REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO 76 OF 2019

STEPHEN OMONDI ONYANGO……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an Appeal from the Judgment of Hon H. M. Nyaberi (SPM) delivered at Winam in Principal Magistrate's Court in SOA Case No 24 of 2018 on 3rd December 2019)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006. 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 H. M. Nyaberi, Senior Principal Magistrate who sentenced him to life imprisonment. The Learned Trial Magistrate therefore made no finding on the alternative charge.

2. Being dissatisfied with the said Judgement, on 23rd December 2019, the Appellant lodged an Appeal herein. His Petition of Appeal was dated 20th December 2019. He set out eight (8) grounds of appeal.

3. His undated Written Submissions which incorporated ten (10) Supplementary Grounds of Appeal were filed on 14th January 2021. The Respondent's Written Submissions were dated and filed on 20th July 2020.

4. The Judgment herein is based on the said Written Submissions which parties relied upon 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 testify and thus make due allowance in that respect.

7. Having looked at the Appellant's two (2) sets of Grounds of Appeal, his Written Submissions and those of the Respondent, 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.

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), (3), (4), (5), (6) and (7) of the Petition of Appeal dated 20th December 2019 and filed on 23rd December 2019 and Supplementary Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (8), (9) and (10) 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 under the heads shown hereinabove.

A. DEFECTIVE CHARGE SHEET

10. The Appellant argued that his right to fair trial under Article 25 (c) and 50 (2) of the Constitution of Kenya, 2010 was violated on the basis that the Trial Court did not apply Section 214 (sic) during trial. He submitted that the Prosecution failed to prove its case beyond reasonable doubt to warrant a conviction with a defective charge sheet.

11. He was categorical that the main count was defective and that the police rubber stamp was missing on the said Charge Sheet. He added that it was trite law that a charge sheet must have an official rubber stamp and the signature of the officer but that the Charge Sheet had no rubber stamp rendering the same defective and not good in law. He contended that he had gone through the trial with a non-existent charge sheet that could not be cured. He blamed the Prosecution for having failed to scrutinise the mistakes on the Charge Sheet which would have warranted an amendment or alteration before closing its case.

12. He placed reliance on the case of **Jon Cardon Wagner vs Republic Cr Appeal No 404 of 2007** (eKLR citation not given) where the court held that a charge sheet should be very clear on the offence charged upon so that an accused person knows what offence he is facing as he is supposed to defend himself.

13. He also cited the case of **Madline Akoth Baraza & Another vs Republic [2007] eKLR** where the court held that violation of a constitution will normally result in an acquittal irrespective of the nature of the evidence which may have been adduced to support the charge. He reiterated that the charge sheet was defective under Section 214(1) of the Criminal Procedure Code. The Respondent did not submit on this issue.

14. This court perused the Charge Sheet herein in light of Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya). The said Section 134 of the Criminal Procedure Code requires inter alia that:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"**

15. Notably, the original Charge Sheet had only mentioned the offence of defilement as per Section 8(1) of the Sexual Offences Act No 3 of 2006. The same bore the official stamp of the Office of the Director of Public Prosecutions Winam and the official stamp of OCS Kondele Police Station. Subsequently, the Charge Sheet was amended and the words "Section (2) of the Sexual Offences Act No 3 of 2006" added therein. This court noted that in the amendment, the Act had been indicated as Sexual Offences Act 'No 2' of 2006. The aforesaid amended Charge Sheet did not, however, bear any stamp but bore a signature.

16. The court perused the Charge Sheet and noted that the same had complied with the provisions of Section 134 of the Criminal Procedure Code. The offence which the Appellant was charged with was clear and unambiguous. There was no requirement that the Charge Sheet had to bear the signature of an Officer Commanding Station (OCS) and/or rubber stamp of a police station.

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

18. Applying the aforesaid principle, this court was satisfied in the instant case that the omissions and discrepancies which did not prejudice the Appellant herein occasion him miscarriage of justice, render the Charge Sheet defective or the conviction, a nullity.

19. In any event, the omissions and/or defect were 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."**

20. The above statutory curative position is also replicated in Section 214 (2) of the 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."**

21. This court was therefore of the considered view that the omissions of the police station stamp in the charge sheet did not occasion a miscarriage of justice and did not require any amendment of the Charge Sheet. The Learned Trial Magistrate was not obligated to invoke

Section 214 (1) of the Criminal Procedure Code and consequently, the Appellant's right to fair trial was not infringed upon for the reason that the Charge sheet was not fatally and incurably defective.

B. AGE

22. The Appellant did not submit on the age of the Complainant (hereinafter referred to as "PW 1"). On the other hand, the Respondent pointed that PW 1's mother, CA (hereinafter referred to as "PW 2") produced PW 1's Certificate of Birth which showed that PW 1 was born on 4th January 2009. As the defilement occurred on 15th June 2018, she was therefore aged nine (9) years at the material time.

23. This court was thus persuaded that PW 1's age had been proven and that for all purposes and intent, she was a child.

C. IDENTIFICATION

24. The Appellant submitted that the Prosecution failed to call independent witnesses, among them plot members and/or neighbours such as David Omondi and Bernard Ogola who he argued were vital witnesses.

25. On its part, the Respondent submitted that PW 1 identified the Appellant and explained that it was him who defiled her. It added that PW 1 knew him by name and nickname and they had been neighbours for three (3) months. It was emphatic that the incident occurred in broad daylight.

26. It contended further that PW 2 testified that she was called by the aforementioned David Omondi to return home and that is when she found out that PW 1 had been defiled by "Jaringa" which was the nickname used by neighbours to refer to the Appellant herein who was their neighbour.

27. It added that Dan Onyango Oketch (hereinafter referred to as "PW 4") was with the said David Omondi when he heard PW 1 crying from the Appellant's house and that when they went to see what was happening, the Appellant came out running. Upon entering the house, they found PW 1 on the bed naked. It added that PW 1 then told the two that it was "Jaringa" who had defiled her.

28. The Respondent summarised the evidence that was adduced by the Prosecution witnesses. It was therefore not necessary to set it out again. Notably, PW 1 positively identified the Appellant as the person who defiled her on 15th June 2018 at 10.00am by pointing at him. The first sentence of her testimony during trial was **"I recall on 15/6/2018 at 10 am, this man (pointing at the accused) called me and told me to go and buy mandazi for him."**

29. PW 4 also identified the Appellant as the man he saw running out of the house where he and David Omondi went after hearing someone crying next to where they lived. The house was next to where they lived. He also testified that later on that day, he was informed by a neighbour that the house belonged to the Appellant. His evidence was that the incident occurred on the first day he came to Kisumu.

30. The incident occurred during the day when the conditions were favourable for identification of an accused person. When she was cross examined, PW 1 maintained that she knew the Appellant well and that she told PW 2 that he defiled her on the same day it happened. PW 1, PW 2 and the Appellant had also been neighbours for about three (3) months and were therefore not strangers. As PW 1 interacted with the Appellant at the time he was sending her to buy mandazi for him and when he defiled her, this court was convinced that PW 1 identified him through recognition as having been the perpetrator of the offence.

31. Section 108 of the Evidence Act Cap 80 (Laws of Kenya) provides 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."**

32. 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."**

33. Notably, to rebut the Prosecution's evidence, the Appellant was obligated to have called a witness to corroborate his *alibi* defence that he was at Dubai Complex Nyamasaria at the time of the incident, the burden of proof having shifted to him.

34. The Appellant's submissions that the Prosecution ought to have called other independent witnesses to confirm his identification were therefore rendered moot.

D. PENETRATION

35. The Appellant submitted that the P3 form that was prepared by Collins Omondi Odongo (hereinafter referred to as "PW 3"), a Medical Clinical Officer based at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH), did not bear his job reference number and further it did not bear the stamp of the hospital which stated was normally put in P3 Form and Post Rape Care (PRC) Form. He therefore questioned the authenticity of the documents and submitted that the same having not been proven, they were unreliable and unworthy for trial.

36. He contended that the doctor's analysis of the evidence on record showed that the Prosecution case was fabricated in the material particulars and lacked probative value. He was categorical that there was no medical evidence which connected him to the alleged offence. He added that PW 3 failed to bring light to this court whether the bruises were fresh or they were old bruises. He argued that a minor would normally have a tight vaginal-genitalia and therefore would not have been examined as being normal after penetration.

37. He contended further that if PW 1 had not taken a bath before the medical examination, then the bruises would have been found to have been fresh. He blamed the Prosecution for having failed to take her clothing to the government chemist for laboratory testing.

38. It was his further averment that although PW 1 was treated for STI, he was not tested for the same so as to connect him to the alleged offence. He added that PW 6 also testified that PW 1 was examined days after the alleged penetration and hence, there was nothing watertight that could have proven the defilement.

39. He pointed out that although the incident took place on 15th June 2018 at 10.00am, the P3 form indicated that it was filled at 7.32am which was before the incident took place. He submitted that the Prosecution evidence was full of contradictions, that the investigations were poorly conducted and that the Prosecution relied on framed up evidence to incriminate him.

40. On its part, the Respondent submitted that PW 1 testified that the Appellant inserted his penis into her vagina. It added that PW 3 examined PW 1 a few hours after the incident and formed an opinion that PW 1 had been penetrated. It submitted that the PRC Form and P3 Form which were produced in court as P Exhibit 3 and 2 proved that PW 1 was defiled.

41. Although this court noted the Appellant's submissions, it found that the same did not assist his case for the reason that he had already been identified as having been the perpetrator of the offence. His sworn evidence of *alibi* did not therefore out-weigh the Prosecution case.

42. It was the considered opinion of this court that his argument that the P3 Form did not bear the job reference of the health officer who prepared it and the hospital stamp was thus immaterial. This documentary evidence merely corroborated PW 1's, PW 2's and PW 4's evidence that the Appellant had defiled PW 1. Indeed, PW 2 had observed PW 1 having difficulties in walking and PW 1 told her that the Appellant had defiled her and without the documentary evidence, nothing detracted from the fact that the Appellant defiled her on the material date and time.

43. Having said so, this court nonetheless found and held that quite apart from the Appellant's identification by PW 1 and PW 4, the P3 Form and PRC Form that were adduced in evidence by PW 3 and by Dr Ombok Lucy (hereinafter referred to as "PW 6") also based at JOOTRH scientifically corroborated PW 1's, PW 2's and PW 4's evidence that there was penetration of PW 1's vagina.

44. 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**. This court found and held that the Learned Trial Magistrate came to a correct determination that the Prosecution had proved its case against the Appellant beyond reasonable doubt as it had proven that PW 1 was a child, she was defiled and she identified the Appellant as the person who defiled her.

45. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the Petition of Appeal dated 20th December 2019 and filed on 23rd December 2019 and Supplementary Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (8), (9) and (10) were not merited and the same be and are hereby dismissed.

II. SENTENCE

46. Ground of Appeal No (8) of the Petition of Appeal dated 20th December 2019 and filed on 23rd December 2019 and Supplementary Ground of Appeal No (7) were dealt with under this head as they were all related.

47. The Appellant had urged this court to set aside his sentence while the Respondent argued that the sentence ought to be upheld.

48. Notably, PW 1 was aged nine (9) years at the material time. 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."**

49. The Learned Trial Magistrate did not therefore err when he sentenced the Appellant to life imprisonment as that was the sentence that was stipulated by the law.

50. In the premises foregoing, Ground of Appeal No (8) of the Petition of Appeal dated 20th December 2019 and filed on 23rd December 2019 and Supplementary Ground of Appeal No (7) were not merited and the same be and are hereby dismissed.

DISPOSITION

51. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 23rd December 2019 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as it was safe to do so.

52. It is so ordered.

DATED and **DELIVERED** at **KISUMU** this **30th** day of **March 2022**

J. KAMAU

JUDGE