REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 30 OF 2020

DOUGLAS WEPUKHULU WANJALA.....APPELLANT

- VRS -

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. V. Kachuodho – SRM Thika dated and delivered on the 26th day of April 2018 in the original Thika Chief Magistrate's Court Criminal Case No. 3258 of 2015}

JUDGEMENT

The appellant was sentenced to imprisonment for fifteen (15) years for the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act.

The particulars of the offence were that on diverse dates between 29th June 2015 in Gatanga Sub-county within Muranga County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MGN a child aged 17 years.

The prosecution called six witnesses and in summary the facts of the case were that at the material time the complainant, then a Form 2 student at [Particulars withheld] Girls High School, was on mid-tem and had gone to visit her grandmother at a place called Gatunyu. On 26th June 2015 while she was still at her grandmother's place she and her cousin went to the nearby market to buy groceries. After they were done they parted ways and she went to a salon to have her hair done. By the time she was done it was late and she could not recall the directions to her grandmother's home as she was not very familiar with the place. It was as she was asking for directions that she encountered the appellant. She stated that shortly after she spoke to him she lost consciousness only to find herself in his house. It was her evidence that she stayed in his house until 3rd July 2015 when her mother and other members of the public rescued her. It was the prosecution's case that during the days the complainant stayed in his house, the appellant defiled the complainant and used her to do his household chores and would threaten he would kill her if she raised any alarm. The prosecution produced a P3 Form in which a doctor who examined her after the rescue, opined there was evidence of penetration. The prosecution also produced a birth certificate which indicated the complainant was born on 10th February 1998 and hence 17 years at the time of the offence. It was also the prosecution's case that the appellant kept the complainant in his house against her will by drugging her and that she had told him her age and the fact that she was a student.

On his part, the appellant who gave evidence on oath admitted that he met the complainant near the market on 29th June 2015 and took her to his house. He confirmed her testimony that she approached him and asked him if she knew a certain lady. He stated that they introduced themselves to one another and afterwards they went to his house where the landlord opened the gate for them. He confirmed that they stayed together until 3rd July 2015. It was his testimony that he would go out to work and leave her in the house and when he returned he would find she had done the chores. He claimed that he used to go shopping with her, introduce her to his friends and whenever he went out to play football he would go with her. He denied that he drugged her as she alleged and contended that she told him she was an adult who worked in Nairobi (selling clothes). He stated that he loved her and that they had agreed to get married. He denied that he used to lock her up in his house.

The appellant contests the conviction and sentence on the following grounds: -

> **"1. THAT the learned trial magistrate erred in both law and facts on where the prosecution case was not proved beyond reasonable doubt in pursuant to Section 107 of the evidence act.**
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> **2. THAT the learned trial magistrate erred in both law and facts on where no exhibits were availed or given to the appellant or either attached to the proceedings for perusal.**

3. THAT the learned trial magistrate erred in both law and facts on where penetration was not proved or established by the prosecution especially through p3 form and other medical supportive evidence.

4. THAT the learned magistrate erred in both and facts on where the medical evidence availed in court as exhibit or attached to the court records for perusal and satisfaction purpose i.e. p3 form PRC from among other documentary evidence.

5. THAT the learned magistrate erred in both law and facts on where there was contravention of section 124 of the CPC on where the victim was not truthful.

6. THAT the learned magistrate erred in both law and facts on where the alleged landlord did not prove that the appellant was his tenant, thus no documentary evidence was availed to prove the ownership of the alleged plot and tenancy documentary evidence among other crucial/essential evidence for ascertainment of the same.

7. THAT the learned trial magistrate erred in both law and facts on where the adversely mentioned witness was not availed or summoned by the court to section 150 of the CPC.

8. THAT the learned trial magistrate erred in both law and facts on where the minor (victim) was not truthful in contravention of section 124 of the Evidence Act.

9. THAT the learned trial magistrate erred in both law and facts on where the victim's evidence was marred and variated with contractionary and inconsistent, incredible evidence which wouldn't amount to a safe and secure conviction and sentence.

10. THAT the learned trial magistrate erred in both law and facts on the sentencing issue on minimum mandatory sentence where the appellant is currently serving a 15 years imprisonment which contradicts the order of the court of 10 years imprisonment and time spent in remand section 333 (2) CPC.

11. THAT the learned magistrate erred in both law and facts on where the appellants defence was rejected with no cogent reasons in contravention of section 169 (2) of the CPC.

12. THAT the erred (sic) trial magistrate erred in both law and facts where no point or points of determination and the reasons for reaching such a decision in pursuant to section 169 (1) CPC."

The appeal proceeded by way of written submissions. I have carefully considered the grounds of appeal, the submissions by both sides and the cases cited by the appellant. However, as the first appellate court I have a duty to analyse the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses myself and make provision for it – ***(See Okeno v Republic [1972] EA 32).***

It was proved beyond reasonable doubt that at the material time the complainant was still a child (seventeen years). In his defence the appellant admitted that he took her to his house and lived with her for six days as his friend. It was his evidence that she lived with him of her own free will and that he even went out shopping with her and introduced her to his friends. That he had sexual intercourse with her is therefore not in doubt. His grounds of appeal therefore fly in the face of the defence he mounted in the court below as do most of his submissions as him having had sexual intercourse with the complainant was proved beyond reasonable doubt.

It would appear from his evidence that the appellant was raising the defence provided at **Section 8 (5) (a) and (b) of the Sexual Offences Act** that: -

"It is a defence to a charge under this section if—

a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b. the accused reasonably believed that the child was over the age of eighteen years."

Section 8 (6) however makes it clear the defence is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant. The complainant gave consistent evidence that she did not go to the appellant's house of her own free will. She stated that she was drugged; that she started feeling dizzy and then lost consciousness after a brief conversation with the appellant only to find herself in his house. She also stated that he forced her to do chores around the house and that he used to threaten her. She also testified that she disclosed her age and the fact that she was in school to him. The prosecution called the appellant's landlord Moses Mugure as Pw3. In his evidence he stated that the complainant was freely moving in the compound even when the appellant was not there. He confirmed that she was doing household chores and never once complained she was in trouble. It was his evidence that to him she appeared to be an adult. The complainant however told the court that the appellant used to put some ***"medicine"*** in her food and to me that would explain why she appeared docile to Pw3. I believed the complainant's account of what transpired. This is because she was very consistent and her testimony was corroborated by the rest of the witnesses none of who could have had a reason to fabricate evidence against the accused. I believe the appellant took her to his house and kept her there against her will and that she told him she was still a minor who was still in school. I do not believe she told him she was an adult who used to sell clothes in Nairobi. It is my finding that the appellant had sexual intercourse with the complainant knowing very well that she was still a child who was incapable of consenting to sex. To me it was also for that reason that he would drug her. In regard to the complaint that the prosecution failed to call certain witnesses the Court of Appeal dealt with a similar issue in **Kisumu Criminal Appeal No. 28 of 2013 Daniel Odero Oboyi v Republic** and stated: -

"On the Complaint that some witnesses were not called by the prosecution suffice to say that Section 143 of the Evidence Act declares: -

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

As long ago as 1953 the predecessor of this court stated in Abdalla Bin Wendo & Shah Bin Mwambere v R [1953] 20 EACA 166 that subject to certain exeptions a fact may be proved by the testimony of a single witness. In Benard Mutua Matheka v Republic [2012] eKLR where essential witnesses were not called to testify it was held that as a general rule the prosecution is supposed to call all witnesses whose evidence is material for the just determination of a case, whether or not it is favourable to their case. The prosecution is not obligated to call more witnesses than are necessary for the just determination of the case (Bukenya & others v Uganda [1972] EA). The court may however draw an adverse inference that an essential witness who is not called to testify would have testified adversely against the prosecution case unless reasonable cause is shown for not calling that witness. It was further held that there was an additional qualification – an adverse inference may only be drawn where the evidence in support of the prosecution case is barely sufficient to prove its case."

I am satisfied that the evidence adduced by the prosecution proved the case against the appellant beyond reasonable doubt and no essential witnesses were left out.

On the sentence, I find that although the trial Magistrate imposed the same only because it was the minimum hence mandatory and the mandatory sentences have been declared unconstitutional, the same was just in the circumstances of the case and I shall not disturb it **(see Jared Koita Injiri v Republic [2019] eKLR and Evans Wanjala Wanyonyi v Republic [2019] eKLR).** In the premises the appeal is dismissed in its entirety. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE