REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 34 OF 2017

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No. S. O. 46 of 2016

in the Chief Magistrate's Court, Naivasha, (Z. Abdul, RM)

JOSEPH NJOROGE GITAU...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

JUDGMENT

Background

1. The appellant was charged, tried and convicted for defilement contrary to **Section 8(1)** as read with **section 8 (2)** of the **Sexual Offences Act.** He was sentenced to life imprisonment.

2. Briefly, the facts are that the appellant on 26th July 2016, unlawfully caused his penis to penetrate the vagina organ of VW. a child aged 9 years. The prosecution called for witnesses and the accused gave unsworn evidence. He was not represented by counsel at the trial.

3. Dissatisfied with the outcome, the appellant filed an appeal and later amended the grounds of appeal. The subject grounds are now as follows:-

> ***"1. That appellant did not enter guilty at trial.***
>
> ***2. That the trial court erred in matter of law and fact as defilement and penetration was not clearly established to the required level. PW1 and PW2 were incredible court circumvented by child's demeanor.***
>
> ***3. That erred in law and fact vital witness not availed contrary to section 150 of the Criminal Procedure Code, cap 75 laws of Kenya issue of grudge exclusioned.***
>
> ***4. That principles applicable in a case of circumstantial context not applied thus appellant found guilty contrary to section 169 of the Criminal Procedure Code cap 75 laws of Kenya.***
>
> ***5. That conviction of appellant manifestly unsafe trial not fair invoke Article 50 of the Constitution of Kenya (2010).***
>
> ***6. The appellant unrepresented wish to attend at hearing."***

4. I deal with each head of appeal hereunder.

Penetration

5. The accused impugns the trial court's finding that there was penetration. He asserts that the complainant (PW1) could not even remember the date when the alleged event occurred. He further asserts that the evidence of PW2, the complainant's mother concerning penetration was

hearsay since she merely repeated what the complainant told her, namely, that the accused removed "his something of urinating and did her bad manners down there. In the body of a woman."

6. The evidence of PW1 a class one pupil, was that she recalled the day the incident occurred, but not the date. She testified that she was with her sister W and brother M outside her house, when "Baba Shiru" who she identified as the accused called her. She went to his house and after he asked her whether her parents were there and was told no, he locked the door. She then testified:-

> ***"It was one room. There was a table and a bed he took off his trouser. He called me when he was sitting on the bed……..He put me on his lap and started to do me bad manners. I was wearing a dress……. He did bad manners to me, he took out that "kitu yake ya ndani" (that his thing of inside) and he did me from here behind. Then he took his shirt and he (futa). He wiped me from behind. He made me sit on him and he took that thing from inside and he did it to me."***

7. In cross-examination, PW1 maintained her story despite the many questions she was asked. The trial court noted, however, that she became distressed and was crying. An adjournment was therefore allowed.

8. On being told about the incident, PW2, her mother, testified that she reported to the police and was sent to Naivasha District Hospital where PW1 was treated, and given a P3 Form. PW2 the Clinical Officer from Naivasha District Hospital produced the P3 Form. She testified that on examination she found PW1's hymen was broken and she had bruises on her vaginal wall. In her opinion, PW1 had been defiled. The P3 Form was completed on 28th July 2016, two days after the incident occurred also shows that PW1 had been defiled; that her hymen was broken and her vaginal walls were hyperaemic.

9. To the trial magistrate the foregoing evidence was satisfactory proof that PW1 had been penetrated. This court, too, does not see any reason to differ from the trial magistrate's conclusion on this aspect. There is no doubt in my mind that what PW1 called the appellant's "thing of inside" which he did her with from behind was the one he put in PW1's vagina. Absent any other explanation, her hymen was torn by his "thing". No serious suggestion can be made that the "thing" with which the accused urinated as was corroborated by PW2, was not the appellant's penis.

Plea of Not Guilty

10. There were no substantive arguments raised on this ground except that, upon the appellant pleading not guilty a full hearing was undertaken at which it was the prosecution's responsibility to prove the offence beyond reasonable doubt. The mere non-guilty plea is not in itself sufficient to suggest the accused's innocence.

Vital witnesses not called

11. The appellant argued that PW1 mentioned three persons - Kariuki, Hannah and W who were present outside when the offence was allegedly being committed. That they heard her crying and in addition there was one Njoki. (see pages 10-12 of the record of proceedings). The appellant asserts that none of these people who were mentioned were called to testify. This was despite the fact that in PW2's statement it was indicated that Kariuki was a witness who said he had witnessed the incident. I have noted that PW2 later denied that she told the police anything about Kariuki after questioning by the court and further cross-examination.

12. The appellant had testified in his defence in the lower court that the said Kariuki had asked PW1 to frame him as a way of revenge because the accused had testified against him in 2012.

13. The question that arises is whether the evidence availed by the prosecution was sufficient to convict absent the evidence of the witnesses allegedly not called.

14. The prosecution pointed out **Section 143** of the **Evidence Act** which provides that no particular number of witnesses must be called to prove a fact. Here, the entire evidence was that of PW1, a child of tender years. **Section 124** of the **Evidence Act** provides:

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings. The court is satisfied that the child is telling the truth."***

15. In the proceedings, there is on record that the court found that PW1 had handled her evidence and cross-examination *"stoically until this moment"*. That moment was the time when PW1 started crying, and sought to have an adjournment. It was granted when the trial magistrate noted PW1 had become distressed. In her judgment, the trial magistrate noted that the sitting trial magistrate, her predecessor:

> ***"Observed and recorded that the girl (PW1) was overwhelmed by emotions and broke down during cross-examination…… The girl cried possibly when she saw the accused and flash-backed on the incident (or reason). It is very clear in my mind that indeed it is the accused who defiled PW1."***

16. The case of **Julius Kiunga M'birithia v. Republic [2013] eKLR** was quoted in which the principle that there need not be a superfluity of witnesses is elucidated:

> ***"though the prosecution is supposed to call all witnesses necessary to establish the truth, it is not expected to call a superfluity of witnesses. Further, that in adverse inference should be entered by the court where evidence tendered is sufficient to prove the particular matter in issue, or the entire case".***

17. In light of the foregoing, I am satisfied that there was sufficient evidence by PW1 and PW2 to prove beyond reasonable doubt that the accused committed the offence. The witnesses called were sufficient to prove the offence.

Whether the trial was conducted in a fair way

18. The accused complained that the trial was unfair in that the conviction was manifestly unsafe for reliance on circumstantial unsworn evidence, and for not taking into account the grudge between PW2 who had taken charcoal from the accused and had not paid for it.

19. On the unsworn evidence it is trite law (See **Section 19** of the **Oaths and Statutory Declaration Act**) that when a child of tender years is giving evidence, she or he may give unsworn evidence if the child does not understand the nature of an oath. Such evidence must be corroborated (See **Oloo v. Republic KLR).** In this case the evidence of PW1 was corroborated by that of her mother, PW2. In addition the evidence of PW1 was not circumstantial, but direct eye witness testimony.

20. In light of all the reasons herein, I see no basis for interfering with the trial magistrate's decision which I hereby uphold. The appeal is therefore dismissed in its entirety.

21. Orders accordingly.

Dated and Delivered at Naivasha this 15th Day of October, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Maingi for the State

2. Joseph Njoroge Gitau - Appellant in person

3. Court Clerk - Quinter Ogutu