REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO 72 OF 2019

JOSEPH AMATABI KHAMETE.....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 Criminal Case No 536 of 2016 on 29th November 2019)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (2) 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. The Learned Trial Magistrate, Hon J. Mitey, Senior Resident Magistrate tried and convicted him on the main charge and sentenced him to life imprisonment. He did not make any finding on the alternative charge.

2. Being dissatisfied with the said Judgement, on 11th December 2019, the Petitioner lodged an Appeal herein. His Petition of Appeal was undated. He set out six (6) grounds of appeal challenging conviction. On 5th October 2021, he filed undated Amended Grounds of Appeal in which he relied on ten (10) grounds of appeal.

3. His undated Written Submissions were filed on 5th October 2021 while those of the State were dated 1st November 2021 and filed on 9th November 2021.

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

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is 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 case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal, his Written Submissions and those of the State, it appeared to this court 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; and

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

A. FAIR TRIAL

9. Grounds of Appeal No (2) of the undated Amended Grounds of Appeal filed on 5th October 2021 was dealt with under this head.

10. The Appellant submitted that he ought to have been accorded legal representation. He argued that since the offence was serious and carried a mandatory life sentence, the Trial Court ought to have promptly informed him of his right to a representation by an advocate since substantial injustice was likely to result at the end of trial.

11. In this regard, he placed reliance on the case of **Pett vs Greyhound Racing Association (1968) 2 ALL ER 545 at page 49** where the Court held that not every man has the ability to defend himself on his own and that for justice to be done, he ought to have the help of someone to speak for him and that there was no one better to do this than a lawyer who had been trained to do so. The Respondent did not submit on this issue.

12. Article 50(2)(h) of the Constitution of Kenya,2010 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."**

13. 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.

14. 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.

15. In the premises foregoing, Grounds of Appeal No (2) of the undated Amended Grounds of Appeal filed on 5th October 2021 was not merited and the same be and is hereby dismissed.

A. DEFECTIVE CHARGE SHEET

16. Grounds of Appeal No (8) of the undated Amended Grounds of Appeal filed on 5th October 2021 was dealt with under this head.

17. The Appellant submitted that the charge sheet was incurably defective and that it was not amended under Section 214 of the Criminal Procedure Code Cap 75 (Laws of Kenya). He argued that the Charge Sheet indicated the material date of the alleged incident as having been on 3rd July 2016 while Dr Kevin Ochieng (hereinafter referred to as "PW 4") a medical doctor at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) and the Post Rape Care (PRC) Form indicated the same to have been on 2nd July 2016.

18. He was emphatic that the inconsistencies in dates and time made the charge sheet defective. He placed reliance on the case of **Yongo vs Republic Criminal Appeal No 1 of 1983** where the court gave the particulars of a defective charge under Section 214 (1) of the Criminal Procedure Code where it was held that a charge sheet is defective where it does not accord with the evidence that has been adduced during trial and if it gives mis-description of the alleged offence and that the court has power to order an alteration of the charge sheet and call upon the accused person to plead to the charge afresh. The Respondent did not also submit on this issue.

19. This court perused the record and found that the Charge Sheet indicated the date of the offence as 3rd July 2016 while PW 4 testified that it was on 2nd July 2016. The PRC Form also indicateed this date at 2nd July 2016.

The test applicable by an appellate court when determining the existence of a defective charge and its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of **JMA vs Republic (2009) KLR 671**, it was held that it was not in all cases in which a defect in the charge that was detected on appeal would render a conviction invalid because that Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant was not discernible.

20. This court was not satisfied that the discrepancy between the date in the Charge Sheet and PW 4's evidence prejudiced the Appellant or cause him miscarriage of justice for the reason that both the Charge Sheet and the P3 Form had indicated the date of the alleged incident as 3rd July 2016 which was the correct date of the incident. In any event, errors on dates in a charge sheet could not make it defective and/or render the conviction a nullity.

21. Indeed, this defect is therefore curable under Section 382 of the Criminal Procedure Code which provides that:-

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction**

shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice."

22. The above statutory curative position is also replicated in Section 214 (2) of Criminal Procedure Code which provides that:

"Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

23. This court was therefore of the considered view that the discrepancy on the dates as contained in the charge sheet and as contained in the evidence tendered by PW 4 did not occasion a miscarriage of justice. As he had not raised the issue of why he had been arrested in the Trial Court, this could not consider the same on appeal. Suffice it to state that the Charge Sheet contained all the necessary information to inform him of the offence he had been charged with.

24. In the premises foregoing, Ground of Appeal No (8) of the undated Amended Grounds of Appeal filed on 5th October 2021 was not merited and the same be and is hereby dismissed.

B. AGE

25. It was the Appellant's contention that the age of the Complainant, BAO, (hereinafter referred to as "PW 1") was in doubt. He explained that the evidence tendered by the Prosecution witnesses was inconsistent as some indicated that she was six (6) years old while others testified that she was almost seven (7) years old. He was categorical that there was no age assessment report, no baptism card or birth certificate that was produced in court to prove her age.

26. He placed reliance on several cases among them the case of **Abdisaran Abdi vs Republic Criminal Appeal No 82 of 2008** (eKLR citation not given) where it was held that the failure to adduce age assessment evidence in respect of the alleged defilement victim amounted to inadequate evidence necessary to sustain a conviction.

27. The Respondent submitted that the ingredient of PW 1's age was not clear. It contended that PW 1's teacher BRO (hereinafter referred to as "PW 2"), testified that PW 1 was aged six (6) years as that is the age of pupils in her class and that PW 1's grandmother, JAO (hereinafter referred to as "PW 5") informed her that PW 1 was six (6) years old. It added that PW 6 (sic) had also testified that PW 1's birth certificate had not been processed as at the time she was testifying.

28. It was its contention that no document was tendered in court to show PW 1's actual age. It agreed with the Appellant's submissions that her age was never proved. It observed that although evidence showed that the Appellant defiled her, lack of proof of her age was prejudicial to the Appellant's case. In the foregoing, it submitted that the Appellant's appeal was merited.

29. A perusal of the proceedings showed that PW 1 could not recall her age. PW 2 told the Trial Court that PW 1 was aged six (6) years old as she had been informed by PW 5. PW 5 testified that PW 1 was seven (7) years old. The PRC and P3 Form that were produced as P Exhibit 2 and 3 respectively indicated that PW 1 was seven (7) years old.

30. Notably, no birth certificate or baptismal card was produced in court to prove PW 1' s age. No age assessment was done. If the same was done, the Prosecution did not tender in evidence an age assessment report. However, this court was not persuaded by both the Appellant and the Respondent's submissions that PW 1's age had not been proved to the required standard.

31. Indeed, the fact that there was no baptismal card or Certificate of Birth did not mean that PW 1's age was not proven. In the absence of documentary evidence, observation and common sense can assist the court in determining a minor's age. In the case of **Joseph Kieti Seet vs Republic [2014] eKLR**, the court therein held that a minor's age could be proved by common sense. This is a position that this court also held.

32. In the case of **Evans Wamalwa Simiyu vs Republic [2019] eKLR**, the court therein accepted the doctor's indication of the minor's approximate age in the P3 Form to have been the apparent age of that minor. This court fully associated itself with the said holding.

33. Notably, PW 5 testified that PW 1 was aged seven (7) years of age and having been her grandmother, she was best placed to know PW 1's age. Dr Steve Ochieng Onyango,a doctor at JOOTRH (hereinafter referred to as "PW 3") tendered in evidence a P3 Form that showed that PW 1 was aged seven (7) years at the material time. Further, PW 4 who tendered in evidence the PRC Form testified that PW 1 was aged seven (7) years. He did not indicate PW 1's age in the PRC Form but opined that the child could not remember the exact date when she was defiled as she was a minor.

34. Going further, the Trial Court conducted a *voire dire* examination of PW 1 where he observed that PW 1 was of tender age and understood the meaning of telling the truth but that she was too young to understand the meaning of oath and thus directed that she adduce unsworn evidence.

35. As this court did not have the benefit of seeing PW 1, it was satisfied that she was a child of tender years as she could not remember the exact date of the incident and she could not understand the meaning of an oath. Common sense leads this court to conclude that the Trial Court did not err when it determined that PW 1 was below eleven (11) years of age at the material time of the incident.

36. This court came to the firm conclusion that the discrepancy in PW 2's evidence that PW 1 was six (6) years of age and PW 3's PW 4's

and PW 5's evidence that PW 1 was seven (7) years old was so inconsequential not to have amounted to a material contradiction. This is because the sentence of children below eleven (11) is the same. This court could have agreed with the Appellant and the Respondent that PW 1's age was not proven had she physically appeared to have been so close to the age bracket of twelve (12) to fifteen (15) where the penalty for defilement is different and would have downed its tools forthwith.

C. IDENTIFICATION

37. The Appellant argued that when he was arrested, he was not informed of the reason for his arrest. He contended that that contravened Article 49 (1) (a) (i) of the Constitution. He placed reliance on the cases of **Christine vs Leachinsky** (citation not given), **Byrne vs Kinematograph Renters Society Ltd (1985) 2 ALL ER 579** and **Ndenge vs Republic (1985) KLR 534** where the common thread in the aforesaid cases was that no rule of natural justice should be sacrificed.

38. He argued further that there was no sufficient evidence that could be based on, to convict him. He relied on the case of **Kiarie vs Republic (1984) KLR 739** where the court held that a witness may be honest but be mistaken. He also placed reliance on the case of **R vs Turnbull (1976) 3 ALL ER 549** where the court held that recognition may be more reliable than the recognition of a stranger **(sic)** but that even when a witness had purported to recognise someone he knew, the jury was reminded that mistakes in recognition of close relatives and friends did occur and hence the possibility of a mistaken identity. He was categorical PW 1's mention of his name was an afterthought after consultation with others.

39. On its part, the Respondent submitted that PW 1 pointed at the Appellant in court as the person who had sex with her and therefore the Appellant was therefore positively identified as the perpetrator. It pointed out that she testified that she identified the Appellant as the person who sold ice cream. This implied that he was not a stranger to her and she could therefore positively identify him. It was emphatic that her evidence was corroborated by the other witnesses who also identified him as an ice cream vendor.

40. A perusal of the proceedings pointed to the Appellant as the person who defiled PW 1. Her evidence was that she was playing outside when he grabbed her and took her at the back of a toilet where he defiled her. She had testified that he had defiled her previously. On her part, PW 2 told the Trial Court that she saw PW 1 walking in an abnormal manner and when she enquired from her what had happened, PW told her that "Ja- Ice", the Appellant herein had defiled her. She asked her to inform her immediately she saw him. Later that day, PW 1 went to her house and told her that the Appellant had come. They informed the police who then arrested him.

41. 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."**

42. 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."**

43. Notably, the Appellant did not deny that he sold ice cream at Nyamasaria. He was obligated to call a witness to corroborate his *alibi* defence or produce bus receipts to prove that he was at Kapsabet for music festivals at the time of the incident so as to rebut the Prosecution's evidence, the burden of proof having shifted to him. Having failed to call such a witness, he failed to prove his *alibi* evidence and hence failed to outweigh the Prosecution's evidence on his recognition. His submissions that PW 1's mention of his name was an afterthought after consultation was neither here nor there and had been rendered moot.

D. PENETRATION

44. The Appellant submitted that penetration was not properly proven as the Prosecution's case was based on speculation and conjecture. He argued that the hymen could also be broken through vigorous physical training, riding of bicycle, swimming and house riding (sic). He stated that PW 1 was a school going child and her hymen may have broken through physical training.

45. He invoked Section 122 A (1) (sic) (Act not provided) and Section 36 (1) of the Sexual Offences Act No 3 of 2006 in arguing that he ought to have been subjected to a DNA sampling procedure to establish if there was any nexus between him and the alleged offence.

46. He placed reliance on the case of **Ndungu Kimani vs Republic (1979) KLR 282** where the court held that a witness in a criminal case should not raise suspicion about his trustworthiness or say something which would indicate that he was a person of doubtful integrity.

47. On its part, the State submitted that penetration was proved by medical evidence and corroborated by PW 1's evidence as was highlighted in **Charles Wamukoya vs Republic Criminal Appeal No 72 of 2013** (eKLR citation and reasoning not given). It was its contention that PW 3 and PW 4 examined PW 1 and filled her P3 and PRC Form which revealed that her hymen was broken which was unusual for a girl her age and hence proof that she was defiled.

48. Although this court noted all the Appellant's submissions on penetration, the same did not assist his case for the reason that this court had already determined that he was identified as having been the perpetrator of the offence herein rendering further analysis of on this issue somewhat immaterial. There could have been no clearer proof of guilt than the Appellant's contention during his mitigation that he would never repeat the offence again.

49. Be that as it may, this court nonetheless considered PW 1's, PW 2's and PW 5's evidence and further PW 3's and PW 4's oral and documentary evidence which confirmed that there was penetration of PW 1's vagina. PW 3 attributed her sexual assault injury to a blunt weapon. He was emphatic that it was not necessary that an injury that had penetrated a child's vagina would have injuries as the Appellant had suggested. PW 1's testimony was thus corroborated by scientific evidence.

50. 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**.

51. After carefully analysing the evidence that was adduced by the Prosecution, this court came to the firm conclusion that PW 1's age and her penetration was proven and that she positively identified the Appellant as the person who defiled PW 1. It was this court's considered view that the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt.

52. Contrary to the Appellant's assertions, the Trial Court gave its reasoning for its determination as envisaged in Section 169(1) of the Criminal Procedure Code.

B. SENTENCE

53. Ground of Appeal No (3) in the Petition of Appeal that was filed on 11th December 2019 was dealt with under this head.

54. However, both the Appellant and the Respondent did not submit on this issue. That notwithstanding, Section 8(2) of the Sexual Offences Act provides that:-

> **"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."**

55. The Trial Court did not therefore err when it convicted the Appellant to life imprisonment as that was the sentence that was stipulated by the law.

DISPOSITION

56. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 11th December 2019 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as it was safe to do so.

57. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH, 2022

J. KAMAU

JUDGE