REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.201 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.931 of 2015 by: Hon. J. Wanjala – C.M.)

JOHN MUGO GATHONI.....APPELLANT

V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

John Mugo Gathoni was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charges are that on unknown dates during the month of November, 2014 at [Particulars Withheld] Village in Laikipia County, unlawfully and intentionally caused his penis to penetrate the vagina of M.L. a girl aged 15 years.

In the alternative, he was charged with the offence of committing an indent act with a child contrary to Section 11(1) of the Sexual Offences Act.

After a full trial, the appellant was found guilty on the principal charge and sentenced to twenty years imprisonment.

Aggrieved by the conviction and sentence, the appellant filed this appeal through the firm of Waichungo & Co. Advocates citing 9 grounds of appeal which are as follows:

> *1. That the learned trial magistrate erred in law and in fact in failing to find that the appellant was charged under non existing provisions of the law and the charge sheet was fatally defective;*
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> *2. That the learned trial magistrate erred in law and in fact in failing to find that the particulars of the charge sheet were so vague on the date of the commission of the offence and the appellant was prejudiced;*
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> *3. That the learned trial magistrate erred in law and in fact in failing to find that the complainant's age was not proved and the charge sheet and the evidence adduced was at variance on the age of the complainant at the time of the alleged offence;*
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> *4. That the learned trial magistrate erred in law and in fact in failing to find that the complainant's age at the time of the commission of the alleged offence did not fall within any of the subsections of Section 8 of the Sexual Offences Act and if it did the applicable subsection was subsection (4) and not (3) and thus the sentence meted was illegal;*

5. That the learned trial magistrate erred in law and in fact in failing to find that failure to conduct a D.N.A. test on the appellant and the complainant's child was fatal;

6. That the learned trial magistrate erred in law and in fact for dwelling on extraneous matters and statements made by the appellant in court in finding the appellant guilty;

7. That the learned trial magistrate erred in law and in fact for shifting the burden of proof to the appellant and failing to consider his defence raised under Section 8(5) of the Sexual Offences Act;

8. That the learned trial magistrate erred in law and in fact in failing to find that the complainant was not forced into engaging in sexual intercourse and she did not willingly and behaved like an adult and was only discovered after she fell pregnant and thus was not defiled;

9. That the trial magistrate erred in law and in fact in failing to find that failure to call the Investigating Officer was fatal to the prosecution case.

Mr. Waichungo also filed written submissions which he highlighted. The appellant therefore prays that the court allow his appeal, quash the conviction and set aside the sentence.

This is a first appeal and it behoves this court to asses, analyze, evaluate all the evidence that was tendered before the trial court afresh and arrive at its own determinations. The court must however make allowance for the fact that it did not have an opportunity to see or hear the witnesses testifying. However, the trial court had that opportunity and was better placed to assess the credibility and demeanor of the witness' evidence. I am guided by the *Kiilu v Republic (2005) KLR 174.*

In total, the prosecution called three witnesses while the accused gave an unsworn defence.

PW1, M.L. told the court that she was 16 years old having been born on 24/8/1999. She identified her birth certificate. She befriended the appellant in November, 2012; that they had sex with appellant from 2012 up to December 2014; that he used to warn her to ensure that she does not get pregnant and to get family planning drugs but she did not. She started vomiting, the teacher noticed and informed her grandmother. She was taken to the Doctor at Losogwa Dispensary and found to be pregnant. The matter was reported to Nyahururu Police Station. She was taken to Nyahururu District Hospital. She started attending Clinic when she was 7 months pregnant. She took back the P3 form to the police station. The appellant refused to take responsibility. She gave birth on 9/7/2015. The child was shown to the court.

PW2, JM is PW1's grandmother. She recalled having been called by PW1's teacher Ms. Mworia on 7/4/2015 and was informed that PW1 was pregnant. They took PW1 to Hospital. They later reported to the Chief and then Police Station that PW1 was pregnant and had named John Mugo the appellant as the one responsible for the pregnancy. PW2 knew the appellant because they both worked for the principal of [Particulars Withheld] Secondary School; that the appellant was arrested after she identified him to the police the complainant was examined by Doctor Joseph Karimi Kinyua (PW3) on 8/4/2015. On examination, he found PW1 to be pregnant, 28 weeks; that the hymen was missing and therefore she had penal penetration. He produced the treatment notes and P3 form in court as exhibits.

When called upon to defend himself, the appellant opted to give unsworn evidence. He admitted to having known the complainant as a neighbor and asked the court to forgive him because he did not know that she was not yet 18 years.

In his submissions, Mr. Waichungo submitted that the age of the complainant was not proved because, whereas the charge stated that she was 15, the alternative indicated she was 17 years; that though the birth certificate was marked for identification, it was never produced in evidence. Counsel relied on the decision of *Kiangu alias Kamoso v Republic Cr.A.5021/2010* where the court said that age is critical in Sexual Offences Act as sentence is dependent on the age; counsel also submitted that the appellant claimed not to have known that the complainant was under 18 years; that PW1's evidence is that she had sex with the appellant but did not disclose exactly what was allegedly done to her and therefore the

offence of defilement was not proved.

Counsel relied on the decision in *Peter Ngari v Republic A.231/2010* where this court held that sex is a legal term and there needs to be an explanation through evidence what it means.

Counsel also submitted that the complainant gave birth to a child but that she was not subjected to DNA to determine who the father was.

Counsel also urged that the appellant's rights under Article 50(1) was breached in that the court ordered for DNA and later on 20/4/2016 the court recorded that accused had said DNA should not be done because he admitted being the father of the child; that the appellant should have been told not to give self-incriminating evidence even though DNA was abandoned because of what he allegedly told the court. The defence counsel also complained that the court ignored the defence because the appellant believed the complainant was over 18 years and she never reported anywhere till she got pregnant.

The counsel urged the court to consider the decision in *Eliud Waweru Wahu v Republic Nai.Cr.A.102/2016*… and *Nathan Odero v Republic HCr.A.32/2015*; that the said defence qualifies as a defence under Section 8(5) of the Sexual Offences Act. Counsel urged that if the court dismissed the appeal, then the court should consider reducing the sentence.

The appeal was opposed. Ms. Rugut learned counsel for the State submitted that PW1 told the court that she was born on 24/8/1999 which evidence was corroborated by her grandmother, PW2, PW3 and PCR Forms which indicated that she was 15 years. Counsel argued that the indication that she was 17 years old in the alternative charge did not cause any prejudice to the defence.

In reply to the issue of DNA, counsel argued that the appellant agreed to take care of child and he declined to take the test and that he knew the child to be his and that is why he decided to abandon his right to DNA.

As to the applicant's defence that he did not know that PW1 was under 18 years, counsel submitted that the appellant never took steps to ascertain how old the complainant was and the court was right in disregarding the said defence.

The appellant was charged with the offence of defilement contrary to Section 8(1) Sexual Offences Act. To prove the said offence, the prosecution has to prove beyond reasonable doubt the following ingredients:

1. *That there was penetration;*
2. *That the complainant is a minor;*
3. *The identity of the perpetrator.*

Whether the age was proved:

It is the duty of the prosecution to prove beyond doubt the age of the complainant because in an offence of defilement, age is a critical determinant of what sentence will be meted on the accused in the event of a conviction. See *Kiangu case (Supra)*.

> *"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependant on the age of the victim."*

The age may therefore be proved by a birth certificate, birth notification from a Hospital where the child was born or an age assessment by a Doctor. In the case of *Flappyton Mutuku Ngui v Republic (2012) eKLR, Cr.A.32/2013,* the Court of Appeal said as follows:

> *"that conclusive proof of age in cases under the Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."*

I am also guided by the Ugandan decision in *Francis Omuroni v Uganda Cr.A.2/2000* where Court of Appeal said:

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. *Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"*

In this case, PW1 testified that she was born on 24/8/1999. PW2, PW1's grandmother, corroborated PW1's evidence in that regard. In fact, the birth certificate was before the court but for some reason, it was not produced in evidence, may be because the investigating officer did not testify. But PW1 or the guardian could have been recalled to produce it. At the time she testified, PW1 said she was 16 years old in 2015. PW1 was not a small girl as not to know the date of birth. She was school going and I have no reason to doubt her evidence. The offence occurred in 2014 and therefore PW1 was 15 years old then. The Doctor who examined PW1 also estimated her age to be 15 years. This court has no doubt that the complainant's age was proved to be 15 years. The indication in the alternative charge that she was 17 years old is a mere error. Besides, the appellant was not convicted of the alternative charge.

Whether penetration was proved:

Section 2 of the Sexual Offences Act defines penetration as *"..the partial or complete insertion of the genital organs of a person into the genital organs of another person…."*

In her testimony, PW1 did not disclose what the appellant specifically did to her. She talked having had sex with the appellant since 2012 and that the appellant kept telling her to use family planning drugs but she did not and was not aware that she could get pregnant. She later got pregnant and gave birth on 9/7/2015. She told the court that the baby belonged to the appellant.

PW2 learned from PW1's teacher that she was pregnant after PW1 was seen vomiting and was taken for examination. Even though PW1 did not describe what took place between her and the appellant that may have constituted defilement, yet a child was born and the child could only have been conceived if there was penetration of PW1.

The court had ordered for a DNA be done and the appellant agreed to do it but later changed his mind and told the court that he would take care of the child, meaning that he was admitting responsibility. He did not stop there, in his defence, he admitted knowing the complainant as a neighbor and asked the court to forgive him because he was new and did not know that the complainant was not yet 18 years. He as well also admitted to what PW1 had told the court because he admitted to having heard the evidence adduced in court. Even though the prosecution did not lead evidence of penetration, the birth of the child from what PW1 called 'sex' is evidence of penetration. The instant case is distinguishable from the decision in *Peter Ngari v Republic Cr.A.231/2010* where there was no other evidence to support the complainant's testimony on what happened to her.

Who was the perpetrator:

As to who the perpetrator is, that is not in doubt. PW1 identified the appellant as a neighbor. The appellant admitted as much. The sexual acts between PW1 and the appellant were not once but several times from 2012 to 2014 when she conceived.

Of the defence Under Section 8(5) of the Sexual Offences Act:

The appellant raised a defence under Section 8(5) of the Sexual Offences Act. Although it was submitted

that the trial magistrate did not consider it, I find that the trial court did consider it substantially. The court said on page 35:

> *"The only defence the accused person is offering is that he did not know that the complainant was aged below 18 years. He has not explained the steps he took to ascertain that the complainant was not a child. According to the complainant she started having sex with the accused person from the year 2012 up to the year 2014. The accused has not stated what made him think that the complainant was aged eighteen years or above. There is nothing to show that the complainant deceived the accused person into believing that she was over age of 18 years at the time of the commission of the offence. There is nothing to prove that the accused person had reason to believe that the complainant gave testimony that she was born in August, 1999. Therefore by December, 2014 when the offence is alleged to have been committed she was aged below sixteen years. She was slightly over 15 years but below 16 years of age. She was therefore a child."*

I totally agree with the trial magistrate's finding that indeed the appellant did not know that PW1 deceived him that she was over 18 years nor did he show any steps he took to ascertain PW1's age before engaging in sexual escapades with her. In fact, at the time, the complainant was still attending [Particulars Withheld] Primary School, a fact that should have raised the appellant's antennae, that PW1 was still a child. The defence was not convincing and was properly dismissed.

Of a defective charge:

On the allegation that the charge sheet was defective because the main charge indicated PW1's age to be 15 years while the alternative indicated 17 years, that was a mere error because the complainant could only have the age at a given time. That error could have been cured under Section 382 of the Criminal Procedure Code. This is because whether 15 or 17 years, there was sufficient evidence to prove that the complainant was 15 years and the fact is that the complainant was still a minor and the exact age of the complainant was only material in respect of the offence of defilement but not in the alternative charge. There was no finding made on the alternative charge in any event.

Whether the applicant's rights under Article 50(2)(l), to give self-incriminating evidence was breached:

Article 50(2)(l) provides as follows:

> *"Every accused person has the right to a fair trial which includes the right:*
>
> *To refuse to give self-incriminating evidence."*

The question of self-incriminating evidence has been considered in several cases. In the case of *Penyls Vania v Muniz 496 US 582, the US Supreme Court* said *"The privilege against self-incrimination protects an 'accused' from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature." Schmerber v California, 384 US 757, 384 US 761, but not from being compelled by the state to produce 'real or physical evidence…'*

In *Richard Dickson Ogendo & 2 others v A.G & 5 others (204) eKLR*, J. Manjanja said:

> "To my mind, the privilege of an accused person not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of a crime. The purpose of the protection against self-incrimination was summed up by the *US Supreme Court in Miranda v Arizona 384 US 436 (1996)* where the court observed as follows:
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> > *"All of these policies point to one overriding thought: the Constitutional foundation underlying the privilege is the respect of government, State or Federal, must accord to the dignity and integrity of its citizens. To maintain a 'fair' state-individual balance, to require the Government to shoulder the extra 'load' to respect the inviolability of the human*

> *personally, our accusatory system of criminal justice demands that the Government seeking to punish an individual produce the evidence against him by its own independence labours, rather than by the cruel, simple expedient of compelling it from his own mouth. In Schmeber v Califonia, 384 US 757 (1966) the US Supreme Court held that the compulsory taking of blood for analysis of its alcohol and its use in evidence did not violate the defendant's privilege against self-incriminations."*

Clearly, from the above decisions, there must be some force or coercion by the State in obtaining evidence from an accused either oral or documentary. No such thing happened in this case. On 19/4/2016, the prosecutor applied that DNA be done to ascertain the paternity of the child. The appellant said that he had no objection to taking the DNA.

Later on, the appellant told the court that DNA should not be done because the baby was his and he will take care of the child. Later, on 24/5/2010, the prosecutor informed the court that DNA was not done and the appellant said *"I said the DNA should not be done as I will take care of the child."*

There is no evidence that the appellant was forced to make the said statement. He agreed to the child being his voluntarily. In any event, the appellant later went on to admit the offence in his defence. No right was breached.

Besides, the extraction of blood for DNA has been held not to infringe the right to self-incrimination. The right not to incriminate one-self protects against compulsory oral examination or documentary evidence for purposes of getting a confession.

Whether failure to call the investigating officer is fatal to the prosecution case:

The defence took issue with the failure to call the investigating officer. Even though it is desirable to call the investigating officer in certain instances and especially in cases of identification of the accused or where there is recovery of exhibits by the investigating officer or arresting officer, in this case, the identity of the appellant is not an issue doubt. The appellant and PW1 were neighbours and knew each other well and hence no need to call the investigating officer. My finding is fortified by the decision in the case of *Jeremiah Gathiku v Republic Cr.A.73/2008* where it was held:

> *"…the effect of failure to call police officers in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate."*

In the end, I find that the conviction of the accused for the offence of defilement of PW1 is well founded on very strong evidence. The offence was proved beyond any reasonable doubt. I affirm the conviction.

On sentence, the appellant was handed twenty years imprisonment. The law provides that where a victim of defilement is between 12-15 years old, upon conviction, the accused is liable to a term not less than 20 years imprisonment. Since the decision of *Charles Karioko Muruatetu v Republic SC.Pet.15/2015*, the Supreme Court and subsequent Court of Appeal decisions did away with mandatory sentences.

For that reason and in exercise of this court's discretion, I will set aside the 20 years imprisonment and sentence the appellant to 10 years imprisonment.

The sentence will run from the date the appellant was convicted on 31/7/2017. The appeal succeeds to that extent.

It is so ordered.

Dated, Signed and Delivered at *NYAHURURU* this *19th* day of *November*, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Ms. Wanjiru Muriithi for Applicant

Soi – Court Assistant