REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 28 OF 2019

MOHAMED ABDUL............APPELLANT

VERSUS

REPUBLIC.........................RESPONDENT

JUDGMENT

1. Mohamed Abdul demurs a conviction and sentence against him on four broad grounds. That the charge sheet was defective, the evidence contradictory, no identification parade was conducted and that his defence was rejected in violation of section 169 of the Criminal Procedure Code.

2. The conviction was in respect to a charge of defilement contrary to section 8(1) (4) as read with section 8(3) of the Sexual Offences Act No. 2 of 2006. The particulars were that on the night of 26th and 27th June 2017 at [particulars witheld] village in Lugari Sub-county within Kakamega County he intentionally caused his penis to penetrate the anus of DK a boy child aged 16 years.

3. The sentence imposed was a prison term of 15 years.

4. The prosecution case which comprised of the evidence of four witnesses is easy to sketch. DK was born on 31st May 2001 (See Certificate of Birth P. Exhibit 3) and was just about 2 months in excess of 16 years of age on the date the sexual assault is said to have happened.

5. The evidence of the child was that on that night, at about 7.00pm, he was confronted by 2 people one of whom hit him on the head. He passed out and was to later to find himself in a mud walled house. In the house was a man he had seen earlier in the day at about 3.00pm. That in the course of the 10 hours he was held under hostage in the house, the man defiled him 4 times by forcefully having anal sex with him.

6. At about 5.00 a.m, he was able to escape and through guidance of a school child he was able to make his way home. There, he told his parents, who included his father JNT (PW 2), what had befallen him. In his father's company, PW1 reported the matter to Lumakanda Police Station and thereafter proceeded to Lumakanda Sub-county Hospital for treatment.

7. At the hospital, Chelule Maiyo Samuel (PW 3), a clinician, attended to him and was later to fill a Police Form 3 (P. Exhibit 1). This is the same officer who, on a later date, also examined the Appellant who was brought there under the escort of police.

8. Later, on 27th June 2017, PW 1 led his parents and police officers, who included Patrick Oluoch (PW4) to a house which he pointed out to be where he had been defiled. This was at about 10 p.m. In the house was a man. PW1 pointed him out to be the offender and he was arrested. The person arrested was the Appellant.

9. In a short unsworn testimony, the Appellant stated that he was a manager of Ufamisi Kipkaren River Hotel. That on the date of his arrest, he was in his house with his wife and children. On hearing a knock on the door, his wife opened and he was arrested by police officers and was later charged with the offences he faced at trial amongst which was the offence in which he was convicted. He denied the charges and that he was never given a P3 Form.

10. In a Judgment dated 24th January 2019, the Trial Magistrate found there was sufficient evidence that the child had been defiled as PW4 found the victim to have bruises and a tear on his anal opening. Further, that the victim had positively identified the Appellant as the person who defiled him.

11. This is a first appeal and the role of the Court is well settled in Okeno vs Republic [1972]EA 32;

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424."

12. The Appellant thinks that he was convicted on a defective charge. It being common ground that the victim was slightly older than 16 years the charge is said to be flawed for citing Section 8(3) which reads:-

> "(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."

13. It is true that the charge as drafted is not without difficulty, it reads:-

> "Defilement Contrary to Section 8(1) (4) as read with Section 8(3) of the Sexual Affences Act No. 2 of 2006."

Never mind the misspelling of the word "offences", the more substantial difficulty is that section 8(3) was cited yet that provides the punishment when the victim is a child between twelve and fifteen years.

14. That said, the flaw in the charge may not be as grave as the Appellant would have the Court to hold because other than section 8(1), subsection 4 of the section is also included in the charge. Subsection 4 which is the correct penalty provision when the victim is between 16 and 17 years reads:-

> "(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."

15. For that reason, I am unable to hold that the charge is fatally defective for including a subsection which was inapplicable.

16. The other criticism taken up against the charge is that the word "unlawful" is omitted. To my mind the inclusion of the word "unlawful" is unnecessary and the words of subsection (1) of section 8 are clear:-

> "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Penetration is defined in section 2 to mean:-

> "The partial or complete insertion of the genital organs of a person into the genital organs of another person."

Logically then, any penetration of a child is unlawful and it would be superfluous and an overkill to include the word unlawful in the charge.

17. Though in truth a matter for evidence, the Appellant further argues that the charge sheet is defective because it cites OB No. 2/28/6/2017 while the P3 Form refers to OB 14/27.6.2017. I note that this was not taken up by the Appellant during the cross-examination of the Investigating Officer (PW4). But is it not possible that there could be multiple OB entries in relation to one incident? For instance, an entry made when a complaint is lodged, the entry made when a suspect is arrested in respect to that complaint and another entry when the suspect is removed from the cells for arraignment in Court on the same complaint.

18. The Court now turns to the argument that the conviction is unsafe because the suspect was not subjected to an identification parade. The evidence is that the Appellant was arrested at a house when PW1 pointed him out to the police. It would therefore be unnecessary and indeed futile to arrange an identification parade for the victim to identify his assailant when he had done so just before the arrest.

19. Before I turn to interrogating the evidence around the identification of the Appellant by the victim, let me say this about the medical evidence. There is evidence that child was treated for bruises and tears he sustained in his anus and also for bruises on his neck. In the P3 Form produced in Court, PW 3 mentions the anal injuries only. In his testimony PW3 told the Court:-

> "We treated him and he had an injury on the back of his head and his annul (sic) open and he was sodomized."

When this medical evidence is put together with the testimony of the child then it is easy to infer that there was penetration. Was the Appellant the person who defiled the child?

20. In accepting that the only evidence as to the identity of the assailant came from PW1, the learned Trial Magistrate cited the following passage from the decision in Joseph Maina –vs- Republic [2016] eKLR:-

> "In 2003 an amendment was occasioned to Section 124 creating a provision to omit requirement for corroboration of evidence of a child of tender years. It states as follows:

> “Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

21. Section 124 of the Evidence Act reads:-

> “Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, 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.”

22. Section 19 of the Oaths and Statutory Declaration Act reads:-

> “Evidence of children of tender years;
>
> (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.
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> (2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.”

23. This Court is not too certain that the learned Magistrate needed to make reference to section 124 of the Evidence Act because PW1 gave evidence on oath. Evidence such as of PW1, aside from the provisions of section 124, could found a conviction if credible and believable.

24. The Trial Court explained its conclusion that the Complainant positively identified the Appellant. The Court stated:-

> “On the issue of whether the person who defiled PW1 could be and was identified, the Complainant stated that he was able to recognize the accused from his voice when he greeted him, from the scar on his head and stomach and because he saw the accused standing at the veranda when it was raining and also because there was a lamp on in the house when he woke up and was able to see the photos on the wall, the mad walls, the door, the bed and the stove. Although the accused in his defence stated that he was home with his wife and children when the police arrested him, the police and PW2 who were led to where the accused was when he was arrested made no mention of there being any other person in the house where the accused was arrested and the accused did not call his alleged wife as a witness. Based on the fact that PW1 had seen the accused during daylight and was able to see well enough in the house, it would be safe to conclude that the identity of the person who defiled the complainant has been positively established.”

25. This Court is unable to fault that conclusion. The victim stated that he had first seen the Appellant at 3.00 p.m. That would be in broad day light. He again saw him in the house after he came round. As to how he was able to see him, the witness testified:-

> “There was a kerosene lamp in the house it had a glass cover. He put it on and then put it off. I don’t know what time he put it on because when I woke up it was on.”

26. This is a man the victim had seen early. This is a man who defiled him 4 times. This is the man who was with him for 10 hours and then there was light to enable him see the assailant. There was sufficient opportunity for the victim to see his assailant. He was even able to notice a scar on the assailant’s head and stomach.

27. The learned Magistrate did not infract on the provisions of Section 169 of the Criminal Procedure Code which reads:-

> “Contents of judgment;
>
> (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
>
> (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
>
> (3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”

28. The Trial Magistrate framed the points for determination and gave reasons for each finding. This included why it rejected the Appellant's defence (See the passage above.)

29. The Appeal on conviction is without merit and is rejected. As to the punishment, the 15 years imprisonment imposed is that prescribed by section 8(4) to be the minimum and the learned Magistrate cannot be faulted. That said, the law has now evolved to extend discretion to a sentencing Court even where there is a minimum punishment prescribed (See Francis Karioko Muruatetu & another v Republic Supreme Court Petition No. 16 of 2015 [2017] eKLR and Solomon Limangura v Republic Court of Appeal Criminal Appeal No. 187 OF 2018 [2019] eKLR). For this reason, I reduce the jail term from 15 years to 7 years from the date of sentence, that is 18th February 2019.

Dated, Signed and Delivered in Court at Nairobi this 23rd Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:-

Mohamed Abdul (the Appellant) present in person.

Miss Limo (DPP) for the State