REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 63 OF 2017

SIMON NDUNGU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(*Being an Appeal against both the conviction and the sentence of Chief Magistrate Hon. J.N.NTHUKU delivered on the 11th July 2017 in Nakuru CM Criminal Case No. 133 of 2015 in Republic v* Simon Ndungu)

JUDGMENT

1. The Appellant was charged with the offence of **defilement of a girl contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the diverse dates of April 2015 and 3rd June 2015 in Gilgil Sub County within Nakuru County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **EW** a child aged 12 years.

2. In the alternative, the appellant was 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 the diverse dates of April 2015 and 3rd June 2015 in Gilgil Sub County within Nakuru County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **EW** a child aged 12 years.

3. In the lower court trial, the prosecution availed six witnesses. The appellant was placed on his defence. He gave unsworn statement in his defence. He was convicted of the main charge and sentenced to life imprisonment.

4. Being aggrieved by decision of the trial magistrate, the appellant filed this appeal on both conviction and sentence on the following grounds:-

i. That the trial magistrate erred in fact and law by failing to to find that the appellant did not take plea during the trial

ii. That the trial magistrate erred in fact and law by failing to appreciate the fact that the appellant was not given witness statements and other documentary exhibits as required by law

iii. That the trial magistrate erred in fact and law by failing to appreciate that the medical evidence adduced was insufficient to corroborate the charge or support a safe conviction.

5. The appellant relied on ground of appeal and written submissions filed. In his written submissions, the appellant restated grounds of appeal. He cited the case of **Thomas Patrick Gilbert Cholmondeley {2008]eKLR** to underscore his submission that an accused person should be given all relevant materials, witness statements of witnesses in advance and that the appellants right to fair trial was violated by trial courts failure to do so.

6. In response, **Ms Nyakira** for the state submitted that the state opposes the appeal. She submitted that the age of the child was assessed and report showed she was between the age of 12 and 13. She added that when the girl testified, she said she was born in the year 2004. She submitted that the magistrate properly considered that the age of the girl was 12 years.

7. She further submitted that when the child was examined at PGH Nakuru, she was found to have a bruise on the left thigh and had inflamed labia majora and labia minora and the hymen had been broken.

8. She further submitted that the child testified that she had been defiled by the appellant after asking her where her grandmother was. He stripped his clothes and inserted his penis in her vagina; that she further explained that in April, the appellant called her to his house and defiled her.

9. The state counsel submitted that the child and her family knew the appellant as his house was about 20 metres from the child's home. She gave his name as Ndungu. The state counsel urged the court to uphold conviction and sentence.

ANALYSIS AND DETERMINATION

10. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court fresh evaluation and analysis .this I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour.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.)"**

11. In view of the above, I have perused and considered the trial court record. On the allegation that the appellant never took plea in the trial court, record show that plea was taken on **5th June 2015**. It shows that the charge and every element thereof was read to the Accused person in the language he understood. The appellant responded by saying "*Si kweli*"in Kiswahili which means, "*it is not true*" in the main charge and the alternative charge. Charges were again read to the appellant on 31st March 2017 when charges were amended and he responded as before. He was asked whether he required recall of any witness in view of the amendment and he replied: "*hapana*" in Kiswahili meaning "no"

12. It is not therefore true that plea was not taken as alleged by the appellant. That ground of appeal therefore fail.

13. On allegation that the appellant was not provided witness statements and exhibits, there is no indication that the appellant asked for witness statements and exhibits and was denied. Record show that the appellant fully participated in the proceedings. He cross-examined the witnesses and it cannot therefore be true that he was unprepared when the trial took place.

14. On perusal of evidence, there is no doubt that the child was defiled; this is confirmed by broken hymen and bruises on her left thigh and inflamed labia minora and labia majora.

15. There is no doubt on identifications the appellant was known to the child and her family. Appellant confirmed in his defence that the child's grandmother was her neighbour. The appellant said the child's grandmother wanted intimate relationship with him, had mental insanity and was jealous of his aunt's crops but never availed his aunt or any other person to corroborate his defence. His defence never cast any doubt on prosecution evidence

16. From the foregoing, I see no merit in appeal against convict and dismiss accordingly.

17. In respect to sentence the appellant herein was sentenced to 20 years imprisonment. That is the minimum sentence provided by the sexual offences Act for defilement of a girl aged 12 to 15 years. I am alive to the decision in case of **Francis Karioko *Muruatetu* & another v Republic [2017] eKLR**.to the effect that the court discretion should not be taken away in sentencing. Mitigating factors would be superfluous if the court will be forced to impose particular minimum sentence despite the circumstances of the offence and mitigation raised by an accused persons. My view however is that, each case must be decided on its own merit.

18. In the instant case, I have taken note of the fact that as noted by the trial magistrate the complainant herein was an orphaned girl of 12 years. I have considered mitigation raised by the appellant in the lower court; but in view of the fact that he took advantage of a defenceless child of 12 years and defiled her repeatedly, I find that he deserves not reduction of sentence imposed by the trial court.

19. **FINAL ORDERS**

- **Appeal on conviction and sentence is dismissed.**

Judgment dated, signed and delivered at Nakuru this 6th day of December, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Court Assistants – Schola and Jeniffer

Appellant in person

Rita counsel for state