REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 116 OF 2017

JOHN NYAGA MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Kagoni E.M., Senior Resident Magistrate, delivered on 10th October, 2016 in Mombasa Chief Magistrate's Court Criminal Case No. 45 of 2015).

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that between 28th September, 2015 and 18th October, 2015 in Likoni District, within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of NA [name withheld] a child aged 13 years. The appellant was sentenced to 30 years imprisonment.

2. The appellant being dissatisfied with the conviction and sentence filed a petition and grounds of appeal. He amended his grounds of appeal on 13th December, 2018 with leave of the court. He stated that the sentence of 30 years imprisonment was excessive, that the age of the complainant was not proved, that the provisions of Section 150 of the Criminal Procedure Code were not complied with as the Chief who allegedly arrested him was not called as a witness and that his defence statement was not considered.

3. The appellant relied entirely on the written submissions he filed on 13th December, 2018 and the response to the respondent's submissions which he filed on 21st February, 2019.

4. On the issue of sentence, the appellant submitted that the minimum sentence under the provisions of Section 8(1) as read with Section 8(3) of the Sexual Offences Act is 20 years. He therefore submitted that 30 years imprisonment was excessive. He urged this court to reduce the same.

5. He submitted that the age of the victim was a material aspect to be considered and conclusively proved as it determines the sentence that should be imposed against an accused person. He relied on the case of **Hillary Nyongesa vs Republic** [2010] eKLR, to augment his submission. He also cited the case of **Kaingu *alias* Kasomo vs Republic**, Malindi Criminal Appeal No. 504 of 2010 (unreported) where the Court of Appeal was of a similar view. He also referred to the case of **Alfayo Gombe Okelo vs Republic** [2010] eKLR, to fortify his argument.

6. The appellant urged this court to find in his favour as the age of the victim was not proved beyond reasonable doubt. He relied on the case of **Chiroto Nyamawi Mumba vs Republic,** Criminal Appeal No. 373 of 2010 (unreported).

7. The appellant further submitted that his source of arrest was not established as the Chief who was purported to have arrested and handed him over to the Police was never called to testify. He referred to the case of **John Kenga vs Republic,** Court of Appeal Criminal Appeal No. 118 of 1984, where the appellant was acquitted due to the prosecution's failure to clear the doubt of his arrest.

8. The appellant requested this court to consider his defence and prayed for his appeal to be allowed due to the prosecution's failure to prove its case beyond reasonable doubt.

9. The respondent through Ms Marindah, Prosecution Counsel, opposed the appeal through written submissions filed on 8th February, 2019. She submitted that PW1 was very candid in her evidence and had no reason to lie against the appellant whom she had not known prior to the day they met. It was further submitted that her evidence was corroborated by PW3 that the appellant was living with her in a house at his place of employment. The Prosecution Counsel stated that PW1 was defiled by the appellant whom she lived with for a month.

10. It was the submission of the Prosecution Counsel that the Trial Magistrate correctly relied on the provisions of Section 124 of the Evidence Act and found that PW1 was a truthful witness and her evidence could form the basis of a conviction.

11. It was further submitted that the P3 and PRC forms produced in court corroborated the evidence of PW1 and that PW2, the Doctor, confirmed that PW1 had been defiled. He observed a healing abrasion on her vagina and her hymen was broken. There was a foul smell on her vagina. The age of the injury was 6 weeks.

12. Ms Marindah when submitting on the age of PW1 stated that no birth certificate, baptism card, school leaving certificate or medical evidence was produced to prove the age of PW1. She urged this court to go by the apparent age of PW1 which was given on the P3 form as 13 years. She cited the case of **Evans Wamalwa Simiyu vs Republic** [2016] eKLR where the court held that under the apparent age in part C of the P3 form, the estimated age and under the Children's Act "age" where the actual age is not known means the apparent age. The Prosecution Counsel prayed for the appeal to be dismissed

ANALYSIS AND DETERMINATION

13. The duty of the first appellate court is to analyze and re-evaluate the evidence tendered before the court below and reach its own independent decision. See **Okeno vs Republic** [1972] EA, where the Court of Appeal held as follows:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

14. PW1, MA [name withheld] was taken through voir dire examination by the Trial Magistrate. He ruled that she should give sworn evidence. She recounted how she ran away from their home on 28th September, 2015 after being mistreated by her mother. As she was loitering around Matimbuni area, she met the appellant who asked her why she was loitering. He told her to accompany him to his house and that he had a wife and 4 children. PW1 accompanied him but found no one in his house. He gave her food to eat and thereafter, a mat to sleep on. He gave her a mosquito repellant which she applied and lost consciousness. When she awoke, it was 10:00 a.m., she found herself naked lying on the appellant's bed. At that time she was feeling a lot of pain in her private parts.

15. It was her evidence that at 1:00 p.m., she tried to get up but her arms were tied to the bed with a rope. She untied herself and tried to open the door but it was locked from outside.

16. On coming back to the house, the appellant asked her to cook, which she did. Thereafter, he gave her the repellant again and on applying it, she passed out. She came to in the morning. It was her evidence that for a week the appellant would give her the repellant to use but she later refused to use it. She stated that he held a knife and threatened to stab her and took a rope and tried to tie her. She indicated that she also threatened him.

17. PW1 further testified that after 1 week, the appellant started putting some powder in her food and she would get a black out. She indicated that after a month, he told her he had found a new job as a milkman and he would take her to a boarding school as he had sold a piece of land.

18. PW1 gave evidence that they shifted to Sita's house where he told her to lie that she was his granddaughter and that her name was Mary Muthoni and her father was Jeremiah Muturi. After 1 week, Sita's wife asked her what her relationship with the appellant was and she said he was her grandfather. She recalled that one day they heard her singing two songs as she cried and people discovered she was not a Kikuyu. She recounted that one day after fetching firewood, when she returned to the place they were staying in, she found Nyumba Kumi Elders, one of whom was a Luo. She was taken to Sita's house where she stayed for 3 days. Thereafter, she and the appellant were arrested. She was examined at Coast Province General Hospital (CPGH) where Post Rape Care (PRC) and P3 forms were filled.

19. Dr. Raila Seif of CPGH testified as PW2. He produced the P3 form for PW1 on behalf of Dr. Mutula whom he had worked with. He was thus familiar with her handwriting and signature. He stated that the age of PW1's injury was 6 weeks. He explained that she had a foul smell on her genitalia and healing abrasions. Her hymen was broken. The degree of injury was classified as maim. He stated that the P3 form was signed on 12th November, 2015 by Dr. Mutula.

20. PW2 also produced the PRC form for PW1. He further stated that it was filled on 23rd October, 2015 and the injuries noted thereon are reflected in the P3 form. PW2 produced both the PRC and P3 forms in evidence.

21. PW3, Sila Muinde's evidence was that on 11th October, 2015 at about 5:00 p.m., his wife called him and told him that his Farm Help, who was the appellant had been visited by his granddaughter aged about 12 years. PW3 was uncomfortable about a child spending the night with the appellant. PW3's wife however told him that both PW1 and the appellant were comfortable sleeping together.

22. He further stated that the appellant refused to release PW1 but it later turned out that she was not related to him at all. PW3 testified that when he went to his home, he informed the Village Chairman who had the appellant arrested.

23. No. 96042 Police Constable (PC) Beth Kagendo testified as PW4. She stated that on 13th October, 2015 while working at Inuka Police Station, the OCS informed her that an activist had informed him that there was an old man who was living with a minor as a wife in Shauri Area. The activist sought help for the girl to be rescued.

24. She recounted that as they were heading towards that direction they met the area Chief who was with a young girl and the appellant. The Activist, Mama Sauti, informed PW4 that the appellant was the suspect. He was arrested and taken to the Police Station. PW4 stated that PW1 reported that she had been locked in the appellant's house against her will and defiled.

25. In his defence, the appellant denied having committed the offence.

26. The issues for determination are:-

(i) If the age of the complainant was established;

(ii) If the failure to call the person who arrested the appellant was fatal to the prosecution's case;

(iii) If the appellant's defence was considered;

(iv) If the prosecution proved its case beyond reasonable doubt; and

(v) If the sentence was harsh or excessive.

If the age of the complainant was established

27. It is not disputed that no birth certificate or Child Health Card, or age assessment form was produced to ascertain PW1's age. PW1's mother was not called as a witness and it was PW1 who stated that her age was 13 years when she was taken through voir dire examination. Apart from that information, the P3 form in Section "C" gives the estimated age of PW1 as 13 years. The Hon. Trial Magistrate considered the above issue and in a well reasoned Judgment, he made reference to two authorities from the Court of Appeal which have addressed the issue of how a court should handle the issue of the age of a victim, where no documentation of proof of age is available.

28. In **Evans Wamalwa Simiyu vs Republic** [2016] eKLR, the Court relied on Part "C" of the P3 form to establish the apparent age of a victim of defilement for purposes of determining the penalty to mete out to the offender therein. The said court stated as follows:-

> ***"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of that information. The complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where the actual age is not known means apparent age. This means that in the Doctor's opinion the apparent age of the complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established the apparent age was established as 12 years. This means her actual less her or more (sic) and this was sufficient to bring the complainant within the age bracket of 12 - 15 years or the purposes of the penalty under section 8(3) of the Sexual Offences Act."***

29.In this case, as indicated in Section "C" of the P3 form, the apparent age of PW1 was 13 years. I therefore hold that the Hon. Magistrate did not misdirect himself as to the age of PW1.

If the failure to call the person who arrested the appellant was fatal to the prosecution's case

30. According to PW4, the appellant was at the first instance arrested by the Chief of the area where he was staying. It was P4's evidence that she came across the Chief, the victim and the appellant as he was being taken to the Police Station.

31. The decision in **PM and 2 Others vs Republic** [2014] eKLR applies in this case. The Court of Appeal when dealing with the issue of witnesses who were not called to testify in the case therein stated as follows:-

> ***"Failure to call a witness can only be construed against the prosecution if it can be demonstrated that had such a witness been called, his/her evidence would have been against the prosecution. The question that ponders our minds is whether the evidence of the investigating officer would be prejudicial to the appellants. We think not, the investigating officer would collate, collect and repeat what PW1, PW2, PW3, PW4, PW5 and PW6 as well as other prosecution witnesses stated. We are of the considered view that failure to call the investigation officer and other witnesses was not fatal to the prosecution case. In all the cases, the investigating officer is not an eye witness and in the instant case, the testimony of the eye witness was sufficient to convict the appellants."***

32. In this case, having gone through the evidence of PW1 and PW3, I am of the view that the Chief's evidence would only have been to the extent of explaining how he arrested the appellant and rescued PW1, but he would not have adduced evidence as an eyewitness to the commission of the offence. It is my finding therefore that failure to call the said Chief did not in any way prejudice the appellant.

If the appellant's defence was considered

33. The Hon. Trial Magistrate made no mention of the appellant's defence in the Judgment. I have considered the same and noted that the appellant said very little in his defence. He denied having committed the offence. The Hon. Magistrate was therefore under an obligation to

consider the prosecution evidence to establish if it proved the prosecution's case beyond reasonable doubt or if the defence by the appellant cast any doubt to the prosecution's case. Having considered the evidence tendered by the prosecution, the defence put forth by the appellant stands out as false. I dismiss it as such.

If the prosecution proved its case beyond reasonable doubt

34. A perusal of the Judgment of the lower court reveals that the Trial Magistrate ably carried out the task of analyzing the evidence presented before him. PW1 gave a vivid account of her ordeal in the hands of the appellant. She was categorical that he took advantage of her vulnerability when he came across her loitering after she had run away from home. He deceived her into believing that he would give her shelter in his house where he said he lived with his wife and 4 children. The evidence of PW1 was that she was detained by the appellant in his house where he would tie her hands on the bed and lock her inside the house. She also testified that she was defiled by the appellant.

35. The issue of defilement was corroborated by the evidence of PW2 who produced the P3 and PRC forms which established that PW1's hymen was broken and she had healing abrasions. The evidence indicates that the appellant detained PW1 from 28th September, 2015 to the 13th October, 2015 when he was arrested. That was a period of about one month and a half. The Doctor testified that the healing abrasions were 6 weeks old, which tallies up with the duration the appellant kept PW1 in his house and defiled her.

36. The Trial Magistrate relied on the provisions of Section 124 of the Evidence Act and held that PW1's evidence was straight forward and flawless. He found it to be truthful and wholly accepted it as such. I have no justifiable reason to depart from the said holding.

37. Apart from PW1's evidence and the medical reports, there was the evidence of PW3 who had employed the appellant for 11 days. He testified that he is the one who reported to the Village Chairman that the appellant was living with a girl whom he said was his granddaughter. PW3 in his evidence stated that he was uncomfortable with PW1 sharing a room with the appellant. It is my finding therefore that there was overwhelming evidence to prove that the appellant had the opportunity to commit the offence of defilement.

If the sentence was harsh or excessive

38. The appellant submitted that the sentence of 30 years was harsh and excessive. The minimum sentence under the provisions of Section 8(3) of the Sexual Offences Act is 20 years imprisonment. The Hon. Magistrate when sentencing the appellant did consider that he sexually abused PW1 for about a month and that he was old enough to be her grandfather. The appellant did not express any remorse when given an opportunity to mitigate. He only stated that he did not commit the offence.

39. Given the aggravated circumstances in which the offence was committed by the appellant tying up PW1 to his bed and locking her in his house for about a month and a half as he defiled her, I see no factor that can persuade me to interfere with the sentence meted out against him. In addition to that, he would give her a spray to use in the guise of a mosquito repellant, that would make her became unconscious. At times he would lace her food with a substance that would also make her lose consciousness. I therefore hold that the Hon. Magistrate did not misdirect himself on the issue of sentence. I therefore uphold the conviction for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. I also uphold the sentence of 30 years imprisonment imposed against him.

40. The appeal is dismissed in its entirety. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **14th** day of **June, 2019.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Ogweno, Principal Prosecution Counsel for the DPP

Mr. Oliver Musundi - Court Assistant