REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

HCCR. APPEAL 56 OF 2018

BETWEEN

HARAN CHEGE WANJIKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Kangema S.O. Case No. 7 of 2018 delivered by Hon. P.M. Kiama (SPM) on 25th September, 2018).

JUDGMENT

Background

1. The Appellant was charged with defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006 with the particulars of the offence being that between 12th day of January, 2018 and 28th February, 2018 at Othaya sub-county, Nyeri County, intentionally caused his penis to penetrate the vagina of (JNG) a girl aged 16 years. He was found guilty and consequently sentenced to 15 years imprisonment.

2. The Appellant has appealed to this Court against both the conviction and sentence. He has set forth grounds of appeal in respect to the weight given by the court to the evidence adduced by the prosecution, blames the victim's mother for not taking care of her, that the age of the victim was not proved, failure to prove when penetration and breaking of the hymen occurred as the victim is said to have disappeared from home for almost a year and the failure by the trial court to consider his defence.

3. The Appellant did file an Amended Petition of Appeal on grounds that initial witnesses were not called to testify, that the medical evidence did not link him to the offence, that the prosecution evidence was contradictory and uncorroborated. He also faults the trial court for rejecting his sworn statement of defence that was not controverted by the prosecution.

Submissions

4. At the hearing, the Appellant relied on his grounds of appeal and the written submissions filed on 1st February, 2020.

5. The Appellant has asked this court to evaluate all the evidence afresh and faults the prosecution for failing to call certain witnesses, namely the Victim's father, a mama Boni whose home she is said to have escaped to, the Victim's brother who is said to have been present during his arresting and a lady named Mukami whom PW2 claimed to have informed her of the Victim's whereabouts.

6. He submitted that the medical evidence from the P3 Form adduced by PW3, the Clinical Officer did not disclose any injuries on the genital areas of the Victim, neither was a DNA test done. Further that his identification was not properly conducted as he was only called through mobile phone before being arrested.

7. The Learned prosecution counsel, Miss Gichuru supported both the conviction and sentence. It was her submission that the age of the Victim was proved as required in law through her Birth Certificate. She added that it was PW1's testimony that she met with the Appellant on 13th January, 2018 at Kareru village and proceeded to Chinga to the house of Mama Boni where they slept and had sex. That they continued to stay in that house having sexual intercourse and later moved to a rented house on 27th January, 2018 in Othaya where they continued to have sex. They would later be arrested on 28th February, 2018 and taken to Kiria-ni Police Station.

8. Miss Gichiuru submitted that the evidence of PW1 was corroborated by that of PW2 in regards to her absence from home in the period she had cohabited with the Appellant. That PW3, the Clinical Officer who examined the victim confirmed that even though there were no lacerations on the vagina, penetration had taken place due to the broken hymen. That PW4, the investigating officer confirmed that the Appellant was living with PW1 and was engaging in sex with PW1.

9. Learned counsel further submitted that the Appellant merely denied committing the offence and alleged to have been in Nairobi when he was called, which defence he failed to support with any tangible evidence.

10. As regards the sentence, Counsel submitted that the same was lawful and urged the court to uphold both the conviction and sentence.

Summary of Evidence

11. It is now the duty of this court as a first appellate court to reevaluate the evidence on record and deduce its own conclusions. I have borne in mind however that I did not myself see and hear the witnesses testify, and I have given due allowance for that fact. See: **Okeno v Republic (1972) EA,32** and **Kiilu &Another v Republic (2005)1 KLR, 174**

12. This is basically a case of eloping. The complainant who testified as PW1 was at all material times aged 16 years having been born on 22nd June, 2001. According to her mother, **PW2, MW,** she left PW1 taking care of her younger child on 11th January, 2018. When she returned home in the evening, PW1 was not there. She was informed by her friend that she had been at the shopping centre with the one Chege, the Appellant herein. She checked her there but did not find her. She thus reported the matter at Karia-ini Police Station on 13th January, 2018 and again on 14th January, 2018 at Kenya Njeru.

13. On 18th January, PW2 was informed by a cousin of the Appellant that PW1 was the Appellant. She reported to Kiria-ini Police Station. She tried reaching out to him on phone but his mobile phone had been switched off. Again on 25th February, 2018, PW2 was told by a friend one Mukami that on 16th January, PW1 had been spotted at Othaya Hospital looking very ill. She went to the Hospital where a guard gave her a number which she handed over to the police at Kiria-ini Police Station. On the following day, the telephone number was traced at Othaya. PW2 was thus referred to Othaya Police Station for action. Police finally tracked PW1 in the company of the Appellant at a place called Ngurubani in Othaya on 27th February,2018. PW2 adduced PW1's Birth Certificate which showed that she was born on 22nd June, 2001.

14. According to PW1, she met the Appellant on 13th January, 2018 who requested her to show her a place called Kahiro. He then took her to a house of one mama Boni where they stayed until 26th January, 2018. All this time both slept in one bed and had sex. That on 27th January, 2018 they left the house of Mama Boni for Othaya town where the Appellant rented a house and both lived together whilst having sex. She confirmed that they were arrested on 28th February, 2018.

15. PW3, Dona Maithima was a Clinical Officer at Kangema Sub- County Hospital who filled PW1'S P3 Form on 1st March, 2018. By then PW1 was aged 17 years. He found no injuries, lacerations or bruises to the genitals but the hymen was missing. No spermatozoa or syphilis or pregnancy tested positive. He adduced the P3 Form in evidence.

16. PW4, IP Danil Ali took over the investigations from another officer, one PC Emily Odhiambo. He testified that the matter was reported at Kiria-ini Police Station by PW2 as a case of a missing child. With the cooperation of PW2, the mobile number of the Appellant was tracked at Othaya where he and PW1 were found living as a husband and wife. The Appellant was arrested and accordingly charged.

17. After the close of the prosecution case, the court ruled that the prosecution had established a prima facie case to warrant the Appellant to be put on his defence. The Appellant opted to adduce an unsworn statement of defence.

18. In his brief statement, he stated that he was in Nairobi when he was called through a telephone call by the police. He was arrested by a police officer in Nairobi and informed that he had committed the offence. He said that he was first taken to Othaya Police Station and later to Kiria-ini Police Station. He claimed he was arrested because his friend was tracked on mobile phone.

Determination

19. Section 8(1) of the Sexual Offences Act defines defilement as:

> **"a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."** Thus, to prove an offence of defilement, the following are the elements:
>
> **(1) Proof of penetration;**
>
> **(2) Proof of the victim's age;**
>
> **(3) Proof of the perpetrator's identity.**

20. As regards the age of the Victim, he Complainant's Birth certificate shows she was born on 22nd June, 2001 while the offence was committed on 13th January, 2018 which means she was 16 years and 6 months at the time of the incident.

21. PW1's narration of how she met the Appellant who was known to her and how she was taken to Mama Boni's house where they spent the night and how the sexual activity took place was that *"he inserted his penis into my vagina"*. The same was said in a candid and consistent manner. She went on to state that they continued sleeping together and having sex at that house and later moved to the Appellant's rented house where they continued to have sex and would later be arrested on 28th January, 2018. It is on the same date of the incident that PW2 testified that her daughter the victim went missing, that a cousin of the Appellant informed her he was the one who had the victim which was later confirmed by the Victim's brother, namely Samson after calling the Appellant who confirmed he was with the victim. The victim would later be seen by a lady called Mukami at Othaya Hospital unwell who in turn informed PW2 of the same where PW2 went and was advised by the guard that the daughter had gone back home and gave her a mobile number which was later tracked and traced to the Appellant's home. That both the Appellant and the victim were arrested from Othaya at Ngurubani. Hence, the issue of the identification of the Appellant is not in issue.

22. AS regards penetration, PW4 the Clinical Officer in his examination of the victim revealed that there were no bruises or lacerations on the vagina but the hymen was absent and there was vaginal discharge evident of penetration.

23. In the instant case, clearly the prosecution did carefully piece up together its evidence in proof of the three fold ingredients to the required standard. The conviction was thus safe.

24. As regards sentencing a custodial sentence is couched in mandatory *terms under Section 8(4) of the Act which states –*

> **"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."**

25. However following the Supreme Court decision in the case of **Francis Kariokor Muruatetu & Another (2017)e KLR,** minimum mandatory sentences were declared unconstitutional. The sentence should thus be dictated by the circumstances of the case having regard to both the aggravating and mitigating factors.

26. The court should also be guided by the principles governing interference with sentencing by an appellate court as set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held that:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"**

27. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

> **"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."**

28. In mitigation the Appellant only pleaded for leniency as she has no parents. He deliberately defiled a young girl who for some days he forced to be his wife. This was uncalled for, shameless and deserves a deterrence. But on noting that the Appellant was a 1st offender, I set aside the 15-year jail term and substitute it with ten years imprisonment. The period of five months 9 days he was in remand custody prior to conviction shall be considered to constitute part of the sentence.

29. In sum, the appeals fail as regards conviction but partially succeeds as regards the sentence in the terms set out above. It is so ordered.

DATED AT MURANG'A THIS 3RD DAY OF DECEMBER 2020

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. Appellant in person.

2. Mr. Waweru for the Respondent.