REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 94 OF 2018

JOHN NGIGI GITHINJI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of principal magistrate

Hon. AMWAYI Resident Magistrate. delivered on 30th April 2015 in Nakuru CM

Criminal Case No. 114 of 2015 in Republic v John Ngigi Githinji)

JUDGMENT

1. The Appellant was jointly charged with Joseph Mwangi in the lower court with two counts of offences. Count one is the offence of **Gang Rape Contrary to Section 10 of the Sexual Offences Act No. 3 of 2006**. Particulars in count one are that, on 26th December 2014 and 3rd January 2015 at [Particulars Withheld] area in Nakuru North District within Nakuru County, in association with another, accused unlawfully and intentionally committed the act of inserting his male genital organ namely penis, into the female genital organ namely vagina of **MW** a child aged 16½ years old which caused penetration.

2. Count 2 is the offence of **conspiracy to commit a felony contrary to section 393 of the penal code.** Particulars are that on diverse dates between 26th day of December 2014 and 3rd January 2015 at [Particulars Withheld] area in Nakuru North District within Nakuru County the appellant and his co-accused conspired to commit a felony namely gang rape on **MW.**

3. In the alternative, the appellant and his co-accused were charged with the offence of committing **indecent act contrary to section 11 (1) of the sexual offences Act No.3 of 2006**. Particulars are that on diverse dates at at Kabatini area in Nakuru North District within Nakuru County, accused unlawfully and intentionally committed an indecent act with a child namely **MW** a child aged 16 ½ years old by touching her private parts namely vagina.

4. The prosecution availed five witness while the appellant gave unsworn statement and availed one witnesses. The trial magistrate found the appellant of the offence of **defilement and convicted him under section 8 (1) as read with section 8 (4) of the sexual offences Act No.3 of 2006**. He was sentenced to 20 years imprisonment count 1 and 5 years imprisonment for count 2. The appellant's co-accused was convicted of count 2 and sentence to 5 years imprisonment.

5. Being aggrieved by the sentence, the appellant filed this appeal on the following grounds:-

i. That the trial magistrate erred in fact and law by failing to invoke provisions of Section 169 of the Criminal Procedure Code while sentencing.

ii. That the trial magistrate erred in fact and law by failing to invoke provisions of section 8 (1) of the sexual offences Act.

6. In respect to ground 1, the appellant submitted that the trial magistrate sentenced the appellant without a judgment in that there are no findings and issues for determination and reason for decision; further that there is no section of the penal code that was applied while sentencing the appellant.

7. On sentence, he submitted that the age of complainant is important and said that the child was born on 9th September 1998 and was therefore 16 years 7 months at the time of the offence. He submitted that as per charge sheet the appellant was charged under **section 8(1)**

and 8 (4) of the sexual offences Act, which provide for a minimum imprisonment of 15 years yet he was sentence to 20 years imprisonment.

8. In his oral submissions, the appellant said that he was 19 years old at the time he was arrested. He urged court to look at his case and that of the complainant and evidence adduced in court and particularly the fact that apart from the father of the complainant, no other family member adduced evidence. He prayed for conviction to be quashed and sentence set aside.

9. In response, **Ms. Nyakira** for the state submitted that the state opposes the appeal on the ground that the prosecution proved their case beyond reasonable doubt. She submitted that the age of the girl was proved by birth certificate produced by PW5; that it shows the girl was born on 19th May 1998 and was therefore 16 years at the time of the offence. The girl and her father PW2 confirmed that age.

10. She further submitted that on identification, the appellant was well known to the complainant and her mother PW2. She submitted that the girl testified having had sexual intercourse with the appellant and that for several days; the appellant would lock her in his friend's house when going to work and would come back and have carnal knowledge of her.

11. She submitted that on allegation that the appellant was 19 years old, he never indicated that in the lower court. She urged court to uphold conviction and sentence.

ANALYSIS AND DETERMINATION

12. This being the first appellate court, I am obligated to re-evaluate evidence adduced before the trial court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I never got the opportunity to take evidence first hand and make observation on demeanour of witnesses. For this I will give due allowance. The principles that apply in the first appellate court are set out in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

13. In view of the above, I have perused and considered the lower court proceedings. I have also considered submissions by both the appellant and the state.

14. The complainant in her testimony stated that on 26th December 2014, she had gone to visit one **Jackline Wangari** in Kabatini. On failing to find her, she went back home. She said it was getting dark and on the way, she thought her mother would beat her; she said she feared to go back home and decided to make telephone call to the appellant and ask that they meet. She said the appellant told her he was at Maili Sita but he came and he went and met her at AIC Church Kabatia. She said after telling him what had happened, the appellant offered to take her to her home but the complainant refused to go to her home. The appellant then got a motor bike and took her to Joseph Mwangi's (co-accused) house, locked her in and went for food. She said the co-accused was not in; they ate and they slept. Complainant said that night the appellant never did anything to her.

15. The complainant further testified that, the next day he took her to Gilgil and they had sexual intercourse. Complainant said the she agreed to have sex and that appellant never forced her. She said the next morning the appellant went back to Kabatini leaving her alone up to 1st January 2015 when he went to take her back to Kabatini. She said the appellant told her that her father had gone to look for her. She said while she was with the appellant, they had sex three times. She said she had known the appellant for 2 years and Joseph Mwangi was a neighbour. She said when she went back to Kabatini from Gilgil they stayed in Joseph's house. Complainant said she had a mobile phone but she used to switch it off and never called her mother.

16. As to whether the charge against the appellant was proved, I note from the proceedings that the age of the girl said she was 16 years. She showed court birth certificate serial number [******] which confirmed her date of birth as 19th May 1998. The incident occurred between 26th December 2014 and 3rd January 2015.

17. On penetration, PW4 the doctor who examined the complainant testified that she had healed bruises on the face and on examination of genitalia there were no bruises on the vagina but the hymen was broken. On examination of vagina swab there was pus cell but no spermatozoa was seen. Broken hymen confirm penetration.

18. On identification, evidence adduced show that the girl knew the appellant. The girl had known the appellant for 2 years. She testified that she was with the appellant from 26th December 2014 to 3rd January 2015 when she was found by police and her father in accused's house; during the period she said she stayed with appellant at Kabatini and Gilgil and was defiled 3 times. The doctor confirmed that from the history given to her the girl was defiled more than once. There is therefore no doubt on appellant's identification.

19. From the foregoing, I find that the three ingredients of the offence of defilement namely: age, penetration and identification of suspect were proved beyond reasonable doubt. The appellant was rightfully convicted of the offence of **defilement contrary to section 8(1) as read with section 8 (4) of the sexual offences Act.**

20. In respect to sentence, I note that the child was 16 and half years old. I note that defilement under **section 8(4)** provide that any person found guilty of defiling a girl between 16 and 18 years is liable upon conviction for a term not less than 15 years .

21. I do agree with the Supreme Court decision in Muruatetu case where the court held that the the jurisdiction of the court in exercising discretion in sentencing should not take away as it would render mitigating factors superfluous.

22. In view of the above decision, I have considered circumstances surrounding the commition of the offence herein, I have also considered the age of the complainant. I also note that it is the complainant who looked for appellant and despite appellant offering to take her back to her home. However, the appellant being older than the complainant, he should have acted responsibly by declining the complainant's proposal to go to his house instead of accepting to be escorted to her home. I have also considered accused's mitigation and find he deserves exercise of discretion in sentence imposition of sentence. I therefore reduce sentence imposed to 7 years imprisonment.

23. FINAL ORDERS:

i. Appeal against conviction is hereby dismissed.

ii. Sentence in count 1 is reduced to 7 years imprisonment.

iii. Sentence in count II to remain.

iv. Sentences in the two counts to run concurrently from the time imposed by the trial court.

Judgment dated, signed and delivered at Nakuru this 11th day of December, 2019.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Court Assistants – Schola and Jeniffer

Appellant in person

Wambui for state