



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCRA NO. 36 OF 2019

FRANCIS MWANGI GICHINGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Resident Magistrate Hon. Edina Angima (M.s) dated 21/05/2019 in Mukurweini P.M Sexual Offence Case No. 11 of 2018.)

JUDGMENT

1. **Francis Mwangi Gichinga** 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 2006. The particulars were that the Appellant on unknown dates of December 2017 at [particulars withheld] village in Mukurwe-ini sub-county within Nyeri county, intentionally caused his penis to penetrate the vagina of LWK a child aged 14 years.

2. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the unknown dates of December 2017 at [particulars withheld] village in Mukurwe-ini sub-county within Nyeri county intentionally touched the vagina of LWK a child aged 14 years.

3. Having denied the charge, the matter proceeded to full hearing with the prosecution calling eight (8) witnesses. The Appellant gave a sworn defence and called one witness. Eventually he was found guilty, convicted and sentenced to 20 years imprisonment.

4. He filed this appeal through the firm of Wabandi Gacheru & Kariuki and Co. advocates raising the following grounds:

a) **That**, the learned judge erred in fact and law in failing to consider, analyze and evaluate the entire evidence on record thereby relying on insufficient evidence to uphold that the prosecution had proved the charge as against him beyond reasonable doubt.

b) **That**, the learned Magistrate erred in fact and law in failing to find that the conviction and sentence could not be justified as the evidence of Pw1 the minor could not comply with the threshold spelt out in section 124 of the evidence act and reach to a verdict that the minor was untruthful.

c) **That** the learned Magistrate erred in fact and law for upholding the conviction without taking into account the provision of section 36 of the Sexual Offences Act.

d) **That** the learned Magistrate erred in fact and law for upholding the conviction without disregarding the evidence of Pw8 who could not prove that he was an expert in the medical field.

e) **That**, the learned Magistrate erred in fact and law for proceeding to convict and sentence the accused person based on grossly defective charge sheet.

f) **That**, the learned Magistrate erred in fact and law for ignoring in total the accused defense and submission before conviction and sentence.

5. The complainant (LWG) testified as Pw1. She was 14 years old as at 1st August 2018 when she testified. She said she first met the Appellant in August 2017 during the school holidays when he came to do wiring for electricity at their home. One day in the same month of August they went to Chinga dam and they had their first sexual encounter. She said they were in love. When schools closed in December 2017 the two continued with their sexual encounters. She used to communicate with the Appellant using her grandmother's phone since the Appellant had given her his phone number.

6. The Appellant would come to their home as the wiring for electricity was not yet through. They would then go to some neighbouring abandoned houses and meet their sexual needs. In January 2018 she missed her periods but told no one. She went to school and in April she came home for holidays. Schools opened in May 2017 and in June 2017 she came home for half term. That's when her mother (Pw3) asked her if she was pregnant and she denied it. Pw3 carried out a pregnancy test and she tested positive.
 7. The next day on 22nd June 2018 they went to the dispensary where another pregnancy test was done and it turned out to be positive. A report was made at Gakindu police post. Upon interrogation by police she disclosed who was responsible for the pregnancy as Mwangi the Appellant. They were referred to Mukurweini police station where LWG recorded her statement and she went back to school after being tested and examined and a P3 form filled.
 8. In cross examination she said the wiring was done at her uncle's (Pw2) home. She said all these encounters were during the school holidays, and Appellant never forced her. She was the one removing her clothes voluntarily. She was offered Kshs.300/= the first time they met but she declined it. She also said that the Appellant was the only boyfriend she had at the time.
 9. In re-examination she said that their house and that of her uncle (Pw2) are on the same compound.
 10. **Pw2 SNM** testified that he used to invite the Appellant to do wiring in his new house from time to time. He trusted him and would leave him in the house working as he returned to his boda boda work in Gikindu. He said the Appellant was also a boda boda rider. He was called by his brother (LWG's father) on 22nd June 2018 11:30 am who requested him to meet Pw3 for some discussion. It was after meeting Pw3 that he learnt that the Appellant had impregnated his niece (LWG).
 11. In cross examination he said he knew the Appellant as a technician in their church. He is a machine operator and so connects and operates them. He said when the Appellant first came to his home LWG was on the compound. In April 2018 when he opened the house he invited the Appellant. He never saw the Appellant and LWG together at any time. The Appellant is a member of a group called Umoja ni Nguvu Gakindu boda boda and the Appellant is a member.
 12. **Pw3 GW** is LWG's mother. She testified that she noted on 21st June 2018 that LWG appeared pregnant. It was later confirmed and the matter was reported after her father had been informed. Tests were done and a P3 form filled after which the Appellant was arrested. It is LWG who informed them that Mwangi was responsible for the pregnancy. She did not know the said Mwangi. She identified the birth certificate which showed LWG was born on 14th November 2003 and she was 28 weeks pregnant at the time of testing on 22nd June 2018.
 13. In examination she said LWG did not go for any tuition during the August holidays. She used to leave LWG with the younger children and there were days.
 14. **Pw4 SGM** is the father of LWG. He worked in Nairobi and so was not present when all these things were taking place. He therefore got this information from Pw2 and Pw3. He later came home and LWG told them Mwangi the electrician was responsible for the pregnancy. The witness had not known the said Mwangi. He identified the house in EXB1 and 2 as abandoned houses in the neighborhood. **Pw5 LW** is LWG's grandmother. She lives on the same compound with Pw4's family. She confirmed that in 2017 LWG used to use her phone quite often. The girl would tell her she was talking to her father, who lives in Nairobi. She used to see the Appellant doing wiring in Pw2's house. She knew the Appellant as they go to the same church PCEA Ndiani.
 15. In cross examination she denied receiving any call from one Francis Mwangi Gichinga.
 16. **Pw6 No. 69011 Cpl Mwamero Bongo** received a report of defilement from Pw3 and LWG on 22nd June 2018 at around 3:00 pm. He referred them to Mukurweini sub-county hospital for examination. The report that came confirmed that the girl was pregnant. He interrogated LWG. He arrested the Appellant on 5th July 2018 through an informer.
 17. In cross examination he confirmed that he went to the abandoned house where LWG and Appellant used to go and have sex. The first encounter had been at Chinga dam.
 18. **Pw7 No. 236527 I.P Sally Kemei** was the incharge at Mukurweini police station. She received LWG, Pw3 and Pw4 who were following a defilement report. She sent them to the hospital for examination and recorded their statements. On 5th July 2018 the witness plus other officers went to trace the Appellant who was later arrested.
- Pw7 took photos EXB1a and b and EXB2a and b of the abandoned house. He also drew a sketch plan (EXB7).
19. **Pw8 Dr. Michael Gichui** produced a P3 form on behalf of Dr. Njeri with the consent of the defence. He stated that the tests and examination done showed that LWG was pregnant and the hymen was broken. He produced the P3 form, PRC form and treatment notes (EXB3-5).
 20. The Appellant when placed on his defence gave sworn evidence and called one witness. He testified saying he is an electrician and he does wiring. He denied the charges and even meeting LWG in August 2017. He said he was in Pw2's home on 10th February 2018, and 7th March 2018 only. He denied going to that home in 2017. Basically he denied everything that LWG said against him.
 21. He further stated that he talked to Pw2 severally but not to LWG. In February 2018 he worked with one Benson Wambugu at Pw2's home. He denied any knowledge of the houses contained in the photos EXB1a & b and EXB2 a & b.
 22. In cross examination he denied having worked for Pw2 in August 2017. He used to see LWG in PCEA Ndiani church, but they never

interacted.

23. **Dw2 Benson Wambugu** is the Appellant's friend who works at Mathai supermarket. He met the Appellant on 10th February 2018, where they had gone to do piping at the home of Pw2. He went with the Appellant on his motorbike. They worked from 8:00 am – midday and left together. He denied knowing LWG.

24. In cross examination he said he was a boda boda rider in 2017 but not 2018. He only worked for a day in Pw2's home. He was paid KShs.500/=. He admitted seeing the houses in EXB1a and b and EXB2a and b as they could be seen from where they were.

25. The appeal was canvassed by written submissions.

26. Learned counsel Mr. Wabandi for the Appellant submits on grounds 1 and 4 together. It is his submission that the prosecution case was built on suspicion, contradictions, false allegation, fabrications, presumptions and inconsistencies due to unreliability of the witnesses inter alia the alleged victim evidence. He has mentioned a number of instances including but not limited to the following:

- Trip to Chinga dam. Date and details of the motorbike both unknown.
- 1st meeting date – unknown
- No description of Chinga dam scene of 1st sexual encounter.
- Details of the abandoned/empty house not given
- No phone call data of Pw5's phone and Appellant's
- Doubts on Pw8's credentials
- Age of pregnancy not known.
- Was LWG given money? See evidence of LWG and Pw7
- Production of the birth certificate was unprocedural.

27. In respect to ground 2, counsel submits that failure to conduct a voir dire examination was fatal to the prosecution case and the conviction should not be left to stand. He relies on the case of **Kivevelo Mboloi –vs- Republic (2013) eKLR** where he produced a long portion of it. He contends that the said procedure not having been followed it would not be possible to tell whether LWG knew the importance of speaking the truth.

28. On grounds 3 and 5 counsel submits that the charge sheet was defective arising from the confusion in the dates in the charge sheet and the evidence of LWG. He wondered why a DNA sampling was not done. He referred to the case of **Boniface Kyalo Mwololo –vs- Republic (2016) eKLR** which applied section 36 of the Sexual Offences Act. In respect to ground 6 counsel submits that the Appellant's defence and submissions were ignored.

29. The appeal was opposed by learned counsel M/s Wambui Gicheha on behalf of the Respondent, who submits that the prosecution proved the ingredients of age, penetration and identity of the assailant through the evidence of LWG. She contends that the identification was by way of recognition. That LWG told the court she had never had sex with anybody else save the Appellant.

30. It's her further submission that the learned trial Magistrate observed the victim's demeanor and was satisfied that she spoke the truth. On the issue of Section 36 Sexual Offences Act counsel submits that the issue at hand was not paternity and though a DNA may have been useful it was not mandatory.

31. Pw8's qualifications counsel submits that the witness introduced himself as a doctor and even gave his registration number. There was nothing presented by the Appellant to counter that. Further on the defective charge sheet she argues that LWG testified that he had been defiled on diverse dates. Therefore failure to give a particular date did not prejudice the Appellant in any way.

32. Finally, she has submitted that the trial court took its time to analyse the defence on four (4) pages, and found that the same had not been displaced. That the Appellant and Dw2 gave contradictory evidence.

Analysis and determination

33. As a first appellate court, this court has a duty to re-analyse and reconsider the evidence and arrive at its own conclusion. An allowance should be given owing to the fact that this court unlike the trial court did not hear or see any of the witnesses. In the case of **Mwangi –vs- Republic (2004) 2 KLR 28** the Court of Appeal stated this of this duty:

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.

2. *The first appellate court must itself weigh the conflicting evidence and draw its own conclusions*

3. *It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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 had the advantage of hearing and seeing the witness"*

34. I have considered the evidence on record, the grounds of appeal and both submissions and the law. The main issue I find falling for consideration is whether the prosecution proved its case against the Appellant to the required standard.

Section 8(1) of the Sexual Offences act provides:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

Section 2 of the Section Act defines "penetration" as

"The partial or complete insertion of the genital organs of a person into the genital organs of another person;

35. For a charge of defilement to be proved three ingredients must be established. These are: proof of age; proof of penetration of the child's genitals, identification of the perpetrator. In the case of **Charles Wamukoya Karani –vs- Republic Criminal appeal No. 72 of 2013** it was held that:

"The critical ingredient forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant".

(i) *Proof of age*

36. In defilement cases, proof of age is very critical, the main reason being that under the Sexual Offences Act penalties are pegged on age. In the case of **Kaingu Elias Kasomo –vs- Republic Criminal Appeal No. 54 of 2010**, the Court of appeal sitting in Malindi held thus:

"Age of a victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved In the same way as penetration in cases of rape and defilement. It is therefore, essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim".

37. LWG and Pw4 said LWG was aged 14 years old and was in form I as at 1st August 2018 when she testified. Her mother (Pw3) stated that LWG was born on 14th November 2003. She produced the birth certificate of LWG as EXB6 and confirmed the date given by Pw3. It was therefore established that as at the date of incident (as per the charge sheet) LWG was aged 14 years plus one month. I find that age was established to have been 14 years.

38. Mr. Mabandi for the Appellant raised issue with the failure by the court to conduct a voir dire examination On LWG. Having confirmed her date of birth to have been 14th November 2005 it follows that as at 1st August 2018 when Pw1 testified she was 14 years plus 8 months and 2 weeks. Children of tender years fall under the age of 14 years and LWG was above that age and did not have to be taken through that process. Mr. Mabandi's argument is the true position in law but is not applicable to children who are above 14 years of age as LWG was.

(ii) Proof of penetration of the child's genitals.

39. The evidence before the court from Pw1-Pw8 shows that LWG was pregnant. She also told the court when she testified on 1st August 2018 that she was pregnant. The medical evidence (EXB3,4,5) too confirms the pregnancy. My conclusion is that there was penetration of her genital organ by a male genital organ.

40. Before I move to the last issue for determination I wish to address an issue raised by Mr. Mabandi for the Appellant in respect to a defective charge sheet. He argues that the charge sheet refers to unknown dates in December 2017 yet LWG also referred to dates in August 2017 and January 2018. This to him confused the Appellant and amounted to an unfair trial.

41. The ingredients necessary in a charge sheet were stated in the case of Isaac **Omambia –vs- Republic (1995) eKLR** as follows:

" In this regard it is pertinent to draw attention to the following provisions of section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge, every charge or information shall contain, an shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

42. The Court of Appeal in the case of **Peter Ngure mwangi –vs- Republic (2014) eKLR** was guided by the case of **Peter Sakem Leitu –vs- Republic Criminal Appeal No. 482 of 2007 (UR)** where the court held thus:

"The question therefore is, did this d effect prejudice the Appellant as to occasion any miscarriage of justice or a violation of his

fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded.

As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that Pw1 was not personally robbed and did not also witness the robbery did not in any way prejudice the Appellant”.

43. From the onset, LWG told the court that when she met with the Appellant the two of them fell in love. They had sexual intercourse on diverse dates in August 2017, December 2017 and January 2018 before schools opened. Nothing in the charge sheet is said of the dates in August 2017 and January 2018. This is for very obvious reasons. They concentrated on the December dates because the main issue at hand was the pregnancy.

44. Secondly the Appellant who was represented denied the charges. Even in his defence he denied knowing LWG at all or doing anything to her. He could not have done that if he did not understand the charges and the case he was responding to. Besides the general claim of an unfair trial counsel did not point out what prejudice the Appellant suffered as a result of the non-inclusion of the said dates.

45. Mr. Wabandi also raised issue with Pw8 doubting his qualifications. I have checked the record. Pw8 testified on behalf of Dr. Njeri who had examined LWG. Before he did so Mr. Gacheru who acted for the Appellant then, raised no objection to Pw8 testifying on behalf of Dr. Njeri.

46. Pw8 answered questions using the documents prepared by Dr. Njeri since he is not the one who examined her. The defence had no objection to Pw8 testifying and producing the exhibits, and so cannot come up now to ask this court to discredit Pw8’s evidence.

(iii) Whether the Appellant was identified as the perpetrator of the penetration.

47. From the evidence before the court though LWG lived with Pw2, Pw3 and Pw5 and her siblings on the same compound none of them witnessed any of the actions complained of. Pw2 – Pw5 duly came into the picture when LWG was found to be pregnant at 28 weeks according to the mother (Pw3)

48. LWG told the court that she missed her period in January 2018 before she even returned to school. This ought to have been the first indicator to her especially aft eth way she had been conducting herself. She never told anyone, including whoever is supposed to have been the father of the unborn baby.

49. The evidence of Pw5 is that LWG used her phone to call someone very often and for quite some time. According to her evidence when she inquired from LWG whom she was calling, she would tell her she was calling her father (Pw4) who lived in Nairobi. LWG in her evidence admitted having used Pw5’s phone to call the Appellant who had given her his number. Armed with this information the officers (Pw6 and Pw7) who handled this matter did not see the point or need of getting the mobile numbers of the Appellant and Pw5. They would have used them to request for the call data from the service providers to assist in their investigations.

50. It is also notable then LWG did not raise this issue with her parents, grandmother even after missing her periods in January 2018. She was home for the April 2018 school holidays and still did not raise it. She told the court that their first date was at Chinga dam a public place where there were people. She and her lover did not care about the people around and they just went aside and she removed her clothes and they did it. Further that on all the other occasions they did it in some abandoned houses (EXB1a – b & 2a-b) near her home.

51. Pw4 who is L.W.G’s father described clearly where these houses are situated. She stated this at page 30 record of appeal:

“These houses MFI 1 and 2 are abandoned. This land is not even titled. We have a common boundary. There is a broken fence, because people heard their cattle there. There is no specific gate. There is even an access road from my house to that compound. Two houses are closed but they have been dug so one can gain entry.”

52. The impression I get is that these houses were not hidden nor un-reachable from Pw4’s home. The evidence is that the compound Pw1 – Pw5 live on is full of life since there are several people who live there.

53. In spite of all that, there was no one who testified talked of having seen the Appellant there with LWG. Pw2 said he would give the Appellant wiring material there and leave him there to work. Pw2 did not mention anything about his wife and/or children. He did not even state when he in particular had the Appellant come and do the wiring. The Appellant in his defence vehemently denied having gone to Pw2’s home in 2017 to do any wiring. He even denied meeting or knowing LWG. It was therefore incumbent on the prosecution to put forward a strong case to pin down the Appellant for the conviction to stand.

54. The above being the evidence it is clear that the only evidence that the prosecution relied on for identification is that of LWG. The law is that in sexual offences the court can rely on the sole evidence of the victim to convict the perpetrator. If it believes the victim and the reasons must be recorded. Section 124 of the Evidence Act provides:

124 *“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*

Provided *that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the*

court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

55. With the shortfalls I have outlined above, I find LWG's evidence not to be water tight to be the basis for a conviction without corroboration. Is there corroboration? Corroboration would have been easily found in a DNA. Sampling had the same been ordered for under section 36 of the Sexual offences Act which provides:

Evidence of medical or forensic nature

36. (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.

(4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5)-

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and

(b) in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against-

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.

56. Positive DNA results would have filled the gaping holes in the evidence of LWG. That being the case I find that the conviction of the Appellant unsafe.

57. I find merit in the appeal which I allow. The conviction is quashed and sentence set aside. The Appellant to be released **forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Dated and signed this 11th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge