REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 71 OF 2015

RODGERS WEKESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal against conviction and sentence in Eldoret

Chief Magistrate's Court Criminal Case No. 4661 of 2013

by Hon. S. TELEWA Resident Magistrate

delivered on 27th May, 2015]

JUDGEMENT

1. The appellant (**RODGERS WEKESA**) was convicted on a charge of defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act and sentenced to life imprisonment. The particulars of the charge were that on 9th October 2013 in **ELDORET EAST DISTRICT** within **UASIN GISHU** county, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ of (vagina) of **JJK*** a child aged 9 years. He denied the charge.

2. JJK (PW2) told the trial court that on 09.10.2013 while on the way to the shop, as she was going past the appellant's house, he called out to her, requesting her to assist him charge his phone. She knew the appellant as he worked for her father's brother one **J**. As she approached the door, he pulled her by the hand and put her onto his bed. He removed her panty, then removed his trouser and inner pants and "***He inserted his penis into my vagina, the then heard* M T *talk, he dressed up and opened the door."***

3. M T and **F J** found **JJK** inside the house – apparently they had seen the appellant pulling her into the house, as they had ben milking cows – so the two girls reported what they had seen to **JJK's** mother. **JJK's** mother reported to the village elder and after being taken to hospital for examination which confirmed defilement, the appellant was arrested.

4. 13 year old **F J** (PW3) a sister to PW2 told the trial court that on 9.10.2013 while taking the cows to the shed, her in-law named **M T** called her and told her **JJK** had gone into the appellant's house, and suggested that they should check what was going on. So the pair went to the appellant's house and pushed the door. The appellant opened the door but refused to let them enter into the house, instead he called out **JJK** who came out crying. So she went with **JJK** to their mother and narrated what she had witnessed.

5. On cross examination PW3 stated;

> ***"… the child disclosed that you had defiled her. I saw her at your place …. I found JJK at your house."***

6. This evidence was repeated by **M T** (PW4) who told the trial court that while in the bathroom she saw **JJK** (whom she knew as her-in-law) entering the appellant's house. The appellant entered the house and locked. She informed PW2 what she had seen and accompanied her to the appellant's house. They called out **JJK** but there was no response. PW3 pushed the door, and the appellant came and opened. She saw **JJK** inside the bedroom, and she advised PW2 to tell her mother what had happened.

7. She knew the appellant very well as his house was near hers saying "***I know you Rodgers***." She explained that the bathroom where she was is situated outside and does not have a roof.

8. Doctor **JOSEPH KORIR** (PW6) who examined **JJK** noted injuries on the labia minora and the hymen was torn.

9. The child's mother **C K** (PW1) gave **PC DAVID CHEBET** (PW7) who was the investigating officer the immunization card which confirmed that **JJK** was born on 31st August 2002. She also testified in court that **JJK** was 9 years old and confirmed that she had sent **JJK** to the shops on 9.10.2013. Later the daughter named **F J**came accompanied by **JJK** and informed her that **JJK** had gone into the appellant's house and the appellant had closed the door. She interrogated **JJK** who confirmed to her that the appellant had defiled her.

10. In his sworn defence, the appellant told the court that on 9th he begun preparing for his journey from **CHEPKWABI** in Bungoma to Nairobi where his brother had found him employment. He begun his journey on 11th going through **Kitale** then to **Eldoret**. It was while inside a bus in **Eldoret** that he sat next to a boy with whom he struck a conversation. Shortly the boy left and then a woman and a girl got near him and asked for the boy who had left. The next thing he knew was being under arrest and charged in court.

11. On cross examination he maintained that he did not know the girl, and he first saw her in court. He stated that the witnesses only got to know his name after his identity card was taken away from him. He did not believe that the minor wads defiled and claimed that the doctor lied.

12. The trial magistrate in the judgment found that the appellant was positively identified by all the prosecution witnesses. The trial magistrate also cautioned herself on the fact that the crucial evidence was by a minor but pointed out that the circumstances pointed to the appellant as the culprit, and the evidence was confirmed by the doctor's findings.

13. The appellant contested these findings on the amended grounds that the prosecution case was not proved beyond reasonable doubt, and there was no proof the complainant was below 18 years. He termed the evidence by prosecution witnesses as contradictory, and that the crucial elements (which according to him include force) were not established to the required standard. He also doubted that there was penetration since the laboratory tests did not detect any spermatozoa. He also faulted the trial magistrate for not considering that perhaps the clinic card presented could have been doctored.

14. The appellant canvassed his appeal through written submissions where he argued that there were a lot of discrepancies in the prosecution case and the clinic cared could not be used to prove age as it is a document which can be procured by anyone to achieve their selfish ends.

15. The appellant also submitted that whereas PW1 claimed that **M T** and **F J** heard PW1 screaming, PW2 had said she never screamed; and in light of this she should benefit from the contradiction.

16. He faulted the finding that penetration was proved saying the lab tests showed no spermatozoa was detected in the minor's genitalia, and such absence creates a resistible inference that there was no sexual intercourse. That in any event the circumstantial evidence did not point to him.

17. He also argued that his right to a fair trial was violated as the trial magistrate declined his request to have the matter begin afresh under Sec. 200(3) of the Criminal Procedure Code", yet the matter had been partly heard by B. Bartoo (Resident Magistrate) who was then transferred and S. Telewa (Resident Magistrate) took over.

18. In opposing the appeal **Ms Mokua** on behalf of the State submitted that he minor's age was proved by the clinic card produced as Ex.1 which indicated the minor was born on 31t day August 2002, and since the incident took place on 9th October 2013 then the minor was 11 years old. The charge sheet on the particulars of the charge stated her age as 9 years – that was the same version given by the minor and her mother. Although Dr. Korir (PW6) stated that the minor was 9 years old – no age assessment was carried out. Was this fatal, and prejudicial to the appellant.

19. I recognize the crucial role age plays in sexual offences because it is used as a determinant in meting out sentence – I share the sentiments expressed by various judicial pronouncements.

20. Under **Section 8(1)** of the **Sexual Offences Act** as read with **Section 8(2)**

> **"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child of eleven years or less shall upon conviction be sentenced to imprisonment for life …"**

21. The provision take in the ages 0 – 11 years – so whether the victim was said to be 9 years or shows 1 years the age category covered by Section 8 (1) and 8 (2) of the Act and no prejudice was caused to the appellant.

22. Further the clinic card was not obtained just before or during the trial, it was issued on 1st Feb. 2002, and indeed the entries confirm that the minor was first attended in the year 2002. The date is shows as 31.08.2002 – this was years before the offence took place, and the claims that it was doctored for selfish ends has no leg on which to stand.

Identification

Ms Mokua submitted that the appellant was well known to the minor as a worker to uncle and this was corroborated by the evidence of PW3 and PW4. Indeed PW4 who was in an open roofed bathroom outside her house, which neighboured the appellant's residence testified that

she saw the minor enter into the appellant's house (confirming what the minor stated that on the appellant's request, she was entering into the house to assist him charge his phone). She also noticed that the appellant got into the house and locked the door.

23. The appellant was well known to her and she referred to him by name as Rodgers. PW3 (**F J**) also confirmed that the appellant was known to her as he was their uncle's employee, so identification was by recognition, Apart from that, PW3 and PW4 actually got the accused inside the house with the minor – this placing him at the scene, and demonstrating appellant had opportunity to commit the offence. PW3 was clear and stated;

> "***I know Rodgers works for my uncle J.* M T *called me that JJK had gone to the house of George who is Rodgers … He is the one in court. I knew him well"***

The evidence on identification was satisfactory.

24. **Penetration**; Miss Mokua pointed out that the medical findings indicated that the minor's hymen was broken and she also had minor bruises on the labia minor with visible tears. Further, that the doctor testified and confirmed that the minor had been defiled.

25. The appellant's major concern is that the laboratory results did not find spermatozoa present. An act of defilement is not proved by the presence of absence of spermatozoa – the key ingredient is penetration – which was confirmed by the Doctor's finding as supported by the injuries noted on the minor's genitalia. I am satisfied that the trial magistrate took into consideration the medical findings and arrived at a safe conclusion.

26. As noted, the matter before the lower court begun before one magistrate, who was subsequently transferred from the station before completing the hearing. It was taken over by a different magistrate who heard the remainder of the case. Miss Mokua has drawn to this court's attention that the trial magistrate did indeed comply with provision of Sec.200 (3) to the extent of explaining to the appellant his options, but relied against what he elected.

27. The appellant is on record as requesting for de novo hearing saying "I did not expect those kinds of questions"

The prosecution stated;

> **"He was given a chance to cross examine"**

The trial court then stated;

> **"Case to proceed from where it had stopped;**

"Section 200 (3) CPC provides as follows;

> **"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."**

Certainly the trial Magistrate ought to have given flesh to these directions, and explain to the appellant why his option had been overruled. From what is recorded, it is even not clear whether what accused referred to as not expecting were the questions he asked on cross examination of the witnesses, or when he was being cross examined – the statement is ambiguous and gives the impression of an attempt to now patch up his case. I would under the circumstances therefore not find it prudent to order a retrial.

28. Consequently I find that the conviction was safe and it is upheld. The sentence meted was as provided by law and I confirm it.

The appeal is dismissed.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 11th day of July 2018.

H. A. OMONDI

HIGH COURT

JUDGE