REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 91 OF 2016

JKN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in criminal case no 1716 of 2014 in Milimani chief magistrate court at Nairobi rendered on 30/5/2016, before Hon. M. MUTUKU (SPM)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2016, the particulars of which were that on the 28th day of November, 2014 at [particulars withheld] within Nairobi County unlawfully and intentionally committed sexual offence act by inserting a male genital organ (penis) which caused penetration into the genital female organ (vagina) of E.N a child of 13 years.

2. He faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

3. He pleaded not guilty to the said charges, was tried, convicted and sentenced to serve twenty-five (25) years imprisonment.

4. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal: -

a) The trial magistrate overlooked the contradicting and inconsistencies in the adduced evidence.

b) The prosecution case wan sot proved beyond reasonable doubt.

c) The medical evidence was unsatisfactory.

5. When the appeal came up for hearing before me, the appellant who was unrepresented filed amended grounds of appeal and written submissions which he relied upon, while Ms Chege for the prosecution opposed the appeal by way of oral submissions.

SUBMISSIONS

6. It was submitted by the Appellant, that the prosecution case was based upon unsatisfactory and unreliable evidence that could not sustain a conviction. It was submitted that the bedsheet which was allegedly produced as an exhibit was not referred to by PW1 and PW2 in their testimonies and further that it was acquired contrary to Article 50(4). It was further contended that as per the evidence of PW6 – it was not stained with blood

7. It was the appellant's further contention that the way the DNA profiling was undertaken, violated Section 122(1) (a)(b) and (d) of the Penal Code as it was not collected by the relevant police officer, in support of which the case of **DAVID KARIUKI THAMBARA v REPUBLIC C.A Cr. App. No. 2 of 2014 Nyeri** was submitted.

8. It was stated further that the case was not properly investigated as there was evidence that the complainant's mother was the appellant's former lover who had differed with the same and thereby used the innocent child to frame him up. It was submitted that vital prosecution witnesses including the neighbour whom the victim sought help from and the whose door was broken to gain entry into the house did not record statements and were never called to testify. The following cases were submitted in support of the submissions: - **MAINA v REPUBLIC (1970) EACA 370, HENRY MAURINYO v REPUBLIC 150 153 AND HASSAN SALUM v REPUBLIC.**

9. It was finally submitted by the appellant that he requested for the DNA report but the same was not availed even after the court had issued

directions to that effect. He submitted further that his defence to the effect that PW1 used to sleep at the neighbours place was not considered.

10. Ms Chege for the prosecution, submitted that all the elements of the offence were proved and the conviction was based on evidence. It was submitted that penetration was proved through the evidence of the minor and the two doctors from Nairobi Women Hospital and the police. The appellant was arrested on the same night of the offence and at the scene, having refused to open the door, the DNA collected form the scene matched that of the Appellant and the complainant. The age of the complainant was further proved through her testimony, her mother and the Investigating Officer.

11. It was submitted that the Appellant was identified by the minor and her mother who was his ex-girlfriend and who stated that having fallen out with the Appellant, but unknown to the minor, she welcomed him into the house and at night he turned against her and defiled her. It was stated that the appellant's defence did not raise any doubt in the prosecution case.

12. On sentence it was stated that the complainant was about to sit for her examinations at the time and must have been affected by the action of the Appellant, who used threats on her should she raise an alarm. It was stated that the appellant was not remorseful and given the nature of the offence the sentence was appropriate.

PROCEEDINGS

13. This being a first appeal, the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion, though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v REPUBLIC [1972] EA 32: -**

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). 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, see Peters v Sunday Post [1958] EA 424."***

14. On behalf of the prosecution PW1 ENN testified after voire dire had been conducted and stated that she was 13 years old in class eight (8) at the time of the offence, she stated that the appellant, who she identified as her uncle, used to visit their home at night. Her mother at that time was working at a club and would leave the house at 5.00 p.m. and return back at 11.00 p.m., while weekends she would leave at 2.00 p.m. and come back at 2.00 a.m. She knew the appellant as a painter in the area. It was her evidence that whenever the appellant came home in the absence of her mother, she would prepare supper for him and he would then proceed to sleep in her mother's bed, while her together with her sister would sleep on a mattress spread on the floor. It was her evidence that he started visiting their mother when she was in class seven third term.

15. On the material day, the appellant came home at 9.30 p.m. and refused to eat supper when served. He sat on the chair and after the complainant's sister had fallen asleep, he picked up a knife and held her on the neck, took her to her mother's bed, removed all her clothes and in her words "*started doing bad manners to me"* she had never had sex before that day. It was her evidence that the Appellant struggled to penetrate her fully before ejaculating into her. Immediately thereafter, someone came to the door and called the Appellant who did not answer who stopped her from going out of the house.

16. She thereafter crept out of the house and went to a neighbour's house where she called her mother using her phone, who she told what had happened to her. Her mother thereafter came with the police who arrested the appellant. The following day she was taken to Nairobi Women Hospital where she was treated she produced her birth notification certificate confirming that she was born on 30th March, 2002.

17. When recalled, in cross examination she stated that he appellant used to live with the mother until they disagreed when, he left. He returned on the fateful night and she opened for him since she did not suspect that he would defile her. She stated that she did not frame him because he had disagreed with her mother and that she stayed at the neighbour's house until the mother came.

18. PW2 M.N.G testified that she was at work when she got the sms to the effect that her child had problems at home. When she called back, PW1 told her that the appellant had defiled her. She reported to the police who later arrested the appellant who used to be her boyfriend before they separated. She confirmed that that was not the first time the appellant was in the house alone with the children.

19. PW3 KINUTHIA EDWARD MBUGUA a Clinical Officer at Nairobi Women Hospital produced a report on behalf of Dr. Omwaya confirming that the complainant's hymen was broken, hvs, HIV and syphilis tests were negative. **PW5 DR. SHAKO** also examined the complainant who had a tear on the external genitalia. She examined the Appellant on 1/12/2014 and found his external genitalia normal.

20. PW4 SGT ALPHONCE MUNICE went to PW2's house and found the Appellant inside the house asleep, with a three-year-old child crying while sitting on a sofa. The complainant was at a neighbour's house, whom he interrogated and stated that the appellant came to the house and threatened to kill her with a knife before defiling her. They recovered a cream bed sheet on PW2's bed which he forwarded to the government chemist for analysis. **PW6 ANNE WANGECHI NDERITU** received the recovered bed sheet and buccol swab taken from the Appellant and confirmed that the bed sheet was stained with semen and spermatozoa which matched the DNA profile of the appellant.

21. PW7 SGT MARGARET NCHIRUMO escorted the appellant to the police surgeon and the victim to Nairobi women hospital and confirmed that the appellant had been arrested from the complainant's mother's house from where the bed sheet was recovered.

22. When put on his defence the appellant stated that on the material day he woke up at 6 a.m. when MN asked for Kshs.20,000/- as a

contribution requested by her brother to which he stated that he did not have money and promised to give her money in December. He further told her that he had a wife and two children and her mother was ailing. She then threatened to have him jailed. He then left kinoo for Nairobi. He called one Stephen Musyoka who owed him Kshs. 30,000/- before proceeding to Runda where he was working for Bishop Muiru. He then later on proceeded to Kinoo and got there at 4.30 p.m. to the house of PW2 where he joined her in bed, she once again asked for money and he gave her Kshs.100/- she then asked him why he was not giving her money, yet spending the same on prostitutes.

23. It was his evidence that at 7.30 p.m. he left Kinoo to meet one Kavita up to 10.30 p.m. when he was dropped back to PW2's place. At 11.30 p.m. he decided to sleep. It was his evidence that the complainant was sleeping at a neighbour's house where he used to pay Kshs. 500/- while her younger sister was sleeping on the floor. At about midnight he heard someone open the gate and someone thereafter knocked on the door but he decided not to open the door. When he opened the door he noticed that the padlock had been opened using a key and nobody got into the house. M then called him on phone and he switched off his phone.

24. It was his evidence that M then came in the company of the police and he was arrested and locked in the police cell. He was later on told that he had defiled the complainant yet they never used to stay with her. In cross examination he stated that he used to stay in the house of PW2 whom he called MN with her daughter aged 13 and 3 ½ years respectively. He stated that the complainant used to sleep at a neighbour's house and that her mother never used to relate well with neighbours.

ANALYSIS AND DETERMINATION

25. From the proceedings, Memorandum of appeal, amended grounds of appeal and he submissions herein, I have identified the following issues for determination: -

a) Whether the prosecution case was full of contradictions.

b) Whether the case was proved beyond reasonable doubt.

c) Whether the appellant's defence was considered.

26. The age of the complainant was not in dispute, the same was proved through her evidence her mother's evidence and the birth notification certificate confirming that she was aged 13 years at the time of the alleged offence. The appellant in his testimony confirmed that she was aged 13 years. The fact that she was defiled was further confirmed through her evidence in chief, the evidence of PW3 Kinuthia Edward Mbugua a clinical officer at Nairobi Women hospital and Dr. Shaka, a police surgeon who produced medical evidence to the effect that her vagina had tears at 7 & 4 o'clock. I therefore find and hold that those two elements of the offence were proved beyond any reasonable doubt.

27. The only issue in dispute is whether or not she was defiled by the appellant. Form the evidence on record, the appellant was a former boyfriend of the complainant's mother whom she knew as uncle. The appellant confirmed having been in PW2's house on the material night from where he was arrested by PW4. The bedsheet collected from PW2's bed had semen and spermatozoa stains which upon examination and analysis matched the DNA profile of the appellant. This evidence corroborated the complainant's account, that the Appellant struggled to penetrate her vagina and only managed to penetrate slightly before he ejaculated which she termed "poured that watering fluid," Her evidence that someone thereafter came calling on the appellant was corroborated by his own evidence in chief that someone knocked at the door but he refused to open. In a charge of defilement, penetration is defined under Section 2 of the Act to mean the partial or complete insertion of the genital organs of a person in to the genital organs of another person.

28. The appellant was arrested in the house of the complainant's mother by PW3 while the complainant was found at the neighbour's house thereby corroborating her evidence in material particulars as well as the mother's account. The fact that the neighbour in whose house the complainant was found and the one who opened her door so that the appellant could be arrested were not called did not affect the prosecution case. The omission to call the said witnesses is covered under Section 143 of the Evidence Act to the effect that no particular number of witnesses is required for proof of any fact. I further find and hold that the appellant had not placed before the court any material to enable it make adverse inference on the prosecution case, that those witnesses would have been favourable to his case.

29. On the Appellant's submission that he was framed up by the complainant's mother as a result of their dispute over money, the accused did not raise the issue of the money during his cross examination of PW2 and would therefore agree with the trial court that the same was an afterthought. From the evidence of PW1, she was very clear on what happened to her at the hands of the Appellant and I see no reason why she would have conspired with her mother to frame up the appellant, who admitted that they had broken up with PW2 as at the time of the alleged offence.

30. I am further not persuaded by the Appellant's submissions that the bed sheet which linked him with the offence was collected in violation of Article 50(4) of the Constitution as the evidence was not illegally obtained and therefore dismiss that ground of appeal.

31. It is clear that the prosecution case against the appellant was proved beyond reasonable doubt and that his defence was considered and dismissed by the trial court and therefore his conviction was safe and sound. I therefore find no merit on the appeal against conviction which I hereby dismiss.

32. On sentence, the Appellant did not make submissions thereon. As submitted by Miss Chege, under Section 8(3) of the Sexual Offences Act, the sentence provided for is a term of not less than twenty years. The Appellant was sentenced to twenty-five years and in sentencing the same, the trial court stated that the same was not remorseful and his attitude towards the offence was also negative. Sentencing is at the discretion of the trial court and appellant court will only interfere with the same on the following conditions as set out in **MACHARIA v REPUBLIC [2003] 2 EA 559 quoted in MISC CRIMINAL APPLICATION NO. 254/2018 MOSES OPULU MATIKA & 2 OTHERS v REPUBLIC**

"20. …….. the key principle is that a court on appeal does not alter a sentence on mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat deferent sentence. Secondly, unless it is evident that the Judge (magistrate) has acted upon some wrong principles or overlooked some material factors.

21. Justice Odunga when face with the issue of resentencing in the case of JOSIA MUTUA MUTUNGA &ANOTHER v REPUBLIC [2019] eKLR had this to say:-

25. The predecessor of the Court of Appeal in the case of OGOLLA S/O OWUOR v REPUBLIC, [1954] EACA 270, pronounced itself on this issue as follows: -

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

26. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

27. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, 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. Even if, the Appellate Court feels that the sentence 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 on sentence unless, anyone of the matters already states is shown to exist."

28. In my view, it does not follow that in resentencing, the court is obliged to reduce the initial sentence. What is required of the court undertaking the resentencing is to look at all the circumstances of the case and to make a determination whether the appellant's incarceration has achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. In other words, the court is not to be bound only by the appellant's conduct that led to his incarceration but also his conduct and circumstances since the said incarceration."

32. I have noted that the Appellant was in a romantic relationship with the mother of the complainant which relationship ended, he had no business in venting his anger and frustrations upon an innocent child who was a virgin at that time and who was in class eight whose life must have been negatively effected through the appellant unwarranted action and will therefore not interfere with the sentence meted against the same the confusing emerging jurisprudence arising out of Muruatetu decision notwithstanding.

33. The upshot of the above is that the appellant's appeal herein against both conviction and sentence is hereby dismissed for lack of merit and the trial court's determination thereon affirmed. The Appellant has a right of appeal.

Dated, Signed and Delivered at Nairobi This 14th Day of October, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE

In the presence of: -

Ms Chege for the Respondent

Appellant in person

Court clerk Karwitha