REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 21 OF 2020

SIMON NJUGUNA MWANGI.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. G. Omodho – SRM

Thika dated and delivered on the 13th day of November 2018 in the

original Thika Chief Magistrate's Court Criminal Case No. 4715 of 2016}

JUDGEMENT

The appellant was sentenced to twenty (20) years imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. His appeal challenges both the conviction and sentence and is premised on the following grounds: -

> **"1. THAT, the learned trial magistrate erred in matters of law and fact by failing to find that the pregnancy saga, heavily relied on by the prosecution was enshrouded in controversy besides failure to conduct a DNA test to ascertain paternity of the child.**
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> **2. THAT, the learned trial magistrate erred in matters of law and fact by failing to find that the failure of the complainant to raise alarm, is not justifiable under the unique circumstances of the case.**
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> **3. THAT, the learned trial magistrate erred in matters of law and fact by failing to find that the delay between the alleged commission of the offence and its reporting is not justifiable under the unique circumstances of the case.**
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> **4. THAT, the learned trial magistrate erred in matters of law and fact by failing to find that the prosecution case is heavily reliant on hearsay evidence; generally inadmissible in a criminal trial.**
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> **5. THAT, the learned trial magistrate erred in matters of law and fact by failing to find that the prosecution case is premised on the single evidence of a child; which does not meet the threshold to warrant admission and reliance under Section 124 of the Evidence Act (Cap. 80) Laws of Kenya.**
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> **6. THAT, the learned trial magistrate erred in matters of law and fact by failing to find that the motives of implication are apparent by dint of: -**
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> > ***(i) The evidence being tainted by the anomalous improbability that it would have been the accused's wife who allegedly reported the incident to the complainant's mother.***
> >
> > (ii) ***The fact of the accused's family having moved out of the plot made him a soft target for implication by the complainant (PW1)."***

It is the appellant's contention that the prosecution did not prove its case beyond reasonable doubt as to begin with a DNA was not conducted to confirm that he was the biological father of the child the complainant was expecting. To buttress this argument, he relied on the case of **Amos Kinyua Kugi v Republic [2015] eKLR**. He contended that once the trial court ordered a DNA test then it was mandatory for the prosecution to conduct the test. The appellant also submitted that the evidence of the complainant was not credible because: -

(i) She did not raise any alarm yet the conditions prevailing were suitable for her to get help his argument being that there were several tenants in the plot where it is alleged he committed the offence.

(ii) She did not report promptly. In this respect he relied on the case **of Elias Kimati Njeru v Director of Public Prosecutions [2015] eKLR where the court stated: -**

"I take judicial notice that the complainant though a minor at the material time, she was not a child of tender age and was capable of understanding the importance of informing her parents or reporting the alleged crime matter to the police. The delay in this case was not explained and it leaves a lot to be desired. It cannot be ruled out that a sexual intercourse did not take place between the complainant and the appellant or any other man which resulted in pregnancy. However, the conduct of the complainant and her parents puts their credibility as witnesses in question. The trial magistrate did not address the issue of the delay in her judgment. It was important that this critical issue be addressed." (Emphasis added).

The appellant further argued that because of the complainant's delay in making a report coupled with the omission to conduct a DNA test and/or any other medical examination to connect him to the offence the prosecution's case was based on hearsay evidence. He also submitted that the proviso to **Section 124 of the Evidence Act** was not applicable to this case as the trial Magistrate did not give reasons for believing the complainant. In this regard, he cited the case of **Elias Kimati Njeru v Director of Public Prosecutions (supra)** where the court stated: -

"I have perused the judgment of the learned magistrate and note that although she dealt with the evidence of the complainant at length she did not record the reasons which made her believe her evidence. Section 124 requires that the reasons be recorded in case of conviction of the accused where the court is satisfied that the alleged victim is telling the truth. Failure to record the reasons was a misdirection on the part of the magistrate."

He also relied on the case of **Jacob Mumo Mutia v Republic [2015] eKLR** where it was stated: -

"19. According to Section 124 of the Evidence Act, where the court relies solely on the evidence of a child of tender years, the accused person cannot be liable to conviction on such evidence unless the Trial Court records reasons in the proceedings that it is satisfied that the alleged victim is telling the truth. (See Geoffrey Kioji v Republic, Criminal Appeal No. 270 of 2010 (Nyeri).

20. No reasons prompting such a belief are recorded in the proceedings. In her Judgement the Learned Magistrate states thus:

"…….there is no doubt in the mind of the court that the accused defiled PW!. I therefore find that the prosecution has established the main charge……."

Similarly, in her Judgement she failed to expressly state if indeed she believed the victim (Complainant) and further she failed to record reasons that made her have such a belief. This was fatal to the prosecution's case." Emphasis added).

Also the holding in the case of **Arthur Mshila Manga v Republic [2016] eKLR** that: -

It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See MOHAMED V REPUBLIC [2008] KLR (G&F), 1175 and JACOB ODHIAMBO OMUOMBO V REPUBLIC (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

The appellant also cited a portion of the decision in the case of **Fappyton Mutuku Ngui v Republic [2020] eKLR** where it was observed that: -

"32. The appellant has also questioned the conviction because it was based on the "uncorroborated" evidence of a minor. Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and Material 2nd ed Butterworth's London 1984, 84, the reasons were put thus:

First, a child's powers of observation and memory are less reliable than an adult's. secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations." (Emphasis added).

The appellant argued that the complainant had three motives to falsely accuse him namely: -

"(i) The complainant (Pw1) after being discovered to be pregnant must have been under duress of threats and or circumstances from her mother as well as teachers to tell who was responsible.

(ii) Teenage consensual sexual indulgence cannot be ruled out because it is common place. She may therefore have wished to protect her teenage boyfriend or whosoever else was responsible.

(iii) At that time, I, the appellant herein had moved out. She may have thought that I was unreachable and hoped that putting blame on me would have pushed such queries under the carpet."

He urged this court to find that the prosecution did not discharge the standard of proof required and to allow the appeal, quash the conviction and set the sentence aside.

The appeal is vehemently opposed. Counsel for the State submitted that the key ingredients for the offence are: -

· **Age of the victim.**

· **Identity of the perpetrator and**

· **Penetration**

He submitted that all the three elements were proved. He submitted that the complainant confirmed that the appellant had sexual intercourse with her and that she was threatened with death. Counsel submitted that the complainant positively identified the appellant. It was also his submission that the complainant's mother testified she was born in 1993 and a birth certificate was also produced. Counsel stated that the court relied on that evidence to find the complainant was fourteen years old. Counsel contended that the evidence of identification was that of recognition as the complainant and the appellant were neighbours and had interacted for a considerable period of time. Counsel further submitted that penetration was proved by medical evidence that the complainant's virginity was broken. He contended that the court was conscious in applying **Section 124 of the Evidence Act.** He stated that the appellant's defence was a mere denial and asserted that the appellant moved to another place upon learning the complainant was pregnant. Counsel pointed out that the complainant's evidence remained consistent on the two occasions she was cross examined by the appellant. Counsel urged this court to find the conviction and sentence safe and hence dismiss the appeal.

In reply to the submissions of Prosecution Counsel, the appellant submitted that he had lived in that neighbourhood for only one year and explained that he moved because he had built his own house. He also reiterated his submission that no medical evidence was adduced to connect him to the offence.

I have considered the rival submissions fully but as the first appellate court I must also reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion. I have done this while bearing in mind that I did not see or hear the witnesses who gave evidence (***see Okeno v Republic [1972] EA 32).***

The ingredients of the offence of defilement are now settled and these are that **the victim is a child, the age of the victim** for purposes of sentencing, **penetration** and **identification of the perpetrator. The issue for determination** in this appeal **is whether the afore-stated ingredients were proved beyond reasonable doubt.** I am satisfied that the same were proved beyond reasonable doubt. Although the complainant's mother stated that the complainant was born in 1993 which would then mean that the complainant was twenty-two years when the offence was committed, a certificate of birth was produced to show that she was in fact born on 28th September 2001. The doctor who completed her P3 Form also opined that she was fourteen and I am therefore satisfied that she was fourteen when this offence was committed.

I am also satisfied that penetration was proved beyond reasonable doubt. The complainant's evidence that the perpetrator inserted his genitalia (penis) into her genitalia (vagina) coupled with the doctor's evidence that she was six months pregnant when she was examined on 9th June 2016 is in my view conclusive proof of penetration.

Identification is the issue that is most vehemently contested but I am satisfied that that too was proved against the appellant beyond reasonable doubt. **Section 124 of the Evidence Act** has a proviso that does away with the requirement for corroboration in sexual offences involving minors. It is my finding that that proviso is relevant and applicable in this case. Contrary to the appellant's submission that the trial Magistrate did not state whether she believed the complainant and why she did, the trial Magistrate stated as follows in the proceedings: -

("The witness is very comprehensive and answers questions very clearly indicating clear understanding of her environment) – I derive she is speaking the truth. She is expectant)."

In the judgement the Magistrate stated: -

"Having duly warned of (sic) myself of the dangers to convict on the evidence of a child and accommodating the provisions of Section 124 of the Evidence Act, I find that though the victim's story being uncorroborated (sic) the victim was very consistent during her testimony, through cross examination and even at 2nd cross examination. She remained forthright and stuck to her facts giving me the confidence that she spoke the truth……."

This case is therefore clearly distinguishable from those of **Elias Kiamati Njeru v Director of Public Prosecutions (supra)** and **Jacob Mumo Mutia v Republic (supra)** which were cited by the appellant. Having evaluated the evidence, myself, I too believed the complainant because firstly she was very vivid in her description of the incident, where it took place and how it occurred and secondly she was very consistent. What she told the court in her examination in chief was consistent with what she stated when she was cross examined by the appellant the first and second time. She impressed me as a very truthful witness and like the trial Magistrate I found her evidence reliable and trustworthy. The fact that no DNA to prove paternity of the child born to the complainant or other medical examination was conducted to connect the appellant to this offence does not create any doubt in the mind of this court that the appellant committed this offence. Such medical evidence would have been material if the evidence of the complainant required corroboration or was less than credible but as I have stated the proviso to **Section 124 of the Evidence Act** did away with the need for such corroboration and her evidence was cogent and credible.

In the case of **Geoffrey Kioji Vs Republic, Crim. App. No. 270 of 2010 (Nyeri)** the court held: -

> ***"Where available medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused."***

As to the allegation that the complainant should not be believed because she took long to report, it is indeed correct that whether one makes a report immediately confirms their consistency. However, it is my finding that the delay in this case did not water down the prosecution's case. The complainant explained that the reason she did not report the incident to her parents immediately was because she was threatened by the appellant. It is evident that in fact she would never have done so but for the fact that it was discovered she was pregnant. It is not uncommon for children of her age or even older to keep mum when threatened. I find that because she gave a plausible explanation for keeping quiet about it her case is distinguishable from that **of Elias Kiamati Njeru v Director of Public Prosecutions (supra)** where no explanation was given at all. The complainant also told the court that although they had neighbours none of them was at home when the appellant defiled her. She also stated that he had gagged her with a piece of cloth and his hand. This explains why she did not raise an alarm during the incident and provides an answer to the appellant's submission that she should not be believed because she did not raise any alarm.

I have also combed the evidence for any reason as to why the complainant and her mother could have lied against the appellant and I could not get any. He himself did not suggest any and I am therefore satisfied that the case against him was not actuated by ulterior motives but because he committed the offence. The appeal against conviction has no merit and it is dismissed.

The trial Magistrate sentenced the appellant to the minimum sentence prescribed for that offence. The courts are now moving away from minimum sentences. In the case of **Jared Koita Injiri v Republic [2019] eKLR** the Court of Appeal imported the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** into sexual offences and held: -

> ***"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis……..***
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> ***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & another v Republic (supra) we would set aside the sentence for life imposed and substitute it thereof with a sentence of 30 years from the date of sentence by the trial court."***

In the Muruatetu case the Supreme Court was emphatic that what was impugned was not the sentence itself but the mandatory nature thereof. On my part I am satisfied that given the seriousness of the offence and the circumstances under which it was committed and the conduct of the appellant thereafter including the fact that he is not remorseful, the sentence imposed by the trial court was not excessive. Accordingly, I shall affirm it and proceed to dismiss this appeal 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