REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HCCRA NO. 47 OF 2018

GEORGE MAKORI NYANCHUBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*Being an appeal against the judgment of Hon R.M Oanda (S.P.M) Kilgoris Law Court in Criminal Case No. 1797 of 2014 delivered on 31/01/2018)**

JUDGMENT

1. The appellant George Makori Nyanchuba, was charged defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 26th day of December 2014 in Nyamache District within Kisii County unlawfully did cause his penis to penetrate the vagina of ENO a girl aged 16 years. The second count was assault causing actual bodily harm contrary to section 251 of the Penal Code and the particulars being that the appellant willfully and unlawfully assaulted ENO thereby occasioning her bodily harm. The alternative charge was indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 26th day of December 2014 in Nyamache District within Kisii County the appellant intentionally touched the vagina of EN a girl aged 16 years with his penis.

2. The trial court found the appellant guilty of the first and second count. The appellant was sentenced to 15 years imprisonment in regard to the first count, on the second count the trial court discharged the appellant under section 35 (1) of the Penal Code.

3. The appellant's grounds are set out in the petition of appeal filed on 18th July 2018 and his written submissions. The thrust of his case was that the prosecution failed to prove its case beyond reasonable doubt and that the evidence was contradictory, unreliable and was not corroborated and that his defense was not considered.That the process and the manner in which the proceeding was conducted was contrary to the law and that the sentence of 15 years was manifestly oppressive.

4. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to consider the evidence adduced and reach an independent decision as to whether to uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify **(*see Okeno v Republic [1972] EA 32*).**

5. Pw1 EMtestified that she is a student at [particulars withheld] Primary School. She recalled that on 26.12.2014 she had gone to [particulars withheld] market to get a sim card. She met the appellant who told her to accompany him a hotel for lunch which invitation she declined. They instead went to [particulars withheld] Bar and she had a soda (sprite). When she took the soda she felt drunk and the appellant had sex with her in private room. He then took her to his home and the appellant asked her whether she would stay or leave. The appellant beat her up when Pw1 responded that she would leave. Pw1 then told the appellant that she would accept his advances if he stopped beating her. They then had sex. In the morning the appellant demanded for the phone he had given the Pw1 which was with Pw1's sister. The appellant called Pw1's sister asking to have the phone. The police were able to track where she was and Pw1 taken to Nyacheki Sub-district Hospital. She produced into evidence the P3 form dated 26/12/2014 and the Post Rape Care form both dated 28/12/2014. She gave evidence that she had met George twice on 6th and 8th of December 2014.

6. Pw2, FRT,a sister to Pw1testified that on 26/12/2014 that Pw1 went to buy a sim card using an Identity Card belonging to D. At 2:30 p.m she got a call from a strange number who asked whether Pw2 had his phone. He handed the phone to Pw1 who narrated toPw2 that the appellant was going to kill her as he was armed with a panga and had already injured her arm. Pw1 informed her that she had given the phone to the girl in the house. The phone was disconnected. The appellant then called and informed her he would send Moffat for the phone. Pw2 called her brother and informed him of the plight of Pw1. When the motorcyclist arrived they derailed him and called another bodaboda cyclist. The bodaboda cyclist, her brother and the chief proceeded to the home of the accused.

7. Pw3 Salim Oramat the assistant chief of [particulars withheld] Sub-location testified that on 26/12/2014 he received a call from Liaulo Nyamini who informed him that a Bodaboda cyclist had taken their girl. The man arrested was Moffat who was brought to Nyacheki AP Line. Upon interrogation he stated that he knew where the girl was, the girl was with George. Moffat then called George and informed him

that he was bringing the phone. They got to the appellant's home at around 7:00 p.m. The appellant was by the road waiting for Moffat to bring the phone. The appellant was arrested with a panga and a stick. There was a second team that found Pw1 in the appellant's house. An identity card belonging to DN was also recovered from the appellant's house. Pw1's arm was swollen and her clothes were soiled. She was taken to Nyacheki hospital where she was treated and discharged the following day.

8. Pw4 Michael Maina an Administrative Police based in Nyamache sub-county Nyakechi Division recalled that at around 7:00 p.m. on 26/12/2014 a group of people reported that their colleague had been arrested in Kilgoris after transporting a child. Shortly thereafter a man was brought to the station. Pw4, members of the public and parents of the girl boarded a probox and the bodaboda cyclist led them to appellant. They arrested the appellant while the other members of the public proceeded to look for the girl in the appellant's house.

9. Pw5 EY testified that on 26/12/2014 he got a call from his sister, Pw2, who informed him that someone had gotten a hold of his other sister Pw1. Pw5 called the chief. They went to the police station and the police accompanied them to the scene. The person sent to collect the appellant's phone led them to the appellant's house. The girl was with the appellant in the house. The two were taken to Nyacheki in Nyangusu police station.

10. Pw6 No. 83640 CPL Olivia Ledonyo was the investigation officer in this matter. On 27/12/2014 she perused the Occurrence Book and saw the report of defilement in respect to Pw1. The appellant was already in custody. Later on that day she interrogated Pw1 and took her statement which gave details what happened between her and the appellant. He escorted Pw1 to the hospital and P3 form was filed. The complainant was then 17 years old.

11. Pw7, Wycliff Otambo was a clinical officer based at Atago level four hospital. He gave evidence that he filled both the P3 Form and the post rape care form. Pw1, who was 16 years old, had a history of sexual defilement. She had sustained swellings on her upper left limb and was tender on her lower limb. She came to the hospital two days after the incident. A blunt object caused the injury. She had normal genitalia, hymen was torn, and labia were inflamed. Pw7's conclusion was that Pw1 was defiled.

12. Pw8, Cornelius Mariera was the registered clinical officer at Nyacheki Hospital. On 27/12/2014 Pw1 who was 16 years old had a swollen left upper limb and also general body malaise after an assault which occurred the previous day. She has swollen tender lower limb. She had normal external vagina with reddish vigina opening. The Hymen was torn. Lab test indicated that Pw1 had an infection. Pw1 was treated.

13. When put on his defense the appellant gave unsworn statement. He recalled that on 26/12/2014 he took cattle grazing. At around 6:00 p.m. as he was going home a vehicle approached, he was stopped and arrested.

14. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under section 8(1) of the Sexual Offences Act, the prosecution must show that the appellant did an act that amounted to penetration of a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

15. The Appellant entirely relies on his written submissions. The appeal is opposed Mr. Orinda, counsel for the state. He submitted that the complainant was 16 years at the time of the offence and he was well known to the complainant. The victim was found in the home of the appellant. He further submitted that defilement was proved based on the compelling evidence.

16. Pw1 testified that how the appellant sexually assaulted her, first in one of the rooms in corner bar. She also gave evidence that the appellant assaulted her and thereafter defiled her again.The appellant was a person known to her as she had met him twice on 6 th and 8th of December 2014. The appellant had given her a phone which she had left at home. Her testimony was corroborated by the testimony of Pw2, who received a call from Pw1 who asked her to bring the appellant's phone.

17. Pw1's testimony is further corroborated by the medical evidence of Pw7 and Pw8. Pw7 filled the P3 form and came to the conclusion that Pw1 had been defiled. Pw7 upon examination of Pw1 found that the hymen was torn. The medical evidence consistent with the fact of penetration. The appellant's defense only amounted to denial of the offence.

18. Age is a crucial ingredient in the offence of defilement as was discussed by the Court of Appeal in ***Moses Nato Raphael v Republic NRB CA Civil Appeal No. 169 of 2014 [2015]eKLR*** :

> On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.

19. There is no doubt that Pw1 was a child, Pw6 produced into evidence the Birth Certificate of Pw1 which indicate that the date of birth was 05/01/1997. At the time of the offence Pw1 was 17 years. I reject the submission by the appellant that the child's age was not proved and find that the child was aged 17 years. The prosecution laid a watertight case against the appellant in the absence of Moffat (the motorcyclist).

20. The appeal also raised the ground that the proceedings were conducted contrary to law. Having gone through the entire record before me, I have to address my mind on whether **Section 200 of the Criminal Procedure Code**was complied with when Hon. Oanda,SPM took over hearing of the case. In ***Victor Wekesa Wanyama & 2 others v Republic [2018] eKLR*** the Court of Appeal held as follows:

"As regards the non-compliance with section 200(3) of the Criminal Procedure Code (CPC) which requires a succeeding magistrate to inform an accused of the right to have the witness re-summoned to testify, it is true that the trial was conducted by three judges. Koome, J. received the evidence of two witnesses. The record shows that when Muketi, J. took over, section 200 of the CPC was complied with and the judge ordered the trial to proceed from where it had reached. After Muketi, J. received the evidence of two witnesses, she was succeeded by J.R. Karanja, J. The record does not show that J.R. Karanja, J. explained the provisions of section 200 of the CPC. After the trial was adjourned several times, J.R. Karanja, J. released the appellants on bail and thereafter received the evidence of three prosecution witnesses and the evidence of the appellants in defence and eventually delivered the judgment and passed the sentence.The appellants were represented by a counsel throughout the trial….

It has not been established as a fact that the appellant intended that the trial should start afresh. That the appellants' counsel did not say so and participated in the trial without raising any issue, indicated that the intention of the appellants was that the trial should continue from where it had reached. The appellants do not say that they suffered prejudice by the continuation of the trial. In the premises, we are satisfied that section 200 of the CPC was complied with and that the ground of appeal is raised as an afterthought and amounts to a mere technicality.

21. On the 21/6/2016 when Hon Oanda took over the case the court noted that 4 witnesses had testified pursuant to section 200. That the matter to proceed from where it had reached. Counsel who was present in court on the said date did not raise any objection. The appellant was represented by counsel and therefore the appellant was not prejudiced as counsel was acting on the instructions of the appellant.

22. The totality of the evidence is that the prosecution proved all elements of the offence. The age of the child falls within the bracket of section 8(4) of the Sexual Offences Act No. 3 of 2006 which prescribes a minimum sentence of 15 years imprisonment. The conviction is confirmed and the appeal is dismissed.

Dated and delivered at KISII this 9th day of January 2019.

R.E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Orinda For the State/Respondent

Rael Court clerk