



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NUMBER 32 OF 2019

BETWEEN

JAMES MAHUGA MAINA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in

the Chief Magistrate's Court at Murang'a Sexual Offence Case

No. 7 of 2008 delivered by Hon M. Wachira C.M., on the 25th day of June 2019).

JUDGMENT

1. The Appellant was charged in the main count with defilement contrary to **Section 8(1)** as read with **Section 8(3) of the Sexual Offences Act**. The particulars of the charge were that on diverse dates between 28th April and 2nd May, 2018 at [Particulars Withheld] Location in Kahuro sub-county within Murang'a County, willfully and unlawfully caused his penis to penetrate the vagina of **LNN**, a child aged fourteen (14) years. In the alternative, he was charged of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act** in that he intentionally and unlawfully touched the vagina of **LNN**, a child aged 14 years with his penis.

2. The Appellant pleaded not guilty. He was subsequently released on a bond of Kshs. 400, 000/-. At the conclusion of the trial, he was found guilty of the main count and convicted accordingly. He was sentenced to an imprisonment term of twenty (20) years. He was dissatisfied with both the conviction and sentence against which he preferred the instant appeal to this court.

3. In a Petition of appeal filed in person on the 15th July, 2019 the Appellant raised five grounds of appeal which I have condensed into the following:

- a. That the evidence, particularly medical evidence, was insufficient to warrant a conviction;**
- b. That his defence was not considered;**
- c. That there was non-compliance with section 124 of the Evidence Act.**

Summary of evidence

4. I am aware that this is the first appellate court. Therefore, I am duty bound to reevaluate the evidence of the parties and arrive at a conclusion independent to that of the trial court. Further, I am forewarned that I did not have an opportunity to observe the demeanor of the witnesses and must give due regard for that. (See **Okeno v Republic [1972] EA32**).

5. **PW1., LNN** the complainant gave a sworn statement of evidence. It was her evidence that she was aged 14 years old and a class 8 pupil at K.M. Primary School. **PW5, PC Tiberius Ombonyo**, the investigating officer produced a birth certificate as an exhibit which substantiated the same. It was the testimony of **PW1** that on 28th of April, 2018 at 4.00 pm, she left her mother's workplace and visited her aunt. The same was reiterated by **PW2 GNN**, her mother. She then headed to view a landslide in Kahatia. While there, she met a friend called T who invited her over to her grandmother's house and she obliged. It began to rain when she was about to leave and therefore spent the night there. She left the following day and was escorted by her friend's grandmother to her home.

6. She arrived home and found her sister but her mother had gone to church. Her sister asked her to wash the children and headed to

[Particulars Withheld] to look for her mother. She was unable to find her and decided to call her at around 8.00 pm and was instructed to head home. It was raining when she began heading there.

7. As she walked, a motor cycle with two occupants slowed down next to her. They gave her a chase and she ran and hid in coffee bushes. The Appellant came and held her by the hand. He told her that she it was good that she hid because her uncle wanted to beat her. Despite the time of night, she could see the man that came to her as she was in a streetlight-lit place. She further knew him as he often visited a mutual friend who lived near the plot where she lived. He urged her to remain in hiding to avoid her uncle and that he would find her a place to sleep. She obliged.

8. He came back at around 9.00 pm and took her to his sister's house. On arrival she was asked to hide in his sister's house. She hid in a room where his aunt's son slept and the boy was asked to sleep with his brothers. He went into the room to sleep where he defiled her. He told her it was a favor she needed to return for saving her life. She woke up the next day and asked him to allow her go to the toilet to which he obliged. As she walked out, she was spotted by his sister after which the Appellant ran off.

9. Later, at about 7.00 pm the Appellant came to his sister's house with a motorcycle and took **PW1** to his home in [Particulars Withheld]. However, because of the presence of children there they went back to his sister's place where they slept again. He did not defile her this time round. The next day he left stating that his father was unwell. She was taken by the Appellant's sister to their mother. While there she was informed that the Appellant had been arrested. She was thereafter found by her uncle and mother. They took her to Kahuro Police Station and later to Muriranja Hospital for treatment. An out-patient card, exhibit 1, was produced to this effect.

10. **PW2, GNN**, the mother to **PW1** confirmed that her daughter was aged 14 years old and she identified a Birth Certificate to substantiate it. She reiterated that on the 28th of April, 2018 she sent **PW1** home but on calling later to find out whether she had arrived she found out that she had not gotten home. She called the girl's uncle, **PW3, RWN** He assisted her in searching for **PW1** throughout the night. She consequently reported the matter to Kahatia Administration Police Post.

11. On 1st May, 2018, **PW3** spotted **PW1** on a motorcycle belonging to Mahuga, the Appellant. He reported the same to the police and communicated with **PW2**. The police arrested the Appellant. They were instructed by the Police to go to the house of the Appellant's mother as a tip off had been received concerning **PW1**'s whereabouts. They found **PW1** there and reported back to the Police. **PW1** and **PW2** were referred to Muriranja Hospital and issued with a P3 Form.

12. **PW4 Joel Onyantha** produced an outpatient card, Exhibit 1 and P3 Form, exhibit 3. The documents were prepared by a Dr. Kairu who examined and treated **PW1** and had worked with **PW4**. It was his testimony that there were no lacerations on **PW1**'s genitalia but that the hymen was broken. Further that the complainant had admitted that this was not her first sexual encounter.

13. **PW5**, stated that **PW2** reported to Kahuro Police Station that **PW1** was missing. Later, **PW2** reported that **PW1** had been spotted on a motorcycle belonging to the Appellant. The Appellant was consequently arrested by Administration Police officers from Kahatia and escorted to Kahuro Police Station.

14. **DW1**, the Appellant herein gave a sworn defence. He stated that on 1st May, 2018, **PW3, PW1**'s uncle went to his home looking for the complainant. He did not find her there. On 2nd of May, 2018, he received a call from a Senior Sergeant from Kahatia Administration Police Camp. When he availed himself he got arrested.

15. **DW2, LNN**, stated that she accompanied **PW1** to where there was a landslide. While there they met a mutual friend, T. **PW1** left with T. She met T the next day and on enquiring where **PW1** was, she informed her that she had gone to Kahuti. After this they learnt that the Appellant had been arrested. They went to see him and he told them to go look for **PW1**. They found **PW1** at Gatuya and tried to urge her to report to the Kahuro Police Station. She was afraid and therefore they took her to her mother's and uncle's home.

Determination

16. The appeal was heard vide Zoom Video conference. The Appellant relied on hand written submissions filed on 18th August, 2020 which he highlighted orally whilst the Respondent, through learned State Counsel, Miss Gichuru tendered oral submissions. It suffices to state that the Respondent opposed the appeal. I have accordingly considered the evidence on record and the respective rival submissions. I have demarcated the issues for determination to be whether the case was proved beyond a reasonable doubt and whether the Appellant's defence was considered.

17. On proof of the case, it was the submission of the Appellant that **PW1** was at home when **PW2** and **PW3** reported her missing at the Police Station. He submitted that the complainant was reported missing on 29th of April, 2018. However, by her own admission, she was at home. He further questioned why some persons were not called as witnesses. He took issue with the prosecution not calling **PW1**'s sister and one T, her friend to testify on what transpired on the respective dates.

18. On her part, Miss Gichuru submitted that the prosecution adduced cogent and consistent evidence that established the case for the prosecution beyond a reasonable doubt. As to the age of the complainant, she submitted that the same was established by a Birth Certificate adduced as exhibit 3. As regards penetration, she stated that the oral evidence of **PW1** was supported by the medical evidence of the Clinical Officer which showed that the hymen was broken. Further that, the identification of the Appellant was not in doubt as it was conclusive that he stayed with **PW1** from 28th April, 2018 to 2nd May, 2018. Furthermore, that the Appellant in his defence did not attempt to dislodge the prosecution case.

19. It is clear that **PW1** was articulate in her narration of the sequence of events. She further demonstrated a genuineness of accounts surrounding the defilement that elicits confidence in her narrative. This is despite the trauma that she evidently suffered. She made specific

mention of being with the Appellant throughout the night of the 29th April, 2018 and into the following day. PW1 did also tell of the attempts by the Appellant to move her between houses. She was taken to and from the Appellant's house and that of his sister. This was within the period of three days from the 29th April, 2018 to the 1st of May, 2018. This fact was corroborated by both the mother and uncle to PW1. This chronology informs the fact that PW1 was absent throughout the period in question. As such, the Appellants submission that the complainant was reported missing before she ever went missing is not factual

20. PW1 did not mince her words that on the first night she spent with the Appellant, they had sexual intercourse. PW4 produced evidence on behalf of Dr. Kairu who conducted the examination and made the outpatient card entry with regard to the defilement ordeal. It was attested by the doctor that there was evidence of interference with the genitalia of PW1 and indeed that the hymen was missing as a testament of penetration.

21. As regards the identification of the Appellant, it is not disputed that PW3 knew the Appellant. He then spotted the Appellant riding a motorcycle with PW1 on it. He attempted to give a chase but the Appellant outpaced him on the motorcycle. He reported the matter to Police and the Appellant was subsequently arrested. While in court both PW1 and PW3 identified the Appellant as the man they had seen. PW1 identified him as the perpetrator and PW3 identified him as the person he saw on a motorcycle. This therefore puts the Appellant as the man spotted with PW1 and the one who defiled her.

22. The Appellant put forward his defence to the effect that he presented himself to the police after learning that he was wanted in connection with the disappearance of the complainant. However, it did not dislodge the case for the prosecution that he was with PW1 on the night of the 29th April to the morning 2nd May 2018. As well, he failed to disprove the testimony that he was seen riding his motorcycle with PW1 at the back. This was corroborated by both PW1 and PW3. Lastly, he failed to disprove the testimony that he took PW1 to his house on the material night he defiled her. I am satisfied, just as the learned trial magistrate did that his defence was a mere afterthought. The learned trial magistrate properly dismissed it as lacking in merit.

23. On the whole I have no reason to doubt what PW1 told the court the truth. I disagree with the Appellant that the trial court contravened the provisions of Section 124 of the Evidence by believing the testimony of PW1. Under the proviso to the section, the court is obligated to rely on the evidence of the minor notwithstanding the absence of corroboration as long as it believes what the minor victim told the court. This scenario obtains in this case. I find that the prosecution proved its case beyond a reasonable doubt that indeed the Appellant defiled PW1. His conviction was therefore safe.

24. On the issue of sentence, the Appellant was sentenced to serve twenty (20) years imprisonment. However, pursuant to the Supreme Court decision in the case of **Francis Kariokor Muruatetu and Another V Republic [2017] eKLR**, the minimum mandatory nature of sentences was declared unconstitutional. From the evidence on record, it is clear that the Appellant chased down and abducted PW1. Secondly, he detained her for two (2) days. Thirdly, he attempted to translocate her to avoid the family finding her. I find that the Appellant was not only conniving but also malicious and cunning. He meticulously planned and attempted to continue the offence further. This is an aggravating factor that would warrant a stiff sentence.

25. He however was a first offender notwithstanding that he offered no mitigation. On this ground alone I shall reduce the sentence to fifteen years imprisonment.

26. In sum, the conviction is upheld save that the sentence is reduced to a fifteen-year jail term. I note that the Appellant was on bail during the period of the trial and therefore the sentence will run from the date of conviction, 26th of June, 2019. 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.*