REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 5 OF 2019

WILSON KARIUKI MWANGI.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. E. Nyongesa – SRM Gatundu dated

and delivered on the 28th day of June 2018 in the original Gatundu Principal Magistrate's Court Criminal Case No. 975 of 2014}

JUDGEMENT

On 28th June 2018 the appellant was sentenced to thirty (30) years imprisonment for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars of the charge were that on diverse dates between 1st and 2nd September 2014 (as amended on 21st August 2015) at [particulars withheld] in Nairobi the appellant intentionally and unlawfully did an act which caused penetration of his genital organ, namely penis, into the genital organ, namely, vagina, of HWU a child aged 12 years.

Being aggrieved the appellant preferred this appeal. The appeal initially rested on what the petitioner referred to as Amended Grounds of Appeal filed on 11th February 2019. Annexed to that petition are submissions upon which the appellant relied at the hearing. On record however, is a **"Memorandum of Appeal"** filed on 5th April 2019 by the firm of Mbiyu Kamau & Co. Advocates. At the hearing of the appeal the appellant preferred to proceed in person and to rely on the written submissions he himself had filed. As the same are based on the five grounds in the annexed petition this court will in the interest of justice combine those grounds and those filed by the firm of Mbiyu Kamau & Co. Advocates and consider them together. The grounds by the appellant are: -

> **"1. THAT, the learned trial magistrate erred in law and facts when he convicted me in the present case, yet failed to find that the provisions of Section 200 (3) and 213 of the CPC were not duly complied with.**
>
> **2. THAT, the learned trial magistrate erred in law and facts when he convicted me in the present case, yet failed to find that its trial was conducted out of jurisdictions of the alleged offence.**
>
> **3. THAT, the learned trial magistrate erred in law and facts when he convicted me in the present case, yet failed to find that no proper investigations were done in the present case.**
>
> **4. THAT, the learned trial magistrate erred in law and facts when he convicted me in the present case, yet failed to find that the sentence awarded was harsh, cruel and excessive.**
>
> **5. THAT, the learned trial magistrate erred in law and facts when he dismissed my plausible defence without observing the same was not challenged under Section 212 of the CPC."**

Those filed by the Advocate are: -

> **"1. The Learned Trial Magistrate erred in law and in fact by admitting a plea that was not unequivocal**
>
> **2. The Learned Trial Magistrate erred in law and in fact in failing to mention in which language the plea was taken and trial conducted.**
>
> **3. The Learned Trial Magistrate erred in law and in fact in failing to conduct a voir dire even though the complainant was a child below 14 years hence arriving at a wrong decision**

4. The Learned Trial Magistrate erred in law by implying that the appellant should have set up a certain kind of defence hence arriving at a wrong decision

5. The Learned Trial Magistrate erred law and the conviction is unsafe and against the weight of evidence.

6. The Learned Trial Magistrate erred in law by failing to consider the evidence of the appellant and his witnesses hence arriving at a wrong decision.

7. The Learned Trial Magistrate erred in law and fact by failing to take into veracity and character of the prosecution's main witnesses hence arriving at a wrong decision.

8. The Learned Trial Magistrate further erred in law and fact by admitting evidence that does not meet the threshold of Section 124 of the Evidence Act.

9. That the Learned Trial Magistrate erred in matters of law and fact by convicting on a charge that was bad in law for replication of facts between the main count and the alternative charge of facts

10. The Learned Trial Magistrate further erred in law and in fact in failing to find that the P3 medical form was inadmissible as it was not produced by the maker thereof or under section 77 of the Evidence Act (Chapter 80 of the Laws of Kenya). The doctor who examined PW 1 and prepared the P3 form was not called.

11. The Learned Trial Magistrate further erred in law and in fact in failing to find that the medical evidence that was adduced before the trial court did not connect the appellant with the offence

12. The Learned Trial Magistrate further erred in law and in fact in failing to deal with the alternative charge and the second count in the judgment hence the appellant was prejudiced in the sense that had the trial magistrate considered the alternative charge; she would have come to a different conclusion on the matter.

13. The Learned Trial Magistrate erred in matters of law and fact by conducting the trial in a manner that violated his constitutional rights to a fair hearing under Article 50 (2) (c) (j) of the Constitution of Kenya 2010 for none provision of witness statements.

14. The Learned Trial Magistrate erred in matters of law and fact by failing to mention in their Judgment dated 28th June, 2018 which offence the accused person was being convicted of.

15. The sentence meted out to the appellant is excessive in the circumstances."

The appeal is vehemently opposed. As I have already stated, the appellant canvassed the appeal through written submissions while Learned Counsel for the respondent submitted orally. As the first appellate court my duty is to analyse and re-evaluate the evidence in the court below so as to arrive at my own independent conclusion bearing in mind that I did not see or hear the witnesses giving evidence **(see Okeno v Republic [1972] EA 32).** I have also considered the rival submissions put forth at the hearing of this appeal.

The key elements for the offence of defilement are age, penetration and identification of the perpetrator.

In this case the fact that at the material time the complainant was a child was proved through a Certificate of Birth. The certificate proves that she was born on 19th February 2001 and as the offence was allegedly committed on diverse dates between 1st and 2nd September 2014 then she was 13 ½ years old. That puts the issue of age to rest.

On **identification** my finding is that as the complainant knew the appellant very well and the appellant indeed admitted to have accommodated the complainant at his quarters in [particulars withheld] for some days, identification is a non-issue.

That then leaves us with the issue of **penetration.** The complainant testified that on 31st August 2014 she ran away from home to escape the wrath of her mother. That night she slept in a coffee plantation. The next day she contacted the appellant and asked if she could go to his place. He agreed and so she went to his quarters at [particulars withheld] in Nairobi. It was her evidence that they had sexual intercourse on 1st, 2nd and 3rd September before her father (Pw3) went for her on 4th September and the matter was then reported to the police. In his defence the appellant admitted that he received the complainant in his quarters at [particulars withheld]. He however denied that he defiled her and stated that he spent the nights she stayed in his house with his friend K. He also stated that it was him who called the complainant's father to come for her. He called K as a witness who confirmed that for the period the complainant stayed in the appellant's house the appellant would go to his (K's) house to sleep.

Section 124 of the Evidence Act provides that for sexual offences there is no requirement for corroboration and the court can convict solely on the evidence of the victim provided it believes her and records the reasons for doing so. In this case the prosecution adduced medical evidence in a bid to corroborate the evidence of the complainant and the only piece of evidence that can be said to corroborate her evidence is that her hymen was missing. However, in cross examination Dr. Opanga (Pw4), who gave evidence on behalf of his colleague who examined the complainant but who had since left the hospital, while stating that the missing hymen could be evidence of sexual contact conceded that there could be other reasons for the missing hymen. In the case of **PKW v Republic [2012] eKLR** the Court of Appeal faced with a similar issue observed: -

> ***"…….. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of*** **The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769."**

In the absence of evidence that the complainant had not engaged in any other activity that could be the cause of her missing hymen, I am unable to hold that the fact that it was missing is proof of sexual contact. It is my finding therefore that the medical evidence adduced does not corroborate that of the complainant and all we have is the complainant's word against that of the appellant.

The appellant urged this court not to rely on the evidence of the complainant because being a minor she should have been subjected to a voire dire before reception of her evidence. On her part, Prosecution Counsel urged this court to find that failure to conduct the voire dire ought not to vitiate the conviction as there was sufficient evidence to support it. The Court of Appeal decision in the case of **Maripett V. Lookomok v Republic [2016] eKLR** cited in **Peter Wahome v Republic [2018] eKLR** stated: -

> ***"It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;***

> ***"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."***

In this case there is evidence that the complainant was born on 19th February 2001. The offence is alleged to have been committed on diverse dates between 1st, 2nd and 3rd September 2014 when in my view she was 13 ½ years old but not twelve as stated by the witnesses. The records shows that she testified on 21st August by which time, by my calculation, she was 14 ½ years old. It is now settled that fourteen years and below remains the age at which a voire dire is mandatory - **(see Maripett Loonkomok v Republic [2016] eKLR and Samuel Warui Karimi v Republic [2016] eKLR)**. A voire dire was therefore not mandatory in this case.

Section 200 (3) of the Criminal Procedure Code was duly complied with by the succeeding Magistrate as the witnesses were recalled for cross examination by Counsel for the appellant. His argument that this case was a mistrial on that account therefore has no merit. Be that as it may I find merit in his submission that the charge against him was not proved beyond reasonable doubt. Whereas the appellant gave an unsworn statement he called a witness who corroborated his evidence that he never spent a night in his own house when the complainant was there. The two of them also testified that it was the complainant who called the father of the complainant to go pick her from his house. One is justified in believing their evidence given that the complainant's father (Pw3) never disclosed how he knew the complainant was at the appellant's house in [particulars withheld]. I am satisfied that the appellant's defence though unsworn was corroborated by the evidence of K (Dw2). It is instructive that K's (Dw2) testimony was not challenged through cross examination hence giving the impression that the prosecution considered him a truthful witness. I am satisfied that his evidence taken with the accused's statement rebutted the prosecution's case and cast reasonable doubt thereto and the conviction by the trial court is therefore not safe.

Accordingly, **this appeal is allowed, the conviction is quashed and the sentence of imprisonment for thirty (30) years is set aside**. The appellant shall be set at liberty forthwith unless otherwise lawfully held. 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