REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 16 OF 2018

MOLOKE KITEIYA NANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of subordinate court of 20 years imprisonment at Kilgoris Law court before Hon. R.M. Oanda (PM) the judgment was delivered on 30th day of November) 2017)

JUDGMENT

1. The appellant, Moloke Kiteiya Nanga, was charged, convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to section 8(1) as read with subsection (3) of the Sexual Offences Act No. 3 of 2006 The particulars of the charge were that on 9th November 2016 in Transmara Sub-County within Narok County, he intentionally caused his penis to penetrate the vagina of CC, a child aged 15 years. The appellant now appeals against the conviction and sentence.

2. As the first appellate court, I am required to re-evaluate the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (***see Okeno v Republic [1972] EA 32***). In order to proceed with this task, I will set out the facts as they emerged before the trial court.

3. CCK, Pw1 in her sworn statement, recalled that on 9/11/2016 in the company of her younger brother they met the appellant and Felix. The appellant stop them and threatened them with a knife. Her younger brother managed to run away. The appellant took her to a house and locked her up. The appellant came back later and forced her to have sex with him. The appellant was later found and arrested. Pw1 was escorted home and later taken to Transmara District Hospital. She identified the P3 form, treatment notes and P.R.C form. She admitted that she was pregnant and that the father to her unborn child was called Robert.

4. AKK Pw2, the mother of the complainant stated that at around on the 9/11/2016 at 1:00 p.m. she sent her children for milk, her son came back running. He told her that Pw1 was taken by two men. They searched for Pw1 and found she had been defiled. The matter was reported to the police and Pw1 taken to hospital and found to be pregnant.

5. CTK Pw3 recalled that on the 9/11/2016 at around 3:00 p.m. on the same day he got a call from Pw2 and was informed that his sister, Pw1, was missing. At around 7:00 p.m. he met Pw1 on his was to Ole Sentu area. Pw1 informed him of where she had been and further stated that had been with the appellant. Pw3 was informed by his brother that the appellant was found in his house and arrested.

6. Diana Kisarem Pw4 a clinical officer testified that she worked with John Chepngeno, the clinical officer who filled the P3 form. Pw1 was brought to the hospital on 09/11/2016 with the history of being defiled by someone known to her. Her external genitalia appeared normal, she had whitish discharge and no bruises were noticed. High vaginal swap indicated spermatozoa, pus cells and red blood cells, conclusion being that she was defiled. Pregnancy test was positive.

7. Pw5, Benson Chirchir attached to the D.C.I Kilgoris recalled that on 10/11/2016 he went to the D.C.I.O's office and was asked to take over investigation of the case. The complainant was at the office and upon interrogation confirmed that she met the accused who threatened her, took her to his home and defiled her. The accused at the time was in custody together with one Robert. Pw1 was escorted to Transmara sub-county hospital where the P3 form was filled. Age assessment was done and it was established that Pw1 was 17 years.

8. In his unsworn defense, the appellant denied committing the offence. He testified that on his way to Kilgoris he met brothers to the complainant who were looking for her and who claimed he was Robert. He did not know anything about the case.

9. The appellant relied entirely on the petition of appeal, amended supplementary grounds of appeal and the written submission. The key

issues raised by the appellant are that no birth certificate was produced by the prosecution thus Pw1's age was never ascertained; the evidence does not support the conviction as Pw1 was already pregnant; and his defense was overlooked.

10. Mr. Otieno counsel for the state, conceded the appeal as the age of the complainant was assessed to be between 10-17 years. He submitted that the failure to prove age was fatal in regard to sentencing under the Act as the P3 form estimated the age as 10 to 17 years, then there was a huge gap between ages 10 to17 as the said ages covers 3 sentences under the Sexual Offences Act .That the victim admitted that she was pregnant and that the appellant was not responsible for her pregnancy but a person called Robert.

11. Pw1 testified that she was 15 years, her age when assessment was done is indicated in the P3 form and PRC form as between 10-17 years. Pw5 testified that Pw1 age was assessed to be 17 years. The question of age is a matter of fact. For purposes of the offence, Pw1 was below the age of 18 years. I concur with counsel for the respondent that the precise or apparent age is a question for determining the sentence to be imposed. The P3 indicated Pw1's age was 15 years, the PRC indicated her age as between 10 to 17 years old, the medical notes indicated the age as 15 years and she testified that she was 15 years old. In this instance, the appellant is entitled to the most favorable interpretation of the evidence and in the circumstances**,** I would hold that Pw1 was 17 years old.

12. I have analyzed the evidence presented by the prosecution during trial together with the submissions. Pw1 was approached by two people, Felix and the appellant. The appellant threatened her, took her to his home and defiled her. She was taken at 1.00 p.m. during the day, she also spent considerably a lot of time with the appellant. Evidence of Pw3 indicate that they were not present when the appellant was arrested and it is not clear how she identified the appellant as her assailant after his arrest. I am aware to the fact that the determination of the issue of identification of the appellant is key in the appeal before me. This Court has to satisfy itself as to whether identification was proper or whether it amounted to dock identification. The Court of Appeal in ***Muiruri & 2 Others versus Republic [2002] KLR 274*** stated:

> *"We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like **Abdulla bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 76**, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."*

13. I have considered that identification was based on a single witness, Pw1. In ***Wamunga vs. Republic [1989] KLR 424*** the court held that evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. In this case Pw1spent a considerably long time with the Appellant and from the nature of the offence she was very close to the appellant. She was taken around 1:00 p.m. when there was sufficient light for positive identification. The P3 form produced as exhibit indicate that the appellant was known to her and therefore identification could not have amounted to dock identification. Pw3 gave evidence that the appellant was found in the locus in quo immediately after the offence was committed. I am thus satisfied that identification of the appellant was positive and that Pw1 could not have been defiled by a stranger or Robert as alleged by the appellant in his submission.

14. In order to prove defilement, 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. In her testimony, Pw1 gave clear testimony that the appellant took her to his house, removed her clothes and forced her to have sex with him. Her testimony on what took place was unshaken in cross-examination. She recognized that even though she had already been impregnated by Robert it was the appellant who had forced her to have sex with him on 09/11/2016. Pw3 met Pw1 immediately after the offence and Pw1 told him that she had been defiled by the appellant. Pw1 also told Pw3 where she had been. The appellant was found in the locus in quo immediately after the commission of the offence. It is worth noting that the appellant was not a stranger to Pw1. In addition, the medical evidence was also confirmed that indeed Pw1 was defiled.

16. Finally, the appellant's defense could not withstand the weight of the prosecution evidence. Nothing was put to the witnesses in cross-examination to suggest that they were lying. I therefore find that the appellant's allegation that he was arrested on mistaken identification on thought that he was Robert was an afterthought.

17. I affirm the conviction. The sentence shall be determined in line with section 8 (4) of the Act which provides for the minimum sentence of 15 years where the age of the child is between 16 and 18 years. I allow the appeal on sentence, set aside the sentence of 20 years' imprisonment and substitute it with a sentence of 15 years' imprisonment.

Dated and Delivered at Kisii this 8th day of January 2019.

R.E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Senior Prosecution State Counsel

Rael Court Clerk