REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 52 OF 2016

GEORGE WANJOHI WAITHERI……..................................APPELLANT

VERSUS

REPUBLIC…..RESPONDENT

[Appeal from the judgment by Hon.R.K.Langat (RM) Magistrate in PM's Court Othaya CR.C.NO.444 of 2015 dated 4th July, 2016]

JUDGMENT

FACTS

1. The appellant, **George Wanjohi Waitheri**, was charged with the offence of defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act.** The particulars of the charge were that on the 20th day of July, 2015 at [particulars withheld] Village within Nyeri South Sub-County within Nyeri County he intentionally caused his member to penetrate the private parts of **JNW** a child aged ten (10) years.

2. In the alternative, the appellant was charged with Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006;** that on the aforementioned date and place he intentionally touched the private parts of **JNW** a child aged ten (10) years.

3. The prosecution called a total of five (5) witnesses; the appellant was subsequently convicted on the main charge and sentenced to life imprisonment.

4. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal raising several grounds of appeal, which grounds are summarized as follows;

(i) The complainant did not positively identify the appellant; and that he was implicated by his co-accused;

(ii) The prosecution did not prove its case as required by the law; particularly the age of the victim and the act of penetration both were not proved;

(iii) That the trial court rejected his defence without giving reasons;

5. At the hearing hereof the appellant was un-represented and relied on his written submissions whereas Mrs Gicheha was the Prosecuting Counsel for the State and she made oral submissions; hereunder is a

summary of their respective submissions

APPELLANTS SUBMISSIONS

The appellant submitted as follows;

6. That the Charge Sheet was defective in that the appellant was charged under Section 8(1)(2)of the Sexual Offences Act as opposed to being charged under Section 8(1) as read with 8(2) of the Act; that the section he was charged under is non-existent and that the defect was not curable; and the prosecution made no attempt to amend the charge sheet;

7. That penetration whether partial or complete entails insertion of the genital organ; **PW1** used the words **"tabia mbaya"** and did not define to the court as to what actually happened to prove that there was partial or complete penetration giving rise to the offence of defilement;

8. The trial court misdirected itself by relying on unsatisfactory and speculative evidence and therefore arrived at the wrong conclusion;

9. **PW1** also used the word **"kamuti"** without stating whether the injury was caused by the genital organs which means that the injury was caused by something else; this attracts a different charge under Section 5(1)(a)(i)(ii)(b) as read with Section 5(2) other than the instant charge;

10. The stained clothing of the complainant was not produced in court; there were contradictions in the evidence of **PW1** and **PW5** as to where the incident took place; **PW1** said it occurred in tea bushes whereas **PW5** stated it occurred in a coffee plantation;

11. The current case was poorly investigated; a key witness from the government chemist was not called to testify;

12. The prosecution failed to prove age and penetration and therefore failed to prove its case beyond reasonable doubt;

13. The trial court erred in rejecting his defence without giving reasons.

14. The appellant urged the court to analyze the evidence adduced by the prosecution and come up with a different conclusion.

RESPONDENTS SUBMISSIONS

In response Prosecuting Counsel for the State made the following submissions;

15. The evidence of **PW1** was that the appellant did ***"tabia mbaya"*** and that he removed his ***"kamuti"*** and placed it between her legs; the appellant contends that the use of these words ***"tabia mbaya"*** and ***"kamuti"*** are not proof of defilement;

16. To this contention Counsel submitted that the courts have judicial notice of the words used by minors; the minor gave a vivid description of what took place; that the appellant was in the company of his friend and they had enticed her with guavas whilst she was out in search of firewood; they lured her into his house in a coffee plantation; she described how the appellant removed her inner wear and how he removed his clothes; he then removed his **'*kamuti'*** and placed it between her legs and she felt pain

and screamed; the appellants friend stood by just laughing; later she reported the matter to her mother who then took her to the hospital;

17. **PW3** was an eye witness and was in the company of the appellant when all this happened; he confirmed that he watched the whole incident and that what **PW1** said had actually taken place;

18. **PW4** the medical doctor confirmed that the minor had a freshly broken hymen and lacerated labia minora; and that there was blood in the vagina; and that the act of penetration was proved beyond reasonable doubt;

19. Another ground of appeal was that stated that the Charge Sheet was defective because he was charged under Section 8(1)(2) of the Sexual Offences Act which section he contends is non-existent; that the Charge Sheet ought to read Section 8(1) as read with section 8(2);

20. In response counsel stated that the charge under Section 8(1) was proved; the error on the penalty section was not fatal as drafted; and that the trial court properly imposed the correct sentence as provided under Section 8(2);

21. The Charge had been substituted because the appellant had been charged together with **PW3;** the charge was withdrawn and substituted and that there was compliance with Section 214 of the Criminal Procedure Code.

22. The appellant had submitted that the trial had failed to give his defence due consideration and that it had rejected it without giving reasons; in response counsel for the prosecution submitted that the appellant was given an opportunity to defend himself; his defence was unsworn, he chose to mitigate instead and also called no witnesses; the court could not reject what was not availed to it.

23. As for the sentence imposed the appellant was not treated as a first offender as he had been convicted in Othaya Cr.Case No.175 of 2008 for the offence of attempted defilement and was committed to a Borstal institution for three (3) years; that the life sentence was appropriate and the one provided by the law;

24. Counsel urged this court to uphold findings of lower court and to dismiss the appeal.

ISSUES FOR DETERMINATION;

25. After taking into consideration the parties respective submissions this court finds the following issues for determination;

(i) Whether the Charge was defective;

(ii) Whether the appellant was positively identified;

(iii) Whether the prosecution proved its case as required by the law; particularly the key ingredients of the offence of defilement; the age of the victim and the act of penetration;

(iv) Whether the trial court rejected the appellants defence without giving reasons;

(v) Whether the appellants sentence was harsh and excessive;

ANALYSIS

26. This being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of Okeno vs Republic (1972) EA 72.

Whether the Charge was defective;

27. This court has had the occasion to peruse the Charge Sheet and notes that indeed it reads that the accused was charged with defilement contrary to Section 8(1)(2); the appellant contends that the Charge Sheet is defective as there is an omission of the words **"as read with";**

28. This court notes that the particulars on the Charge Sheet were set out in clear and unambiguous terms; the record also shows that the appellant followed the entire proceedings and appreciated the evidence tendered against him; and that he was given an opportunity to cross-examine all the prosecution witnesses; and was also invited to defend himself;

29. This court is satisfied that the particulars on the Charge Sheet clearly stated the offence and that the omission of the word **"as read with"** did not occasion any miscarriage of justice nor occasion any prejudice to the appellant; he was always aware of the charge against him and the essential elements of the offence had been disclosed to him; and that the defect was curable under the provisions of Section 382 of the Criminal Procedure Code;

30. This court finds this ground of appeal is found lacking in merit and is disallowed;

Whether the appellant was positively identified;

31. The appellants contention was that he was not positively identified by the complainant; and that he was implicated by his co-accused; the appellants contention is understood to be that he was convicted on accomplice evidence;

32. The Penal Code provides that any person who aids and abets another in the commission of an offence is deemed to have taken part in that offence and may be charged with actually committing it; in this instance PW3 had initially been charged with the appellant; the charges against him were withdrawn and the charge substituted;

33. On the issue of identification it is noted that the trial court relied heavily on the evidence of PW3 but did not consider him as an accomplice; and stated as follows in its judgment;

"….PW3 was at the scene and he witnesses (sic) her being defiled; PW# confirmed that he was indeed at the scene and he saw the accused person defiled (sic) the complainant…"

34. This court will also not treat him as an accomplice as the charge against him had been withdrawn; even if **PW3** were to be regarded as an accomplice it is this court's considered view that there is no doubt that the role he played and the degree of his complicity was minimal; and the evidence of the minor and the doctor who examined is ample corroboration of his evidence;

35. The incident was said to have taken place at about 4.30pm making the conditions favourable for identification; the evidence of PW3 was that he used to work together with the appellant and that he was

a person known to him;

36. In considering the evidence this court is satisfied that the evidence of PW3 was credible and that the appellant was positively identified; this court finds no reason to interfere with the trial courts finding that there was overwhelming evidence that the act of defilement was perpetrated by the appellant.

37. This ground of appeal is found lacking in merit and is disallowed.

Whether the prosecution proved its case as required by the law; particularly the key ingredients of the offence of defilement; the age of the victim and the act of penetration;

38. ***On penetration;*** It was the appellants contention that the prosecution failed to prove penetration which is one of the key ingredients of the offence of defilement; that the appellant's contention was that penetration whether partial or complete entails insertion of the genital organ; that in **PW1's** evidence she used the terminology **'kamuti'**; that the use of a thing other than a genital organ meant that the offence of defilement could not stand;

39. It is this court's considered view that the use of the words **"kamuti"** by the complainant in her evidence didn't mean that the offence of defilement was not proved; considering the age of the minor the use of **"kamuti"** is found to be sufficient description by the minor of the appellant's genital organ;

40. Further proof of defilement and the key ingredient of penetration is not dependant on the words used to describe the genital organs but is dependant on whether there was cogent consistent and reliable evidence adduced by the prosecution witnesses to prove the offence;

41. The doctor **(PW4)** who examined the complainant confirmed that the complainant's hymen was freshly broken and that she had tears and lacerations to the labia majora and minora which means that there were physical signs of interference on the complainant's private parts; the report also indicates that there was presence of blood in the vagina; all this evidence is supportive of the fact that there was evidence of vaginal penetration.

42. The trial court based its finding on penetration on the evidence and medical findings of the clinical officer **PW4**; and found that there was cogent medical evidence to prove the key ingredient of penetration as defined under Section 2(1) of the Sexual Offences Act.

43. This court is satisfied that the prosecution proved the key ingredient of penetration to the desired threshold;

44. **On Age** which is the other key ingredient of the offence of defilement; when the trial court conducted the voire dire examination **PW1** told the trial court that she was aged 10 years; **PW4** the clinical officer who examined the complainant placed her age as ten(10)years and indicated this on the P3Form (PExh.); PW5 produced the minors Birth Certificate (PExh.) which confirmed that the complainant was born on the 18/02/2006 and was therefore aged about ten (10) years at the time the incident took place.

45. This court is satisfied that the age of the minor as proved and finds no reason to interfere with the trial court's finding on age;

46. The prosecution is found to have proved its case to the desired threshold; this ground of appeal is found lacking in merit and is disallowed.

Whether the trial court rejected the appellants defence without giving reasons;

47. Upon perusal of the lower court record it shows that the trial court found that the appellant had a case to answer and when placed on his defence he gave unsworn evidence and stated as follows;

"I do not have work. I stay with my mother. I reside at Kariko. That is all."

48. The appellant instead of setting down his defence chose to mitigate his case; in its judgment the trial court had this to say;

"The accused person in his defence did not deny the act. His only evidence was that he was residing with his mother.

The accused did not adduce any evidence to challenge the evidence on record. No reasonable doubt was raised."

49. This court is satisfied that the appellant offered no defence for the trial court to consider; and finds this ground of appeal lacking in merit and the same is disallowed.

Whether the appellants sentence was harsh and excessive;

50. The appeal is against both conviction and sentence; On appeal no submissions were made by the appellant nor the Prosecuting Counsel on this issue; nevertheless this court deems it fit to address the issue as the appeal is against sentence which is also the prescribed maximum sentence; the appellant was found to be a repeat offender as he had a previous record; the above notwithstanding the fact is the appellant is a person aged 25 years and substituting the life sentence with a term of thirty (30) years is commensurate to a life sentence as he will spend the most productive stage of his life in jail.

51. This court finds that these are good grounds that warrant interference with the sentence.

52. This court is satisfied that the sentence imposed was excessive in the circumstances and finds good grounds for interfering with the life sentence imposed by the trial court;

53. This ground of appeal is found to have merit and is allowed.

FINDINGS

54. In the light of the forgoing this court makes the following findings;

(i) That the error on the Charge Sheet is curable under the provisions of Section 384 of the Criminal Procedure Code;

(ii) The appellant was positively identified;

(iii) The prosecution is found to have proved its case to the desired threshold; and the conviction found to be safe;

(iv) The trial court is found to have given good reasons for rejecting the appellants defence.

(v) There are good grounds to warrant interference with the sentence.

DETERMINATION

55. For the above reasons the error on the Charge Sheet is corrected to include the words **"as read with Section 8(2)";**

56. The appeal is found to be partially successful on the issue of sentence;

57. The appeal on conviction found to be lacking in merit and it is hereby dismissed; the conviction is hereby upheld;

58. The appeal on sentence is found to be meritorious and it is hereby allowed; the sentence is hereby set aside and substituted with a term of thirty (30) years with effect from the 4/07/2016;

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 20th day of December, 2017.

HON. A. MSHILA

JUDGE.

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