IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), MUSINGA & J. MOHAMMED. JJ.A.)

CRIMINAL APPEAL NO. 104 OF 2015

BETWEEN

JOHN MWANGI KING'ORI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nanyuki, (Kasango, J.) dated 16th *December, 2015* **in HCCR.A. NO. 10 OF 2014)**

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JUDGMENT OF THE COURT

Background

1. The appellant, **John Mwangi King'ori** was charged and convicted of defilement of a girl aged 11 years contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** and sentenced to life imprisonment. His first appeal to the High Court was unsuccessful, hence this second appeal

2. The jurisdiction of this Court on a second appeal is well settled. In ***Njoroge v Republic*** **[1982] KLR 388** this Court held that:

"On this second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

3. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-evaluated by the High Court in reaching the impugned judgment, to place the instant appeal in context.

4. The particulars of the offence of defilement were that on 5th April, 2014 at [Particulars Withheld] Village in Nyambugichi location within Laikipia County, the appellant unlawfully and intentionally caused his penis to penetrate CM (name withheld) a girl aged 11 years.

5. The prosecution called five (5) witnesses including the minor complainant. In brief, the complainant testified that she was 11 years old and that the appellant was employed as a farmhand by CM's father; on the night of 5th April, 2014, the complainant arrived home from school and she and the appellant went to serve food; that before she finished serving food, the appellant called her to sit next to him on the sofa but she refused; that the appellant grabbed her, laid her on the sofa, removed her trouser and underpants and defiled her; that she reported the matter to her grandmother despite the fact that the appellant had told her not to report; and that she called her mother and reported to her that the appellant had defiled her; that her mother reported the matter to the complainant's father and the matter was reported to the police and the appellant was subsequently arrested.

6. JKM (PW2), the complainant's father testified that the complainant was born on 14th October, 2002 as evidenced by the Birth Certificate which was exhibited. PW2 further testified that the appellant was his employee and that on the material day at about 7.30 pm, his wife requested him to return home urgently and upon arrival, the complainant informed him that the appellant had defiled her on 5th April, 2014 and had tried to defile her on 12th April, 2014 and 19th April, 2014. It was his further testimony that he reported the matter to the police and the complainant was treated at Nanyuki District Hospital on 21st April, 2014 where she was issued with treatment notes, P3 form and Post Rape Case (PRC) forms; and that the appellant was subsequently arrested.

7. PC Elias Ndubai (PC Ndubai), (PW3) of Ngobit Police Station testified that on 23rd April, 2014 at about 11.30 am, he received a P3 form from the complainant and her father; that he arrested the appellant who was alleged to have defiled the complainant.

8. Dr. Philip Mwangi, (Dr. Mwangi) (PW4) of Nyahururu Hospital testified that on 22nd April, 2014, he examined the complainant and found her hymen was torn and it had spots of blood. He also found that she had a urinary tract infection and concluded that there was penetration and signed the P3 form and PRC form.

9. When placed on his defence, the appellant denied the offence and gave an unsworn statement and did not call any witness. He stated that at the time of his arrest, he was working as a herdsman and *shamba* boy (gardener) for the complainant's father; that on the material day, he went to the garden with the complainant's father and one Mathenge, that the complainant's father left at noon and went to Nairobi; that he and Mathenge worked until 1.00 PM, had a lunch break and continued working in the garden until evening and did not see the complainant on the material day; that the complainant's grandmother, aunt, uncle and mother were at their home; that no one witnessed the commission of the offence; that on 12th April, 2014, he spent the day with the complainant's mother and did not see the complainant on that date; that on 19th April, 2014, he went to carry out his duty of milking the complainant's parents cows but the complainant prevented him from doing so; that he reported the matter to the complainant's grandmother and uncle who admonished her and she informed the appellant that she would report him to her parents; that later that evening, the complainant's father approached him armed with a *panga* and threatened to kill him; that three days later he was arrested and charged with offences that he did not commit.

10. The High Court **(Kasango, J.)** was satisfied that, based on the evidence on record, the appellant's conviction and sentence were well founded and dismissed the first appeal.

11. In his second appeal, the appellant who was represented by **Mr George Morara Gori** contends that the learned Judge erred in the following respects; failing to subject the evidence before the trial court to a comprehensive analysis and evaluation; failing to resolve inconsistencies and contradictions in the prosecution's case in favour of the appellant; failing to find that failure to call key prosecution witnesses in the proceedings before the trial court was fatal to the prosecution's case; failing to observe that the prosecution case was not proved beyond reasonable doubt; in disregarding the appellant's defence and by failing to find that the trial court's decision to compel the appellant to cross examine **Dr. Mbugua** who produced the P3 report was prejudicial and

an affront to the appellant's rights as enshrined in **Article 50** of the **Constitution of Kenya.**

Submissions

12. At the hearing of the appeal, learned counsel **Mr. Makora** for the appellant submitted that he had filed written submissions arguing four (4) main grounds and that he relies on their written submissions and did not wish to orally highlight the written submissions. Counsel urged us to allow the appeal.

13. In the appellant's written submissions, the grounds of appeal were reiterated. Counsel submitted that the learned Judge failed to analyze and evaluate the evidence and resolve the contradictions and inconsistencies in the case including the fact that it was irregular of the first appellate court to uphold *suo moto* amendment of the charge sheet which was defective as the charge showed that the appellant was charged with defilement on a girl contrary to **Section 8(1)** as read with **Section 8(3)** but the appellant was convicted and sentenced under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. Counsel submitted that this was prejudicial to the appellant as **Section 8(2)** carries a life sentence couched in mandatory terms. Counsel submitted that the first appellate court should have resolved that aberration in favour of the appellant.

14. It was counsel's further submission that the prosecution failed to call crucial prosecution witnesses including the complainant's mother and grandfather. That these witnesses were crucial and failure to call them rendered the prosecution case weak to sustain a conviction against the appellant.

15. It was counsel's further submission that the appellant gave an unsworn statement and that on some of the material dates on which he was alleged to have committed the offence he was charged with, he indicated that he was with PW2; that he alluded to a grudge and set up a defence of alibi which was however disregarded by the trial court and the 1st appellate court.

16. Counsel further submitted that the appellant's Constitutional rights were violated in that when **Dr. Mwangi** (PW4) was testifying, the appellant was unrepresented. It was counsel's contention that the appellant was denied his constitutional right to legal representation. Counsel reiterated that the breach of the appellant's constitutional rights rendered the trial a nullity.

17. In opposing the appeal, **Mr. Ondimu,** the Principal Prosecution Counsel for the respondent submitted that he had filed written submissions which he relied on. Counsel urged us to dismiss the appeal.

18. Mr. Duncan Ondimu opposed the appeal and submitted that an evaluation of the record show that the prosecution proved all the ingredients of the offence of defilement; the age of the complainant; that she was 11 years old; that there was penetration of the appellant's genital organ into the complainant's vagina; that the identity of the appellant as the perpetrator was proved as he was well known to the complainant and her family being an employee of the complainant's father (PW4).

19. On the contradictions and inconsistencies, which counsel for the appellant claimed were riddled in the prosecution case, counsel submitted that there were no contradictions nor inconsistencies and even if they were present, they are minor and do not go to the root of the prosecution case; and that any minor inconsistencies were satisfactorily explained which proves the credibility of the prosecution witnesses.

20. Counsel concluded that taking into account all the evidence on record, the prosecution discharged its burden; that the prosecution evidence tendered in court was not in any way discredited by the defence during cross examination.

Determination

21. We have carefully considered the appeal, the submissions, the authorities cited and the law. **Sections 8(1)** and **8(2)** of the **Sexual Offences Act** provide that:

"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 aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

22. To prove the offence of defilement, the prosecution had to establish that there was penetration of the victim's organs, that the victim was aged 11 years or less and that the identity of the appellant as the perpetrator was proved.

23. In our evaluation, the issues arising for our determination in this appeal are whether the elements of penetration and identification were proved to the required standard; whether there were material contradictions in the evidence that ought to have been resolved in favour of the appellant; and whether it is in the interests of justice for this Court to interfere with the sentence meted on the appellant.

24. On the question of proof of penetration, it is clear from the record that the complainant's testimony was corroborated by medical evidence. It was confirmed by **Dr. Mwangi** (PW4) that the complainant's hymen was missing and was bloody and that there was evidence of penetration and he concluded that the complainant was defiled.

25. The two courts below did not therefore err in relying on medical evidence that was adduced to conclude that there was penetration.

26. Regarding the question of identity of the perpetrator, the complainant identified the appellant as the person who defiled her. It was a case of identification by recognition. The appellant was a person who was well known to the complainant as he was employed by the complainant's father as their herdsman and gardener. This fact was confirmed by the complainant's father. The 1st appellate court found that the complainant's identification of the appellant as the perpetrator was proper.

27. The proviso to **Section 124** of the **Evidence Act** provides as follows:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

In the circumstances, we are satisfied with the concurrent findings of the two courts below regarding the appellant's positive identification and are not inclined to interfere with that concurrent conclusion.

28. On the question of the age of the complainant, we find that the same was proved by the production of her birth certificate which indicated that she was born on 14th November, 2002. The complainant was therefore 11 years, 6 months when the offence was committed.

29. On the question whether there was material contradictions in the evidence that ought to have been resolved in favour of the appellant, the appellant challenges the prosecution evidence with respect to the time when the complainant allegedly informed her mother that the appellant had defiled her.

30. In **Phillip Nzaka Watu v Republic [2016] eKLR,** ***Criminal Appeal 29 of 2015,*** this Court observed that:-

"…when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

31. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence. We therefore find that the appellant's contentions that his defence was not considered and that the first appellate court did not reconsider the evidence are without merit.

32. From the foregoing, we are satisfied that in light of the overwhelming evidence adduced against the appellant, his defence denying having committed the offence was properly rejected. His conviction was therefore sound.

33. As regards the propriety of the sentence meted on the appellant by the trial court and confirmed by the first appellate court, we note that in sentencing the appellant, the trial court considered the appellant's mitigation that he is a first offender and has a wife and three children who depend on him.

34. The first appellate court found no fault with the sentence which was in accordance with **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**. As a second appellate court, we find no justification to interfere.

35. In **Wanjema v Republic [1971] EA 493**, the predecessor of this Court stated that:-

"[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."

36. In the result, we find no merit in this appeal and do therefore dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021

W. OUKO (P)

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR