REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 51 OF 2019

CHARLES MWANGI NJOROGE.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence by Hon. T. Murigi – CM Thika dated and delivered on the 6th day of December 2018 in the original Thika Chief Magistrate's Court Criminal Case No. 1631 of 2013}

JUDGEMENT

The appellant is serving life imprisonment for the offence of Defilement contrary to Section (1) as read with Section 8 (2) of the Sexual Offences Act the particulars of which were that on 20th May 2013 at [particulars withheld] within Kiambu County he intentionally caused his penis to penetrate the vagina of NN a child aged 7 ½ years.

This appeal which is against the conviction as well as the sentence is premised on the following amended grounds: -

> **"1. THAT, the trial magistrate erred in both law and in fact by failing to appreciate that the voire dire that was conducted on the minor was wrongly procured as she did not in any way understand the solemnity of the occasion.**
>
> **2. THAT, the trial magistrate erred in both law and in fact in failing to find that one of the key ingredients of the offence i.e. penetration was not proved to requisite threshold.**
>
> **3. THAT, the trial magistrate erred in both law and in fact when he failed to realize that part of the medical report did not comply with provisions of section 77 of the Evidence Act.**
>
> **4. THAT, the trial magistrate erred in both law and in fact by failing to find that explicit contradictions and inconsistencies on the record were fatal to the whole of the prosecution's case.**
>
> **5. THAT, the trial magistrate erred in both law and in fact by failing to adhere to express provisions of section 200 of the CPC when the trial commended under a different magistrate thereby prejudicing the appellant greatly.**
>
> **6. THAT, the First appellate court erred in matters of law by rejecting cogent defence case which exhibited an underlying grudge between the accused person and Pw2 and which forms the basis of the charges herein.**
>
> **7. THAT, this honourable court in default considers exercising its discretion in light of the jurisprudence under the Francis Muruatetu & Another petition No. 15 of 2016 which declared unconstitutional minimum mandatory sentences by affording the appellant an opportunity to mitigate again."**

It is the appellant's prayer that this court finds merit in the appeal, quash the conviction and set the sentence aside.

At the hearing of the appeal, the appellant relied on written submissions while adding that the complainant was used by her mother to frame him so they could eject him from his home and take his land. He submitted that while he was in remand custody they went to his home and carted away everything including his land ownership documents. He stated that his complaint was however dismissed by the court.

Miss Ndombi who appeared for the State submitted orally. I have considered the rival submissions and the authorities cited carefully but I have also as the first appellate court analysed and evaluated the evidence before the lower court so as to arrive at my own independent conclusion albeit bearing in mind that I did not see or hear the witnesses who testified and so did not observe their demeanour **(see Okeno v Republic [1972] EA 32).**

The appellant's first contention is that penetration was not proved. It is indeed correct that penetration is one of the ingredients of the offence of defilement which must be proved beyond reasonable doubt. From the submissions I discern the appellant as saying that penetration was not proved because there were inconsistencies in the evidence of the prosecution witnesses; that because the complainant stated that she bled after the offence then it must have been the first time she had been defiled. He contrasted that with the evidence of Pw4 (the investigating officer) who said she had been defiled by the appellant prior to this incident. The appellant also took issue with the evidence regarding the time it took the complainant to go to hospital – whether it was 2 days or 9 days. He contended that these discrepancies only go to show that the evidence was concocted.

The **Sexual Offences Act** defines **penetration** as follows: -

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

The point for determination then would be whether there was insertion of the genital organ of the appellant into the genital organ of the complainant be it partial or complete. In determining this issue this court has to consider that under **Section 124 of the Evidence Act** it need not look for corroboration of the complainant's evidence.

The complainant narrated to the court how the appellant who had lived with her mother for about 2 months took her to the house, closed the door, laid her on the bed, removed her pants and lay on her. She went on to state that after that he inserted the organ with which he urinates into her organ for urinating. She stated that she felt a lot of pain but he threatened to kill her if she reported the matter to her mother. For that reason, even though her mother returned home at 5pm on that day she did not inform her. Her mother (Pw2) however noticed she was not herself and asked her but she would not still disclose. She however developed complications – could not pass stool – and this caused her mother to take her to hospital. It was then that the complainant opened up and said what had happened. She was taken to hospital first in Thika and then to Mama Lucy Kibaki Hospital in Nairobi. It is my finding that her evidence even taken alone proves there was penetration. She was very consistent on what the appellant did and the only reason she kept mum about it was the threat. I believed her and I am satisfied she was a credible and reliable witness. I do not agree that the discrepancy between her evidence and that of the investigating officer cast any doubt on his guilt. Whereas there is no need for corroboration the P3 Form filled about 9 days later indicates injuries in her genitalia hence confirming her testimony.

The appellant stated that he too should have been examined in order to confirm he was the one who defiled the complainant. This issue was addressed by the Court of Appeal in **Kassim Ali v Republic [2006] eKLR** where the court held that in view of **Section 124 of the Evidence Act** such an examination is not mandatory to sustain a conviction. The court stated: -

> ***"…[The] absence of medical examination to support the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"***

Also in **George Kioji v Republic Nyeri Criminal Appeal No. 270 of 2010 (unreported)** the court stated: -

> ***"Where available medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to Section 124 of the Evidence Act, cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records reasons for such belief."***

Similarly, I find that nothing turns on the omission to have the appellant tested. I do also find that the appellant's submission that the P3 Form did not show the state of the hymen has no basis. It is not the presence or absence of the hymen that proves there was penetration but the evidence of the complainant.

It was also the appellant's contention that part of the medical evidence was inadmissible as it was produced by a person other than the author. **Section 77 (1) of the Evidence Act** clearly stipulates that **in criminal proceedings any document purporting to be a report under the hand of a medical practitioner is admissible in evidence** and **sub-section (3) of the Section** states that **when such a report is so used the court may, if it thinks fit summon the medical practitioner and examine him as to the subject matter of the report**. My finding is that **subsection (3)** allows the production of such a report, in this case the P3 Form, without the necessity of calling the medical practitioner. It would therefore suffice if the investigating officer produced it. In this case however the prosecution did better than that and called another doctor to produce the report given that the doctor who filled the P3 Form could not be found without undue delay. Moreover, even had I found that the evidence was improperly admitted **Section 175 of the Evidence Act** requires me to consider whether independently of the evidence objected to, there was sufficient evidence to justify the decision. I have already made a finding that the testimony of the complainant alone proved the offence. Indeed, I find that the evidence was watertight.

The defence was not credible. The appellant himself concedes that he filed a case against the complainant's mother in regard to his documents but it was dismissed. I would also dismiss the defence as being untrue given that he remarried shortly after this incident yet his wife who testified as Dw1 did not make any reference to theft at their home.

The appellant's allegation that the magistrate who convicted him did not comply with **Section 200 (3) of the Criminal Procedure Code** is not correct. The **proceedings of 15th August 2016** states as follows: -

> **"Before**

Hon. T. Murigi

Prosecutor Oyugi

CA Tabby

Accused present

Court – accused to comply with Section 200 (3) of the CPC as the trial Magistrate was transferred.

Accused – I pray that my case proceeds from where it reached.

Court – Section 200 (3) complied with. Case to proceed with the evidence on record. Mention on 15/9/2016 to confirm if proceedings have been typed."

It is this magistrate that convicted the appellant. The others before her did not record any of the evidence. I am also satisfied that the voire dire as conducted revealed the complainant understood the solemnity of the occasion. Her evidence taken together with the evidence of the rest of the witnesses and the appellant's defence reveals that she understood where she was and spoke the truth. **In the upshot I find no merit in the appeal against conviction and it is dismissed.**

On the sentence, the appellant urges this court to consider his mitigation and re-sentence him in view of the decisions of the Court of Appeal regarding minimum sentences in the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** and the High Court decisions in **George Kuria Mwaura v Republic [2019] eKLR.** I have considered these decisions and the circumstances of this case. The only reason the trial court sentenced the appellant to life imprisonment is because it is the minimum sentence prescribed by the law. The appellant is entitled to equal benefit of the law as do other convicted persons. Accordingly, this court shall set aside that sentence and in its place substitute it with one for imprisonment for thirty years from the date he was sentenced by the lower court. The appeal is otherwise dismissed.

Signed and dated this 15th day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17th day of October 2019.

C. W. MEOLI

JUDGE