REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 10 OF 2019

KEITH WEKESA SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Thika Chief Magistrates Court Criminal Case No. 1510/2015 (S.O) by Hon. B.N. IRERI (PM) on 30/5/2017)

J U D G M E N T

1. **Keith Wekesa Simiyu,** the Appellant was charged with the offence of **Defilement** Contrary to **Section 8(1) (4)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the charge were that on **1st day of May 2015** at **Gumbu Trading Centre** in **Muranga County** within the **Republic of Kenya**, by use of his genital organs namely penis committed an act which caused penetration to the genital organs namely vagina of **H.N.** a girl **aged 17 years.**

2. In the alternative he was charged with the offence of **committing an indecent act with a girl** contrary to section **11(1) of the sexual offences Act NO. 3 of 2006.** Particulars of the charge were that on **1st day of May 2015** at **Gumbu trading Centre** in **Muranga County** within the **Republic of Kenya**, intentionally touched the vagina **of H.N.** with his penis against her will.

3. He was tried, convicted and sentenced to **fifteen (15) years imprisonment.**

4. Aggrieved, he appeals on fourteen (14) grounds that may be condensed thus: The charge was not proved beyond reasonable doubt: Evidence adduced was contradictory and inconsistent: crucial witnesses were not availed to testify: **Section 169(1) and (2) of the Criminal Procedure Code** were not complied with: and the sentence imposed was harsh and excessive.

5. Facts of the case were that on the **1st May 2015, H.N**., the complainant herein was on her way home at 6.50 p.m. when the Appellant followed her, seized her neck, removed her panty, forced her on the ground, lay on her and violated her sexually. On being released she ran to the home of Joyce Wanjiku a person the Appellant was allegedly doing for some construction work. She caused other workers to avail the Appellant. The complainant's parents were notified of what had happened. The complainant's father went, arrested the Appellant and took him to the police station. Investigations were carried out which culminated into the Appellant being charged.

6. Upon being put on his defence the Appellant stated that on the 1.5.2015 he was hired by a foreman to work at Punda Milia Kambiti a place he had not been previously. As they walked at about 8.00p.m., they encountered some strangers who asked who Waingo was. He identified himself only to be arrested. They beat him up and took him to the Administration Police Post where he saw a girl he had never seen before. He was beaten until he lost consciousness. Later, he was taken to Makuyu Police Station where he was accused of defiling a girl.

7. In his written submissions the Appellant urged that the age of the complainant was not proved. Evidence adduced by the complainant was inconsistent, therefore, unbelievable. That the owner of the construction site that the complainant ran to was not availed to testify to support the allegations of the complainant. That the trial court was not fair as required by **Article 50 (2) (1) of the Constitution** as the Appellant was not given adequate time to access the P3; the defence put up that was cogent was rejected for no apparent reason; there was no compliance with **Section 169 (1) of the Criminal Procedure Code** and the sentence meted out was excessive.

8. The Respondent through learned Counsel, **Ms Ndombi,** opposed the appeal. She urged that the required ingredients of the offence were proved. That the age was proved by the complainant, her mother and a birth certificate that was produced. The complainant had known the Appellant as a worker at her neighbour's construction site. That the fact of penetration was proved as the hymen was broken.

9. This being the first appellate court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. To prove the case the prosecution was duly bound to prove:

> ***(i) The age of the victim.***
>
> ***(ii) The fact of penetration of the victim's genetalia***
>
> ***(iii) Positive identification of the perpetrator of the act***

11. PW1, the complainant told the court that she was born in 1998, January. PW2 **N M** her mother stated that she was born on **18/2/1998.** A child health card (immunization card) issued in respect of N K whose mother was N K and father S K indicate her date of birth as 18/2/1997. Evidence adduced by the prosecution therefore proved beyond doubt that the complainant was 18 years old hence an adult at the point of the alleged incident. There was contention in respect of the age of the complainant. A charge of rape had been drafted and it found its way to the court record but as the prosecution opted to go by what the complainant stated there was no substitution.

12. After the incident the complainant was subjected to medical examination. PW5 **Anthony Mwangi** a Clinical Officer filled the Medical Examination report **(P3).** He used treatment notes that were issued at Makuyu Health Centre and Maragua Hospital where the complainant was seen at the outset. On examination the complainant's hymen was broken; there was whitish discharge but there was no evidence of tears.

13. What was not established is when exactly the hymen was broken. Penetration is defined by Section 2 of the Sexual Offences Act as:

> ***"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;''***

The complainant testified that the assailant forcefully inserted his penis into her vagina. If this is what happened it would amount to penetration. However, there is evidence of the complainant having been seen at Maragua District Hospital on 01/5/15 at 10.45 p.m. after being sexually violated at 6.50p.m at their home but no evidence of tears that would be consistent to the force used as alleged by the complainant. The fact of the broken hymen was not explained. The prosecution did not state when exactly the hymen was broken. Presence of whitish discharge may not be evidence of penetration of the genetalia since white vaginal discharge could be a sign of an infection. Looking at the P3 form the Clinical Officer opined that ***"the patient was likely sexually assaulted"***. This meant that it was a presumption that could be rebutted. Consequently, there was no proof beyond doubt that the complainant was penetrated on the fateful date.

14. Regarding the identity of the assailant, the complainant identified the individual as a person he used to see working at a neighbour's home. She testified that after being assaulted she went to the home of their neighbour J W and asked if the Appellant was in but he was not. The lady allegedly sent his other workers to go find the appellant.

15. PW3 **SK** the father of the complainant stated that his attention was attracted by screams by the roadside and when he went there he found the complainant crying and she was with mama N, a neighbour. Upon enquiring the complainant told him that a man who worked for J known as W had raped her. He called J and in company of his wife (PW2) and Mama N they went to her home. They established that the person was with other workers therefore they went to arrest him.

16. The Appellant argued that PW3 found him with his workmate and asked for W, then had him arrested. PW3 stated that he did not know the Appellant before and he did not go with the complainant to arrest him. In her testimony the complainant stated that she was attacked at 6.50p.m. although she said that her attacker used to work for J W her evidence was silent on the name of the individual. The question to be answered is how PW3 came up with the name of the person.

17. In the case of **Bukenya & Others vs. Uganda (1972) EA 549** it was held thus:

> ***"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence of those witnesses, if called would have been or would have tended to be adverse to the Prosecution's case."***

With the kind of evidence adduced by PW1 and PW3, it was important to call J W and Mama N to fill in the loopholes that were apparent. Failure to call them was detrimental to the prosecution's case.

18. From the foregoing it was not safe for the trial court to return a verdict of guilty in the instant case. Therefore the appeal has merit. I do quash the conviction and set aside the sentence meted out. **The Appellant shall be set at liberty unless otherwise lawfully held.**

19. It is so ordered.

Dated, signed and **delivered** at **Kiambu** this **12th** day of **September, 2019**

L.N. MUTENDE

JUDGE