REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO 20 OF 2019

CALEB OKUMU OUNGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon J. N. Wambilyanga (PM)

delivered at Kisumu Chief Magistrate's Court in SOA Case No 10 of 2018

on 30th April 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. He was tried and convicted on the main charge by Hon J. N. Wambilyanga, Principal Magistrate who sentenced him to serve life imprisonment. The Learned Trial Magistrate therefore made no finding on the alternative charge.

2. Being dissatisfied with the said Judgement, on 13th May 2019, the Petitioner lodged the Appeal herein. His Petition of Appeal was undated. He relied on four (4) grounds of appeal.

3. The Appellant's undated Written Submissions were filed on 3rd November 2021 while those of the State were dated 21st September 2021 and filed on 1st October 2021.

4. This Judgment 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 and thus make due allowance in that respect.

7. Having looked at the said Grounds of Appeal, the respective parties' Written Submissions, 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) and (4) 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's first ground of appeal was that the Trial Court failed to comply with Article 50(2)(j) of the Constitution of Kenya, 2010 hence jeopardising his defense preparation. He did not submit on it. However, the court deemed it prudent to address it in the first instance for completeness of record.

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

> **"Every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."**

12. Once he was charged, the Appellant was entitled to be informed of all the evidence the Prosecution intended to rely upon during trial. Although there is no indication that he was provided with the said evidence, there was nothing in the proceedings that showed that he requested the Trial Court to be provided with the evidence the prosecution intended to rely on in advance of trial the same was denied.

13. There was also nothing to demonstrate that he was likely to suffer substantial injustice if the trial proceeded without the prosecution providing the same as he cross-examined all the witnesses and relied on the said documents while arguing the Appeal herein. In the absence of evidence that the Appellant was prejudiced in the manner the trial in the lower court was conducted, this court found and held that Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

B. AGE

14. It was the Appellant's contention that the age of the Complainant (hereinafter referred to as "PW 1") was not proved at all, by production of any document, as provided for under the Sexual Offences Act. He was categorical that proof of age was important as it determines the punishment in sexual offences cases. In this regard, he relied on the case of **Hillary Nyongesa vs Republic** (eKLR citation not provided). He argued that none of the witnesses elected to prove the complainant's age in regard to the provisions of section 191(1) of the Children's Act (sic).

15. The Respondent pointed out that PW 1's father, SOM (hereinafter referred to as "PW 2"), testified that PW 1 was four and a half (4 ½) years old. It submitted further that PW 1's mother, CAO (hereinafter referred to as "PW 3") corroborated PW 2's testimony and produced an original Birth Certificate as PExhibit 2 which showed that PW 1 was born on 7th May 2014. It added that Collins Omondi (hereinafter referred to as "PW 5" also confirmed in the Post Rape Care (hereinafter referred to as "PRC") form that PW 1 was four and a half (4 ½)years at the material time.

16. The defilement occurred on 3rd August 2018. Going by the birth date of 7th May 2014, PW 1 was aged four (4) years at the material time. This court was thus persuaded that for all purposes and intent, PW 1 was a child and that her age was proved.

C. IDENTIFICATION

17. The Appellant argued that he was not identified by any other independent witness.

18. On its part, the Respondent submitted that PW 1 testified that a person who told her he was uncle bought her chips and took her to his house where he slept on her. It added that PW1 further testified that the following morning, the said uncle made her tea, potatoes and bread and that she took tea. It averred that PW 1 pointed to the Appellant and said he was the "uncle" who had slept on her.

19. It explained that according to PW 2, PW 1 went missing on 3rd August 2018 and on the following day, he went searching for her. He found her standing at Kowino area and that when he went to her, she told him that it was Caleb. who was washing clothes, who had brought her there. It contended that PW 1 also told PW 2 that it was the Appellant who slept on her. It was therefore its averment that PW 1 positively identified the Appellant as the perpetrator.

20. The Respondent had summarised the Prosecution's case in its Written Submissions. A perusal of the proceedings showed that PW 1 informed PW 2 that the Appellant, who was washing clothes, was the person who had defiled her and that she had selpt in his house on the material night. PW 2 was emphatic that PW 1 pointed at the Appellant as her perpetrator when he found her. In his sworn evidence, the Appellant admitted that he spoke to PW 2 regarding a lost child who was found outside his plot. He added that PW 2 took the child and left. During trial, PW 1 pointed at the Appellant as the person who slept on her.

21. PW 1 went missing on 3rd August 2018 at 6.30 pm. She was found the next day at about 9.30 am. During this time, she interacted with the Appellant as he even cooked for her breakfast. This was ample time for her to have been able to recognise the Appellant as her perpetrator shortly thereafter.

22. Although it was PW 1's word against that of the Appellant, once she identified the Appellant as the perpetrator, the burden of proof having shifted to him to rebut her evidence. He was obligated to have called a witness to prove that she did not sleep in his house on the material date. He failed to do so.

23. Notably, 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."**

24. 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."**

25. Having analysed evidence that was adduced during trial, this court came to the firm conclusion that having failed to call a witness to verify his *alibi*, his defence did not therefore outweigh Prosecution's evidence of how he was identified by PW 1 at the scene of the crime at the material time. His submissions that PW 2 testified that PW 1's brother informed him that PW 1 was taken away by one David Odhiambo was neither here or there thus rendered moot.

26. This court was satisfied that the Appellant was positively identified by PW 1 and PW 2 during trial in court and identification was by recognition. The Trial Court did not therefore err when it determined that PW 1 positively identified the Appellant as her perpetrator.

D. PENETRATION

27. The Appellant submitted that the Prosecution evidence on penetration was inconclusive as it did not support the allegations. He contended that the said evidence did not show that the hymen was freshly broken as the outer genitalia was found to be normal. He added that there were no obvious injuries meted on both the outer and internal genitalia. He argued that no spermatozoa was noted and no blood was sampled.

28. On its part, the Respondent argued that penetration was proved by medical evidence and corroborated by PW 1's evidence as was highlighted in the case of **Charles Wamukoya vs Republic Criminal Appeal No 72 of 2012** (eKLR citation not provided).

29. It averred that Dr Peter Odhiambo (hereinafter referred to as "PW 4") examined PW 1 and filled the Post Rape Care (PRC) Form and P3 Form at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOORTH) in Kisumu where he had worked as a doctor for three (3) years. It was its contention that the medical evidence revealed that PW 1 had injuries on the vagina, the hymen was broken, there were lacerations on the vagina and presence of white discharge which proved that PW 1 had been defiled.

30. Although this court noted the Appellant's submissions regarding the issue of penetration, it found that not much value would be added if it analysed the same as he had been identified as having been the perpetrator of the offence herein. Having said so, this court nonetheless looked at the evidence of PW 4 and Collins Omondi, a Clinician at Moi Teaching and Referral Hospital (hereinafter referred to as "PW 5") who produced the P3 report and PRC form as P Exhibits (1) and (2) which showed that there had been penetration of PW 1's vagina. PW 1's testimony was thus corroborated by scientific evidence.

31. 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.** This court was satisfied that the Prosecution had proved beyond reasonable doubt that PW 1 was a child, she was defiled and the Appellant was identified as the perpetrator of the offence and that the Trial Court had come to a correct determination of convicting him of the said offence.

32. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. SENTENCE

33. Notably, the Appellant did not appeal on sentence, however, he submitted on the same and this court found it prudent to determine the same.

34. The Appellant had argued that the issue of constitutionality of the mandatory nature of the sentence was decried by the Supreme Court and regarded as harsh, unjust and thus deprives the court of its legitimate jurisdiction to exercise discretion and hence supported by the Kenya Sentencing Policy Guidelines.

35. He urged the court to consider Section 333(2) of the Criminal Procedure Code while sentencing him and to treat him as a first offender who came into conflict with the law for the very first time and thus remorseful to the parties concerned.

36. The State on the other hand, submitted that the sentence was lawful. Notably, 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."**

37. As the Appellant's sentence was indeterminate, Section 333(2) of the Criminal Procedure Code that mandates courts to take the period a person has spent in custody during trial into account when computing his sentence was inapplicable in the circumstances of the case herein.

DISPOSITION

38. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 13th May 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.

39. It is so ordered.

DATED and **DELIVERED** at **KISUMU** this **29th** day of **March 2022**

J. KAMAU

JUDGE

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39. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF MARCH 2022

J. KAMAU

JUDGE