REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 18 OF 2017

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 186 of 2013 of the Chief Magistrate's Court at Naivasha before S. Muchungi – RM)

STEPHEN GITAU MWANGI……...APPELLANT

-VERSUS-

REPUBLIC…….....……PROSECUTOR

J U D G M E N T

1. The Appellant was charged in the lower court for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. In that on the 20th day of January, 2013 in Naivasha Municipality within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of **M.W.M.**, a girl aged 16 years. He denied the charge, and following a full trial, he was found guilty and sentenced to 20 years imprisonment.

2. Aggrieved with the outcome, he filed the present appeal. His initial grounds of appeal are subsumed in the so-called amended supplementary grounds filed in the eve of the hearing of the appeal. The said grounds are as follows:-

> **"1. THAT the learned trial magistrate erred in law and fact by convicting the appellant yet failed to appreciate that the charge sheet was defective**
>
> **2. THAT the learned trial magistrate erred both in law and fact by convicting the Appellant based on evidence which was otherwise contradictory and uncollaborated.**
>
> **3. THAT the learned trial magistrate erred both in law and fact by convicting the Appellant yet failed to appreciate that medical evidence did not connect the Appellant to the offence as he was not himself tested to ascertain whether or not he actually committed the offence.**
>
> **4. THAT the learned trial magistrate erred both in law and fact when she allowed another medical practitioner to adduce medical evidence on behalf of his colleague with invocation of Section 33 of the Evidence Act.**
>
> **5. THAT the learned trial magistrate erred both in fact and law when she convicted the Appellant yet some crucial exhibits were not produced before the court.**
>
> **6. THAT the learned trial magistrate erred both in law and fact by denying the Appellant the right to benefit of the least severe punishment as envisaged under Article 50 (2) (p) of the Constitution.**
>
> **7. THAT the learned trial magistrate erred in law and fact to have found that the Appellants defense created a reasonable doubt as to oust the prosecution case."**

3. In support of the first ground, the Appellant submitted that his trial was vitiated by the discrepancy of the dates of the offence as stated in the main and alternative counts, and in the evidence. He asserts that the charge was defective and the same cannot be cured by Section 382 of the Criminal Procedure Code.

4. Ground 2, 3, 4 and 5 challenge the adequacy of the evidence upon which his conviction was based. In summary, he picked out what he considered contradicting statements as to the complainant's age and in the two medical reports tendered. In his view the contradictions were grave, thus he sought to rely on the decision of the Court of Appeal in **Erick Onyango Ondeng' -vs-Republic NAI CA No. 5 of 2013**

5. He also submitted that no DNA test was conducted to ascertain his involvement in the offence. He also takes issue with the production of the medical reports by a witness, other than the maker without invocation of Section 33 of the Evidence Act. Further, he takes issue with the failure by the prosecution to produce certain exhibits e.g. broken spectacles, and complainant's blood stained clothes. Finally he challenges the sentence of 20 years asserting that under Article 50 (2) of the Constitution he was entitled to the least severe sentence.

6. The appeal was opposed by the DPP through Mr. Mutinda. He supported the conviction and reiterated the prosecution evidence, which he said displaced the defence tendered. He submitted that the sentence was legal and urged the court to dismiss the appeal.

7. The duty of the first appellate court was succinctly outlined in **Pandya -Vs- Republic [1957] EA 336** as follows:-

> ***"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."***

8. The prosecution case was that the complainant **M.W.M. (PW1)** was 16 years old in 2013. She resided at [particulars withheld] village with her parents. On the afternoon of 20th January, 2013 she was headed home from Murungaru. The Appellant, an employee of **PW1's** immediate neighbour was standing at the gate of his employer. He held the complainant by the hand before carrying her in his hands to his room. There, he undressed her and had sexual intercourse with her. He then led her out after she had dressed up.

9. **PW1** went straight to sleep, but early on the next day she called an older sister **J.N.M. (PW2)** to whom she narrated her ordeal. PW2 took her to the police station where a report was made. They were referred to Naivasha District Hospital. The complainant was found to have been defiled and the P3 form was completed. The Appellant was traced and arrested by **APC Nyamango (PW3)** of Kirima Administration Police post. He was then arraigned in court.

10. In his unsworn defence, the Appellant stated that he was employed as a guard at Kipipiri and did not know the complainant. After his arrest the complainant's father allegedly demanded Shs 200,000/= to settle the matter. He did not have the money. He stated that he had lived in the village for only 1 ½ months. He complained that he was not subjected to medical examination.

11. That the complainant was aged 16 years in the material period is well established by her oral evidence and birth certificate tendered as **Exhibit 1**. Secondly her oral evidence on defilement is confirmed by the **PRC** Form tendered as **Exhibit 1** and **P3** Form (**Exhibit 1a**) which document injury to the labia minora, breached hymen and discharge from the genitalia. Both reports indicate that the complainant's clothes were blood stained, including her panty.

12. The Appellant's complaint that the court irregularly allowed the production of the above medical evidence is not borne out by the record of the day. On 8th August 2014 when the prosecution applied that **Bernard Nderitu (PW5)** produce the reports, the Appellant told the court he had no objection. He further cross-examined **PW5.** And the fact that the Appellant was not medically examined does not diminish the evidence given by **PW1,** and the medical evidence confirming defilement.

13. It seems to me that the real issue in contest was the identity of the assailant. The trial magistrate having reviewed evidence by **PW1** concluded that:

> **"Though there was no one who witnessed the incident, I found the minor to be a truthful person. Her demeanour portrayed her as an honest person. She narrated the same story to her sister and the police officer when she made the report…….her evidence was corroborated by other witnesses …… On the issue of identification the minor said the Accused used to work for a neighbour who stays nearest to them. She had seen him before and knew him as a neighbours employee. She had heard people call him Stephen. She was thus able to identify him and identification of the Accused could not be faulty since identification was based on recognition and the offence took place at day time."**

14. The alleged contradictions highlighted in the Appellant's submissions are not true contradictions and cannot be a basis to disregard the evidence by **PW1** and other witnesses. In cross-examination by the Appellant **PW1** graphically set out the proximity between her home and the compound where the Appellant worked. She said the distance was about 10-15 metres. Despite lengthy cross-examination of **PW1,** the Appellant never suggested to **PW1** that she did not know him, or any reason why she would falsely accuse her.

15. I agree with the trial magistrate's finding that the Appellant was known to **PW1** and that she had ample opportunity to recognize the Appellant in daylight as the offence was perpetrated. Her description of events starting from the first encounter at the gate to the events in the house of the Appellant and right up to when he escorted her away is lucid. **PW1** may have briefly passed out but when she came round, she found herself naked, bleeding from the genitalia and the Appellant undressed. She described his efforts to wipe away blood from her genitalia. No other person was involved and the Appellant eventually escorted her close to her home. There is no possibility of mistaken identity in this case.

16. The Appellant's denials were displaced totally by the prosecution evidence. It matters not that the complainant's blood stained clothes

were not produced. Nor even that no DNA test was conducted on the Appellant. The Appellant's defence dwelt on his arrest and the unbelievable insistence that **PW1** did not know him, itself a subjective fact. If the Appellant thought or believed that **PW1** or other people in the village did not know him, that is not a statement of fact. Perhaps he behaved as he did on the eventful date in that false belief.

17. The Appellant was properly convicted on the main charge. The charge is not defective and carried adequate particulars that enabled him to raise a robust defence as evidenced by his cross-examination of witnesses. There is no merit in the appeal against conviction.

18. Regarding the imprisonment sentence of 20 years the sentence is legal and Article 20 of the Constitution has no relevance in this instance. Sentencing is a discretionary matter and the court was entitled to award what it considered a proportionate sentence. For my part, I cannot find any reason to interfere with that exercise of discretion, there being no evidence that it was not properly exercised.

19. In the case of **Wanjema -Vs- Republic (1971) EA 493** the Court of Appeal stated regarding interference with sentencing

> **"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

20. The upshot of the foregoing is that the appeal has no merit and is hereby dismissed.

Delivered and signed at Naivasha, this **3rd** day of **May, 2018.**

In the presence of:-

Mr. Koima for the DPP

Appellant – present

C/C – Japheth and Kamau

C. MEOLI

JUDGE