REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCRA NO. 10 OF 2019

JOHN MAINA MUYA.....APPELLANT

--VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. Nelly W. Kariuki dated 08/02/2019 in Nyeri C.M.C Sexual Offence Case No. 04 of 2018.)

JUDGMENT

1. **John Maina Muya** the Appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on diverse dates between 22nd to 28th January 2018 at Chaka trading centre, within Nyeri county, unlawfully and intentionally caused his penis to penetrate the vagina of JWN, a child aged 13 years.

2. He faced 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 diverse dates between 22nd and 25th January 2018 at Chaka trading centre within Nyeri county, unlawfully and intentionally touched the vagina of JWN a child aged 13 years with his penis.

3. The prosecution case was premised on the evidence of four (4) witnesses. The Appellant gave an unsworn statement of defence and did not call any witness. After the full hearing the trial court found the Appellant guilty, convicted him and sentenced him to 20 years imprisonment on the main count.

4. Being dissatisfied, the Appellant appealed through Gori Ombongi advocates against the whole judgment raising the following grounds:

a) **That,** the learned Magistrate erred in law and in fact by failing to appreciate the defense's testimony, submissions and mitigation.

b) **That,** the learned Magistrate erred in law and fact in sentencing him for the offence charged when there was no adequate evidence to prove the charge.

c) **That,** the learned Magistrate erred in law in finding that he committed the offence of defilement of a girl contrary to section 9 of the Sexual Offences Act No. 3 of 2006 when there was no adequate evidence to support that finding.

d) **That,** the learned Magistrate erred in law and fact by relying on the evidence of the prosecution which was not enough to establish a case against him beyond reasonable doubt.

e) **That,** the learned Magistrate erred in law and fact in accepting and relying on evidence from the prosecution which ought not to have been received and/or admitted on record.

f) **That,** the learned Magistrate erred in law and in fact by totally disregarding his evidence and further placing credence on extraneous matters not material to the case and thereby finding that the prosecution had established its case beyond reasonable doubt.

g) **That,** the learned Magistrate erred in law and fact by failing to appreciate that the testimony of the Appellant was cogent, truthful and justified.

h) **That,** the learned Magistrate misapprehended the law in sentencing him to serve a term of twenty years imprisonment which sentence was excessive in the circumstances.

i) **That,** the learned Magistrate erred in law and fact by failing to appreciate the mitigation given by the Appellant.

5. JWN the complainant testified as Pw1 after a *voir dire* examination and said she was 13 years old. She stated that on 22nd January 2018 she ran away from home for fear of being beaten by her mother for talking to a guy the previous day. A report to that effect had reached the mother through the watchman of Wonder Joy school. She therefore slept at a neighbour's (*mama Denis*) that evening.

6. The next day she was called by her mother who told her to go to school. She still feared and so went to Chaka township where she wondered the whole day. In the evening she decided to go home. While on the way at about 5:00 pm she met the Appellant and his friend. The Appellant told her to go with him to his place. He held her hand and went with her to the quarry at his friend's place and the friend left. It was a one roomed house. She sat on the bed and so did the Appellant.

7. He forcefully removed her inner wear and had sex with her by inserting his penis into her vagina. The door had been closed from inside. She stayed there for three (3) days with the Appellant's friend too. She would be locked in the house, as the two men left. They would return at lunch time and leave until evening. After the three days the Appellant's friend gave her Kshs.200/= and told her to get lost.

8. She went home and she told her mother where she had been. A report was made at Kiganjo police station and she took the police to the Appellant's house which they found the house vacated. She was thereafter taken to hospital. While at the hospital pharmacy with her sister she saw the Appellant with some people. She notified her sister who informed her mother who inturn called the police. That's how the Appellant was arrested. She stated that the Appellant had sex with her twice on the 1st day and on the 2nd day.

9. She identified the P3 and PRC forms and her birth certificate. In cross examination she insisted that it is the Appellant who defiled her at his friend's place.

10. **Pw2 MN** is Pw1's mother. She confirmed that Pw1 disappeared from home on 22nd January 2018(*Monday*) and resurfaced on 25th January 2018 after being brought home by a neighbour called Kamotho who said she had been found in Chaka. Pw2 had reported the matter to the OCS Kiganjo the previous day. On 25th she reported to Kiganjo police station. JNW was then escorted to hospital by Pw2 and officer Jane.

11. She said JWN told her she was caught by a boy who was with another girl near Kamukuyua catholic church and they took her to a house. That she was defiled on wednesday at about 5:00 pm by one boy. Upon receiving the report that the suspect had been seen she went to Chaka and notified the police. She came to the scene with the police and JWN who identified the suspect to the police. She produced JNW's birth certificate (EXB2).

12. **Pw3 Dr. Eustace Murigu Kareya** examined J.N.W. on 10th April 2018. The findings were as follows:

- No bruises on the genitalia
- Hymen was previously broken
- No forceful penetration.
- The PRC form EXB1B did not show any trauma of a physical nature.

He used the information on the PRC form (EXB1B) to fill the P3 form.

13. **Pw4 No. 79236 CPL Betty Jepkoech Kiptum** from Kiganjo police station testified that on 22nd January 2018, the station received a report of a missing child. She was found on 25th January 2018 and she came to the station with the mother. The child JWN explained to her how she had run away from home and met the Appellant and another who took her to their house.

14. She was left with the Appellant who had sex with her. She remained there for three days after which she was given Kshs.200/= and she went home. The child was taken to hospital for examination. The Appellant's house was visited severally by the police but it was always found locked. The Appellant was later traced and arrested.

15. In cross examination she said JWN is the one who identified the Appellant before his arrest at Chaka market.

16. In his unsworn defence the Appellant denied the charges. He said he was away in Doldol loading stones on lorries from 22 nd, 23rd and 24th January 2018. The stones were sold in Naromoru, Chaka and Nanyuki. He was arrested on 9th February 2018 by the police and brought to court. He denied the names appearing in the charge sheet saying he is **John Wang'ondu Muya**. That JWN did not say in what capacity she came to his place.

17. The appeal was canvassed by way of written submissions. Mr. Ombongi learned counsel for the Appellant submits that JWN was not a reliable witness and the trial court should have cautioned itself against her evidence. He wondered why the child never screamed nor made any noise during her alleged three days stay in the one roomed house. That it was not clear whether the toilet was inside or outside the house. Counsel submits that JWN lied to escape the mother's beating.

18. Counsel further submits that there are three persons who ought to have been called to testify but were not namely: the two girls who were with the Appellant and the friend in whose house JNM was taken. To him the Appellant was not placed at the scene of crime, because the existence and ownership of the house remained unknown.

19. He further submits that identification of the Appellant was not proved to the required standard for the following reasons:

- JNM never knew the Appellant prior to this incident.
- The Appellant's names are not the ones appearing in the charge sheet.
- It's not clear from where the Appellant was identified i.e. the pharmacy or market.

20. Counsel contends that the prosecution evidence has discrepancies. That it is not clear whether she was defiled once, twice or thrice from her own evidence and that of her mother (Pw2). He argues that the medical evidence did not support her and the words "*previously broken*" could mean anything. It's his final submission that a hymen can be broken by simple things like bike riding, horseback riding and gymnastics. Thus the trial court should not have assumed that a broken hymen *"per se"* was proof of penetration. He urged the court to allow the appeal.

21. The appeal is opposed by the Respondent through learned counsel M/s Martha Ndungu who submits that the ingredients of age, penetration and identity were proved. That the absence of bruises or lacerations was because of the days it had taken before examination. The missing hymen corroborated penetration she argues. On identification she has submitted that JNM stayed with the perpetrator for three days and so recognized him well.

22. Counsel has submitted that the Appellant's defence was considered by the trial court which noted that he failed to avail evidence by way of eye witness or an *alibi* placing him at his place of work at the material time. On the issue of names she argues that the Appellant introduced himself as Maina and he had not availed any evidence to ascertain his claim.

23. On sentence, she submits that the sentence provided for under section 8(3) Sexual Offences Act is 20 years imprisonment which is a mandatory minimum sentence. According to her the court considered the Appellant's mitigation and gave the sentence it did which is lawful.

Analysis and determination

24. This is first appellate court and as such it is guided by the principles set out in the case of **Okeno –vs- Republic (1972) E.A 32** where the Court of Appeal stated as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 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 has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post [1958] E.A 424."***

25. After considering the evidence on record, grounds of appeal both submissions and case law, I find the following to be the issues for determination:

i. Proof of age of JNM.

ii. Proof of penetration of JNM's genital organ.

iii. Identification of the perpetrator.

iv. Whether the sentence was harsh and excessive.

Proof of age

26. One of the ingredients necessary to satisfy the charge of defilement is determination of the victim's age.

27. Section 8(1) and (3) of the Sexual Offences Act provides as follows:

> ***8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

28. The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See **Alfayo Gombe Okello –vs- Republic Criminal Appeal No. 203 of 2009 (Kisumu**).

29. In the instant case, J.N.M said she was 13 years old and her mother (Pw2) said she was born in the year 2004. A birth certificate (EXB2) was produced by Pw2 showing JNM was born on 28th April 2004. At the time of the alleged incident she was therefore 13 years plus nine months. Age was therefore proved and it falls under the section 8(3) bracket of the Sexual Offences Act.

Issue no. (ii) Proof of penetration of JNM's genital organ.

30. According to JNM she stayed with the stranger (youngman) from 23rd -25th January 2018. During this period, he only had sexual intercourse with her on 23rd January 2018 evening. Later she said he had sex with her twice on the first day and on the second day and it was her first time to have sex. **Pw3 Dr. Eustace Murigu Kareya** produced the medical evidence (EXB1A and B). The treatment notes were never mentioned nor produced. The PRC form EXB1B was filled on 25th January 2018 which is the day JNM was taken to hospital. It's from this document that the P3 (EXB1A) was filled.

31. The medical evidence (EXB1A and B) besides showing that JNM's hymen was not intact and/or was previously broken did not confirm her allegations. This was a 13 year old girl who according to her evidence had never been involved in sex. The medical evidence (EXB1B) shows she had no physical injuries, no bruises. The HVS revealed nothing abnormal not even the presence of epithelial cells. There was no bleeding at all. The Respondent has submitted that the tearing of the hymen had healed and that's why it was not showing. The doctor who examined her and could have seen her never said so.

32. The learned trial court at **page 3 lines 15-17** states thus:

> "*I am further persuaded that the fact that her hymen was found to have been previously broken supports the fact that penetration took place"*

From the above statement, the only evidence that confirmed penetration was the previously broken hymen.

33. A missing hymen *per se* is not proof of penetration. The missing hymen MUST be connected to the complaint at hand. Previously broken hymen means it was broken on any other date before the date of incident or the date of treatment. Pw3 did not expound on his statement of "*previously broken hymen*" to estimate when this may have been done.

34. In the case of **P.KW –vs- Republic (2012) eKLR** the Court of Appeal (Maraga and Rawal JJA as they then were) stated thus:

> ***"15.*** *In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse"*
>
> ***16.*** *Hymen also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding bicycle riding and gymnastics there can also be a natural tearing of the hymen. See the* ***Canadian case of The Queen –vs- Manuel Vincent Quintanila (1999) AB QB 769."***

35. From the above decision of the Court of Appeal and which was applied in the case of **David Mwingirwa –vs- Republic 2017 eKLR** "*a broken hymen per se*" is not sufficient proof of penetration. There must be more to it.

36. In the instant case, the only other evidence touching on penetration which the court ought to consider is that of JNM she contends at **page 17 lines 3-5** (Record of Appeal) that:

> "*I felt pain. After that, we both have our clothes (sic). I stayed there for three days with the other friend of his. That was the only time he had sex with me. After three days, his friend gave me Kshs.200/= to get lost."*

Later on, in the evidence she says the Appellant had sex with her twice on 23rd January and also on 24th January 2018. She is the same one who told her mother (Pw2) that the young man she had been with only had sex with her once.

37. Further when she was recalled for cross examination this is what she said at **page 26 lines 5-7**

> "*You slept with me three times. I was a virgin when you slept with me. We should believe the doctor if he says that I was not a virgin when the incident occurred"*.

38. From JNM's evidence it is not clear whether she was staying with the Appellant or his friends for the three days from 23rd January 2018. She said she left the Appellant's place on 25th January and went home. However Pw2's version is that on 25th January 2018 she was called by a neighbor (Kamotho) who informed her that JNM was at Chaka and looking very dirty. She asked him to take and bring her to her. Kamotho complied and brought the child her.

39. The prosecution did not deem it fit to call Kamotho as a witness to explain to the court as to how and where he found JNM. It is not lost to the mind of this court that when JNM first disappeared from her home she went hiding at a neighbour's. She slept there and the next day left for Chaka and so she never went to school. This neighbor was also not called as a witness. How did JNM land at that neighbour's home and in what state did she leave that home?

40. Pw2 and Pw4 said they were taken by JNM to the house she had spent the previous three days. It was a single roomed house she said. There was no evidence given as to the location of this house. Was it an apartment, was it in a plot with other houses or was it a stand-alone house? Did the occupant have neighbours? These are questions Pw4 ought to have answered through her evidence. If indeed there were neighbours did anyone of them notice the presence of JNM there? If she used to go to an outside toilet, didn't any of the neighbours see her?

41. Its true Pw2 made a report of her missing child. On 25th January 2018 when the child was found, she went with her to the police station, and Pw4 recorded their statements. At no point did she say that the child gave her a description of the person who had been defiling her. All they were doing was just visiting the alleged house where the offence is alleged to have taken place. JNM did not know the Appellant prior to this incident. She ought to have given some form of description to the police to corroborate her visual identification.

42. In the case of **Simiyu & Another –vs- Republic (2005) 1 KLR 192** the Court of Appeal had this to say of such identification:

> "**(2)** *In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.*
>
> ***(3)*** *The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers identity".*

43. In the instant case JNM later saw the Appellant at a pharmacy and informed her sister that he was the person who had defiled her. Pw2 was notified and she inturn notified the police who went to the scene with Pw2 and JNM. There was in the circumstances no way an identification parade could have been conducted since the Appellant was arrested in the presence of JNM.

44. However, had a prior description been given then it would have supported the identification at the market. Mistakes have been made even in respect of people well known. It's therefore important that before such evidence is relied on, a proper basis is laid down. This was not done in this case.

45. After analyzing all the material before me I am satisfied that JNM though young was not a reliable witness. Further the prosecution took so many things for granted and failed to place before the court crucial evidence.

46. The Appellant raised an *alibi* defence. It was not his duty to avail witnesses to support it. The court had to consider it alongside the evidence on record and determine whether it unsettled the prosecution case or not.

47. In the case of **Kiarie –vs- Republic (1984) KLR** the Court of Appeal held:

> "*An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons".*

48. I find that the alibi defence was not displaced by the weak evidence of the prosecution. I therefore further find that the appeal has merit and I allow it. The conviction is quashed and sentence set aside.

49. The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Dated and signed this 10th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge