeding. PW4 examined PW1 on the 25th June 2013. PW6 on the other hand examined her on the 22nd June 2013. The incident itself occurred on 20th June 2013. PW4 saw her five days after the incident. It is not surprising that he saw no bleeding. By then healing must have set in due to effluxion of time. The Government Chemist also found no semen or blood in the Complainant's vaginal swab and the Complainant's pant. The samples were received by the department in two batches, on 2nd August 2013 and on 5th November 2013. The analysis was carried out on 7th April, 2015. No question was put to the Chemist in regard to the quality of storage of the samples and the possible effects of delay to the analysis.

19. On the issue of defilement, the learned trial magistrate found as follows:

> **"Taking into consideration what the child stated and what the mother observed on the child and also what was seen at MSF clinic as per the evidence of PW6 PA I believe that the complainant was defiled. The person who is said to have committed the offence is the accused person in this case a well-known person to the complainant and a neighbor. There was no history of any grudge or any differences between the accused person and the complainant or her mother. Hence, I do not have any reason to disbelieve what the complainant stated in court. I believe that she was defiled.**
>
> **Her hymen was interfered with. Her age was 13 years at the time of the said offence was committed. I find this offence proved and I proceed to find that the accused person is connected to the commission of the offence. He has been identified."**

20. I have analysed and examined afresh the entire evidence adduced in this case, both by the prosecution and the defence. I am in agreement with the findings of the learned trial magistrate. The evidence adduced by the prosecution has proved that there was penetration of the Complainant's private part on the date in question, being 20th June 2013.

21. The second issue raised by the App was that of evidence of a single witness. The App contended that the prosecution relied on the evidence of a single witness which was obtained through coercion in that the Appellant testified that she did not tell her mother about the incident until after one day upon her return, and even then only after she was beaten. For that proposition he relied on **Paul Kenya Gitari vs. Republic [2016] e KLR** where court held that since the complainant reported the alleged defilement after she was beaten, the court could not dismiss that fact as an idle or unsubstantial contention.

22. The law is clear that there is no limit to the number of witnesses required to establish a fact in a case. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166** the Court of Appeal

> **"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care."**

23. Furthermore, **Section 124** of the **Evidence Act** and the proviso thereof, is clear that a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (See **George Kioyi V R Cr. App. No. 270/2012** (Nyeri) and **Jacob Odhiambo Omumbo V. R. Cr. App No. 80 of 200** (Kisumu).

24. In the instant case, the trial court convicted the Appellant not on the sole evidence of PW1 the complainant, but also on the findings of the Complainant's private parts by her mother PW2, as well as the MSF nurse PW6. The trial Magistrate also believed the testimony of PW1 and discounted the allegations by the Appellant that he was being framed. Even though there was no eye witness who testified that he witnessed the incident, there was sufficient evidence to support the evidence of the Complainant.

25. The other issue raised was the credibility of witnesses. The Appellant contended that there was inconsistency and lack of corroboration of the complainant's evidence, and that the other evidence relied upon to cure the defect was itself not credible. The Appellant urges that the complainant's evidence was that her mother PW2 was gone 4 days when the incident occurred. PW2 on the other hand said her mother was gone only for a day. Appellant urged that PW1's evidence does not pass the test of **section 124** of the **Evidence Act**. He relied on **GMW – vs. Republic [2019] e KLR** where the trial judge found inconsistency in complainant's evidence gave the evidence the character of a developing story instead of evidence supporting the charges relating to a specific event.

26. Mr. Momanyi for the State urged that the prosecution had adduced sufficient evidence. Counsel urged that there was no doubt as to the identity of the offender since the Appellant was well known to PW1 and 2 as a neighbor and a watchman, and that PW2 corroborated PW1's evidence to that effect.

27. The inconsistency complained of in this case was the fact the complainant said that her mother went home leaving her in Nairobi for 4 days but her mother said that she was gone only for a day. The complainant's evidence in the case the Appellant relies on was faulted by the appellate court because of the fact the complainant kept adding new evidence as her testimony progressed, giving the impression she was developing her case on her feet. That is not so in this case. There was a variation in the evidence of the Complainant and PW2. The variation was not material, did not affect the evidence adduced against the App and does not go to the root of the prosecution case. Nothing turns on this point.

28. The other issue raised was failure by the prosecution to avail vital witnesses to the case. The Appellant urged that his son whom the complainant said witnessed the incident was a material witness for purposes of corroborating the complainant's evidence and should have been called as a witness. He relied on **Christopher Nzolio Kimunya vs. Republic [2019] eKLR** where court found that failure to call an eye witness rendered the circumstances of identification unsuitable for positive identification of the accused. Appellant also relied on **Patrick Owino Okumu vs. Republic [2016] e KLR**, a case where the accused in the case said that he lived in the same house with his wife, who was not called as a witness. The court found that failure to give an explanation why she was not called to testify created a gap in the complainant's evidence and therefore raised reasonable doubt whether the Appellant committed the offence charged.

29. The Appellant urged court to draw an adverse inference for the prosecution failure to call vital witnesses, the Appellant's son, and relied on **Bukenya vs. Uganda** (no citation given) **Daniel Kipyegon Ng'eno vs. Republic [2018] e KLR**.

30. I was unable to procure the cases cited by the Appellant as none of them were supplied. Nonetheless, the issue here is not that of identification. Further, a wife is not a compellable witness against her husband and to call her to testify has to be where she is the complainant, or the victim is her close relative.

31. The issue of how many witnesses need to be called to prove a fact has been shown in the case I have cited above of **ABDULLAH BIN WENDO VS. REX**, supra. The real issues is whether the witnesses called by the prosecution are sufficient to prove their case. In case cited but the App, of **BUKENYA & OTHERS** (supra), LUTTA Ag. VICE PRESIDENT held:

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

32. Was the son of the App a necessary witness? We have not been told how old the boy was and therefore we have no clue if he could testify. However, given the nature of the case, common sense would dictate that one cannot call a child to testify against his father. In this case, it cannot be said that the evidence adduced by the prosecution was barely adequate to establish the prosecution case. Nothing turns on this point.

33. The Appellant argued that the prosecution failed to meet the burden of proof. He took issue with the evidence of PW6 who said that there was no need to take the Appellant together with the complainant for forensic examination. He urged that the evidence of PW6 was not reliable.

34. PW6 was the nurse at MSF who was the first medical personnel to see and examine the complainant after the defilement. PW6 works for an NGO which helps rape and defilement victims in slums. They are never involved in investigations except to gather evidence in the course of examining the victims. They have no role with offenders. That is where PW6 was coming from when she made those remarks.

35.The Appellant took issue with fact the investigating officer took his blood sample to Government Chemist on 2nd August, 2013 wondering where the samples were kept in the meantime. He relied on **GMW,** supra, for the holding of the court that due to lack of witnesses in defilement cases, the need for forensic evidence cannot be over emphasized. Further the court found that both an accused and the complainant should be treated as scenes of crime and proper samples should be taken from them for examination. The Appellant relied on same case of **GMW**, supra where the court found that sexual offence cases involving minors were used to settle scores as not being foreign to criminal justice system.

36. This complain has no basis. PW4 told the court that she took both the App and the Complainant to the Police Surgeon for examination on the 25th June, 2013. The investigating officers therefore adhered with the expectation of the court in the cited case, and subjected both parties to examination.

37. As for the appeal against sentence. The Appellant was sentenced to 20 years' imprisonment from the day he was remanded in custody for this case. That was in compliance to **section 8 (3)** of the **SOA** as well as **section 333 (2)** of the **Criminal Procedure Code**. The learned trial magistrate who passed sentence observed that the sentence under **section 8 (3)** of the **SOA** was mandatory. However, that is no longer the case as the court of appeal has ruled in several case, which is binding on this court, that the Supreme Court case of **Muruatetu and another Vs. Rep, Petition No. 14 and 15 of 2015** applies. The effect of that is that mandatory sentences need not be imposed to the letter but the court can vary it by reducing the sentence prescribed.

38. The trial court did not make any comments in the form of accessing the suitable sentence. I will quote guidance given in the **Sentencing Policy Guidelines** from the NCAJ. **Paragraph 23.4, 23.5** and **23.6** contains a general statement on following:

> AGGRAVATING AND MITIGATING CIRCUMSTANCES
>
> **23.4 To determine the most suitable sentence, the court shall take into account the aggravating and mitigating circumstances.**
>
> **23.5 In all cases, convicted persons should be expressly provided with an opportunity to present submissions in mitigation.157**
>
> **23.6 The list of aggravating and mitigating circumstances below is not exhaustive.**

47. The aggravating circumstances are listed in **paragraph 23.7**, but as it states, it is by no means exhaustive:

AGGRAVATING CIRCUMSTANCES

23.7 Aggravating circumstances warrant a stiffer penalty than would be ordinarily imposed in their absence. They include:

1. Use of a weapon to frighten or injure a victim; the more dangerous the weapon, the higher the culpability.

2. Multiple victims.

3. Grave impact on national security.

4.Serious physical or psychological effect on the victim.

5. Continued assault or repeated assaults on the same victim.

6. Commission of the offence in a gang or group.

7. Targeting of vulnerable groups such as children, elderly persons and persons with disability.

8. Previous conviction(s), particularly where a pattern of repeat offending is disclosed.

9. Intricate planning of an offence.

10. An intention to commit a more serious offence than was actually committed.

11. High level of profit from the offence.

12. An attempt to conceal or dispose of evidence.

13. Flagrant use of violence or damage to person or property in the carrying out of an offence.

14. Abuse of a position of trust and authority.

15. Use of grossly inhuman and degrading means in the commission of an offence.

16. Targeting those working in the public sector or providing a service to the public.

17. Commission of offences motivated by ethnic, racial and gender bias.

39. In this case, the aggravating circumstances are the ones listed under **paragraph 27.3** as follows:

4.Serious physical or psychological effect on the victim.

The serious physical effect on the complainant being she was infected with an STI while the psychological effect included her inability to go to school due to mental torture for what was done to her. The threats to her life and her mother also affected her.

7. Targeting of vulnerable groups such as children, elderly persons and persons with disability.

The complainant was a child of 13 years. She had been left at home alone for a short while. The App being an immediate neighbor took advantage of her vulnerability in those circumstances to violate her.

13. Flagrant use of violence or damage to person or property in the carrying out of an offence.

The Appellant forcefully covered her mouth before undressing and defiling the complainant. This is traumatizing because the complainant could not scream for help before or during the violation.

17. Commission of offences motivated by ethnic, racial and gender bias.

The App defiled the complainant, a girl of 13 years. This is an act motivated by gender bias.

40. I have taken into account the aggravating circumstances of the case. I have also taken into account the mitigation by the Appellant. He said he was a widow with two sons. He said that he did not know where his children were; and that they were totally dependent upon him. Having considered all, I am of the view that the sentence meted out by the trial court is appropriate for what he did. I find no reason to

disturb it.

41. I have considered this appeal against both the conviction and the sentence and find no merit in the appeal. The appeal is dismissed in its entirety.

JUDGEMENT DELIVERED IN OPEN COURT THROUGH TEAMS.

LESIIT, J

JUDGE

12/10/2020