REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 87 OF 2017

BETWEEN

GGM.....APPELLANT.

AND

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Principal Magistrate's Court at Kangema Cr. Case No. 930 of 2015 delivered by Hon.D.M. Kivuti, SRM on 1st December, 2017).

JUDGMENT

1. The Appellant was charged with defilement and an alternative charge of indecent act with a minor contrary to Sections 8(1)(2) and 11(a) respectively of the Sexual Offences Act. The particulars of the main charge were that on 15/11/15 at Gacharageini Sub location in Mathioya Sub-County in Murang'a County intentionally caused his penis to penetrate the vagina of GW a minor aged 6 years. In the alternative charge the Appellant was accused of intentionally touching the vagina of the said minor. The Appellant was convicted of the main charge and sentenced to serve life imprisonment.

2. The Appellant was dissatisfied with both the conviction and the sentence. He filed Amended Grounds of Appeal on 9th September, 2019 alongside handwritten submissions. He was dissatisfied that the trial Court found that there was penetration whereas the minor victim testified that the Appellant tried to insert his penis into her genitalia. He was also dissatisfied that he was not identified as the assailant and that the judgement of the trial Court was not signed. He urged the Court to quash the conviction and set aside the sentence.

Summary of Evidence.

3. This being the first appellate Court its duty is to reevaluate and re analyse the evidence a fresh and come put with its own independence conclusion. In so doing, the Court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. **See Pandya –vs- Republic (1975) EA, 336 and Okeno vs Republic (1972) EA 32.**

4. In total the prosecution called seven witnesses. The complainant who testified as PW2 was on the material date playing with other children when the Appellant who was a distant relative called her and took her into his house where he undressed her and defiled her. At the time the Appellant lured PW2 to his house, PW4, **C W K** was watching. She was a form 4 student walking on the road near where PW2 was playing. PW4 went and informed her father **W K (PW3**). In turn, PW3 went and informed PW2's father (PW1). PW1 (W K M). PW1 and PW3 quickly went to the Appellant's house which was locked from inside. Upon knocking the Appellant was hesitant to open. Meanwhile, members of the public were piling up. After a plea that he opens the door he obliged. He pushed PW2 out of the house and locked himself again. Members of the public insisted that he had to open the door. When he opened he was arrested by the members of the public who handed him over to police at Gacherageini AP Post.

5. PW2 informed his father and PW3 that the Appellant defiled her. In her description of the act she stated that the Appellant removed her trouser and under pant and urinated on her. She also indicated that when he was urinating on her she felt pain. She was thereafter taken to Kangema Sub-district Hospital where she was examined and treated.

6. **PW 6, Peterson Chomba** from the hospital indicated that the minor was first treated at Nyakianga dispensary on 15/11/2015 with a history of sexual assault. She was re-examined by another medical officer by the name Robert Mwangi and a P3 form filled on 16/11/2015. Both treatment notes and the P3 form were adduced as exhibits 1 and 2 respectively. The examination was that the hymen was freshly broken, evidenced by presence of blood in it. A conclusion was made that there was penetration.

7. **PW5, APC Stephen Wandole Karogi** of Gacharageini AP Post confirmed that he received the Appellant who was escorted to the AP post by members of the public. Accompanying him was the victim and her father amongst other members of the public. He referred them to hospital and advised that the matter be reported to a police station.

8. **PW7** one **Timothy Muhia** was the investigating officer. He summed up the evidence of the prosecution witnesses, recorded necessary statements and referred the charges against the Appellant. He also received a birth certificate of PW2 which indicated that she was born on 12/12/2009 and adduced it as exhibit 3.

9. After the close of the prosecution case the Court ruled that the prosecution has established a prima *facie case* and the Appellant was called to adduce defence. He testified as DW1. He gave a sworn statement of defence but did not call any witness in support. He testified that one the 15/11/2015 at around 2.00 pm he had just come from a bar at Gatore and went home at 9.00 pm. He stated that he was woken up by some people who escorted him to the police for reasons he did not understand. He concluded that he was implicated in the case.

10. In cross-examination, he stated that he knew the complainant since childhood since they lived in one area. He also knew the complainant's father. He admitted that PW3 was a relative but they had a land dispute. Further that he lived alone in his house. Finally, he stated that he was drunk and that he was not aware that the complainant was taken to hospital on that day.

Analysis and determination.

11. The appeal was canvassed before me on 9/9/2019. The Appellant who was in person relied on written submissions, whilst the Respondent through learned State Counsel, Mr. Mutinda made oral submissions.

12. The main point of contestation by the Appellant is that he was not identified. He stated that PW2 constantly referred to him as either Mr. Gichiga or Gachiga which implied that she was not sure who defiled her. On the part of the Respondent Mr. Mutinda submitted that not only was the Appellant was positively identified but all ingredients of the offence of defilement were established.

13. In a case of defilement the prosecution is obligated to proof three main ingredients namely; identification of the perpetrator, penetration and age of the victim. The offence is defined under Section 8 (1) of the Sexual Offences Act No. 3 of 2006 as:

> ***" a person who commits an act which causes penetration with a child is guilty of an offence termed defilement"***

14. The operative word under the definition is "*penetration"* which is defined under Section 2 as ***"…the partial or complete insertion of the genital organ of a person into the genital organ of another person***".

15. With respect to identification of the Appellant, first, this is a case where the Appellant admitted that he was well known to the complainant and her family for a long time. In fact, he admitted to knowing the complainant since childhood. Second, the Appellant was smoked out of his house while in the company of the complainant PW. He had hoped that when he took PW2 to his house no one would notice. But as fate had it, PW4 was nearby and closely monitored what had transpired. She is the one who informed PW3 that the Appellant had led PW2 into his house. In turn, PW2 went and informed PW1 (Complainant's father) That is how these witnesses together with members of public stormed into the Appellant's house and rescued PW2 and arrested the Appellant.

16. It follows that the issue of mistaken identity did not arise. What is paramount and the Court must determine is whether in the period that the Appellant locked PW2 in his house he defiled her. In her own testimony she stated that the Appellant defiled her. In a graphic description she stated that he undressed her and then urinated into her private parts. The trial Court noted that PW1 pointed at her genitalia when referring to where the Appellant had urinated in her. She was also candid that whilst the Appellant was urinating in her she felt pain.

17. This is a case that involved a very young girl who may not have been able to candidly express herself by explaining that she was defiled in the terms of having been sexually assaulted. The fact that she knew into which part the Appellant urinated in her and that during the urination she felt pain, there can be no other conclusion than that the Appellant defiled her.

18. PW2's evidence was clearly corroborated by that of PW6, the Clinical Officer who adduced in his evidence the medical examination form (P3 form). The same together with the initial medical treatment notes showed that the hymen was freshly broken. Suffice it to state, the examination preceding the filing of the P3 form was done only one day after the incident. No wonder the conclusion was that the hymen was freshly broken. On the other hand, the Appellant had been with PW2 only a day before. No one else would have broken the hymen except himself. PW2 was categorically that the organ of the body inserted into her genital was the Appellant's penis. Effectively, the Appellant was responsible for the genital penetration. I have no doubt in my mind that PW1 spoke the truth in implicating the Appellant. Furthermore, his evidence was properly corroborated by medical evidence adduced in Court.

19. Finally, as regards proof of the age, a birth certificate was produced by PW7 as exhibit No. 3. The same shows that PW2 was born on 12/12/2009 which put her age at six years as at the date of the offence.

20. I therefore, conclude that the prosecution ably discharged their burden in proofing the offence of defilement beyond all reasonable doubt. The Appellant's defence that he was implicated in the case because of a land dispute between himself and PW3 was not supported by any evidence. He failed to cross-examine any of witness on this issue. His defence was therefore an afterthought and I dismiss it. I accordingly hold that the conviction was safe and uphold the same.

21. The Appellant also submitted that judgment of the Court was not signed as the law requires. The original record of proceedings does however contain a signed judgment. He was supplied with a certified typed copy which the trial magistrate needed not sign.

22. As regards sentence, this Court is guided by the Court of Appeal decision by the case of ***Evans Wanjara Wanyonyi –vs- Republic (2019)EKLR in which it was held thus:***

"On the enhanced 20 year term of imprisonment meted upon the Appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the Appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:

> *'In this case, the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in* ***Francis Karioko Muruatetu & another – v- Republic (supra****), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial Court.'*

23. This is a case in which the Appellant took advantage of a young child who otherwise would have been entrusted upon him for protection. Instead, he converted himself into a beast by defiling the young soul. The victim will have to live with the trauma of the assault for the rest of her life. Although he pleaded for leniency during that trial citing that he was remorseful, I find the case very serious and deserves a deterrent sentence. On the other hand, life sentence may not necessarily serve as deterrence but rather harden an offender as the offender may have in mind that he is condemned to the prison for the rest of his life. In this regard, I set aside the life imprisonment sentence and substitute it with 30 years imprisonment. The 30 days that the Appellant was in remand prior to payment of bond shall be taken into account in computing the sentence.

It is so ordered.

DATED AND DELIVERED AT MURANG'A THIS 12TH DAY OF SEPTEMBER, 2019.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;-

1. Appellant in person.

2. Mr Mutinda the Respondent