REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 8 OF 2019

TITUS MUINDI KILINGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. J. D. Karani (RM) in the Senior Principal Magistrate's Court

at Makindu Sexual Offence Case No.30 of 2017, delivered on 11th day of December, 2018)

JUDGEMENT

1. The appellant was charged with defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 28th day of June 2017 at Emali township within Makueni County, intentionally and unlawfully caused his male genital organ namely penis to penetrate into the female genital organ namely vagina of one MPM a girl aged 10 years.

2. In the alternative he was charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

Particulars being that on the 28th day of June 2017 at Emali township within Makueni County, willfully and unlawfully touched the vagina of MPM a girl aged 10 years with his penis.

3. He pleaded not guilty and matter went into full trial. He was convicted and sentenced to serve 40 years imprisonment.

4. He was aggrieved thus he lodged instant appeal in which he set out 8 grounds of appeal.

5. During hearing he came up with 5 amended grounds and submissions. The amended grounds which he argued are:-

(1) That, the honourable trial magistrate erred in matters of law and fact by failing to find that one of the key ingredients of the offence i.e. penetration by the appellant was not proved by the evidence on record.

(2) That the honourable trial magistrate erred in matters of law and fact by failing to find section 77 of the Evidence Act was not adhered to when part of the medical report was being admitted to the detriment of the appellant person in the trial process.

(3) That the honourable trial magistrate erred in matters of law and fact by failing to find that essential witnesses and exhibits necessary to corroborate the prosecution's case were not availed hence violating Article 50 (2) (c) and (j) of the Constitution.

(4) That the honourable trial magistrate erred in matters of law and fact by rejecting the cogent defence case which reasonably exonerated him from any wrong doing.

(5) That in light of recent jurisprudential change this court considers giving the appellant the benefit of a lesser sentence in light of consideration of the appellant's mitigation and rehabilitation.

6. The directions were given the appeal be canvassed by way of submissions. However only appellant filed but prosecution relied on the evidence on record.

Submissions by the Appellant:

7. The appellant submits that penetration by the appellant was not proved by evidence. He relied on the classic case of ***DPP vs Woolmingtom [1935].***

8. He submits that the prosecution greatly erred in producing medical report without adhering to the laid down statutory safeguard.

9. That fair trial rights entail not only ensuring that an appellant person is brought before a court of law as soon as reasonably possible but also that he should be furnished with all the necessary documentary evidence that the prosecution intends to use at the trial. This has been enshrined under Article 50 (2) (c) and (j) of the Constitution.

10. That it is his contention that there were key witnesses who ought to have been availed but were not and thus the case against the appellant herein remains largely uncorroborated.

11. He relied on the case of ***Paul Kanja Gitari vs Republic [2016] eKLR*** where it was held thus:

> **"……. It is of course trite that there is no number of witnesses required for the proof of a fact. See section 143 of the Evidence Act. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See Bukenya & Others vs Uganda [1972] EA 549."**

12. On rejection of cogent defence case appellant submitted that he was subjected to a mob justice beating and consequently arrested and charged with the offence he did not commit. He relied in the case of ***Republic vs Sikha Singh S/O Wazir Singh & Others [1939] 6 EACA 145,*** where the former Court of Appeal of Eastern Africa upheld a decision of the High Court in which it stated:-

> **"If a person is appellant of anything and his defence is alibi he should bring forward the alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."**

13. It is submitted that the 40 years sentence meted out by the trial magistrate is excessive in the circumstances as it does not give room for the rehabilitation of the appellant in line with the laid down sentencing guidelines. He relied on several decided cases among them the Court of Appeal case of ***Evans Wanjala Wanyonyi vs Republic [2019] eKLR*** where the court held:

> **"In this appeal, guided by the merits of the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (Supra)* and persuaded by the decisions of this court in *Christopher Ochieng vs Republic (Supra)* and *Jared Koita Injiri vs Republic, Kisumu Criminal Appeal No. 93 of 2014* in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015."**

14. Finally he submitted that, the offence of incest was not spelled out against him to the standard stipulated by law.

Duty of First Appellate Court:

15. This being a first appeal, the role of this Court as an appellate Court of first instance is well settled, it should re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion.

16. This was held in the case of ***Okeno vs. R (1977) EALR 32*** and in the Court of Appeal case of ***Mark Oiruri Mose vs R (2013) eKLR*** that the Court on first appeal is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter in while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify.

Prosecution's Case:

17. **PW1** the complainant minor gave an unsworn statement. She stated that she was on her way to fetch water when she met the appellant person who asked her to go pick her shoes from him.

18. She stated that she knew the appellant as a cobbler. She had taken her shoes for mending. She stated that when she went to his house, he locked the door behind her, and removed her underwear. The said underwear was in court. She stated that he laid her on his bed. He removed his trousers and inserted his penis which she refers as the thing he used to urinate and inserted it into her vagina. She stated that she felt pain and she started screaming.

19. She stated that a boy came and knocked the door, and when appellant refused to open, she opened the door and that is when the crowd that had gathered beat the appellant. She stated that she was taken to hospital.

20. In cross-examination, she stated that there were people who found her in the appellant house. She also stated that the appellant was the one who had asked her to go to his house.

21. **PW2** was PW1's father. He stated that he had sent PW1 to go fetch water. It was about 2 pm. he stated that he was later called and informed that PW1 was taken to hospital by the police. He stated that PW1 was born on 14/7/2006. He identified a birth certificate. He also confirmed that PW1 was treated.

22. PW3 was a medical doctor who filled the P3 form. He stated that he had examined PW1 two (2) days after the alleged incident. He stated that her labia minora was hyperemic, the hymen was tender and perforated and there was discharge from the external genitalia. He produced the P3 and the PRC form.

23. PW4 was the investigation officer. He stated that on the 28/6/2017 at about 4 pm the OCS Emali got a call from members of the public reporting a defilement case. He went to the scene and found the appellant surrounded by members of the public and he had been beaten. He stated that he questioned the minor who stated that she had been defiled. He stated that he visited the scene. He produced the birth certificate.

24. PW5 was the clinical officer who filled the medical notes. He was also the first person to treat both the appellant and the complainant. He stated that he examined PW1(2) hours after the incident. That she was in fair conditions but her inner wear was wet and was stinking of urine. Her labia minora was hyperemic. Her hymen was tender but not completely perforated. She had lacerations on her anterior perennial. She had discharge which he suspected to be semen. He produced the medical notes.

25. The officer also treated the appellant. He had been assaulted. His treatment were stitching and cleaning with pain killers. He also produced the said treatment notes.

26. On close of the prosecution case, the appellant was put on his defence and gave sworn statement but called no witness.

Defence Case:

27. At the close of the prosecution case, the appellant was placed on his defence. He gave a sworn statement of defence. He stated that on the day of the incident, he went to work. He was arrested by the police while buying his lunch at a local hotel. He stated that he met the complainant the next day at the hospital. That when he questioned the girl, she stated that it was her mother who would apply things in her vagina. That he knew the complainant's father by seeing him in Emali town.

Issues, Analysis and Determination:

28. After going through the material before the court, I find the singular issue being; ***whether prosecution proved its case beyond reasonable doubt?***

29. Section 8(1) of the Sexual Offences Act provides that:-

> **"8(1) A person who commits an act that causes penetration with a child is guilty of an offence termed defilement.**
>
> **8(3) A person who commits an offence of defilement with a child 12 years to fifteen years shall upon conviction to be sentenced not less than 20 years."**

30. In ***Dominic Kibet Mwarengu vs Republic [2013] eKLR*** **Ndolo J** stated that;

> **"The critical ingredients forming the offence of defilement are the age of the complainant; proof of penetration and positive identification of the assailant."**

31. Thus the main issue for determination before this court is whether the State was able to prove the above stated ingredients of the offence of defilement.

Age of the complainant:

32. PW1 stated that she was 10 years old. This was corroborated by PW2 and PW4 the investigation officer identified and produced the birth certificate respectively. The birth certificate whose copy was produced as Pexb 5 shows that the minor was 10 years at the time of the commission of the offence. Thus, that that ingredient was sufficiently proved.

Proof of penetration:

33. Penetration is defined as partial or complete penetration into the genital organs of a person.

34. PW1 stated that the appellant inserted his penis into her vagina. She used the term the thing he uses to urinate into where she uses to urinate. She was found by members of public in the appellant's house and in 2 hours later, she was receiving medical examination. PW5 the

first medical examiner to be in contact with PW1 stated that her underpants was smelling of urine and was wet at the middle, her vaginal wall was hyperemic with visible lacerations, her hymen was also perforated. He concluded that the girl had been defiled.

35. The above medical findings show that indeed there was disturbance to the genitals of the minor. Disturbance that ordinary ought not to be there for a girl aged 10 years. This evidence was not controverted in anyway. Thus the finding that the State was able to prove this ingredient justified.

Recognition:

36. PW1 stated that she knew the appellant as a cobbler and that she used to take her shoes to him. It's clear from her evidence that she even knew his home because she went on her own with her younger sister without the aid of a mature person. PW2 stated that the appellant was his neighbour.

37. The appellant although denying knowing PW1 stated that he knew PW2 from seeing him in Emali town. He also did not deny living in Emali town. The trial court also had the opportunity to examine PW1 credibility and did find that she was a credible witness.

38. There was no evidence of grudge or misunderstanding between the two families. PW1 only new the appellant as a cobbler. The offence occurred at 2 pm which is during the day therefore PW1 could clearly see who she was interacting with.

39. Further PW4 stated that PW1 was able to escort him to the scene meaning that she could properly recognize the appellant's home. The above piece of evidence was not controverted in any way and that the State was able to prove that PW1 recognized the appellant.

40. The remaining question therefore is if indeed the appellant committed the offence? PW1 and PW4 stated that when PW1 was found in the appellant's home by members of the public, and the appellant was subjected to some measure of beating. This was corroborated by PW5 who also treated the appellant for injuries sustained on the same day of the alleged offence.

41. The trial court do considered the appellant defence. It found the same to be a mere denial. The appellant did not deny being subjected to treatment when he was questioned by PW5 and PW3. There were treatment notes to prove that he had been assaulted by a mob. PW1 was found in the appellant's home, the appellant was arrested the same day of the alleged offence.

42. The trial court having made a finding that the offence of defilement had been proved, It found that the State had been able to discharge their evidentiary burden in the case. This court agrees with trial court as much.

43. The trial court also noted that the appellant was charged under section 8(1) as read with section 8(3) of the SOA instead of 8(2) .Considering the minor's age it invoked section 346 of the CPC. It found the error not prejudicial to the appellant in any way since it had made a finding that the offence has been proved beyond reasonable doubt.

44. This court as gone through the record and it does not find any fault in the conclusion arrived at by the trial court. Thus the court finds no merit in the instant appeal on conviction. On sentence, the appellant was jailed for 40years imprisonment. He complains that his mitigation, sentencing guide lines and the fact that he was a first offender was ignored and thus awarded excessive sentence.

45. This court finds merit on that ground and is inclined to tamper with the sentence as the trial magistrate sentence was excessive in the circumstances as it did not give room for the rehabilitation of the appellant in line with the laid down sentencing guidelines. See the Court of Appeal case of ***Evans Wanjala Wanyonyi vs Republic [2019] eKLR.***

46. Thus makes the following orders.

i) The appeal is dismissed, conviction is affirmed and sentence is set aside and substituted with 20 years' imprisonment from the date of arrest 28/6/2017.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE