REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 80 OF 2018

EMMANUEL KIPTUI CHERUIYOT...APPELLANT

VERSUS

REPUBLIC...DEFENDANT

(Being an appeal from the original conviction and sentence in Criminal Case No.7625 of 2014 at the Chief Magistrate's Court, Eldoret (Hon. C. Obulutsa, SPM) dated 18 March 2016)

JUDGMENT

[1] The Appellant herein, **Emmanuel Kiptui Cheruiyot**, was arraigned before the court of the Senior Principal Magistrate, **Hon. C. Obulutsa**, charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged in the Particulars of the Charge that on the **5 December 2014** at [particulars withheld] Village in Eldoret West District within Uasin Gishu County, he unlawfully and intentionally caused his penis to penetrate the vagina of **LJ** a girl then aged 15 years. In the alternative thereto, the Appellant was charged with the offence of indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act, No. 3 of 2006**. The Particulars of the Alternative Charge were that on the **5 December 2014** at [particulars withheld] Village in Eldoret West District within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of **LJ** a girl then aged 15 years.

[2] The Appellant denied the allegations and after trial, was found guilty the Substantive Charge. He was accordingly convicted thereof and sentenced to 20 years imprisonment on **18 March 2016**. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on the following grounds:

[a] That he did not plead guilty at his trial;

[b] That he was given an unfair trial;

[c] That the Prosecution did not proved the case against him beyond reasonable doubt;

[3] On the basis of those grounds, the Appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside. He filed Supplementary Grounds of Appeal pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya,** raising the following additional grounds:

[a] That the trial court convicted him on inconsistent and contradictory evidence of the Prosecution witnesses;

[b] That the trial court convicted him on medical evidence which did not support the charge of defilement;

[c] That the trial court convicted him and yet failed to consider his testimony in his defence.

[4] The Appellant urged his appeal by way of written submissions, in which he pointed out aspects of the Complainant's evidence which he considered contradictory and submitted that the inference to draw therefrom is that the Complainant is a liar; and that the whole of her evidence ought therefore to have been disregarded by the trial court. He relied on **Buwala vs. Republic EA 570** and **John Wagner and Others vs. Republic HCCRA No. 405 of 2009** to support his argument that the witnesses are the eyes and ears of the court; and that if they fail to be good eyes are ears, they handicap the courts in the administration of justice. Thus, in the Appellant's view, the trial court ought not to have relied on the uncorroborated evidence of the Complainant. He relied on **Section 124** of the **Evidence Act, Chapter 80** of the **Laws of Kenya,** in support of this argument.

[5] It was further the submission of the Appellant that the medical evidence presented before the lower court did not meet the requisite test and the principles laid in **Nakuru HCCRA No. 280 of 2004: Michael Odhiambo vs. Republic** for the proposition that the rapture of the hymen *per se* is not conclusive proof of defilement; and that such rapture could be caused by other factors. Accordingly, it was the Appellant's submission that the medical evidence adduced against him, including the P3 Form, was worthless as no connection was made thereby between the incident and the age of the Complainant's injuries.

[6] In support of his assertion that the Prosecution did not prove its case beyond reasonable doubt, the Appellant submitted that he raised the issue of a grudge; and that no proper investigations were carried out by the Prosecution to rule out a frame-up. He pointed out that no evidence was adduced as to how and when he was arrested; and that no manuscript notes were availed to authenticate the observations made in the P3 Form. The Appellant accordingly urged the Court to find that the case against him was not proved beyond reasonable doubt before the lower court.

[7] **Mr. Mulamula**, Learned Counsel for the State, was of the contrary view. According to him, the offence of defilement was proved beyond reasonable doubt; and that **PW1** gave cogent evidence at to her age; the fact of penetration and to prove that the offence was committed by the Appellant, a neighbour of theirs. He also pointed out that the Complainant's Birth Certificate was produced as an exhibit before the lower court, as was the P3 Form that was filled by the doctor who examined her; and that both documents supported the evidence of **PW1** that she was defiled and that she was then a minor for purposes of **Section 8** of the **Sexual Offences Act**. He, consequently, urged for the dismissal of the Appellant's appeal.

[8] The Court has given careful consideration to the appeal and taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon; while bearing in mind that it did not have the advantage of seeing or hearing the witnesses.(See **Okeno vs. Republic [1972] EA 32).**

[9] The evidence adduced before the lower court by the Prosecution was that the Complainant, a 15 year old girl, was from Church Global with other girls; and that on the way they met the Appellant; and that the Appellant pulled her into his house and placed her on the table in his one-roomed house. She further stated that the Appellant threatened her with an arrow and proceeded to remove her clothes before laying her on the sofa and inserting his penis in her private parts. He said, it was in that process that the Appellant's sister, **Naomi**, came in and found the Appellant in the act; and asked him, in consternation, what he was doing; whereupon the Appellant climbed down and grabbed his sister who was threatening to go and report the incident; and that it was then that she found an opportunity to escape. She ran home and reported to her parents and was taken to **Likuyani Hospital**, after which the incident was reported to **Soy Police Station** where she was issued with a P3 Form. Thereafter the Appellant was arrested and charged. **PW1** testified that she was born on **4 November 1999** and she backed up her evidence by making reference to her Birth Certificate before the lower court.

[10] The Complainant's mother, **PW2** told the lower court that she was at home on **5 December 2014** at 10.00 p.m. when **PW1** returned from church and woke her up; that she reported to her that the Appellant, who is their neighbour, had forced her to go to his house where he defiled her. She then reported the incident to the village elder and thereafter went with the Complainant to the police station and hospital for. She confirmed that the Complainant was issued with a P3 Form which was filled and returned to the police station.

[11] **PW3**, a Clinical Officer at **Likuyani Hospital**, told the lower court that he examined the Complainant following allegations of defilement; and that he found her hymen broken and thus confirmed that there was penetration. The P3 Form that he filled and signed was marked the **Prosecution's Exhibit 2**.

[12] **PC Cheptarus (PW4)** was the last Prosecution witness. He stated that he was then attached to **Soy Police Station**; and that he was tasked to investigate the defilement complaint filed by **PW1**. He issued her with a P3 Form which was filled and returned to him; after which he caused the Appellant to be arrested and charged. He produced the Complainant's Certificate of Birth as **the Prosecution's Exhibit 1** before the lower court.

[13] On being placed on his defence, the Appellant conceded that he knew the Complainant as a neighbour. He however denied the allegation that he had defiled her adding that the Complainant's family had a grudge against him.

[14] In the light of the foregoing, can it be said that the offence of defilement, as laid in the Substantive Count in respect of which the Appellant was convicted by the lower court, was proved beyond reasonable doubt? **Section 8** of the **Sexual Offences Act,** pursuant to which the charges were laid, provides as follows:

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**
>
> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**
>
> **(4) 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.**

[15] Accordingly, the Prosecution needed to prove the following essential ingredients:

> **[a]** That the Complainant was, at the material time, a child aged 15 years;

[b] That there was penetration of the Complainant's vagina;

[c] That the penetration was perpetrated by the Appellant.

[a] <u>On the age of the Complainant:</u>

[16] From the foregoing summary, it is manifest that sufficient evidence was placed before the lower court, which evidence was entirely uncontroverted, that the Complainant was born on **4 November 1999,** and therefore was aged 15 years as at **5 December 2014**. The Complainant's Birth Certificate No. [Particulars withheld] was produced before the lower court and marked **Exhibit No. 1** to corroborate the evidence of both **PW1, PW2, PW3** and **PW4** as to the Complainant's age. Accordingly, credible evidence was adduced before the lower court to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[b] <u>On Penetration:</u>

[17] In this regard, the evidence adduced before the lower court was principally that of the Complainant. She testified that she was from church and that on the way home she met the Appellant who grabbed her and pulled her into his house; that the appellant threatened her and proceeded to defile her and was only interrupted by his sister. It is noteworthy that the Complainant immediately reported the incident to her mother and it was thereupon that the matter was reported to the police and the Complainant escorted to hospital for examination. According to **PW4**, the Complainant had a ruptured hymen; which was an indication of penetration. Again, the Prosecution evidence in this connection was entirely uncontroverted, and was therefore cogent and credible. Clearly therefore penetration of the Complainant's genital organ was proved before reasonable doubt. Accordingly, the lower court correctly came to the conclusion that penetration had been proved.

[c] <u>On whether the penetration of the Complainant was perpetrated by the Appellant</u>:

[18] As to the pertinent question whether the penetration of the Complainant was committed by the Appellant, the evidence of the Complainant was straightforward enough; that it was the Appellant, a neighbour, who defiled her. The lower court tested that evidence with care and exercised caution as required by **Section 124** of the **Evidence Act, Chapter 80** of the **Laws of Kenya.** He took into account that the two were neighbours; that the Complainant immediately reported the occurrence to her mother and mentioned the Appellant by name. He also took into account that the allegation that there was a grudge between the two families was never taken up during cross-examination and dismissed it as an afterthought. The trial court also noted that **Naomi,** the Appellant's sister who found the Appellant in the act of defilement, would have been the best witness; and that it was not expected that she would willingly take a stand against her brother.

[19] Thus, having reviewed the evidence adduced in support of the Main Count, I have no reason for faulting the Learned Trial Magistrate for believing **PW1**. It is to be remembered that, when it comes to credibility, this Court, as an appellate court, would defer to and be guided by the impressions formed on the mind of the trial court by the by the witnesses. Accordingly, in **<u>Shantilal Maneklal Ruwala vs. Republic [1957] EA 570,</u>** it was held, *inter alia*, that when the question arises as to which witness is to be believed rather than another and that question turns on demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses.

[20] I have similarly taken into consideration the Appellant's argument that the Prosecution Case before the lower court was riddled with contradictions and inconsistencies as set out on page 1 of his written submissions; particularly as to whether the Complainant was with other girls or was alone when they met. I however do not consider that the contradictions referred to by the Appellant were of the sort that would suffice to invalidate the conviction. As was well explicated by the Court of Appeal in **<u>Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1992</u>** thus:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"**

[21] Hence, since contradictions and discrepancies are not uncommon in criminal prosecutions, the question the Court must bear in mind is whether their sum total is serious enough as to create reasonable doubt on the guilt of the person accused; and, from a review of the entirety of the case presented before the lower court, I am satisfied that that is not the case herein. Indeed, in ***<u>Philip Nzaka Watu vs. R</u>*** **<u>[2016] eKLR,</u>** the Court of Appeal expressed the view that:

> ***"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question…"***

As pointed out hereinabove, in the circumstances hereof, I am not convinced that the inconsistencies cited are pertinent, or that they could have affected the outcome of the trial before the lower court.

[22] In the same vein, there is no truth in the Appellant's contention that his defence was not taken into account, for, at lines 1-3 on page 37 and lines14-16 of the Record of Appeal, it is manifest that the trial court did consider the Appellant's defence, and that he weighed the totality of the evidence including the Appellant's defence before arriving at the conclusion that it arrived at. I am satisfied that the Prosecution proved its case in respect of the Main Count beyond reasonable doubt; and that he was indeed accorded a fair trial by the lower court. I am satisfied that the conviction of the Appellant on the main count of defilement contrary was based on sound evidence and the same

is hereby confirmed.

[23] On Sentence, the lower court proceeded on the basis that it had no discretion in the matter of sentence. The Learned Trial Magistrate noted that **"There is a slight ambiguity in the charge in case of the sentencing section..."** but did not elaborate thereon. He then proceeded to sentence the Appellant to 20 years imprisonment. What I see, from a consideration of the lower court record, is a variance between the evidence and the Charge as laid in terms of the penalty provision. The evidence is explicit that the minor was then aged 15 years and therefore the correct penalty provision ought to have been **Section 8(3)** of the **Sexual Offences Act**; yet the penalty provision set out in the Charge Sheet is **Section 8(4)** of the **Sexual Offences Act**. Since no amendment was effected before the closure of the Prosecution Case, the Appellant was entitled to the less severe of the two penalties. I would accordingly reduce the sentence imposed on the Appellant to 15 years imprisonment, to be served from the date he was sentenced by the lower court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2019

OLGA SEWE

JUDGE