REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 2 OF 2020

BETWEEN

DUKA NDEGWA KOMBO.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. T. A Sitati PM on 30.08.2019 in Kwale CMC S.O No. 149 of 2018)

JUDGMENT

Introduction.

1. Duka Ndegwa Kombo was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. He was also charged with offence of alternative count of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. The appellant pleaded not guilty and the matter went to full trial. After trial, the trial Court found the appellant guilty as charged and he was convicted and sentenced to serve 15 years' imprisonment.

3. Being aggrieved by the conviction and sentence, the appellant filed his appeal vide a petition of appeal filed on 21st January, 2020 on the following grounds;

1. That the Trial Magistrate erred in law and fact when he relied on the prosecution evidence which did not warrant a conviction.

2. That the Trial Magistrate used the wrong principle on Res gestae in applying the evidence of PW3 in making his conclusion.

3. That the Trial Magistrate failed to take into account the evidence of the appellant and totally disregarded the same plus that of his witnesses.

4. That the Trial Magistrate did not take into account that the of the prosecution was disjointed and lacked corroboration.

5. That the Trial Court erred in law and fact in relying on the evidence of PW5 which confirmed that the alleged victim was sexually active for a long time before she was examined by the doctor which was not necessarily as a result of the appellant's contract.

6. That the Trial Court erred in law by incorrectly applying Section 19 of the Oaths and Statutory Declaration Act in arriving at a wrong conclusion.

7. That the Trial Court erred in fact in relying on the evidence of PW3 and believing the same entirely without any further witnesses confirming the same or evaluation of the voice of the appellant.

8. That the Trial Court erred in law and fact in incorrectly applying Section 6 of the Evidence Act in incorrectly applying the

evidence of PW3 which was relied in determining the judgment leading to a wrong conclusion.

9. That the Trial Court erred in fact by not evaluating the five (5) months delay period between the alleged period the offence was committed and when it was reported to the police.

10. That the Trial Court erred in sentencing the appellant to fifteen (15) years which was excessive in the circumstance.

4. The prosecution case was that the complainant was defiled by the appellant sometime in August, 2018. PW1 UC who is the complainant's mother testified that she was told in August, 2018 at around 6 pm the complainant aged 17 years was found in the bush being seduced by a man and she was taken to the hospital by her uncle. That at the time PW1 was sick and in Kinango hospital. She was also told that the complainant was defiled

5. PW2 who was the complainant stated that she is a student at [particulars withheld] Polytechnic doing tailoring course. She stated that in August, 2018, the appellant seduced her, told her he loves her and the third time asked to sleep with her. She further stated that the appellant had asked her to go to his home, they went to his shop where they had sexual intercourse. A month or so later, her uncle by the name KC came and on inquiry, she told him that she had had sex with the appellant.

6. PW2 stated that the following day, they reported the matter to the police. That when she was taken to the hospital by her uncle, the doctor said that she had been penetrated and they went back home. She testified that the P3 form was filled later and at the time of the offence she was 16 years old. The P3 form and the treatment notes were produced as prosecution Exhibit 1 and 2 respectively. On cross-examination, PW2 testified that she does not remember the date that they had sex however, she has not slept with any other man and they had sex in the appellant's shop at night while the appellant's wife was in another shop.

7. She further testified that her uncle only asked her after he heard the appellant and when he was asked about the issue in Kinango, he accepted. It was her testimony on cross examination that she agreed to have sex with the appellant and that after the incident, the appellant closed his shop and is no longer there. The complainant denied any knowledge of the bush.

8. PW3 KC an uncle to the complainant stated that the complainant was born on 28th April, 2002. He confirmed that he knew the appellant as he was the son of his longtime neighbor. He further stated that his eyesight is very poor and he cannot see far however, on 16th November, 2018 as he passed the appellant's house, the appellant while in the company of other young men shouted at him that there was no virgin in their village as he had had sexual intercourse with all virgins in the area. He stated that the appellant went ahead and named all the eight girls that he had impregnated prior to their marriage and he also mentioned his daughter Nyamawi.

9. It was PW3's testimony that he sent his first wife to interview the complainant on the said allegations and the complainant admitted that she has had sex with the appellant regularly. He then sent an elder by the name Nyawa Mutsami Mwijo to the appellant's family on the same issue however he was brushed off. He thereafter went over to the appellant's home but on arrival the appellant attacked them and tore his relative's shirt in the process.

10. PW3 testified that they then went to the complainant's school teacher at [particulars withheld] Primary School and the teacher escorted them to the police station to file a report and thereafter the complainant was examined by a doctor and a P3 form was filled at Kinango medical facility. He identified the P3 form and the treatment notes produced as prosecution Exhibit 1 and 2 respectively. He further testified that the doctor observed that there was medical evidence of sexual intercourse.

11. He also testified that the appellant had gone underground and was arrested on 31st December, 2018 when he resurfaced. That after the complainant had testified the appellant and his father went to ask for forgiveness from him and when he refused they sent him a message from a phone number 0722xxxxxx. On cross examination, he denied forcing the appellant to marry the complainant and stated that the appellant had bribed families of the girls he had impregnated.

12. PW4 NT the complainant's biological father testified that on 16th November, 2018 he found the appellant and the complainant chatting and the next day the complainant refused to go to school. That PW4 called his elder brother who advised that they go with the girl to the appellant's home to question him about his boastful exploits since the complainant had also disclosed to him that she was in a sexual relationship with the appellant. He testified that on arrival at the appellant's home on 16th, he got very unruly and the next day they filed they filed a report at the police thereafter the complainant was treated and medically examined at Kinango medical facility.

13. On cross examination, PW4 stated that he interviewed the complainant who confirmed that she had been defiled and that they went to the appellant's father's home to have traditional session to try to resolve the appellant's bad ways. He also testified that the complainant is presently in school and she is also a tailor at Mwembe Tayari and during the visit to the appellant's home, C, MM and PW4 were present.

14. PW5 Titus Kamuu a clinical officer at Kinango Sub-County Hospital testified that at the time he examined the complainant and filled her P3 form, she was 16 years old. On examination of her genitalia, there were no visible injuries to labia majora or labia minora and her vagina and cervix looked normal however, despite the fact that her hymen was missing it was not freshly missing and no bleeding was seen. He further testified that he filled and signed the P3 form on 24th December, 2018.

15. PW6 Constable Sekinah Twaha confirmed that a report was made on 17th November, 2018 by the complainant and her father thereafter the complainant ws escorted to the hospital for examination which culminated to the appellant's arrest at the end of the year.

16. The appellant gave an unsworn statement in his defence where he denied the charged against him and asked the Court to be fair. He called one witness Mwadiga Ndegwa his brother who stated that the charges are fabrication and that the appellant denied in the presence of

his family of having a regular sexual relationship with the complainant when N, C and M went to their home.

SUBMISSION

17. The Appeal was canvassed by way of written submissions. The Appellant in his submissions stated that the trial Magistrate in convicting him relied heavily on the testimony of PW3. He said that the evidence of PW3 is that the appellant in the presence of other young men confessed to the offence of defilement. He further submitted that PW3 was not competent to receive a confession in line with the provisions of Section 31 (1) of the Evidence Act and that failure to call the young men referred to by PW3 weakens the thread of the prosecution's evidence.

18. The appellant submitted that the testimony of PW2 ought to have been corroborated since she was a child aged 16 years and he placed reliance on the case of **Fuad Dumila Mohamed v Rep** K.C.A No. 2010 of 2013 and the provisions of Section 124 of the Evidence Act. He also submitted that the evidence of the doctor did not connect him to the offence and therefore does not amount to corroboration in law. He submitted that PW3 and PW4 fabricated the charges against him when he refused to marry the complainant since the complainant could not even remember the day that they had sex. He relied on the case of **Paul Kanja Gitari v Republic** [2016] eKLR.

19. The appellant submitted that the Trial Magistrate erred in finding that the prosecution witnesses were credible in light of the fact that a formal complaint to the police was made after a considerable long period of time. He further submitted that PW3 stated that he had very poor eyesight but he never claimed that he was familiar with the appellant's voice and never identified the other young men he claimed were in the appellant's company. He also testified the young men were never called to support PW3's evidence thus this weakens the thread of evidence.

20. The appellant submitted that the mandatory minimum sentence of 15 years imposed was harsh and excessive he relied on the case of **Eliud Muchonde v Rep** H.C.C.R AP. No. 93 of 2017 where the High Court at Kiambu considered the effects of Muruatetu case on mandatory minimum sentence.

21. The respondent in its submissions submitted that the appellant had not contended that the complainant was a minor. It submitted that the evidence of PW2 on penetration was corroborated by medical evidence and that the appellant was positively identified by all the prosecution witnesses. The respondent further submitted that the trial Court in finding that the appellant was positively identified, relied on Section 124 of the Evidence Act.

22. The respondent submitted that the application of Section 6 of the Evidence Act by the Trial Court was proper and that the 15 years' sentence imposed is not excessive since the law provides for 20 years' imprisonment under Section 8 (3) of the Sexual Offences Act

23. The appellant replied to the respondent's submissions and submitted that PW4 stated that on his way back to the village, he found the appellant keeping company with the complainant which raised suspicion however, suspicion however strong cannot form the basis of his conviction.

DETERMINATION.

24. This being a first appeal this court as held in the case of **Okeno vs Republic** has an obligation to re-evaluate and re-look at the evidence in the trial court afresh and consider whether the trial magistrate's decision was based on the principles of law and on evidence.

25. The burden of proof in criminal cases is beyond reasonable doubt as was held by Lord Denning in **Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373** as follows:

> **"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."**

26. In the Kenyan criminal justice system, the burden of proof of guilt of an accused lies with the prosecution, an accused person has no duty to prove anything on allegations that are criminal in nature and brought against him or her by the state. The burden of proof lies solely on the prosecution except in instances where there are admissions by the accused person

27. In order to prove an offence of defilement, the prosecution has to prove that there was actual penetration whether partial or complete and the assailant has to be positively identified by the complainant and in some cases if the Court is of the view that the complainant is not being truthful by an independent eye witness. In this case, from the medical evidence that is the P3 form and the treatment notes produced as Prosecution exhibits 1 and 2 respectively and from the evidence of PW5 it is not in dispute that the complainant was defiled. However, from the medical evidence, it is impossible to ascertain when exactly the offence took place since the doctor noted that the hymen is missing though not freshly missing assertions that were corroborated by PW5 during cross examination. What is therefore in dispute is who committed the heinous offence.

28. In the present case, the complainant PW2 stated she was seduced by the appellant in August, 2018 and the third time she had sexual intercourse with him in his shop at night. According to the prosecution this evidence was corroborated by medical evidence that confirmed that the complainant's hymen was missing though it was not freshly missing noting that the complainant filled signed and certified the P3 form on 24th December, 2018.

29. PW3's testimony is to the effect that at around 9.00 PM on 16th November, 2018 on his way home, he heard the appellant in the company

of other young men boasting on how he has slept with all the virgins in the area and went ahead to list the names of all the girls he had impregnated prior to them being married off including PW 2.

30. The trial Magistrate at page 6 of her judgment noted that Section 124 of the Evidence Act is the most relevant in testing the credibility of PW2. The Trial Court also stated that it believed the testimony of PW2 that she had sex with the appellant since the medical evidence confirmed that her hymen was missing of longstanding and in cross examination, her answers were crystal clear and very detailed. The trial Magistrate noted that under the doctrine of res gestae, the evidence was reinforced particularly through the evidence of PW3. She went further to state that the appellant was unaware that PW3 was passing by his house.

31. In light of the above, it is evident that the trial Magistrate convicted the appellant based on the testimony of PW2, PW3 and PW5. I find that the trial Magistrate erred in relying solely on the evidence of PW2, PW3 and PW5 since they are a lot of questions that were left unanswered by the prosecution. With regards to PW2, in my view the fact that she could not recall the exact date she had sexual intercourse with the appellant should have been decided in favour of the appellant since one is left to wonder how she remembers all the other details of the day she was defiled but not the date.

32. On when the Appellant allegedly defiled the complainant, PW1 talks of August, 2018 as the day PW 3 found the Complainant being seduced by the appellant. On the other hand, PW4, the father of the Complainant said that he found appellant chatting with the Complainant on 16th November, 2018. PW3 stated that on the same day, 16th November, 2018 he overheard the Appellant bragging that he had had sexual intercourse with all the virgins in the village including PW2 the Complainant.

33. PW3 stated that after he heard the appellant boast, he sent his first wife to interrogate PW2, he did not question her in person. PW2 on the other hand stated that a month or so after She had sex with the complainant, his uncle asked her after hearing the accused saying that he wanted to marry the complainant. I find that the chronology of events between PW2 and PW3 whose evidence formed the basis of the appellant's conviction did not match thus the trial Magistrate erred in her application of Section 124 of the Evidence Act.

34. In **Baraka Kahindi v Republic** [2019] eKLR the when discussing the application of Section 124 of the Evidence Act held as follows;

> ***"In so far as the appellant case was concerned, the only direct evidence against him was that of the complainant. The learned trial Magistrate ought to have applied the cautionary proviso under Section 124 of the Evidence Act that in his judgement in convicting the appellant he found the complainant to be a truthful and honest witness supported with reasons for that believe. A reading of the trial record on the alleged offence leaves this court with a reasonable doubt why he acted on it without corroboration. The failure by the Learned Magistrate not to warn himself on the application of the provision of section 124 of the Evidence Act to me renders the decision reached unsatisfactory and breach of the above provisions. While I understand that a fact can be proved by a single witness in a case, in the same way it does not lessen the duty of addressing such other independent evidence to discharge the burden of proof beyond reasonable doubt. What corroboration in criminal proceedings does it excludes any possibility of the evidence being tainted or connived to the complainant's advantage regardless whether the accused committed the offence or not?***

35. In **Republic v Henry and Manning 1969 53 Criminal Appeal 150**, the Court observed that corroboration in sexual offences is considered to be necessary, even though a court can convict without corroboration. The court held as follows: -

> ***"In cases of alleged sexual offences it is nearly dangerous to convict on the evidence of the woman or girl alone. This is dangerous because her main experience has shown that in these cases girls and women do sometimes tell an entirely false story which is very easy to fabricate but entirely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all."***

36. In light of the foregoing, I hold that the contradictions between the testimony of PW1, PW2, PW3 and PW4 raised a doubt which should have been determined in favor of the Appellant. The evidence in the instant case was barely adequate therefore the doctrine of ***res gestae*** and the application of Section 6 of the Evidence Act in this case therefore fails.

37. The age of the complainant is also a crucial element in an offence for defilement since in the event an accused is found guilty, it determines the punishment. In the present case, neither the original nor copy of the complainant's birth certificate to ascertain that she was 16 years old at the time the alleged offence occurred.

38. The prosecution produced an Age Assessment report as prosecution exhibit 3 as the basis of the complainants age. From the said report it is not indicated who conducted the age assessment. I note that during the trial before the subordinate Court it was clear that the complainant was not going to school at the time the offence took place, it is therefore difficult to determine the exact age of the complainant in consideration that the name and qualification of the person who assessed the Complainant's age is not known. The Court therefore cannot rely on the said Age Assessment report to prove the Complainant's age.

39. The upshot is that in my view the Learned Magistrate was wrong in convicting the appellant based on the evidence of PW2, PW3 and PW5 in the presence of such major inconsistencies and contradictions. I therefore find that after thoroughly re- evaluating the evidence in this case there is strong suspicion that the appellant took part in the complainant's carnal knowledge.

40. The Appeal on conviction and sentence therefore succeeds, the conviction is quashed, and sentence set aside and the Appellant set at liberty forthwith unless lawfully detained.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT, THIS 18TH DAY OF MARCH, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE