REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 53 OF 2018

ALI KAZUNGU MWALIMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Garsen SPMCRC No. 7 of 2017 delivered by Hon. E. Kadima, RM on 22nd February, 2018)

Coram: Hon. Justice R. Nyakundi

Mwangi for the State

The appellant in person

JUDGEMENT

The Appellant was charged with defilement contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 31st December, 2016 and 29th January 2017 in Tana Delta Sub-county within Tana-River County intentionally and unlawfully caused his penis to penetrate into the vagina of BAO a girl aged 16years.

Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

1) That the learned trial Magistrate erred in law and fact by failing to consider that the prosecution witnesses failed to discharge the burden of proof to their case as required by the law.

2) That the learned trial Magistrate erred in law by sentencing him to 15 years' imprisonment without proper finding that the charge of defilement was not proved beyond reasonable doubt.

3) That the learned trial magistrate erred in law and fact by discounting and not considering in detail my defensive evidence which was unrebutted, thereby casting doubt on the prosecution case.

4) That the learned trial magistrate erred both in law and facts by failing to consider that there were no cogent reasons to link I, the applicant to the commission of the alleged offence hence the conviction was against the merits of the entire case.

5) That the learned trial Magistrate grossly erred in law and facts by failing to consider the legal provision providing for a mandatory minimum sentence under Section 8 of the Sexual Offences Act.

Background

PW1- BAO, the victim was sworn in after voire dire examination. She informed the court that she born on 21st May, 2000. She told the court that the Appellant person is known to her. She met him in Minjila and requested her to be her girlfriend. She later informed court that on the day of the offence she came home and found that her mother had locked the door. She later went to the Appellant's house at around 9:00 pm, a house that had one room. They both removed their clothes and the Appellant proceeded to put his penis into the victim's vagina several times. The victim also informed court that the said act of penetration was repeated on three other occasions. She was taken to Garsen Health Centre where she was treated and examined and later given a P3 Form.

In cross examination by the Appellant, the victim stated that she wrote her statement voluntarily.

PW2 – NAO, was the victim's mother. She confirmed that the victim was born on 21st May, 2000. She stated that on 29th January, 2017 she had left the victim and the brother sharing a room and while she went out to answer a call of nature, she was met by a request by the younger brother to open the door from outside since the victim had locked it. She informed court that the victim had broken the window to gain access. It was her testimony that on that day she ran away from home and never came back. She later found out that she was staying in the bush during the day and at night she was at the Appellant's house. That the victim led the police to the Appellant and that is how he was arrested and taken into police custody.

On re-examination, PW2 confirmed that the victim was born on 21st May, 2000 and that the sexual acts between the Appellant and the victim begun in December spilling over to January 2017 and that at the time she was 16 years old.

PW3 Buya Said Shero Clinical officer at Garsen Health Centre testified on account of examination done on the victim BAO. He informed court that while on duty BAO was accompanied by a police officer. He was informed that the girl had been defiled and upon examination, he never saw bruises nor tears on her vagina. That she had no hymen, no discharge, high vaginal swab was done and no indication of spermatozoa. That he opined that there was no hymen and that he had never seen the accused before. He produced the treatment notes as P. Ex 1 and the P3 as PExh. 3.

PW4 LOO was the victim's father. He informed court that on the material day, the victim had spent the night away from home. Upon questioning the victim on her whereabouts, she informed him that she had spent the night at the Appellant's house. That the same incident was repeated 2weeks later.PW4 also told the court that he confronted the Appellant on the allegations but he denied.

He first reported the matter to the headmaster at the victim's school and was referred to children's office at Garsen where he was later referred to Garsen Police Station. The victim, later led the police to the Appellant's residence and that is how he was arrested. The victim was later taken to the hospital by the police.

PW5 Police Constable Samuel Ochieng No. 63002 attached at Garsen Police Station informed the court that on 31st January, 2017 while at work a parent came with a complaint that his daughter had disappeared from [Particulars Withheld] primary School, he had a letter with him. He informed court that he wrote the report on the occurrence book. That on the 2nd day of February, 2017 the parent came accompanied by the child BAO and had her birth certificate. Upon interrogating her, she disclosed that she had had several sexual encounters with the Appellant.

The victim offered to take them to the Appellant's house where he was arrested after the victim had identified him. He produced the birth certificate of the victim as Exh.1.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the Appellant was placed on his defence. The Appellant elected to give sworn evidence and stated that on 1st of February, 2017 his door was knocked at night and some people entered. That he was later taken to Garsen Police Station and later taken to hospital. On 3rd of February,2017 he was arraigned in court.

Submissions

Appellant's Written Submissions

The Appellant relied on his written submissions filed on 10th July, 2020 in support of his appeal. He submitted that the prosecution did not prove beyond reasonable doubt noting that despite the fact that the victim was known to him, the court could not justify the Appellant's involvement with the offence as prosecution did not call any other witness to support the assertions made by PW1.

Further, he submitted that the medical evidence did not corroborate the evidence of the victim on penetration as it proved that there were no physical injuries nor tears on the vagina. He also submitted that the report concluded that she had on discharge. He contended that the contradictions between the victim's evidence and medical evidence created an impression that the prosecution witnesses were not truthful displacing the provisions of Section 124 of the Evidence Act.

The Appellant submitted that it took almost one year to have the prosecution close down its case and that the trial magistrate recollecting the demeanor of the witnesses could have been faulty. It was his submission that the failure by the learned trial magistrate to record remarks touching on the demeanor of the victim cast a failure of justice in his case.

Lastly, he submitted that the trial court failed to take into consideration the mitigation circumstances that were presented in court. He contended that failure to consider his mitigation as has been presented before the trial court was unjustified and unfair and that this was against the principle of equality before the law. His submission resonates to the fact that Section 8(4) of the Sexual Offences Act No. 3 of 2006 violates Article 27(1) (2)(4) of the Constitution. He urged the court to allow the appeal set aside the sentence. He relied on **Samuel Achieng Alego v R Cr. Appeal No. 187 of 2015** and **Rose Auma Otawa v R (2011) eKLR** in support of his submissions.

Respondent's Submissions

Mr. Mwangi for the Respondent filed his written Submissions dated 21st October, 2020 and filed on the same day opposing the Appeal .it was his submission that in defilement cases the prosecution has a duty to prove the complainant was below the age of 18 years, that there was penetration and that the complainant identified the accused.

Mr. Mwangi submitted that the age complainant was proved to be below majority as the birth certificate produced as Exh. 1 clearly showed

that the Complaint was 16 years. It was also his submission that penetration was proved by the P3 form that showed that the complainant had no hymen. He argued that all the ingredients of defilement were proved and that the prosecution had proved beyond reasonable doubt that the offence of defilement had been committed.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the Appellant.

In order for the offence of defilement to be proved, the prosecution must prove all the three elements of defilement being the age of the Complainant, proof of penetration and the positive identification of the perpetrator. See **Charles Wamukoya Karani v R Cr. Appeal No.72 of 2013.**

On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v R (2015) eKLR.** It has been held that the age of the victim in sexual offences can also be proved by the direct evidence of parents or guardian or by observation by the court. In **Thomas Mwambu Wenyi v R (2017) eKLR** cited with approval **Francis Omuromi v Uganda, Court of Appeal Cr. Appeal No. 2 of 2000** which held that:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense."**

In **Richard Wahome Chege v R (2014) eKLR** the Court of Appeal sitting in Nyeri pronounced itself thus:

> **"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate.PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."**

In the instant case, proof of age of the complainant was given by the mother.PW1 stated that she was born on 21st may, 2000 making her 16 years at the time of committing the offence. Similarly, PW2 informed the court that the victim was born 21st May, 2000 meaning that she was 16 years at the time of the offence. There was no dispute as to the age of the complainant and I hold that it was satisfactorily proved.

On the element of penetration, Section 2 of the Sexual Offences Act defines penetration as, ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** The prosecution has a duty to establish that the complainant was partially or fully sexually penetrated by the Appellant.

In determining penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng v R (2013) eKLR** where the court stated that, **"in cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence…"**

In this case, the victim clearly recounted in court how the Appellant proceeded to put his penis into her vagina several times. The victim also informed court that the said act of penetration was repeated on three other occasions. Having assessed the evidence on record, the victim clearly recounted that the said act of penetration was repeated on three other occasions. It is common place that penetration can be proved by the evidence of PW1 alone as provided by Section 124 of the Evidence Act which provides that:

> **"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."**

This position was succinctly held by the Court of Appeal in **Williamson Sowa Mbwanga v R (2016) eKLR**, where it stated that:

> **"The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this court in GEORGE KIOJI V REPUBLIC CR APP. NO.270 of 2012 (Nyeri): "where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and**

record the reason for such belief."

The evidence of PW1 was corroborated by the medical evidence adduced by PW3. I have analysed the evidence on record and the P3 Form produced and the victim's evidence and I am satisfied that penetration was achieved.

The Appellant contended that there were contradictions between the victim's evidence and the medical evidence stating that the P3Form indicated that there were no injuries. Injuries on the body in cases of defilement would be used to prove that violence was meted out on the victim in the process which was not the case. I find that this ground fails.

On identification, where identification is based on Recognition, this is where the complainant knows the accused and it has been held to be more reliable than identification of a stranger. The court of Appeal in **Francis Muchiri Joseph v R (2014) eKLR** held that, **"in *LESARAU v R, 1988 KLR 783*, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name".**

In the instant case, the victim informed the court that she knew where the Appellant lived and she also identified the house where he lived. According to (PW1) evidence the period of observation of the Appellant was over long period of time to support recognition of the Appellant positively.

From the evidence of the Appellant, he did not disapprove that he did not engage in sexual intercourse with the complainant. Though the case on identification was solely that of the complainant, I find no danger for the trial court to have convicted the Appellant as such on a single identifying witness in the circumstances of this case.

As matters stand, all essential element of the crime, which is the act constituting or linking the appellant to the circumstances of the defilement was pleaded in the charge sheet and proved beyond reasonable doubt.

From the material placed before me, there is no evidence and it is also not clear what part of the Appellant's evidence linking him to the commission of the offence was overlooked. There is also no evidence that the trial court took into account wrong material or acted on wrong principles in order to reach the preferred conviction and sentence.

For the above reasons the appeal on conviction and sentence is dismissed.

That is the order of the court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH, 2021.

……

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mwangi for State – present virtually

Appellant – present virtually