REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 17 OF 2020

VINCENT OTIENO OKOTH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon J. Mitey (SRM) delivered at Winam in Senior

Principal Magistrate's Court in SOA Case No 11 of 2019 on 17th June 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (3) of the Sexual Offences Act No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was tried and convicted on the main charge by Hon J. Mitey, Senior Resident Magistrate who sentenced him to serve twenty (20) years imprisonment. The Learned Trial therefore made no finding on the alternative charge.

2. Being dissatisfied with the said Judgement, on 4th August 2020, the Petitioner lodged an Appeal herein. His Petition of Appeal was undated. He set out five (5) grounds of appeal challenging both conviction and sentence. On 11th August 2020, his Advocate filed a Supplimentary **(sic)** Petition of Appeal dated 10th August 2020. The Supplementary Petition of Appeal set out ten (10) grounds of appeal.

3. The Appellant had two (2) sets of Written Submissions on record. He filed undated Written Submissions on 14th January 2021.Subsequently, his Advocate filed Written Submissions dated 27th September 2021 on even date. The State's Written Submissions were dated 23rd March 2021 and filed on 12th July 2021.

4. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. This court consolidated the two (2) sets of Grounds of Appeal that were filed by the Appellant herein. Having looked at the said Grounds of Appeal, his Written Submissions and those of the State, this court determined that the issues that had been placed before it for determination were as follows:-

a. **Whether or not the Prosecution proved its case beyond reasonable doubt.**

b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.

8. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

9. Grounds of Appeal Nos (1), (2) and (5) of the Petition of Appeal that was filed on 4th August 2020 and Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8) and (9) of the Petition of Appeal filed on 11th August 2020 were dealt with together under this head as they were all related. However, this court looked at different issues that had also been raised therein.

A. FAIR TRIAL

10. The Appellant had initially submitted that he was not accorded a fair trial as provided under Article 25(c) and Article 50 (2) of the Constitution of Kenya, 2010. He averred that he ought to have been accorded legal representation at the State's expense. His advocate and the Respondent did not pick up this argument. However, as he had raised it in his initial Written Submissions, the court deemed it prudent to address it in the first instance.

11. Article 50(2)(h) of the Constitution of Kenya stipulates that:-

"Every accused person has the right to a fair trial, which includes the right 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."

12. As can be seen hereinabove, the Appellant herein was charged with the offence of defilement and an alternative of committing an indecent act with a child. A perusal of the proceedings does not show that he requested the Trial Court to be provided with legal representation and/or demonstrate that he was likely to suffer substantial injustice if the trial proceeded without legal representation. It was therefore not an issue that could have been considered on appeal.

13. Be that as it may, this court found it necessary to pronounce itself as the issue had been raised on appeal. It took judicial notice that provision of legal representation to accused persons at the State's expense as enshrined in the Constitution of Kenya is progressive in nature. Indeed, currently, only persons who have been charged with murder and robbery with violence have been accorded such facilities. This court was thus not persuaded that the Appellant's constitutional and fundamental rights had been breached by not having been provided any legal representation.

B. AGE

14. It was the Appellant's contention that the Learned Trial Magistrate assumed the age of TAO (hereinafter referred to as "PW 1") to have been thirteen (13) years.

15. The State pointed that PW 2 testified that the Complainant was born on 26th May 2006 and a copy of birth certificate produced as exhibit 1 showed the date of birth as 28th June 2007. Guided by the decision on the case of **Hudson Ali Mwachungo vs Republic Mombasa CA CRA NO 65 of 2015** (citation not given), it agreed with the Learned Trial Magistrate to consider PW 1's age as thirteen (13) years at the time when the offence was committed.

16. PW 1 testified that she was born on 28th June 2007 as was shown in the Certificate of Birth. No 90975 PC George Oduor (hereinafter referred to as "PW 5") tendered in evidence the said Certificate of Birth. On the other hand, when she was cross-examined, her mother PAO (hereinafter referred to as "PW 2") testified that PW 1 was born on 26th May 2006 and was thirteen (13) years at the time of trial. She stated that she may have been confused but that the date that was indicated in the Certificate of Birth was correct.

17. The defilement occurred on 18th March 2019. Going by the birth date of 2007, PW 1 was aged twelve (12) years at the material time. If one was to take the year of birth as 2006 as PW 2 had told the Trial Court, then PW 1 was aged thirteen (13) years at the time of the incident.

18. This court found and held that a difference of a year of PW 1's age from PW 1's and PW 2's testimonies was not so divergent as to have raised doubt in the mind of this court regarding PW 1's age and the Learned Trial Magistrate correctly determined PW 1's age as thirteen (13) years when the incident occurred. PW 5 produced a birth certificate belonging to PW 1. This court was thus persuaded that for all purposes and intent, PW 1 was a child and her age was proved.

C. IDENTIFICATION

19. The Appellant invoked Section 212 of the Criminal Procedure Code and argued that no evidence was produced by the Prosecution to challenge his defence that his mobile phone was taken from him when he was arrested. He placed reliance on the case of **Kenyarithi S/O Mwangi vs Republic (1955) EACA 422** where the court therein held that where exhibits had been found at an accused person's place and the accused person had denied, then the court had to establish if there was another person also present at the time and if so, such person had to be summoned for a just decision to be reached. He was emphatic that the Learned Trial Magistrate assumed that the panty that was recovered from the scene belonged to him.

20. He argued further that the Trial Learned Magistrate did not consider his defence of *alibi* and completely ignored it. He added that the

Prosecution ought to have been put to task to prove that the accused was indeed at the scene of the crime and not at his place of work on that night when the offence was allegedly committed. He cited the case of **Ricky Ganda vs The State [2012] ZAFSHC 59** where the court stated that the acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the *alibi* evidence.

21. On its part, the Respondent submitted that PW 1 identified the Appellant through recognition. It added that she knew him and recognised him using the security lights which were outside the house she was sleeping and that she also switched on the kitchen lights and recognised him as he was trying to run away. It pointed out that she testified that he left his phone and underwear behind because she was screaming and the same were found at the scene of the crime.

22. PW1 testified that on the material date, after she realised she was being defiled, she screamed, woke up and switched on the lights. It was then that she saw him trying to look for his underwear and mobile phone but because of her screaming, he ran away leaving them behind.

23. PW 3 was one of the neighbours who heeded to her screams. He testified that when he got to the scene of crime, PW1 informed him that it was the Appellant who wanted to rape her and when he asked her how she knew it was the Appellant, PW1 showed him the underwear and the mobile phone that the Appellant had left behind.

24. PW 5 also corroborated PW1's and PW3's evidence as he confirmed that the Techno phone and the navy blue and red underwear were found at the scene of the crime. The same were produced as exhibits. When PW 5 was further interrogated by court, he stated that at the time of interrogation at Kondele, the Appellant told him that the phone belonged to him.

25. Section 108 of the Evidence Act Cap 80 (Laws of Kenya) states that:-

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

26. Further, Section 109 of the Evidence Act stipulates that:-

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

27. Notably, the Appellant did not deny that the phone that was found at the scene was his. He had merely asserted that it was taken from him at the time of his arrest. To rebut the Prosecution's evidence that he left his phone at the scene of crime, he was obligated to have called a witness to corroborate his alibi that he was at River Yala Club Manyatta at the time of the incident, the burden of proof having shifted to him.

28. From the evidence that was adduced in court, it was clear that the Appellant was not in his house when neighbours came after being alerted by PW 1, his phone was found at the scene of crime and he came to his house after the neighbours had arrived to the scene of crime. Most importantly, PW 1 recognised him when she switched on the lights and saw him running away naked.

29. As they were neighbours and stayed in the same compound for over five (5) years as had been stated by PW 2, this court was convinced that PW 1 identified him through recognition as having been the perpetrator of the offence. This court came to the same conclusion with that of the Trial Court that both PW1 and the Appellant herein were not strangers to each other and that she knew the Appellant and recognized him using the kitchen light that she switched on when she woke up and the security lights which were outside the house.

30. His submissions that the Learned Trial Magistrate thus made an assumption that the innerwear allegedly recovered from the scene of crime belonged to the Appellant without the Prosecution producing sufficient evidence to prove that indeed the innerwear belonged to him was rendered moot. The underwear was not necessary to prove that he was at the scene of crime at the material time.

D. PENETRATION

31. This court noted the Appellant's submissions that there were contradictions regarding the age of the injuries PW 1 suffered from. He had pointed out that although it had been indicated in the P3 Form that the approximate age of the injuries PW 1 allegedly sustained were one (1) day old, on being cross-examined, Dr Ombok Lucy (hereinafter referred to as "PW 6") told the Trial Court that the date when the hymen was broken was not known.

32. He had added that there was a contradiction as to whether or not PW 1's panty was stained. He asserted that although PW 1 testified that there was blood in her panty and that PW 2 stated that there was a brown discharge in her panty, Esther Pendo (hereinafter referred to as "PW4") who examined PW 1 stated that there was no stain on the panty. It was his contention that PW 1 did not say where the blood stain came from and how it got to be in her panty.

33. He had further submitted that the P3 Form made no reference to a defilement contrary to the conclusion that PW 6 arrived at. It had been his contention that Dr Olwala ought to have been called to adduce in evidence the P3 Form.

34. In this regard, he had relied on the case of **Jackson Mwanzia Musembi vs Republic [2017]eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred vs Uganda, Cr Appeal No 139 of 2001 (2003) UG CA,6** and **Charles Kiplangat Ngeno vs Republic CRA No 77 of 2009** (eKLR citation not given) where the courts held that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected leading to the acquittal of an accused person.

35. He had argued that the contradictions and inconsistencies in the evidence that was adduced by the Prosecution witness were not

explained. He termed the case against him a fabrication.

36. He had invoked Section 8(1) of the Sexual Offences Act and stated that the only evidence in support of the Prosecution case on the issue of penetration by the Appellant was PW 1's testimony. He had asserted that she testified that on the material night she was sleeping with her younger sister when the incident occurred, however, the Prosecution failed to call the said sister as a witness. It was his submission that PW 1's sister was a key witness herein who would have positively identified him as the perpetrator of the offence and confirmed if she had locked the door.

37. In this regard, he had placed reliance on the case of **Bukenya vs Uganda (1972) EA 549**, where the court held that the Prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent with its case.

38. He had further argued he ought to have been subjected to a DNA test to ascertain if indeed he was the one who committed the alleged crime. He had stated that the fact that the hymen was missing was not conclusive proof of defilement as there were factors, other than defilement, that could cause the disappearance of the hymen.

39. He had also pointed out that the Trial Court had erred in having found that PW 3's evidence corroborated that of PW 1 and PW 2 yet was not at home when the alleged offence was committed and was only informed of the incident vide a phone call.

40. He had relied on the provisions of Section 124 of the Evidence Act and argued that for a court to convict on the uncorroborated evidence of the alleged victim of the sexual offence, reasons had to be recorded in the proceedings, if the court is satisfied, that the alleged victim is telling the truth. He argued that the Learned Trial Magistrate convicted him without evidence having been adduced to place him at the scene of crime. He faulted the Learned Trial Magistrate for having failed to record reasons why he believed PW 1's uncorroborated evidence as it was not explained how he would have accessed the house which was locked from inside.

41. All the Appellant's submissions though noted by the court did not assist his case as this court had determined that he had already been identified as having been the perpetrator of the offence. It was therefore not necessary to analyse the same. It was sufficient to state that PW 4 and PW 6 produced the Post Rape Care (hereinafter referred to as "PRC") and P3 reports as PExhibits (2) and (4) which confirmed that there was penetration of PW 1's vagina. PW 1's testimony was thus corroborated by scientific evidence.

42. This court agreed with the Respondent that the Prosecution proved its case against the Appellant beyond reasonable doubt and had called all crucial witnesses to prove its case and that calling PW 1's younger sister who was sleeping with PW 1 on the material date would not have added any value to the case.

43. As the Respondent correctly pointed out, the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of **George Opondo Olunga vs Republic [2016]eKLR**, which had been proved in the case herein.

44. This court found and held that the Learned Trial Magistrate came to a correct determination that the Prosecution had proved its case beyond reasonable doubt based on PW 1's evidence. Her evidence was very consistent. The Appellant's sworn evidence did not out-weigh the Prosecution case. This court was thus not persuaded that she had framed the Appellant herein.

45. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (1), (2) and (5) of the Petition of Appeal filed on 4th August 2020 and Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8) and (9) of the Petition of Appeal filed on 11th August 2020 were not merited and the same be and are hereby dismissed.

II. SENTENCE

46. Grounds of Appeal Nos (3), and (4) of the Petition of Appeal filed on 4th August 2020 and Grounds of Appeal No 10 of the Petition filed through his Advocate on 11th August 2020 were dealt with under this head as they were all related.

47. The Appellant had argued that the age of a victim of defilement case is fundamental as it forms the basis for conviction and sentencing of the accused person and therefore the Prosecution should prove the age of a victim with absolute certainty.

48. In this regard, he had relied on the case of **Kaingu Elias Kasomo vs Republic Malindi Court of Appeal in Criminal Appeal No. 504 of 2010** (eKLR citation not given) and the case of **Alfayo Gombe Okello vs Republic [2010]eKLR** where the common thread in all these cases was that age of the victim of the sexual assault under the Sexual Offences Act is a critical component as it forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement.

49. He had submitted that the Trial Magistrate assumed the age of PW 1 and consequently convicted the Appellant to twenty (20) years imprisonment despite the glaring contradiction with regard to the age of the complainant. The State on the other hand, argued that the Appellant's sentence was lawful.

50. This court noted that the Trial Court placed reliance on the case of **Hudson Ali Mwachungo vs Republic** (Supra) where it was held that when there is doubt of a victim's age, the benefit should be given to an accused person so that a lesser sentence is imposed.

51. As was seen hereinabove, according to PW 1's evidence, she was aged twelve (12) years as at the time of the incidence while according to PW 2's evidence, she was thirteen (13) years as at the time of the incident. Whichever way one looks at it, it was still defilement and the sentence that was prescribed was the same.

52. Notably, Section 8(3) of the Sexual Offences Act provides that:-

> **"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."**

53. As this court found that the Learned Trial Magistrate did not err when she convicted the Appellant, he proceeded correctly when he sentenced the Appellant to twenty (20) years imprisonment as stipulated by the law.

54. In the premises foregoing, Grounds of Appeal Nos (3), and (4) of the Petition of Appeal filed on 4th August 2020 and Grounds of Appeal No 10 of the Petition filed through his Advocate on 11th August 2020 were not merited and the same be and are hereby dismissed.

DISPOSITION

55. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 4th August 2020 and the Petition of Appeal filed through his Advocate on 11th August 2020 were not merited and the same be and are hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as it was safe to do so.

56. It is hereby directed that any period the Appellant may have spent in custody before conviction be taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

57. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY 2022

J. KAMAU

JUDGE