REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL NO. 17 OF 2019

JOHN ECHONGET OSAIRE.....APPELLANT

VS

REPUBLI..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate's Court at Naivasha Sexual Offence Case No.46 of 2017 delivered by Hon. J. Karanja (PM) on 14th July 2019).

JUDGMENT

Background

1. The appeal is from a judgment of Naivasha Principal Magistrate Hon. J. Karanja delivered on 14th May, 2019 in Naivasha Criminal Case No.46 of 2017. The Appellant was the Accused whereas the Respondent was the Prosecution in the said suit.

2. **John Echonget Osaire,** the Appellant herein was charged in Count 1 with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 19th day of September, 2017 at [Particulars Withheld] Estate in Naivasha sub-county within Nakuru County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of SBM, a girl aged 10 years' old.

3. In the alternative, the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006** in that on the 19th day of September, 2017 at [Particulars Withheld] estate in Naivasha sub-county within Nakuru County, intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ namely vagina of SBM, a girl aged 10 years' old.

4. The Appellant pleaded not guilty to all counts. Upon trial, he was convicted of defilement. He was sentenced to life imprisonment under **Section 8(2)** of the **Sexual Offences Act**. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

Grounds of Appeal

5. He filed a Petition of Appeal on 17th July, 2019 and later Amended Grounds of Appeal received in court on 2nd August, 2021 raising five (5) grounds of appeal which I duplicate as follows:

> ***a. THAT the trial magistrate erred in law and fact by failing to analyse and evaluate the evidence of a single eye witness which was marred with incredibility of PW1.***
>
> ***b. THAT the learned trial magistrate erred in law and fact by not applying principle of circumstantial evidence and failing to take into account the demeanour of PW1 and PW2.***
>
> ***c. THAT the learned trial magistrate erred in law and fact by failing to appreciate the charge and medical evidence could not corroborate as drawn hence insufficient to sustain the conviction.***
>
> ***d. THAT the age of PW1 was never proven beyond reasonable doubt, two birth certificates were used the 2nd was brought towards the end of the case indicating date of issue 2018 while case started 2017.***
>
> ***e. THAT, by not considering his defence, the appellant was aggrieved hence faulted trial magistrate for conducting unfair trial since he was not provided with case statement.***

Summary of Evidence

6. The prosecution's case can be summarized as follows: **PW1, SBM** the complainant in the case, while on an errand to get vegetables having been sent by her aunt PW3 was accosted by the Appellant who was their neighbor. He covered her mouth, took her to a house and did 'bad manners' to her. PW1 stated that the Appellant then promised her marriage and gave her 3 sweets. She narrated that the scene where it happened was at his house which had no bed but had chairs and a sofa. She testified that the Appellant had also threatened to beat her if she disclosed what had happened. PW1 was by then bleeding through her inner garments and she washed them so that her aunt would not know. PW1 then told her aunt which led to the arrest of the Appellant and her being taken to the District Hospital for treatment. PW1 identified the accused in court by pointing at him. On cross-examination, PW1 further elaborated that the incident happened on a Tuesday at around 5.00 pm.

7. **PW2, a Musanga Wilfred** was stood down having been sworn and taking the stand as the prosecution did not have his statement.

8. **PW3, EK** testified that she was PW1's sister-in-law. She stated that PW1 on 22/9/17 having arrived home after work was told her that she was sick and upon further enquiry stated that the Appellant had defiled her that Tuesday. PW3 learnt from PW1 that the Appellant had threatened to kill her should she disclose what happened. PW3's husband later arrived and took PW1 to hospital.

9. **PW4, Tabitha Ndungu** from Naivasha District Hospital produced PW1's P3 Form as P. Exhibit 2(a) and PRC form as P. Exhibit 2(b) dated 25/09/2017. PW4 stated that PW1 presented a swelling on her labia majora and minora, inflamed vagina and broken hymen.

10. **PW5, Police Constable Sylvia Mwarabu**, then the investigating officer having taken over from Police Constable Boniface Aboki unsuccessfully tried to secure PC Aboki's attendance. He produced PW1's Birth Certificate as P. Exhibit 1 and PC Boniface Aboki's statement as P. Exhibit 5.

11. The Appellant when put on his defense gave an unsworn statement in evidence. He called no other witness. He stated that he had differed with PW3 who told him that he will know that this was Naivasha. On an unspecified Sunday the Appellant stated that PW3 came with her daughter to his house and asked him if he knew the girl to which he said he did not know. The Appellant stated that PW3 told the girl to say it was him who had defiled her. PW3 then started screaming to which he resolved that they go to the police station. The Appellant asked that they talk aside to which PW3 allegedly told him that if the Appellant gave her money she would 'abandon the case. The Appellant stated that he did not have money and so he was taken to the police station.

12. The trial court took into account the submissions of the parties and in its determination relied on the testimony of the complainant/victim herein PW1 finding that her evidence was believable. The trial court further relied on the medical evidence from the PRC and P3 Forms as produced by PW4 in arriving at a conclusion that PW1 was indeed defiled.

13. The trial court considered the submission by the Appellant that PW3 was framing him but faulted the Appellant for not raising the same when PW3 was giving her evidence or in cross examination. He concluded that the defence was an afterthought and convicted the Appellant for the main charge. Having considered the birth certificate, the trial court noted that PW1 was born on 10/04/2007 putting her at 10 years 5 months old at the time of the offence and subsequently the Appellant was meted out life imprisonment.

Appellant's submissions

16. The Appellant relied on his written submissions filed on 2nd August, 2021.

17. On ground one of his appeal, he submitted that suspicion no matter how strong cannot be a base for conviction. He alleged that PW1 came with her sister in law purporting to identify him. He contended that the visit by PW1 and PW3 was to make his being framed for the offence more believable by identifying the furniture in his house and using it against him.

18. The Appellant submitted that PW1 being the sole eye witness in her case left her evidence uncorroborated. It was his case that **Section 124** of the **Evidence Act** was not applicable. He further alleged that failure to produce the blood stained inner wear weakened the case and failed to satisfy Section 107(1) of the Evidence Act. Reliance was put on the case of **Sawe –Vs- Republic [2003] KLR 364 at Page 372** where it was held that suspicion no matter how strong cannot be basis for conviction. Further reliance was put on **Roria v Republic [1967] EA 583** to buttress his stand on the inefficacy of a single witness.

19. On ground two of his appeal, the Appellant submitted that the guidelines in allowing circumstantial evidence were not applied. He asserted that PW1 did not speak of death threats to PW3 but only of the alleged promise of sweets which he cast aspersions as to the trail of events. This, according to the Appellant was because PW3 did not interrogate the alleged claim of bleeding nor see the sweets given to PW1 by him. It was his view therefore that the prosecution was moved by an oblique motive in adducing such evidence.

20. He relied on **R v Kipkering Arap Koske (1949) EACA 135 at 136** where it was held that the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt to form the basis of a conviction on circumstantial evidence. Thus, the failure to adduce the blood stained inner wear and sweets was a perversion of trial by the prosecution.

21. On ground three of his appeal the Appellant submitted that the penetration ingredient of defilement was not proven beyond a reasonable doubt. He submitted that PW4 did not perform a vaginal swab to scoop spermatozoa which he opines would have corroborated PW1's claim. He further submitted that the injuries sustained by PW1 would have been occasioned by an accident or play.

22. He added that the report by PW4 did not disclose whether the hymen breakage was old or fresh. He opined that the fact that PW1 had

allegedly washed her blood stained inner garment further weakened the prosecution's case. He thus submitted that there was no corroboration for presence of spermatozoa. Further that the assertion of swelling of labia which needed corroboration was unfulfilled by not producing bloody panty and was therefore of no probative value.

23. As regards ground four, the Appellant submitted that the age of PW1 was not proven beyond a reasonable doubt. He submitted that PW3 estimated that PW1 was 13 years old and that she (PW3) saw her birth certificate. That there was no corroboration of the age by a baptism card and age assessment. He submitted that his personal assessment of PW1's age was 15 years. He added that PW5 produced P. Exhibit 1, a birth certificate indicating PW1's date of birth as 10/4/2007.

24. The Appellant further pointed to the contradiction of PW1's age that was given at 13 years by PW3 whereas PW5 stated she was 10 years and as such the age ingredient was inconclusive. He contended that the parents of PW1 could have given a better age placement especially her mother.

25. As to ground 5, the Appellant submitted that his defence was not considered, adding that the trial was concluded without him being given the statement of charges and thus he was not accorded a right to a fair trial contrary to **Article 50(2)(c)** of the **Constitution**.

Respondent's submissions

26. Learned State Counsel, Ms. Maingi represented the Respondent. She made oral submissions. As regards the first Ground of Appeal, she submitted that Section 124 of the Evidence was properly applied by the trial court. This was premised on the fact that the minor was the only witness to her case and as long as the court believed in her case, her evidence was sufficient to convict the Appellant.

27. She drew attention of the court to page 24 of the judgment where the court held that PW1's evidence was firm and straight forward and believable notwithstanding the strong medical evidence which supported PW1's evidence. To this end, she pointed out that the PRC and P3 Forms concluded PW1 was defiled by the indication of injury to the labia minora and majora and broken hymen with pain being noted, indicative of forceful entry.

28. As to ground two, Miss Maingi submitted that the issue of circumstantial evidence was inapplicable as this was a case of direct evidence adduced by PW1.

29. She was of a similar view with respect to Ground 3 of Appeal stating that the same was supported by the cogent evidence of the P3 Form which proved forceful penetration.

30. As regards the age of PW1, counsel submitted that the same was sufficiently established by exhibit1, a birth certificate and by the testimony of PW1 who stated that she was 10 years' old. Reliance was put on **Nairobi Court of Appeal Criminal Appeal 497 of 2007 David Njoroge Macharia vs Republic (2011) eKLR** where it was held that the age must be established in Sexual offences.

31. Miss Maingi conceded that PW3 testified that PW1 was 13 years old as at the date of the offence. She was however quick to clarify that this was a minor contradiction that did not water down the documentary evidence. That in any case, PW1 was not the mother of the minor. She thus urged that court to ignore the contradiction.

32. On the ground that the Appellant's defence was not considered, counsel submitted that the trial court did consider the same. That indeed, the trial court found that the Appellant had raised that issue of being framed by PW3 at his defence but had failed to raise it in cross examination to the witness. As such, the court dismissed it as an afterthought finding that the prosecution had adduced sufficient evidence to warrant a conviction.

33. In addition, Miss Maingi submitted that the life imprisonment sentence passed was legal and should be upheld.

Analysis and determination

34. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. These provisions have been underscored in numerous decisions by the superior courts among them the **Court of Appeal in Civil Appeal 79 of 2012 Peter M. Kariuki –vs- Attorney General [2014] eKLR Nairobi** where the court held *inter alia* as follows: -

> ***"We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that he conclusions reached by the trial judge are consistent with the evidence''***

26. I have accordingly considered the evidence adduced in the trial court, the Appellant's grounds of appeal and the respective rival submissions. I have concluded that the issues arising for determination are:

(a) Whether the ingredients of defilement were established.

(b) Whether the evidence of PW1, a single eyewitness was sufficient to warrant a conviction.

(c) Whether the Appellant's defence was considered.

Whether the ingredients of defilement were met.

27. It is trite law that for the offence of defilement to be established three key elements must be established, namely the positive identification of the perpetrator, penetration and the age of the victim minor.

28. As regards the identification of the perpetrator, no doubt PW1 was the sole eyè witness. She pointed to the Appellant at the trial as the one who did, ‘’tabia mbaya’ on her after having cupped his hand over her mouth and took her to his house. She was not only cognizant of the day but also the time as she pointed out that it was a Tuesday in September 2017 at 5.00 pm when she was accosted on her way to get vegetables.

29. The above notwithstanding**,** PW1 alerted PW3 immediately after the incident and proceeded to identify the scene which was in the Appellant’s house. She singled out the Appellant as the soul perpetrator of the offence. It is also worthy to note that the incident occurred in broad day light, a time when the issue of mistaken identity was unlikely to happen. This links with the fact that, apart from identifying the perpetrator, she was able to lead PW3 to the scene. The singled out chain of events was unbroken.

30. As to penetration, the Sexual Offences Act defines **“penetration”** as ***“the partial or complete insertion of the genital organs of a person into the genital organs of another person”.*** PW1 testified that the Appellant, having taken her to his house, did ‘tabia mbaya’ on her. The Appellant in his appeal contends that the absence of spermatozoa and the failure of PW3 to conduct a vaginal swab on PW1 discredited the ingredient of penetration.

31. In the case of **Kisumu Criminal Appeal 295 of 2012** ***Mark Oiruri Mose vs R [2013] eKLR,*** the Court of Appeal had this to say;

> ***“Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ”***

32. In that regard, PW1 was categorical that the Appellant did bad manners to her. It is common knowledge and by custom and usage that the term *“bad manners”* in sexual assault cases is used to connote sexual intercourse. PW1 was thus referring to the Appellant having sexual intercourse with her by stating that he did bad manners to her.

33. It is true that no evidence of spermatozoa was adduced in court. Although there is no evidence that a vaginal swab was done, the evidence of PW4 revealed swollen labia minora and majora with an inflamed vagina and broken hymen. She adduced PW1’s P3 Form as P. Exhibit 2(a) and PRC form as P. Exhibit 2(b). There is no doubt then that penetration was proved.

34. Additionally, PW1’s age was also satisfactorily established. Her birth certificate which was produced in evidence by PW5, the investigating officer put PW1 at ten (10) years) as she was born on 10/04/2007. The Appellant contended that PW3 gave a contradictory age of 13 years which weakened the case for the prosecution. The Appellant nevertheless in similar fashion opined that the age of PW1 was 15 years and submitted that PW1’s parents, especially her mother ought to have given evidence. PW1 however testified that her mother is deceased.

35. Nevertheless, what has been levelled as a rebuttal by the Appellant to the production of the birth certificate was that the birth certificate delayed to be produced and was thus solely made for fixing him. This remained a mere allegation and has not been buttressed by any cogent evidence hence falling far short of satisfying of **Section 107** of the **Evidence Act** in that he who alleges must prove.

36. That leaves the court to solely rely on the corroborating documentary evidence of the birth certificate adduced as P. Exhibit 1 which established PW1’s age as 10 years. I do find the Appellant’s assertion that there were two birth certificates as unfounded as only one existed in the trial court record and only one was adduced in identifying PW1 and her birth credentials.

37. The Appellant alleged that the trial court judgment was founded on delinked circumstantial evidence and challenged the application of **Section 124** of the **Evidence Act**. To add to the second issue of determination, I have no doubt in my mind, just as the learned trial magistrate concluded, that PW1 was telling the truth. The proviso to Section 124 of the Sexual Offences Act empowers a court to convict an accused person based on the single evidence of a victim minor in a sexual assault case so long as the court believes in the evidence of the minor. The proviso reads:

> ***‘….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***.’’

38. There is nothing that plays in the fore that leads that court to doubt PW1’s evidence as to who her assailant was. Besides, her testimony was corroborated by the medical evidence adduced in court which leads me to conclude that she told the truth and the trial court properly relied on the proviso to Section 124 of the Evidence Act.

39. In any case, this is a case of direct evidence where the victim told her own story which was corroborated by other material evidence as enunciated above. PW1 gave direct evidence as to what she suffered at the behest of the Appellant. The court of appeal in **Nairobi Criminal Appeal 16 of 2017 PON v Republic [2019] eKLR** stated that for direct evidence to hold sway, it is that which directly links a person to a crime; **that which is based on an eyewitness account, on personal knowledge or observation** (emphasis mine) and that in the absence of such direct evidence recourse to circumstantial evidence is due. This being a case of direct evidence as accounted by PW1, there was no basis for reliance on circumstantial evidence.

40. On the ground that the Appellant's defence was not considered, the trial court found that the Appellant did not raise the extortion claim when cross examining PW3. It then concluded that that line of defence was an afterthought. On the part of this court, I have no reason to fault the learned trial magistrate as clearly, the Appellant had an opportunity of testing PW3 during cross examination that she was settling a score. Furthermore, his defence was ousted by the strong and credible evidence that was adduced by the prosecution.

41. In the upshot, it follows that this is an appeal without merit. I conclude that the prosecution proved their case beyond a reasonable doubt. I uphold both the conviction and sentence. I dismiss the appeal in its entirety.

42. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 31ST DAY OF JANUARY, 2022.

G.W.NGENYE-MACHARIA

JUDGE

IN THE PRESENCE OF:

1. APPELLANT IN PERSON.

2. MISS MAINGI FOR THE RESPONDENT.