REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 15 OF 2020

DAVID MWANGI KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. Y. I KHATAMBI (SRM) DATED 13TH MARCH 2019 IN CRIMINAL CASE NO. 214 OF 2018 AT NAKURU.)

JUDGEMENT

1. **The appellant was charged with the offence of Defilement contrary to Section 8(1), (3) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on diverse dates between 3rd day of September 2018 and the 5th day of September 2018 at Kanyotu location in Subukia sub county district within Nakuru county intentionally and unlawfully caused his penis to penetrate the vagina of M W N a child aged 16 years.**

2. **The alternative count was Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on diverse dates between 3rd day of September 2018 and the 5th day of September 2018 at Kanyotu location in Subukia sub county district within Nakuru County intentionally and unlawfully touched the vagina of M W N a child aged 16 years with his penis.**

3. The appellant was convicted and sentence to 20 years' imprisonment hence this appeal. The appellant has raised several grounds of appeal challenging the judgement. The grounds are that ***the trial court failed to appreciate the fact that penetration was not proved; relied on incredible evidence of a single witness; that the medical evidence produced could not corroborate the charge; failing to consider that the appellant was a person under the age of 18 at the time of commission of the offence and failing to consider the provisions of Article 53(i) (f) and (ii) of the Constitution of Kenya 2010.***

4. Before looking at the merits or otherwise of the appeal it shall be worthwhile to summarize the evidence as presented during trial.

5. **PW1** the complainant testified in her unsworn evidence that on the material day when the incidence took place she was walking to school at around 6.30 am when "Daudi" the appellant approached her on a motorcycle. She had met the appellant previously at their church in Wanyama, in the month of August. The appellant told her to board the motor cycle, had her change into home clothes on the way and he took her to Subukia in a plot with incomplete houses. She testified that the appellant took her to one of the rooms where she told her to undress while he also removed his clothes and pushed her to the clothes which were on the floor. He then lay on top of her and inserted his penis into her vagina. The same thing again happened the next day on the 3rd and 4th September 2018.

6. She went on to state that on 4th September 2018 her parents started looking for her and on 5th September 2018 she heard the appellant talking with their pastor on phone and he told him that they were in Naivasha. The following day the appellant took her to

their pastor's house and the pastor came with the police around 2.00 pm and they were taken to Subukia police station then to Mwariki police post where she recorded statement. She was in pain and so her mother took her to the hospital where she was treated and given medication. She identified her birth certificate, the medical record from the said hospital, P3 form and PRC.

7. On cross-examination she stated that she wrote her statement on her own free will and was not forced. She confirmed that she had no relationship with the accused.

8. **PW2 JNM** the complainant's father testified that on 3rd September 2018 his wife told him that the complainant left for school but was not back home in the evening. He was told that the accused was with their daughter in Naivasha. He lodged a report with the police and the complainant together with the accused were found at the pastor's house in Subukia on 5th September 2019. He identified the accused person.

9. **PW3 DANIEL MWANGI** a pastor at the complainant's and accused's church, testified that on 3rd September 2019 the complainant's mother called and informed him that the complainant had disappeared with the accused. He spoke with the complainant's mother again on 5th September 2019 and she told him that she was at the police station. He was later called by his wife who informed him that the accused and the complainant were at their house. He called the complainant's father who instructed him to call the chief who later called the police. He was accompanied by the police back to his house where they found the accused and complainant and they took them to the police post. He added that he only called the accused after the complainant's mother called him and that the accused told him that the complainant wanted to run away so he left with her.

10. **PW4 LWG** the complainant's mother stated that the accused had earlier visited her house together with PW3 and that the accused had later returned to her house requesting for a mason job. She testified that on September 2018 the accused returned to her house, spent the night and left early for work the next day. She testified that the complainant also left for school on the same morning. She added that the accused called her in the evening and indicated that he was in Naivasha with the complainant. She called PW2 who later called PW3 and he confirmed that he was with the complainant. She added that the complainant was examined at Nairobi Women hospital and further produced the complainant's birth certificate.

11**. PW5 EDWIN PETER WAMBAKANU** a clinical officer from Nairobi Women hospital testified on behalf of the clinical officer who examined the complainant and filled the p3 form on 7th September 2018. On the vaginal examination he stated that the hymen was old broken, trauma to the vagina and he concluded that there was defilement.

12. **PW6 PC LARY LUVET ESERWA** of Subukia Police Station testified that on 6th September 2018 at around 4.20 pm, one Daniel Kikai came to the police station and reported that one of his congregant David Kimani (the accused) was being sought by officers from Nakuru since he had left with a school girl aged 16 years. He testified that he found the accused together with the complainant at PW3's house where he arrested him and took him to Kanyotu police station.

13. **PW7 PC ELIAS OTHIAMBO** the investigating officer testified that he received report from PW2 to the effect that the complainant had left home for school and never come back. He said that the appellant followed the complainant on a motor bike, offered her a lift and they went into a forest where he defiled the minor. He was arrested and later charged while the minor was taken to the hospital. He produced as evidence the complainant's birth certificate.

14. When placed on his defence the appellant denied the charge and gave unsworn evidence and did not call any witness. He said that he was a motor cycle rider and a mason and that on 1st September 2018 he left for a youth camp in Subukia in the company of the complainant. He went on to testify that on 2nd September 2018 they left the camp for PW4's house where he spent the night. He stated further that the next day after missing his employer at his place of work he decided to go to the church and while he was there the complainant told him that she was not loved by her family and he consoled her. He later told her to go home and upon reaching the complainant's home at Barnabas there was no one and the complainant instead boarded a bus heading to Nairobi. He followed the vehicle and caught up with it in Naivasha. That the motor cycle ran out of fuel but they got a lift in a lorry which declined to stop at pipeline and instead took them to Subukia. He called the complainant's parents who told the complainant to stay where she was. He stated that they went to their PW3's house where he was arrested.

15. The court directed that the matter be disposed of by way of written submissions which the parties have complied.

Appellant's Submissions

16. The appellant reiterated his grounds of appeal mentioned above adding that the penetration was not proved as provided for under section 8 as read with **Section 8(1) of the Sexual Offences Act No. 3 of 2006.** He submitted that penetration was one of the critical ingredients forming the offence of defilement as was held in the case of **Dominic Kibet Mwareng vs Republic [2013] eKLR.** He further draws the court's attention to the cases of; **PKW vs Republic [2012] eKLR and Julius Kioko Kivuva vs Republic [2015].**

17. The Appellant submitted further that the evidence of PW1 that he defiled her severally was not corroborated as was observed by the court in the case of **Johnson Muiruru vs Republic [1983] KLR 445**.

18. The appellant submitted that the prosecution case was marred with contradictions both in nature and in contrast of the evidence that was adduced existed. He placed reliance on the case of **Augustine Njoroge vs Republic Criminal Appeal Number 185 of 1982** where the Court of Appeal held that contradicted evidence is unreliable.

19. The appellant submitted that PW2, PW3 and PW4 confirmed that they knew nothing about the allegations made by the complainant in relation to the defilement. That therefore it was only PW1's evidence that related to the defilement case. He draws the court's attention to the case of **Musikiri vs Republic (Nyeri) HCCRA NO. 120 OF 1986** where the court held that it was really dangerous to convict on the evidence of the woman or a girl alone.

20. The appellant submitted further that the medical report was taken after the requisite 72 hours. He added that the burden of proof in criminal cases never leaves the prosecution's backyard as was held in the case of **Woolmington vs DPP**. He stated that his defence was not considered. He submitted that at the time of his arrest, trial and conviction he was under the age of 18 hence a child within the legal meaning of the **Provisions of Article 260 of the Constitution as read with section 2 of the Children's Act.**

21. He submitted that there was a violation of his rights under **Article 50(h) and 53(i) (f) and (ii) and under Article 37(a) and (b) of UN convection on the rights of the child which Kenya** is a signatory. He draws the courts attention to the cases of **D.K.C vs Republic [2014] eKLR**, **Bruce Ochieng Shaban vs Republic [2019] eKLR** and **A.O.O & 6 Others vs Attorney General** and **Another [2017] eKLR.**

22. He concluded that the trial magistrate did not observe the provisions of **section 8(1) as read with 8(4) of the Sexual Offences Act No. 3 of 2006** and gave him an excessive sentence. He urged the court to allow his appeal, quash the conviction, set aside the sentence and he be set at liberty.

Respondent's Submissions

23. The learned state counsel on the other hand supported the findings by the trial court. She stated that the prosecution proved its case beyond reasonable doubt and that the key ingredients of the offence of defilement were established as in the case of **Dominic Kibet Mwango v Republic [2013] eKLR**. She said for instance that the complainant's age was proved by the production of her birth certificate which was not challenged. That there was proof of penetration as PW5 produced P3 form and confirmed the act of defilement. That further the perpetrator was positively identified by PW1, PW2, PW3 and PW4.

24. On the issue that no medical evidence in support of the complainant's allegations, the learned state counsel submitted that the trial magistrate considered the P3 form and the PRC form which proved that the appellant defiled the complainant. She added that the trial magistrate noted from the said evidence that that PW1's hymen was broken, her history was suggestive of penetration and that the complainant's testimony was duly corroborated by PW5's evidence and the medical records.

25. On the issue that the trial magistrate failed to observe the appellant's constitutional rights vested in Article 50(2) (b)(g)(h) and (4) of the Constitution of Kenya 2010, the learned state counsel submitted that the appellant was well informed of the charges against him with sufficient detail to enable him answer to them. She added that there was no avenue for substantial injustice to occur for the right enshrined under Article 50(2) (h) of the Constitution to be enforced. The court's attention is drawn to the cases of **Chacha Mwita v Republic [2020] eKLR** and **S v Halguju [2002] (2) SCAR 211 SCA.**

26. On the issue that the learned trial magistrate erred both in law and in fact by convicting the appellant on the maximum length and yet there was an avenue of a minimum sentence she submitted that the trial magistrate took notice of the fact that the offence was rampant in that area of jurisdiction. She relied on the case of **Dismus Wafula Kilwake v Republic [2020] eKLR** where court

held that the provisions of section 8 of the Sexual Offence Act must be interpreted so as not to take away discretion of the court in sentencing. She stated that therefore the 20-year sentence meted out was lawful and justified. She urged the court to dismiss the appeal and upholds the conviction and sentence.

Analysis and Determination

27. Having perused the entire record herein, the proceedings and the parties' submissions, the duty of this court was clearly spelt out in the case of **OKENO V.REP 1972 E.A. 32**. The Court of Appeal stated that;

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [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."

28. The key ingredients that ought to be satisfied for sexual offences to be proved are as follows; the age of the victim, the identity of the perpetrator as well as penetration. This was established in the case of **DOMINIC KIBET MWARENG VS. REPUBLIC [2013] eKLR** where the court reinforced the same when it stated that -

'The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.'

29. In the instant matter the age of the complainant was established by the production of the birth certificate and the same indicates that at the time of the incident she was 16 years old. That report though produced by the investigating officer was not challenged.

30. As to the identity of the perpetrator, the minor said that she had met the appellant before in church and PW2 and PW4 confirmed of hosting the appellant in their house on several occasions. Further the appellant does not dispute the fact that he was in the company of the complainant from 3rd to 5th day of September, 2018.

31. As to whether there was penetration, PW1 testified as follows;

'He told me to undress. I removed my dress. I was left with my school shirt. I removed my skin tight and panty on Daudi's instructions. Daudi removed his clothes was left with boxers. He told to lie on the clothes, he pushed to the clothes. I fell on the clothes. He then lay on top of me. I was facing up. He lay facing me. He inserted his penis in my vagina.'

32. On the other hand, PW5 testified as follows;

'…In vaginal. Outer genitalia normal. Hymen was old broken hymen. According to the history of the complainant and examination there was indicative trauma to vagina….in the PRC form injury was as follows; Outer genital normal, hymen old broken, anal area normal. Dr. concluded defilement...'

33. In view of the above, I find that PW1 testimony was corroborated by PW5 testimony where he indicated that upon examination there was an indication of trauma to vagina. Further, the hymen was old and broken which is indicative that the complainant had been defiled earlier or during the time she was with the appellant.

34. On whether the appellant's right under section 143(i) of the Children Act was violated, the said section provides for presumption and determination of age as follows: -

(1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an

order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person" (emphasis mine)

35. In view of the above it is clear that age factor is something that the prosecution and the court ought to have investigated through an age assessment exercise so as to be certain that the person who was going through the trial was an adult and not a child. However, in order for the trail court to have done an age assessment on the appellant it must appear to it that he was under 18 years of age. The appellant did not raise the age issue during trial at the lower court for its consideration. Further, the appellant has in this appeal not produce any documents showing that he was a minor at the time the offence was committed.

36. On whether the appellant right under Article 50 (h) was grossly violated, Article **50** of the **Constitution** provided that the right to fair hearing includes the rights at **(2) (g) and (h)** thus:

"(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

37. Further in **Republic vs Karisa Chengo & 2 others [2017] eKLR** the Supreme Court stated:

"Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

i. The seriousness of the offence;

ii. The severity of the sentence;

iii. The ability of the accused person to pay for his own legal representation;

iv. Whether the accused is a minor;

v. The literacy of the accused;

vi. The complexity of the charge against the accused;"

38. In view of the above I find that the appellant failed to prove that he was a minor at the time the offence was committed and therefore in line with the above cited case the trail court had no obligation to accord him with legal representation.

39. Lastly, regarding the appellant's sentencing, Section 8(4) of the Sexual Offences Act No. 3 of 2006 provides as follows: -

"A person who commits an offence of defilement with a child between the age of sixteen and eighteen is liable upon conviction to imprisonment for a term not less than fifteen years."

40. The Court of Appeal, on its part**, in Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is

shown to exist."

41. Whereas it is true that this court may not interfere with the trial courts discretion on sentencing I note for example that the appellant was a first offender and there was no evidence that he had any other criminal record. At the same time although granted bail he was unable to raise the same and he conducted the matter while in custody all through. For this reason, it is necessary that this court tilts the sentencing period given to the appellant.

42. **In the premises, the appeal is otherwise dismissed, the sentencing of twenty (20) years is however set aside and replaced with a custodial sentence of 15 years with effect from 19th November 2018.**

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 15TH DAY OF DECEMBER 2021.

H K CHEMITEI.

JUDGE