REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 8 OF 2019

SALIM ISSA ABDALLA.....APPELLANT

VERSUS

REBUBLIC.....RESPONDENT

(Being an Appeal from original conviction and sentence in Lower Court Criminal Case No. 1 of 2019

in the Principal Magistrates Court at Lamu before Hon Temba A. Sitati in Chambers dated 14th June 19)

Coram: Hon. R. Nyakundi

Mr. Mwangi for the Appellant

JUDGMENT

The Appellant was charged, tried, convicted and sentences to Twenty (2) years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The brief particulars of the charge were that on the 19.1.2019 at around 0714 hrs, in Wiyoni-Mkomani, Location, the Appellant intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ of LB, a girl aged nine years old.

Being aggrieved with the entire Judgment, the appellant with leave of the Court appealed on the following grounds:

> ***1. That the Learned Magistrate erred in both law and facts by failing to consider that the charge sheet was fatally and incurable defective and that the charge sheet was amended without invoking the provisions of Section 214 of the Criminal Procedure Code rendering the resultant trial annuity.***
>
> ***2. That the Learned Trial Magistrate grossly erred in law and facts by relying on un reliable medical account as the source of corroborative medical evidence which was not conclusive to the commission of the alleged offence.***
>
> ***3. That the Learned Trial Magistrate erred in law and facts by failing to consider that the legal provisions providing for a mandatory sentence under Section 8 in this case Section 8(2) of the Sexual Offences Act No. 3 of 2006 conflicts and contradicts the provisions of Section 216 and 329 of the Criminal Procedure Code thereby denying the judicial officers their legitimate jurisdiction to exercise of discretion of sentencing not to impose an appropriate sentence based on the scope of the evidence adduced and recorded, hence the sentence imposed to the Appellant is unconstitutional in breach of Article 27(1) (2) of the Constitution of Kenya 2010.***

Submissions of the Appellant

At the hearing of his appeal, appellant relied entirely on the Written Submissions filed in Court on 16/7/2019.

The appellant submitted that the Learned Trial Magistrate erred in law and fact when he proceeded with the trial without granting leave of the charge to be amended under Section 214 of the Criminal Procedure Code.

The amendment was in respect of the age of the victim of defilement. Initially indicated as nine years whereas the Birth Certificate clearly captured the age of twelve years old.

The appellant submitted that the law requires an amendment to take place before final Judgment. He relied on the case of ***Yongo –vs- R (1993) eKLR 319*** for the proposition on amendment or alteration of the charge (***see also Mohammed –vs- Republic (195) EKLR, Chengo v-s Republic (1964) EACA 122 William Geugi –vs- Republic (1959) EACA 411 Njuguna –vs- Republic (2007) 2 EACA 370.***

The appellant submitted than non-alteration of the Court and impact of non -compliance with Section 214 of the Criminal Procedure Code was fatal. It was the appellant's contention that the Medical Report never verified penetration of the victim and in absence of the corroboration that ingredient remained unproven. On account of this, appellant cited the case of ***Rose Auma –vs- Republic (2011) EKRL PVW- -vs Republic, Court of Appeal No. 186 of 2020.***

The Appellant further submitted that the mandatory sentence of 20 years' imprisonment was punitive and excessive. He argued and contented that according to Section 216 and 329 of the Criminal Procedure Code the Court was bound to consider mitigation and the ingredients of fair trial rights. Under Article 50(2), and 25(C) of the Constitution.

The appellant argued and submitted that the Learned Trial Magistrate in passing sentence did not take into account the period he spent in pre-trial remand custody pending conclusion of the case. Consequently, the Appellant submitted that the sentence should be varied or set aside.

Submissions by the Respondent

In reply, Mr. Mwangi vehemently opposed the Appeal on both conviction and sentence with reference to the grounds put forward. The Respondent's Counsel submitted that the charge was proved beyond reasonable doubt. On sentence, Mr. Mwangi submitted that in the circumstances of the offence and aggravating factors, the sentence of 20 years can be considered as legal and just. He prayed for the appeal to be dismissed.

Analysis and Determinations

The appellant's Appeal to the Court is basically on the issue of proof of the elements of the offence beyond reasonable doubt and whether mandatory minimum sentence passed by the Trial Court is indeed illegal or manifestly excessive to be interfered with on Appeal. The jurisdiction of the first Appeal Court is now well settled as stated in the case of ***Okeno –vs- Republic (1972) EA 32.***

From the evidence available before the Learned trial Magistrate, PW1 LB testified on oath with regard to the circumstances of the offence. According to (PW1) the penetration occurred when she went to the well to fetch water. However, in the course, she passed through the house of the appellant to request for a can to use it to draw water from the well. This is the time when the Appellant invited her into the house only to commit the said sexual act against her. As soon as the Appellant accomplished his mission, he gave (PW1) Kshs 50 as a token with a caution not to share the incident with any other person. As fate would have it, PW1 testified that as she stepped out of the Appellant's house, PW2 managed to notice her getting out of that house. The step taken by PW2 was to have the matter reported to the police. This was confirmed by PW4 Sargent L Lorem who on receipt of the complaint embarked on recording statements from the witnesses. He also issued (PW1) with a P3 which was filled by PW3 Sheyube of King Fahd Hospital. In these circumstances, according to the Learned Trial Magistrate, each ingredient of the offence was proved beyond reasonable doubt.

The question is being the charge proved beyond reasonable doubt? It is trite law under Section 107(1) and 108 of the Evidence Act the burden of proving the elements of the offence lies with the prosecution. Towards this end, the Court in ***Woolmington –vs- DPP (1935) AC 462*** stated that the burden of proof in Criminal Cases rests throughout with the prosecution. In ***Guyo Duba –vs- Republic CACRA No. 89 of 1999,*** the state has to prove that the accused has committed the offence beyond reasonable doubt. The rational for that burden of proof resting with the prosecution is tied with the constitutional right to presumption of innocence under Article 50 2 (a) of the Constitution. Therefore, an accused person indicted with a Criminal Offence is to be presumed innocent until proven guilty. This right to presumption of innocence can only be displaced by cogent evidence to the Contrary.

It was emphasized ***in Wamukoya Karani –vs- Republic CRA Appeal No. 72 of 2013*** **"that the critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant".**

In assessing whether penetration has taken place to constitute an offence under Section 8(1), (2), (3) of the Sexual Offences Act, the Court considers the definitions under Section 2 of the Act. The term penetration connotes either partial or complete entry of the male genetalia into the female genitalia.

From the foregoing, it is clear that the statement of a single identifying witness under the provision of Section 124 of the Evidence Act is sufficient to proof a fact in issue on penetration without corroboration. However, it should be noted that fact on corroboration must be at the center of the circumstances of each particular offence in sexual offence.

In the instant Appeal on the material day, (PW1) who is a neighbour to the Appellant went to the house to seek assistance of fetching can. According to her, appellant managed to lure her into the house. On entry she was undressed and an act of penetration took place before being released to proceed to the well as earlier arranged to fetch water.

It is in record that PW2 had become suspicious due to the long delay taken by PW1 to return back from the well. According to PW2, as she waited for PW1 at the well, it happened that she saw her emerging from the appellant's house. PW2 thereafter reported the matter to a nearby Police Station in which PW4 was instructed to investigate the offence. According to PW4 on investigation of the matter, he learnt that appellant committed an act of defilement on 19/1/2019. In the course of the investigations, PW4 issued the P3 to (PW1) which on examination by PW3 showed an act of penetration against PW1 had occurred. As earlier indicated in the Judgment of the Trial Magistrate, the evidence of PW3 corroborated material evidence of (PW1) implicating the appellant of committing the offence.

In my view of the evidence of PW1 taken together with circumstantial evidence of PW2 and PW3 satisfied the standard of proof beyond

reasonable doubt that the Appellant was responsible for the penetration of the victim (PW1).

I see no reason to accept the assertion by the appellant that the medical evidence did not corroborate the testimony given by the victim on how she was defiled on the material day.

Proposition the court in ***Bassita vs- Uganda S.C. Criminal Appeal No. 35 of 1995*** the Supreme Court held as follows: -

> ***"The act of Sexual Intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove Sexual Intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt."***

In the instant case, there is evidence of the victim (PW1) connecting the appellant with the actual penetration as he was positively identified as the one who lured her to the house to commit the crime. Some distinct features arise from the evidence of PW1 evaluated in conjunction with that of PW2. First is the characteristic of evidence when PW1 went to the house of the Appellant. Secondly, as seen from PW2 evidence she was able to recognize the victim (PW1) coming out of the appellant's house. A presumption therefore arises on the evidence that the appellant was the last person to be seen with the victim and therefore expected to explain the circumstances on the defilement of PW1. At all events, the failure to adequately explain how the victim found herself in his house forms the basis to conclude that he was responsible for the crime.

It is worthy to note that the victim was seen coming out of the Appellant's house by PW2 immediately after the incident. There was no question that the Appellant was positively identified as the person who had the opportunity to commit the alleged defilement.

In the circumstances of this appeal, the fact is that the victim was not the sole identifying witness of the appellant. On glancing PW2 testimony it will be seen that the crucial element on recognition put before the court, demonstrated the principles **in Republic v Turnbull and others (1976) 3 ALL E.A 549**. The evidence so obtained does not cast doubt as to the identity of the appellant. There is no mistake identity of the appellant.

There is further ample evidence that the victim at the time of the defilement was aged 12 years. In fact, the initial particulars of nine years indicated in the Charge Sheet was firmly varied by cogent evidence from the Birth Certificate which clearly showed the exact age of the victim to be twelve years old. Notwithstanding the fact that it was alleged at the indictment the victim was aged nine years nonetheless it amounted to no prejudice or injustice as the Birth Certificate revealed the correct age. I find no variance between the charge and the evidence adduced with respect to the date which the alleged offence was committed and the age of the victim.

I find it impossible to hold that any failure of justice occurred as a result of that particulars on age set out in the Charge Sheet. From the evidence available before the Learned Trial Magistrate, I am in no doubt that the appellant was guilty of the offence of defilement as set out against him in the Charge Sheet referred to in the impugned Judgment and for which he was tried and convicted.

As regards the sentence passed by the trial Court. The circumstances herein render the appellant underserving of leniency, his mitigation notwithstanding having stated so I am fortified in my opinion by the authorities [**R -v- Shershowsky (1912) CCA 28TLR 263]** while in the case of **Shadrack Kipkoech Kogo –vs- R. Eldoret Criminal Appeal No. 253 of 2003** the Court of Appeal stated thus:-

> **"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered See also [Sayeka –vs- R. (1989 KLR 306)"**

The Court of Appeal, on its part, in **Benard Kimani Gicheru vs Republic [2002] eKLR** restated that:

> **"it is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist"**

In my view the sentence imposed might look in the eyes of the Appellant as being punitive or manifestly excessive but the guidepost to the appropriate sentence does not point to a different direction for this court to interfere with it. After considering all of the relevant factors the sentence arrived at by the learned Trial Magistrate is legal and proportionate to the crime. The upshot of the Appeal is that it's good for dismissal on both conviction and sentence.

Orders accordingly.

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

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the Appellant