REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 28 OF 2020

PAUL GITAU WAMBU.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. N. Mugo – SRM Gatundu dated and delivered on the 11th day of December 2019 in the original Gatundu Chief Magistrate's Court Sexual Offence No. 6 of 2019}

JUDGEMENT

The appellant was charged with defilement of a child aged nine years contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. He was found guilty and convicted on the main charge and sentenced to life imprisonment.

The particulars of the offence in the main charge were that on 28th January 2019 at [Particulars Withheld] village in Gatundu South Sub-county within Kiambu the appellant intentionally and unlawfully did an act which caused penetration of his genital organ into the anus of JNN a child aged nine years.

His appeal challenges both the conviction and the sentence. The appeal is premised on the following five grounds: -

> **"a. THAT, the learned trial Magistrate erred in law and fact by failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by the law.**
>
> **b. THAT, the trial magistrate erred in matters of law and facts by failing to consider the appellant alibi defence which remained unrebutted.**
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> **c. THAT, the learned trial Magistrate erred in law and fact by failing to find that the Prosecution witnesses' narrations of evidence were unbelievable and illogical and there were material contradictions.**
>
> **d. The learned trial Magistrate erred in fact and law when he failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong decision that the Appellant had defiled JN;**
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> **e. THAT, the trial Magistrate erred in law by failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice."**

The appellant relied on written submissions to argue his appeal while Ms. Mbevi, Counsel for the respondent submitted orally.

I have considered the grounds of appeal, the rival submissions and the cases cited by the appellant. However, an appeal is in the nature of a retrial and I must analyse and evaluate the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind and making provision for the fact that I did not see or hear the witnesses who gave evidence ***(see Okeno v Republic [1972] EA 32)***.

The Child Health Card tendered in evidence to prove the age of the complainant is not legible but there was oral evidence both from himself and from his mother, that he was 9 years old. The doctor who examined him following the commission of the offence also opined he was 9 years old. I am therefore satisfied that the complainant was a child aged nine at all times material to this case.

I am also satisfied that penetration was proved beyond reasonable doubt. While his evidence that he was sodomised was credible and

trustworthy and did not require corroboration **(See Section 124 of the Evidence Act)** it found corroboration in the evidence of Dr. Wambua Gachagua (Pw3) and Clinical Officer Lawrence Mwangi (Pw7) who both testified that they saw and examined him on 21st February 2019 and 28th January 2019 respectively and saw he was walking with difficulty, had anal pain when walking and sitting down and the anal region was moist and tender on touch. They both testified that as a result of their examination they both came to the conclusion there was anal penetration. It was the complainant's evidence that his assailant chased after him, wrestled him to the ground and inserted his (assailant's) kasusu (meaning penis) into his anus. The medical evidence conclusively proved anal penetration and I am satisfied therefore that penetration was proved to the standard required.

On the element of identification of the perpetrator the complainant testified that this offence occurred in the morning after he and his friends ran away from school for fear of being punished. The complainant also testified that he knew the perpetrator who he identified as the appellant in this case. Whereas his friends who were called as Pw4 and Pw5 claimed they did not witness either the commission of the offence or see the appellant chasing the complainant which is understandable as they were all chased in different directions, I am satisfied from the totality of the evidence that the complainant positively identified the appellant as the perpetrator. Apart from the fact that the offence occurred in broad daylight and this was evidence of recognition there is evidence that he disclosed the identity of his assailant at the first opportunity. His mother (Pw2) testified that he told her he had been defiled by Gitau. The prosecution also produced police Occurrence Book (OB) extracts of the reports made at [particulars withheld] AP Post and thereafter to Gatundu Police Station as Exhibit 5 (b) and 6 (a). The OB extract for [particulars withheld] AP Post reveals the name of the assailant while in the one for Gatundu Police Station the complainant is said to have revealed he knew the person who sodomised him. That he mentioned the name to his mother and told the police he knew the assailant leaves no doubt in my mind that the complainant was certain of the identity of the assailant. I have considered the alibi mounted by the appellant in the court below and my finding is that in the face of such cogent evidence it could not be true. I did not find any inconsistencies or contradictions as would water down the prosecution's evidence and there is no doubt in my mind that the appellant committed this offence and that his conviction was safe. The appeal against conviction has no merit and it is dismissed.

In sentencing the appellant the trial court while noting he was a first offender nevertheless found her hands tied because of the mandatory nature of the sentence prescribed by the law. Given that the sentence was imposed merely because of its mandatory nature and did not take into account the appellant's mitigation, antecedents and other surrounding circumstances then it is unconstitutional and there is good reason for this court to disturb it ***(see Evans Wanjala Wanyonyi v Republic [2019] eKLR*** and ***Jared Koita Injiri v Republic [2019] eKLR).*** I have considered the seriousness and circumstances of the case and come to the conclusion that a sentence of imprisonment for a term of twenty-five (25) years would be just in the circumstances. Accordingly, the conviction is upheld but the life sentence is set aside and substituted with one of imprisonment for thirty (30) years from the date the appellant was sentenced by the lower court. 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