REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 63 OF 2018

PETER MWANGI WANGUI.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. G. Omodho – SRM Thika dated and delivered on the 27th day of September 2018 in the original Thika Chief Magistrate's Court Criminal Case No. 4270 of 2011}

JUDGEMENT

The appellant was charged with **Defilement of a child contrary to Section 8 (1) as read with Sub-section 8 (2) of the Sexual Offences Act.** The particulars of the charge were that on 21st August 2011 at around 4pm in Murang'a County within the Republic of Kenya, by use of his genital organ namely penis, committed an act which caused penetration to the genital organ namely vagina of ENW a girl aged 12 years.

He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act the particulars being that on the same day and place as in the main charge he committed an indecent act with ENW a child aged 12 years by touching her private parts namely vagina.

The appellant pleaded not guilty on both counts and the prosecution then called five witnesses to prove its case.

Briefly the facts of the case were that on the material day and time the appellant went to the complainant's home where she was with her mother (Pw2) and sister. He was known to them and so when he told her mother that he had been sent by their landlord to go get avocados at his (landlord's) homestead the complainant's mother told her to go with him. She readily agreed to go with him but when they reached the farm he asked her to accompany him to his house. She refused and so they went to the avocado farm. Instead of picking avocados, he beat her and dragged her to his house. She stated that once in his room he removed her pant then removed his penis and pushed it into her vagina all the while holding her by the neck. To get away she lied she was going to the toilet. She ran home crying. She met their neighbour Wilson and when he asked her why she was crying she told him what had happened. The matter was reported to the police and the appellant was arrested. The complainant was taken for examination at Thika Level 5 Hospital. Treatment notes and a P3 Form evidencing the examination were produced in evidence (Exhibit 3 & 4).

To prove her age, the prosecution produced an immunisation card (Exhibit 2) which indicated she was born on 21st December 1999. Dr. Kiprotich Ngetich (Pw4) a medical officer at Thika Level 5 Hospital and who produced the P3 Form confirmed the complainant was seen at the hospital on 22nd August 2011. He stated that although he did not examine or fill the P3 Form there was evidence in the medical records that she had injuries in her genitalia which was reddish, wet and painful. He also stated that the doctor who examined the complainant recorded that her underwear was presented and it was torn, had brown stains and a foul smell.

Police officer Abdulahi Dika (Pw5) of Makuyu Police Station confirmed that the matter was reported to the station on 21st August 2011 and that police acting on the report issued the complainant with a P3 Form and referred her to hospital. He also confirmed that the appellant was arrested together with another man who he shared a name with but after the complainant identified him as her assailant he was charged but the other Mwangi was released.

When the court put the appellant on his defence, he made an unsworn statement. He maintained his innocence and stated that on the day in issue a woman went to his place of work and asked him to go repair her bed. He stated that he obliged but after repairing the bed the woman who alleged to be widowed asked him to sleep with her. He refused and left. He stated that this rejection angered the woman and three days later at about 4am three police officers appeared at his door and accused him of defiling a child an allegation he denied. He contended that he had never met the complainant before this case. He pointed out that the evidence of Pw2 and Pw3 was that they did not know anything. He denied committing the offence and stated that he was innocent.

After considering and evaluating the evidence the trial magistrate found the appellant guilty on the main charge and sentenced him to

imprisonment for life being the minimum sentence provided for the offence. This appeal is premised on grounds that: -

> **"1. The learned Magistrate erred in law and principle when sentenced the appellant to the mandatory sentence when the age of the complainant had not been proved beyond reasonable doubt.**
>
> **2. The Learned Magistrate gravely erred in law when she allowed the prosecution to produce uncertified copies of documents without any legal basis.**
>
> **3. The learned Magistrate erred in law and fact when she relied on contradicting evidence to convict the appellant.**
>
> **4. The learned Magistrate erred in law and fact when she failed to comply with Section 200 of the C.P.C thus violating the appellant's right to a fair trial.**
>
> **5. The learned Magistrate erred in law when she allowed other people other than the makers of documents produce them without laying any legal basis for them to do so.**
>
> **6. The learned Magistrate erred in law when she took into account extraneous matters and thus arrived at a wrong decision.**
>
> **7. The conviction was against the weight of evidence."**

The appeal is opposed. Counsel for the appellant canvassed the appeal through written submissions which he then highlighted at the hearing of the appeal. Counsel for the prosecution replied orally. I have considered the submissions by both sides as well as the cases cited by Counsel for the appellant. However, as the first appellate court my duty is to also analyse and evaluate the evidence so as to arrive at my own independent conclusions. I have done so bearing in mind that I did not see or hear the witnesses giving evidence **(see Okeno v Republic [1972] EA 32.**

The three elements of defilement that the prosecution required to prove beyond reasonable doubt are **the age of the complainant, penetration** and **that the appellant was the perpetrator of the offence.** The appellant has taken issue with only two of the elements to wit age and identification. Counsel for the appellant submitted that the evidence adduced in regard to those two elements fell short of the standard required to prove the same beyond reasonable doubt. **On age,** Counsel submitted that the immunisation card was inadmissible firstly because it was a copy but not the original hence in breach of **Section 67 of the Evidence Act** and secondly because it had an alteration which was not explained. Counsel further took issue with the variation in the name of the complainant in the charge sheet and in that card. He contended that there was no explanation given for not producing a birth certificate. Counsel relied on two persuasive cases **Newton Ochieng Okello v Republic [2016] eKLR** and **Stephen Kiragu Mugwe v Republic Muranga HCCRA 537 of 2017 (unreported).**

In the case of **Musyoki Mwakavi v Republic [2014] eKLR** the Court of Appeal held that age can be proved by other evidence and that a birth certificate is not the only proof of age. The court stated: -

> ***"It was not mandatory for a birth certificate to be produced by the prosecution in the instant case. The evidence adduced by the witnesses in respect of the age of the complainant could not be dismissed as mere assertions per the authority cited by the appellant"***

The Court of Appeal confirmed this position in the case of **Evans Wamalwa Simiyu v Republic [2016] eKLR** where it held: -

> **"[17] In this regard the evidence before the trial court was that of the complainant who stated during her *voir dire* examination that she was 12 years old. Her evidence was corroborated by PW5 who examined the complainant and filled the P3 form, which was produced as an exhibit and which stated the complainant's age as 12 years. Although no age assessment report, nor a certificate of birth or baptism certificate was produced in proof of complainant's age, the fact that the trial court found it necessary to carry out a *'voir dire'* examination to determine whether the complainant understood the nature of an oath or was of sufficient intelligence to understand the importance of speaking the truth, is a clear indicator that the trial court formed the impression that the complainant was a child of tender years, and therefore the fact of her being under eighteen years of age was apparent. Indeed section 2 of the Children Act define "age" as meaning apparent age in cases where actual age is not known. Thus we are satisfied that there was ample evidence before the trial court, to show that the complainant was under 18 years of age and we have no hesitation in finding that for the purpose of establishing the offence of defilement the complainant was established to be a child.**
>
> **[18] 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 this 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 actual age is not known means apparent age. This means that in the Doctors 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 mean her actual less her or more 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."**

In the instant case the complainant and her mother testified that she was born in 1999. The doctor who examined her at Thika Level 5

Hospital estimated her age as 12 years and indeed having been born in 1999 she was twelve years old when the offence occurred. So that, even apart from the immunization card there is evidence that the complainant was a child aged 12 years old. I am satisfied therefore in the light of the Court of Appeal decision that the fact that the complainant was a child aged 12 years old was proved beyond reasonable doubt.

On identification, Counsel for the appellant pointed out several inconsistencies in the evidence of the prosecution witnesses and submitted that the same cast doubt in the prosecution's case. My finding however is that the inconsistencies were minor and hence not fatal to the prosecution's case. The complainant and her mother (Pw2) knew the appellant very well as he was their landlord's employee. That would explain why Pw2 easily allowed him to go with the complainant. This was evidence of recognition which in the case of **Anjononi v Republic [1980] KLR 1566** was held to be **"more satisfactory, more assuring and more reliable".** The court heard that the appellant was arrested together with another with a similar name but when the complainant identified him as the one who defiled her the other man was released. It was also during the day and I am satisfied that the appellant was positively identified and that his defence was nothing but lies intended to save his skin. The conviction is affirmed.

This appeal did not extend to the sentence. However, it is my finding that the trial Magistrate erred in imposing a life sentence whereas the sentence provided in respect of children between the ages of 12 years and 15 years is a minimum of twenty years imprisonment. Accordingly, I am entitled to interfere with the sentence and the same is set aside and substituted with one for twenty years from the date the appellant was sentenced by the lower court. It is so ordered.

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