REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. E010 OF 2021

(*From the Conviction and Sentence in Sexual Offence Case Number 18 of 2018 by the Senior Principal Magistrate's Court at Bomet)*

RKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was convicted for the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya. The particulars of the Charge were that on 18th May 2018, at **[Particulars Withheld]** sub-location, Kiplabotwa location within Bomet County, he intentionally touched the vagina of M. C, a child aged 15 years with his hand.

2. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called three (3) witnesses in support of its case.

3. At the close of the prosecution case, the trial court ruled that a *prima facie* case had been established against the accused person and he was put on his defence. The accused person gave an unsworn statement and called one witness in aid of his defence.

4. At the conclusion of the trial, he was convicted and sentenced to 12 years' imprisonment.

5. Being dissatisfied with the conviction and sentence, the Appellant appealed to this court through a Memorandum of Appeal filed on 15th March 2021 which was later Amended and filed on 18th October 2021. The grounds are paraphrased as follows:

i. **THAT**, the appellant pleaded not guilty to the Charge.

ii. **THAT** the Charge against the Appellant was borne out of malice between the complainant, PW1 and PW3 who had framed the appellant in another criminal case being Sexual Offence Number 66 of 2018 at Bomet Lower Court in which the Appellant was acquitted.

iii. **THAT** the birth certificate of the complainant was forged as the biological parents of MC were RM and MC and not PB and JB as indicated on the birth certificate, thus the Appellant was not accorded a fair trial and the doctor was not availed to establish the age of the complainant.

iv. **THAT** the learned trial magistrate erred in both law and fact by convicting the Appellant while the prosecution's case was full of massive contradictions and conspiracies of PW1, PW2 and PW3 so as to fix the Appellant. The prosecution case did not have the investigating officer or arresting officer.

v. **THAT** I wish to be present during the hearing and determination of the same.

6. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal case of **Okeno – VS – Republic (1972) EA 32** has been consistently cited as follows: -

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

The Prosecution's Case

7. It was the Prosecution's case that the accused person indecently touched the vagina of MC on 18th May 2018 with his hand. PW1 testified that on the material day at around 10 p.m., she was at home sleeping when her father (the Appellant) woke her up and asked her to go and warm his food. After warming his food, her father told her that he will not eat and asked her to sit next to him. She testified that her father then began touching her all over including her private parts. She further testified that she managed to run away to her bedroom where she locked herself in.

8. It was the testimony of PW1 that the father threatened to break down the bedroom door if she did not open it. She testified that the father told her to warm his food again which he refused to eat. That he begun touching her again and asked what the problem was if he touched her. She further testified that she went to call her uncle (PW2) who was asleep in the next room. PW1 testified that the accused person then got a panga and chased PW2 away.

9. It was the testimony of PW1 that after PW2 had ran away, the accused person got back to the house and locked the door. That he asked her to sleep with him and she refused. She testified that the accused person threatened to cut her with a panga if she refused. It was her further testimony that police officers came and she opened the door for them and they found the accused person sleeping with the panga that he had used to threaten her. That he was taken by the police to Mulot. She stated that she went to record a statement at Mulot and later at Longisa. She further stated that the accused person was her father.

10. PW2 who was the brother in law to the accused person testified that he was 18 years old and attended **[Particulars Withheld]** Mixed Day Secondary School. He also testified that he lived at the home of his sister M (PW3). It was his testimony that on the material day, he was sleeping in his room when PW1 woke him up and told him that the accused person had refused to eat and asked him to go and tell the accused person to sleep. That when he went to tell the accused person to sleep, he started quarrelling and took a panga. PW2 testified that he took to his heels and jumped over the fence and went to **[Particulars Withheld]** Boys where he found a watchman and informed him what had happened to him. It was his testimony that he asked the watchman to call his sister who worked at **[Particulars Withheld]** Girls High School.

11. PW2 testified that the sister informed police officers who were at **[Particulars Withheld]** Boys High School what had happened and the police accompanied them home where they found the accused person sleeping with a panga and PW1 seated in his bedroom while crying. That the accused was arrested by police officers. PW2 further testified that the accused person was his brother in law.

12. PW3 testified that she was a security officer at **[Particulars Withheld]** Girls High School. That on the material day, she was in the dormitory where the girls sleep when a phone call came in and was informed that PW2 was at the gate and that he had been chased by the accused person with a panga. She testified that she went to the gate and found police officers and told them what had happened. She further testified that they accompanied her and PW2 home.

13. It was PW3's testimony that upon reaching their house, they found the accused person sleeping while PW1 was crying. She stated that she asked PW1 what had happened and she told him that the accused person had forced her to sleep with him and that he threatened to cut her if she refused. PW3 testified that the accused person had a panga while sleeping. It was her further testimony that the accused person was arrested and taken to the AP line and that they later went to Longisa Police Patrol Base and recorded their statement.

14. PW3 testified that the accused person was her husband and that they no longer relate well because of what he did. She further testified that she did not tell PW1 what to say.

The Defence Case.

15. The accused person testified as DW1. He testified that on the material day, he was at home sleeping at around 9 pm. It was his testimony that PW2 lives with them and at times he beats his children. That he told PW1 to call PW2. It was his testimony that he asked PW2 why he always beats his children yet he had warned him against it.

16. The accused person testified that he got a panga and that PW2 ran away and jumped over the fence. That he went to PW3 who was his sister. He testified that he went to sleep thereafter. That at around 11pm, he was woken up by people who said were police officers and they asked why he had chased PW2. He stated that he wanted to ask him why he was beating his children.

17. It was the accused person's testimony that he was arrested and taken to the AP line then to Longisa Police Post. He stated that it was there where he was informed that he had committed an indecent act. That the arresting officer did not tell him the charge at the point of arrest. The accused person testified that he PW3 was framing him because he caught her doing prostitution.

18. DW2 testified that the accused person was his father. That on 24th December, 2018 he had gone to look for his father and he did not find him. He testified that he was told that his father had been arrested for beating up his uncle and that on the following day he was told that his father had been arrested because of a different offence. He further testified that he was told that PW2 beats up the children. It was his testimony that the offence was placed on the accused person as he disagreed with PW2 and that the accused person and his step mother (PW3) had disagreed and that was the cause of the dispute.

The Appellant's Submissions

19. It was the Appellant's submission that this case was full of fabrications and bias against him. That earlier in 2018, he found PW3 (who was his second wife) with another man on their matrimonial bed. The Appellant submitted that after the infidelity, PW3 sought to be given a share of the land in which the Title Deed was still in the name of his father. The Appellant further submitted that PW3 also framed him in another case where he was charged with incest in Criminal Case Number 66 of 2018 in which he was acquitted.

20. The Appellant submitted that PW3 coached PW1 and PW2 on what to testify. The Appellant further testified that if given a second chance, he was ready to give PW3 a share of the land because they have agreed with his parents and brother. It was the Appellant's submission that the disagreement was family related and it is the cause of all the fabrications and theories from PW1, PW2 and PW3 and it was on that basis that he urged this court to quash the conviction and set aside the Sentence.

21. It was the Appellant's submission that the birth certificate produced was illegal as it did not contain the real names of the parents of PW1. That as a result, it was unlawful for the prosecution and trial court to rely on it. It was the Appellant's further submission that the prosecution erred when it failed to call the doctor to come and establish the legality of the birth certificate and the age of PW1, thus the Appellant was not accorded a fair trial.

22. The Appellant submitted that the prosecution's case was full of inconsistencies from its witnesses. The Appellant further submitted that it was clear that the witnesses were untrustworthy and unbelievable. It was the Appellant's submission that the investigating officer and the arresting officer did not adduce evidence. It was the Appellant's conclusion that the prosecution failed to prove its case beyond all reasonable doubt.

The Respondent's Submissions.

23. The Respondent submitted that the accused person came home on the material day and touched PW1's private parts and that at that time the accused person was armed with a panga. The Respondent submitted that there was medical evidence and further that no eye witness saw the accused person commit the act. The Respondent stated that Section 124 of the Evidence Act removed the need for corroboration in sexual offences and that the trial court could convict on the evidence of the victim only. That in the present case, the trial court indicated in its Judgment that it considered the demeanour of the victim and was satisfied that she told the truth.

24. It was the Respondent's submission that PW2 was present at the scene. That PW2 testified that he had been woken up by PW1 who indicated that the accused person had refused to eat his food and was disturbing her. That further, the accused person chased him with a panga and he fled for his safety and went to the sister's work place. The Respondent submitted that this evidence lend credence to the testimony of PW1.

25. The Respondent submitted that the accused person had no material evidence to prove his assertions that he had marital issues with his wife, PW3 that could have led to framed up charges.

26. The Respondent submitted that PW1 clearly identified the accused person as her father. That this evidence was corroborated by PW3 who also stated that the accused person was the father of PW1. It was the Respondent's submission that the accused person did not controvert this evidence in any way.

27. It was the Respondent's submission that the evidence on record disclosed the offence of incest. That even though it was unclear whether the accused person was her biological father, Section 22 of the Sexual Offences Act provided that an adoptive father was a father for the purpose of the offence of incest. That by dint if Section 180 of the Criminal Procedure Code this court had the powers to substitute charges after conviction and give the appropriate sentence. The Respondent urged this court to convict the accused for incest contrary to section 20 of the Sexual Offences Act.

28. The Respondent submitted that in regards to sentencing, the accused person was a first offender and should not be given the maximum sentence available but should be given a lesser sentence. The Respondent therefore urged the court to maintain the 12 years meted out by the trial court.

29. I have given due consideration to the trial court proceedings, the Amended Memorandum of Appeal filed on 18th October 2021, the Appellant's Written Submissions filed on 18th October 2021 and the Respondent's Written Submissions dated 28th October 2021. They raise three issues for determination as follows:

(i) Whether the Prosecution proved its case beyond reasonable doubt.

(ii) Whether the Defence places doubt on the prosecution case.

(iii) Whether the Sentence preferred against the accused person was manifestly excessive, harsh and severe.

(i) Whether the Prosecution proved its case beyond reasonable doubt.

30. The accused person was charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The Act defines a child by deference to the Children Act No.8 of 2001 which defines a child as any human being under the age of eighteen years,

31. The complainant (PW1) produced her birth certificate (P. Exhibit 1) which indicated that she was born on 15th December, 2002 making her fifteen and a half years at the time of the offence.

32. The Appellant however expressed doubt in the authenticity of the birth certificate for reason that the parents were indicated as PB and J. I have looked at the birth certificate produced as Exhibit 1. It bears the names MC born on 15/12/2002. The father is indicated as PB while the mother is indicated only as J.

33. From the proceedings, it is clear that the Appellant and PW3 MC were the parents of the complainant. No explanation was given on why the names in the birth certificate were different. It could be that the Appellant was not the biological father of the complainant or that the couple had other names but this was not explained. It is even more curios that the name of the mother is indicated only Joyce contrary to the requirement for the entry of name and maiden name. I agree with the Appellant that the copy of the birth certificate was suspect. To this end therefore I find that the age of the complainant was not satisfactorily proven as no other witness, not even her mother (PW3) gave any evidence with regard to her age. As stated by the Court of Appeal in the case of **Richard Wahome Chege Vs Republic (2014) eKLR:**

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself".***

34. With regard to the issue of identification, the Court of Appeal in the case of **Cleophas Wamunga VS Republic (1989) eKLR** expressed itself as follows:

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".***

35. The English case of **R VS Turnbull (1977) QB 224** is useful in this regard:

> ***"If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution".***

36. In the present case, PW1 testified that the accused person was present in court and that he was her father. The remaining prosecution witnesses did not witness the offence though the testimonies of PW2 and PW3 placed the accused person in the bedroom where they were found with PW1. The accused person did not raise the issue of identification when cross examining the 3 prosecution witnesses.

37. The accused person, PW1 and PW3 were members of an immediate family while PW2 was a brother in law, uncle and brother respectively. These are people who lived together and there can be no doubt as to the identity of the accused person as all the prosecution witnesses placed him in the bedroom where he was found with PW1.

38. As earlier mentioned, no one witnessed the alleged offence except the victim, PW1. Section 124 of the Evidence Act gives the proviso that: -

> ***"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 of it, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".***

39. This court is empowered by the above section to convict an accused person solely on the evidence of the complainant. The above position was affirmed in the case of **J.W.A VS Republic (2014) eKLR**, where the Court of Appeal held that:

> ***"We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate".***

A similar position was taken in **George Kioji VS. Republic (UR)** where the Court of Appeal expressed itself as:

> ***"Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

40. In this case, PW1 testified that on the material day, her father woke her up and asked her to warm his food which he thereafter refused to eat. He then began touching PW1 all over including her private parts. She managed to run away and lock herself in the bedroom. Her father threatened to break the door if she did not open up. When she opened the door the father asked her to warm his food again. He did not eat again and began touching her again and then asked her what the problem was if she touched her. The accused person then asked PW1 to sleep with him and threatened her with a panga if she refused.

41. Upon the first cross examination, PW1 stated that the accused person had defiled her on 15th December 2018 which was a later date than the material one. Upon re-examination, PW1 confirmed that the accused person touched her private parts on the material day.

42. When PW1 was recalled for further cross examination she stated that the accused person was drunk on the material day and repeated with clarity what she had stated in the previous cross examination.

43. I am satisfied that PW1 though a child, spoke the truth and answered questions well. She was even cross examined by the accused person twice and was consistent in her answers. Without the benefit of observing her demeanour during trial, I have no reason to depart from the observation of the trial magistrate where she stated that: -

> *"I was able to listen to the testimony of PW1 and I observed her demeanour. She struck me as a child who was out to the truth and there was no indication that her aim was to frame up the accused. Her evidence coupled with that of PW2 and PW3 shows without doubt that the indecent act took place. Indeed, the accused was found in his bedroom with the complainant when he was arrested. His statement in defence didn't therefore cast away doubt on the evidence of the prosecution witnesses".*

44. Thus, this court has every reason to believe her testimony as truthful and accurate.

45. The Appellant has raised an issue that crucial witnesses including the investigating officer and the arresting officers were not called. However, the Court considers whether the witnesses called have established all the ingredients of an offence and whether the witnesses can be believed. In the case of **Kihara –V- Republic (1986) KLR 473** the Court of Appeal stated that: -

> ***"The Prosecution is not compelled to call as many witnesses as there could be as what matters is not the number of witnesses but the best sound evidence that can be given in Court. It would have been pointless to call witnesses who did not know what had happened between the Appellant and the deceased."***

And in KETER –V- REPUBLIC (2007)1 E.A. 135 the Court of Appeal held;

> ***"The Prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt".***

46. The same is backed in statute in Section 143 of Evidence Act (Cap 80) Laws of Kenya which provides that: -

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact

47. In light of the foregoing, I have come to the conclusion that the prosecution proved its case beyond reasonable doubt.

(ii) <u>Whether the Defence places doubt on the prosecution case.</u>

48. The Appellant stated that he was a matatu driver and he lived with his brother in law (PW2). He testified that PW2 beat up his children despite some warnings. That on the material day, after asking PW2 why he beats up his children, he grabbed a panga and chased him. He fell asleep thereafter and was woken up by police officers who asked him why he had chased PW2 to which he answered that he wanted to ask him why he beat up his children. He was then arrested and later on informed that he had committed an indecent act.

49. The Appellant claimed that PW3 who was his wife was framing him because he caught her doing prostitution. The accused person submitted that the family issues which revolved around land and those issues contributed to his being framed up by PW3. In oral submissions before this court, the Appellant revisited the issue of frame up. He submitted that PW3 was his second wife and had tried to fix him through a similar case in Bomet Magistrate's Court in Criminal Case No.66 of 2018 but he was acquitted. Both the Appellant and the Respondent asked the Court to peruse the said file.

50. My perusal of the file (Criminal Case No.66 of 2018) showed that the Appellant was charged with the offence of incest contrary to section 20(i) of the Sexual Offences Act and the victim in that case was the same as in the present case. He was acquitted by the trial court on account that the prosecution had failed to prove the case. In my view, the existence of another case may mean that the complainant had been violated more than once or that there was an actual scheme by PW3 to frame the Appellant.

51. In the appeal before me, I have considered the Appellant's defence. He makes material admission to the effect that he was arrested while having a panga and he does not explain why the victim was in his bedroom. His defence did not displace the evidence of the prosecution witnesses who placed him in the bedroom with the victim.

52. In totality, there is nothing in the Appellant's Defence that would make this court place doubt on the veracity of the prosecution's case with respect to the indecent act having been perpetrated by the Appellant. There is however the issue of age, to which I shall return here below.

(iii) <u>Whether the Sentence preferred against the accused person was manifestly excessive, harsh and severe.</u>

53. In **Bernard Kimani Gacheru VS Republic (2002) eKLR,** the Court of Appeal stated that: -

> ***"It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the***

discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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".

54. In this case the Appellant was charged under Section 11(1) of the Sexual Offences Act. The provision state: -

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

55. In mitigation, the accused person stated that the court look at both sides and that he had children who depended on him and two wives. He further stated that the 1st wife had no work.

56. The court has discretion in issuing of sentences and the minimum nature of this sentence does not make it illegal. In the Supreme Court case of **Francis Karioko Muruatetu and Another VS Republic, Petition NO. 15 & 16 (Consolidated) of 2015** it was held that:

> ***"We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute"***.

57. The Criminal Procedure Bench Book at page 116 provides that:

"The sentences imposed should be geared towards achieving the following objectives set out in the sentencing policy guidelines (paragraph 4.1):

i) Retribution.

ii) Deterrence.

iii) Rehabilitation.

iv) Restorative justice.

v) Incapacitating the offender.

vi) Denouncing the offence, on behalf of the community".

58. In this case however, I have already found that the age of the victim was not satisfactorily proved. The sentencing section should therefore be Section 11A of the Sexual Offences Act which provides 11A which provides:

> "Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both".

59. In the end, I uphold the conviction. I however, set aside the sentence of 12 years' imprisonment and substitute *therefor* a sentence of 5 years' imprisonment from the date of conviction and sentence being 17th January,2020.

Orders accordingly.

Judgment delivered, dated and signed at Bomet this 28th day of February,2022.

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R. LAGAT-KORIR

JUDGE

In the presence of the Appellant acting in person, Mr. Muriithi for the Respondent and Kiprotich (Court Assistant)