REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. E002 OF 2021

(From Original Conviction and Sentence of Hon. Kiptoo B.K. in the Principal Magistrate's

Court at Sotik in Criminal Case S.O. Number. 30 of 2019)

MERCY CHELANGAT .... APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

JUDGMENT

1. The Appellant, Mercy Chelangat, was charged and convicted of the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006. The particulars of the offence were that on 18th day of May 2019 within Bomet County, intentionally and unlawfully caused the penis of KK, a boy aged 16 years, to penetrate her vagina.

2. She was also charged with an alternative count of Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on 18th day of May 2019 within Bomet County, intentionally and unlawfully caused KK, a boy aged 16 years, to touch her vagina with his penis.

3. The Appellant pleaded not guilty to the main charge and the alternative charge before the trial court. A full hearing was conducted. The prosecution called five (5) witnesses. It was the testimony of PW1, the victim, that he and his friend met two girls, that is the Appellant and her friend, whom they decided to escort to where the two girls lived. He testified that once they got into the house, the Appellant gave him a condom and offered to have sex with him. His friend PW2 also had a similar encounter and testified that the victim had informed him that he had had sexual intercourse with the Appellant. The victim's mother who testified as PW4 also stated that her son confirmed to her that the Appellant had had sex with him. That it was the people from the neighbourhood who arrested the Appellant and her friend. The clinical officer who had examined the victim after one month testified that the injuries expected from such occurrence could not have been found after one month.

4. At the close of the prosecution's case, the trial court put the Appellant on her defense under section 210 of the Criminal Procedure Code. The Appellant gave sworn evidence and called no witnesses. In her defense, she testified that the allegations were not true and that she was not present in Mogogosiek as she had gone to the village.

5. By judgment dated on 17th October 2019, the Appellant was convicted and sentenced to serve ten (10) years imprisonment.

6. Being dissatisfied with the decision of the trial court, the Appellant instituted this Appeal against the conviction and sentence. She raised the following grounds:-

i) That she pleaded not guilty;

ii) That the court relied only on the evidence produced by the prosecution which was fabricated to implicate her in the offence;

iii) That the trial magistrate erred in law and fact in concluding that the offence of defilement was proved without considering the evidence of the clinical officer; and

iv) That the learned trial magistrate erred in law and fact by rejecting her alibi defense without a cogent reason.

7. The Appeal was canvassed through written submissions. The Appellant's submissions are dated 3rd May 2021 and were filed on 3rd June 2021 while the Respondent's submissions are dated 23rd July and filed on 27th July 2021.

Appellant's Submissions:

8. The Appellant submitted that the charge sheet was defective in line with section 214 of the Criminal Procedure Code due to the error in dates on the judgment i.e. 18th May 2019 and 18th May 2018. Secondly, she submitted that the clinical officer examined the victim a month after the date of the incident and that she was never examined in respect of the alleged offence. Thirdly, she asked the court to dismiss the evidence of PW4, the victim's mother on the premise that she took long to report the matter. She also asked the court to discard the evidence of PW5 since he only relied on what he was told and never conducted thorough investigations to prove the charge. Lastly, she submitted that the court failed to consider her alibi defence and that the conviction and sentence ought to be quashed and set aside.

Respondent's Submissions

9. The Respondent submitted that the offence of defilement had three main ingredients namely age, identification and penetration and relied on the case of ***Philip Mueke vs. Republic (2017) eKLR***. They submitted that the age of the victim was evidenced by his Certificate of Birth which indicated that he was born on 24th September, 2003 making him 16 years old at the time of the incident.

10. Secondly, the Respondent submitted that the Accused was well known to the victim since they had sex on the material date and had gotten into an intimate relationship. On the issue of penetration, the Respondent submitted that even though the medical examination was carried out a month after the incident and that the medical officer could not ascertain that there was penetration, the victim's account in this case did not require corroboration. To this end, they relied on Section 124 of the Evidence Act which made an allowance for lack of corroboration in sexual offences. They submitted that the court only needed to be satisfied that from the demeanor of the minor, he or she was telling the truth. The Respondent cited the case of ***George Muchika Lumbasi vs. R (2016) eKLR***. In addition, he submitted that the word sex in the victim's testimony connoted the aspect of penetration and relied on the case of ***SCA vs. R (2018) eKLR***. The Appellant concluded that the case was proven to the required threshold.

11. On sentencing, the Respondent submitted that sentencing was discretionary on the trial court and that a superior court could only interfere where the trial court failed to consider material factors or imposed an excessive or harsh sentence. In the present case, the Respondent's view was that since the offence bore a minimum sentence of 20 years, the sentence of 10 years was just and legal. In suport of this, they cited *Wanyema vs. Republic (1971) E.A. 43* and *Rophas Furaha Ngombo vs. Republic (2019) eKLR* in respect of mandatory minimum sentences. The Respondent submitted that the Appeal lacked merit and should be dismissed.

Issues for Determination

12. Having reviewed the Record, the grounds of appeal and the respective submissions of the parties, I find the following issues are pertinent for determination:

(i) Whether the offence of defilement was proven to the required standard and whether the conviction was safe.

(ii) Whether the defence of an alibi was adequately considered by the court.

i. Whether the offence of defilement was proven to the required standard and whether the conviction was safe.

13. A first Appellate court has a duty to carefully examine and analyze afresh the evidence presented from the lower court and draw its own conclusions. It must not necessarily agree with the findings of the trial court and must bear in mind that it lacks the privilege of seeing and examining the demeanor of the witnesses first hand. (See ***Okeno vs. Republic [1972] EA, 32 and Kiilu & Another vs. Republic [2005] 1 KLR, 174]***)

14. It is trite that for the charge of defilement to stand, the Prosecution must prove three main ingredients as provided for under section 8(1) of the sexual Offences Act No. 3 of 2006 being the age of the victim (must be a minor), that there must be penetration and proper identification of the perpetrator (*see* ***George Opondo Olunga vs. Republic [2016] eKLR****)*.

15. Section 8(1) of the Sexual Offences Act provides as follows:

> "*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.*
>
> *(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*
>
> *(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.*
>
> *(5) It is a defence to a charge under this section if -*
>
> *(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and*

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."

The Age of the Victim

16. The importance of proving age in a Sexual Offence case cannot be gainsaid. In the case of **Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010**, the Court of Appeal stated as follows:

"*Age of the victim of secual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the ame way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."*

17. In the present case, it is not in dispute that the victim was a minor aged 15 years 7 months at the time of the alleged offence. He also stated that he was in Form 1. He produced his birth certificate which was marked as PEX1 that indicated his date of birth as 24 th September 2003. His age was therefore adequately proven.

Identification/Recognition

18. As in any criminal offence, the positive identification of a person is what connects them to that offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. In the case of **Kariuki Njiru & 7 others vs Republic, Criminal Appeal no. 6 of 2001 (*Unreported*)** the court held as *follows:*

"*Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."*

19. Further to the above, it is well settled law that recognition may be more reliable than identification of a stranger. However caution must always be taken where a witness is purporting to recognise someone that they know since even in such casesm mistakes may sometimes be made. (see **R vs. Turnbull & Others [1976] 3 ALL ER 549**).

20. In this case, the Appellant was well known to the victim. In his testimony, he stated that his mother was made aware of their relationship, which means he engaged with the Appellant enough to term it as a relationship. Secondly, he also stated that he knew the Appellant as he would always see her at Mogogosiek since she was a common person in that area. With respect to the charge and as already stated, the victim testified that he escorted the Appellant to her house and they had sex. There is no doubt in my mind that the Appellant was well known to the victim. I therefore dispense with the ingredients of identification as well.

Penetration

21. Penetration is defined under **section 2** of the **Sexual Offences Act** as the partial or complete insertion of the genital organ of a person into the genital organs of another person. As an important ingredient of the offence, it must be proven beyond reasonable doubt. This is either through the evidence of the child corroborated by medical evidence or in other circumstances, through the sole evidence of a child and this is governed by section 124 of the Evidence Act Cap 80.

22. PW3, Kipkoech Rotich was the medical officer who examined the victim testified that the victim's genitalia was normal and he could not find anything consistent with defilement. In addition, he stated that since he conducted the examination after one month, it was difficult to find any injuries in respect of defilement. He produced the P3 form- PEX2, Treatment notes – PEX3 and the PRC Form as PEX4. I also noted from the PRC form that everything was normal with the minor, including his genitalia and his mood. The PRC form also indicated that he was well groomed, had good memory, he was happy and the only recommendation was that he should be tested for HIV again after three months.

23. From the above, it is clear that the medical evidence does not prove any act of penetration. This is not unusual as in sexual intercourse and barring any forceful engagement, the male sexual organ would noy be susceptible to bruises and injury in comparison to the femail sexual organ.

24. In the case of **Bassita vs. Uganda S.C. Criminal Appeal No. 35 of 1995,** the Supreme Court of Uganda had the following to say in respect of proving penetration:-

"*The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. <u>Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence.</u> Though desirable, it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual*

intercourse or penetration. <u>Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."</u>

25. In the present case, the only evidence that can be relied on is that of the victim. In his testimony he stated that the Appellant invited him to have sex and handed him a condom. PW2 also corroborated this story when he testified that he was also having his own time with the Appellant's friend. It was PW2's testimony that when he went to call the victim, the victim asked him to proceed home, that they would meet later as they (Appellant and the victim) were not finished with their business. Later that night, the two (PW1 and PW2) would share their individual experiences.

26. The evidence of PW2 in respect of what transpired between the victim and the Appellant is to be considered as hearsay because he only narrated what he was told by his friend, the victim and not what he actually witnessed. Be that as it may, his story brings to the foreground occurences in the night which if considered keenly will likely lead to a conclusion that the victim and the appellant had a sexual engagement.

27. The main question however is whether such a conclusion can be reached with utmost certainity and meet the threshold for the standard of proof in a criminal trial. It remains then that the only evidence admissible is that of the minor in respect of penetration. **Section 124 of the Evidence Act** gives guidance to the court where it opts to solely rely on the evidence of a victim, devoid of other evidence placed before it. It provides as follows:

> "*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.*
>
> *<u>Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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."</u>*

28. I note that a *voire dire* was conducted on the minor and that the trial court was satisfied that he was in a position to comprehend the importance of the oath and that was why he gave sworn evidence. However in both the proceedings and the judgment, the trial magistrate did not explain the reasons why he believed the victim and opted to convict the Appellant on the sole evidence of the minor victim. As stated above already and in accordance with section 124, the court must give reasons why it believed the evidence of the victim. The trial court failed to do this.

29. The degree of proof in cirminal cases was properly established in the classicus English case of **Woolmington vs. DPP 1935 A C 462**. Similarly, in **Bakare vs. State 1985 2NWLR,** Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465:-

> "*Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".*

30. Where there is doubt of any kind in a criminal matter, and evidence which would likely advance the case of the prosecution is not adduced, the effect of such an occurrence would go to the benefit of an accused person, in this case, the Appellant. Questions do arise as to whether there was actual penetration based on the fact that the medical examination was conducted about a month after the offence was allegedly committed. Secondly, the amount of time it took to have the Appellant arrested and charged for the offence which was said to have happened a month prior to the arrest raises questions as to the motivation for the arrest and charge.

31. From my analysis of the entire evidence in this case and in particular the evidence of the victim that he had sex with the Appellant and the circumstantial evidence that they were together in the Appellant's house, it is more probable than not that they had sexual intercourse.

32. The Court of Appeal already gave guidance on convictions based on suspicion. In this regard, it stated thus:-

> "*Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."*

33. In the circumstances, I find that the conviction on defilement as was decided by the trial court was unsafe. There was insufficient evidence to sustain a conviction.

34. I now consider whether the alternative charge of committing an indecent act with a child was disclosed. The offended section of the law is section 11. It states as follows:-

> "*11. (1) 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."*

35. The Sexual Offences Act also defines what entails an indecent act. Section 2 provides as follows:-

“*indecent act*” *means an unlawful intentional act which causes-*

(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) Exposure or display of any pornographic material to any person against his or her will.”

36. In the entire testimony of PW1, there was no indication that the Appellant touched him in any of the places outlined in the above section of the law. The only evidence is the testimony of the victim that thy had sex. Noting that I have already concluded that the offence of defilement was not proved to the required threshold, it is even harder for this Court to determine that an indecent act occurred where the evidence available does not point to it. None of the elements of indecent act come out in the victim’s testimony and as such, I also find that the alternative charge has not been proven.

ii. Whether the defense of alibi was adequately addressed by the court.

37. The Appellant raised the defense of alibi as one of the grounds of her Appeal. I have keenly perused the trial file and noted that there was nothing on the Record that she mentioned about an alibi during the material night. There were no witnesses called in her defence to prove her alibi defense. In addition, this defense was never raised at the onset of the trial much less anywhere during the trial.

38. It is trite that the defense of an alibi must be raised at the earliest opportunity by an accused person during a trial to enable the prosecution look into the same and verify whether the trial ought to proceed or be stopped because such a trial would be superflous in the event that the accused person cannot be placed at the scene of crime at the material time. The former Eastern Africa Court of Appeal case of **Republic vs. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA, 145** gave the necessary guidance on this as follows:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

39. The above precedent settles the issue of an alibi. I dismiss the same as an afterthought.The trial court could not consider something that was never raised by the Appellant to begin with.

40. In the final analysis it is my finding that the Respondent did not discharge its burden of proof to the required legal threshold. The conviction was unsafe due to insufficiency of evidence. I quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

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 present in person, Mr.Muriithi for the state and Kiprotich (Court Assistant)