REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 48 OF 2018[SO]

DICKSON ODUOR ONDORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, conviction and sentence passed by Hon G. Adhiambo, SRM in Ukwala SRM SO Case No. 222 of 2018 on 19/12/2018)

JUDGMENT

Introduction

1. The Appellant herein **DICKSON ODUOR ONDORO** was charged before the Senior Resident Magistrate's Court at Ukwala in Criminal Case No. 22 of 2018 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, the particulars of the offence being that on 21/6/2018 the appellant while at [Particulars withheld] village, Anyiko Sub-location in Ugenya Sub-county within Siaya County intentionally caused his penis to penetrate the vagina of CA a child aged 12 years. The appellant also faced the alternative charge of committing an indecent act with the same child contrary to **Section II (1) of the Sexual Offences Act No. 3 of 2006.**

2. The appellant denied both charges and the prosecution in a bid to prove its case called 5 witnesses. The trial magistrate, Hon. G. Adhiambo after considering the prosecution evidence as well as the appellant's defence found the appellant guilty as charged, convicted him and sentenced him to serve 20 years imprisonment.

3. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal based on the following grounds:

a. That he pleaded not guilty to the charge.

b. That the learned trial magistrate did not consider the contradiction in the testimony of PW1.

c. That he made contradictions during his testimony and even the learned trial Magistrate had formed opinion towards his case and failed to consider facts.

d. That he prays to the honourable court to order a re-trial so that full facts can clearly be stated.

e. That he pleads for court proceedings so that he can be able to adduce more grounds.

Appellant's Submissions

4. The appellant filed written submissions to canvass his appeal. The Respondent too filed submissions opposing the appeal. According to the appellant, there was inconclusive evidence of penetration and that there were material contradictions in the evidence of prosecutions which the trial court did not consider. He further submitted that the evidence of the complainant was evidence of a single identifying witness that discredited her veracity contrary to section 163 of the Evidence Act.

5. Further, he submitted that the trial court did not conduct a proper *voire dire* on the complainant as required by law. Finally, the appellant submitted that this court should consider ordering for a retrial. On sentence, it was submitted that this court should consider a non -custodial sentence.

6. I shall consider the appellant's submissions in detail in my analysis and determination.

The Respondent's Submissions

7. It was submitted by the Respondent's Counsel that there was no contradiction in the chronology of events as narrated by PW1 and that whereas the appellant's defence alluded to his frame up, the same was without merit.

8. The respondent submitted that all facts raised during the trial were considered by the trial magistrate and further that the facts forming the ingredients of the offence of defilement were clearly considered and found proved.

9. It was further submitted that there was no procedural lapse on the part of the court, the prosecution or the defence to warrant an order for retrial. Reliance was placed on the case of **Yusuf Sabwani Opicho v. Republic [2009] eKLR** where it was held that a *retrial will be ordered only when the original trial was illegal or defective***.**

Analysis & Determination

10. This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge v Republic [1987] eKLR** stated thus on the duty of the 1st Appellate court;

> **"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this." S**ee also the case of **Kagori Kaboi v Republic [2020] Eklr.**

11. The evidence as laid out before the trial court was as follows: The complainant child testified as PW1 after being taken through ***voire dire*** examination and found competent to understand the importance of telling the truth and the effect of making an oath. It was her testimony that on 21/6/2018 at around 5pm, she was at the Ligega Shopping Centre when she met the appellant herein whom she referred to as Dick and that the latter informed her that her grandfather was calling her at the stage. PW1 testified that this turned out to be a lie and upon reaching the stage, the appellant informed her that her grandfather was in the maize plantation near Kabuuge Shop.

12. It was PW1's testimony that this turned out to be another lie and while in the maize plantation, the appellant forced her to the ground, tied her hands and legs with a sisal rope after which he *"**did bad manners to her"*** which she explained that the appellant fucked her. The complainant further elaborated that the appellant Dick wore a condom on his "thing for urinating"-meaning the penis and inserted it into her vagina. The trial court noted that even though the complainant did not mention the word vagina, she pointed at her vagina. PW1 testified that when the appellant began defiling her, he forced her legs wide apart, having lifted up her skirt and removed her inner pant earlier. The evidence of PW1 was that after the appellant finished defiling her, he untied her hands and left as she wore her inner pant and headed home.

13. PW1 testified that at that time, she could not walk properly and upon reaching home, her mother inquired as to her improper gait to which she replied that the appellant had threatened to kill her in case she disclosed what had happened. PW1 testified that the following day, her mother took her to Ambira Health Centre where she was examined by a doctor and after treatment, they reported the matter to the police at Anyiko then at the Sega Police Station where she said she recorded her statement.

14. PW1 identified the appellant as the accused person before the trial court and she further stated that in 2017, the appellant had been their neighbor at a rental house where she used to live with her parents. It was her testimony that even before the appellant became their neighbor, she knew him and had known him for a period of 7 years. She further testified that she had met the appellant in broad daylight but by the time the appellant parted with her it was growing dark.

15. In cross-examination, the complainant stated that ***the appellant had sex with her five times prior to the material date and further that the appellant used to tie her.*** She further stated that she did not scream because the appellant threatened to kill her. It was her testimony that someone spotted the appellant defiling her and proceeded to report the same to her father.

16. The complainant's mother, MA, testified as PW2 and stated that on 21/6/2018 at around 5pm, she was at her home and that she had sent the complainant to Ligega Centre to purchase paraffin but that the complainant took time before returning such that by 7pm the complainant had not gone back home. It was her evidence that she went to Ligega to search for the complainant and met the complainant at a corridor but when the complainant saw her, the complainant dropped the paraffin and took to her heels.

17. PW2 testified that she went back home and found that the complainant had arrived and later, after they had taken supper, she asked the complainant why the complainant overstayed where she had been sent to which the complainant stated that the appellant was sleeping with her. It was her testimony that the following morning, she reported the incident to [Particulars withheld] Primary School and the headmaster referred her to the Ligega Administration Police Post where she was referred to the Sega Police Station. PW2 testified that the police directed her to take the complainant to Ukwala Hospital and she took the complainant to Ambira Health Centre where the doctor examined her and gave her medication. PW2 testified that the appellant was her neighbor in the year 2017 when she used to live with her family including the complainant in a rental house and that prior to the year 2017, she did not know the appellant/accused.

18. In cross examination, PW2 stated that the complainant was the one who said that it was the appellant who defiled her. She stated that the appellant lured the complainant to the stage on the pretext that she was being called by her grandfather despite the fact that the complainant's grandfather did not own land in Ligega.

19. The testimony of PW3 NO.2009020536 APC Evans Matutu of Ligega Administration Police (AP) Post was that on 25/6/2018, a woman

by the name of Maureen-PW2 reported that she had received a report from her daughter's class teacher at [Particulars withheld] Primary School that the complainant had complained that the appellant used to sleep with her and that Dick used to do sexual acts with her. It was his testimony that they directed the complainant's mother to take the complainant to hospital which she did and the matter was reported to Sega Police Station. PW3 stated that thereafter, he was furnished with the order of arrest after which he and his colleague APC Stephen Lunani proceeded to arrest the appellant.

20. PW3 stated that they interrogated the appellant for a short while and then took him to Ukwala Police Station where he was charged with the offence of defilement. It was his testimony that he had known the appellant for 3 years as he (the appellant) worked in Ligega at a hardware. It was his testimony that the report was made earlier but the complainant's mother went to the police station again on 25/6/2018 when she took the order of arrest to the Ligega AP Post.

21. PW4 NO. 105968 PC (W) Truphena Ogolla of Ukwala Police Station based at the Sega Police Patrol Base testified that on 22/6/2018 at around 3:45pm she was at the police station when PW2 reported that her daughter who was 12 years and who was a class four pupil at [Particulars withheld] Primary School had been defiled by the appellant. It was her testimony that by the time the complaint was being lodged, the complainant had already been treated at the Sega Mission Hospital. She testified that she issued the complainant with a P3 Form which P3 Form was filled at Ambira Sub-County Hospital and that the maker of the P3 Form confirmed that the complainant was defiled. PW4 testified that she continued with her investigations and later arrested the appellant who was identified by the complainant.

22. In cross examination, PW4 reiterated her evidence in chief and stated that when the complainant lodged the complaint, the complainant was in school uniform but that she did not recover the uniform. She further stated that the complainant knew the appellant very well and voluntarily disclosed the appellant as the person who defiled her.

23. PW5 Victor Odhiambo Achanyo a Clinical Officer working at Ambira Sub-County Hospital testified that he had worked as a Clinical Officer for a period of nine years. He stated that he had filled the P3 Form for the complainant using the treatment notes issued at Sega Mission Hospital. It was his testimony that at the time of treatment, the chief complaints made by the complainant were pain on the thighs, general body malaise and headache.

24. PW5 testified that the patient gave a history of having been taken to the hospital by her mother with a history of having been sexually abused on 21/6/2018 by a person well known to her, on her way from the market. He further testified that the treatment notes indicated that the patient was complaining of painful thighs, general body pains and headache which existed from the time of rape. It was his testimony that on vaginal examination the patient was found to have normal vaginal walls, no lacerations were noted and the hymen was not intact. He said that the treatment notes indicated that on abdominal examination the patient was found to have a normal abdomen which was not tender and that a diagnosis of sexual abuse was made. He said that laboratory tests were done which revealed that the complainant was HIV negative, the pregnancy test was negative and further that the patient was given post exposure prophylaxis as well as paracetamol after which she was referred to the Ukwala Sub-county Hospital for high vaginal swab.

25. PW5 testified that on 22/6/2018 a psychosocial counselling was done to the victim/child and further psychosocial counselling was done on 6/7/2018. He further testified that the appellant was also examined and that on general physical examination the appellant was found to be of good general condition, with normal genitalia, normal physiological functions and no lacerations. It was his testimony that when specimen were collected from the appellant, the following findings were made; on urinalysis pus cells were noted, the VDRL test was non-reactive and the PITC test was non-reactive.

26. PW5 testified that Pus cells are an indication of urinary tract infection which is a bacterial infection and so it cannot be connected with the whitish discharge seen on the complainant's genitalia as that was a sign of fungal infection.

27. On cross examination, PW5 stated that on 25/6/2018 the child had a normal gait and that the vaginal examination revealed that the hymen was missing. He stated that there was evidence of vaginal penetration and that the whitish discharge was suggestive of vaginal candidiasis. PW5 further stated that on 22/6/2018 the said patient was complaining of pain on the thigh but by the time she availed herself for examination on 25/6/2018, the thigh was no longer painful. He stated that he also physically examined the complainant and looked at the complainant's treatment notes that were issued at the St. Anne's Mission Hospital. PW5 stated that he did not see any injuries on the complainant's hands and that sexual penetration if forceful will always cause pain and it does not have to be the first sexual penetration. He stated that the accused was taken to him by police officers.

28. Placed on his defence, the appellant gave sworn testimony and stated that he worked as a mason at [Particulars withheld] and that he was friends with the complainant's father and they used to drink together, expending the complainant's father's money, something which did not sit well with the complainant's mother, PW2.

29. The appellant testified that the complainant's family moved away from the rentals in January 2018 and he did not contact them until sometime when he secured work at [Particulars withheld] Primary School where he saw the complainant who greeted him and asked him to pass her greetings to his son.

30. The appellant told the trial court that sometime in May 2018 he met with the complainant's father who was eager to rekindle their friendship. He further stated that sometime in June 2018, he again met the complainant's father who told him to buy him some alcohol but the appellant refused leading to a disagreement between the two with the complainant's father promising to make the appellant pay for his disrespect. The appellant testified that the following day which was a Monday, whilst he worked at the hardware, he was arrested by two police officers who did not inform him of the reason for the arrest and that he later was informed that someone had lodged a complaint that he slept with his daughter. He said that after that, he was taken to Ukwala Police Station and that he was later taken to the Ukwala Hospital for examination.

31. In cross examination, the appellant stated that he was the neighbor of the complainant's parents (calling the complainant by her first name) for 8 months and that even before then, he used to work with the complainant's father as a turn boy in a lorry. He stated that he had

known the complainant's father for over one year and that all through, they used to take alcohol together.

32. The appellant reiterated his earlier testimony and stated that he separated from his wife in April 2018 after a disagreement. He stated that he was arrested a day after the complainant's father threatened him for his alleged disrespect in failing to buy him alcohol. He stated that he was framed up by the complainant's father. It was his testimony that he had no idea as to why the complainant's parents failed to make allegations against him earlier. The appellant further stated that he never used to talk to the complainant and had no idea as to why the complainant identified him as the person who defiled her.

DETERMINATION

33. Having considered all the grounds of appeal, the evidence adduced in the trial court for the prosecution and the defence and the submissions for and against this appeal, in my humble view, the issue for determination is whether the prosecution proved the charge of defilement against the appellant beyond reasonable doubt to warrant conviction and sentence imposed.

34. Section 8(1) of the Sexual Offences Act provides that:

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

35. The prosecution is required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator.

36. On the question of age, the complainant stated that she was eleven (11) years old at the time she testified before the trial court. Her mother (PW2) told the court that the complainant was 11 years and was born in 2006. PW4 testified that the complainant was 12 years old. PW4 produced an original of the birth certificate for the complainant with the serial No. [xxxx] which indicated the complainant's date of birth as 7/5/2006. The complainant was therefore twelve (12) years of age at the time of the alleged sexual assault. This evidence was not challenged by any other contrary evidence. I therefore find that the prosecution established that the complainant was a child within the meaning of Section 2(1) of the Children's Act.

37. I now turn to the ingredient of penetration. The appellant submitted that there was inconclusive evidence of penetration. Section 2(1) of the Sexual Offences Act defines penetration as:

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

38. The complainant testified that on the material day of 21/6/2018 at around 5pm she was at the Ligega Shopping Centre when she met the accused whom twice lied to her of an impending meeting with her grandfather before leading her to a maize plantation where he forced her to the ground, tied her hands and legs with a sisal rope and ***"did bad manners to her"*** which she explained that the appellant fucked her. The complainant further elaborated that the appellant wore a condom on his penis and inserted it into her vagina. From the evidence on record, the trial court noted that even though the complainant did not mention the word vagina she pointed at her vagina. She stated that the appellant had previously had sex with her. Upon being medically examined, the complainant was found with no injuries but that her hymen was missing.

39. Although corroboration is no longer necessary under the proviso to section 124 of the Evidence Act, the evidence of PW1 was sufficiently corroborated by the evidence of the examining clinical officer who testified as PW5 who examined the complainant four days after the incident had occurred.

40. PW5 stated that he filled the complainant's P3 form and further examined her and though there were no visible injuries on her external genitalia, the complainant's hymen was not intact an indication of recent vaginal penetration. Accordingly, it is my humble view that the prosecution proved the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

41. The third element of defilement is whether the penetration of the complainant's genitalia was done by the Appellant. The appellant in his submissions further complained that the evidence of the complainant was evidence of a single identifying witness that discredited her veracity contrary to section 163 of the Evidence Act.

42. From the evidence on record, the incident occurred during daylight, at about 5pm. The Appellant was well known to the complainant. The complainant stated that the appellant was previously a neighbour to them. The same was corroborated by PW2, the complainant's mother as well as the appellant himself who testified that he had lived next to the complainant and her family for a period of 8 months and further that he had met the complainant whilst working at her school.

43. The complainant informed her mother that the Appellant had sex with her on the material date and previously. Evidence by the complainant was that the alleged incident happened when there was still daylight and by the time the appellant was finished defiling her, it was growing dark.

44. The appellant on his part denied the offence and stated that the charge against him was a frame up courtesy of the complainant's father whom he refused to buy alcohol for. Despite this statement by the appellant, there was no evidence of existence of any grudge between the Appellant and the complainant or any of the other prosecution witnesses. The complainant therefore stood to gain nothing by stating that the Appellant defiled her if no such incident had occurred. In my humble view, the evidence of the complainant was believable that she positively identified the appellant as the perpetrator of the sexual assault occasioned on her.

45. The appellant in his grounds of appeal also claimed that the trial court disregarded the contradictions in the evidence of PW1 and other prosecution witnesses. The appellant failed to point out what contradictions he was referring to. From the trial court record, I find no contradictions which are material and fatal to the prosecution's case. The testimony by PW1, the complainant, was coherent and consistent. The appellant had the opportunity to cross-examine the complainant and other prosecution witnesses. There emerged no contradictions in their testimonies. The Court of Appeal addressed itself on the issue of contradictions in **Richard Munene v Republic [2018] eKLR** stated as follows:

> **"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."**

46. Accordingly, it is my finding that there was no material contradiction in the prosecution's case during the trial so as to prejudice the appellant. Consequently, this ground fails.

47.The appellant also claimed that voire dire examination was not properly done on the complainant minor. I have perused the detailed proceedings taken by the trial magistrate Hon. G. Adhiambo on 16th July 2018. The trial magistrate conducted a proper voire dire examination on the complainant through a question and answer session as required by law and as per the requirements in the case cited by the appellant and she was satisfied that the complainant was intelligent enough and understood the importance of telling the truth and giving sworn evidence. Accordingly, I find no defect in the manner in which the voire dire examination was conducted. The complaint by the appellant is therefore devoid of merit and is hereby dismissed.

48. On whether this court should order a re-trial of the appellant, the principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar v R (1964) EALR 483** offered the following guidance:

> **"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered..."**

49. The Court of Appeal equally stated as follows in **Samuel Wahini Ngugi v. R (2012) eKLR**:

> **"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:**
>
> **"'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."**

50. That decision was echoed in the case of **Lolimo Ekimat v R, Criminal Appeal No. 151 of 2004(unreported)** when this Court stated as follows*:*

> **"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."**

51. Applying the above established legal principles to this appeal and considering the the evidence on record and the charge, I do not find in favour of the appellant. A reexamination of the evidence adduced before the trial court clearly points to an act of defilement perpetrated by the appellant to the exclusion of everyone else. There was no prejudice on the appellant during his trial leading up to his conviction. There is also no mistake or irregularity evident from the trial record, on the part of the trial court to warrant an order for a retrial. The trial record shows that the trial of the appellant was conducted in a fair and objective manner.

52. Furthermore, this court observes that as soon as the complainant had testified, she was brutally murdered and it is possible that the appellant wants a retrial because he knows certainly that there will be no complainant to testify against him in the defilement case. I find the appellant is mischievous and does not want justice to prevail.

53. In the end, I find that the appeal herein against conviction of the appellant is devoid of merit. I dismiss it.

54. On whether sentence imposed was lawful or excessive in the circumstances, the appellant urged the court to consider his sentence after mitigation and give him non-custodial sentence should this court uphold his conviction.

55. The trial court record shows that the appellant, upon conviction was given a chance to mitigate and he did saying ***"I request the court to forgive me. I live with my grandmother and I live in a rental house."***

56. The appellant was then sentenced to serve twenty years' imprisonment. The question is whether this sentence was lawful or was manifestly excessive. From the evidence adduced, albeit the complainant said that she was aged 11 years, the evidence adduced by was of a birth certificate and as per the charge sheet shows that the complainant was aged 12 years hence the applicable penalty section is 8(3) of the Sexual Offences Act. **Section 8(3) of the Sexual Offences Act** provides:

> **"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."**

57. The sentence imposed was lawful and lenient as the appellant was handed the minimum sentence for this offence of defilement under section 8(3) of the Sexual Offences Act, after the trial court considered his mitigation. The principles espoused in the **Francis Muruatetu & Another v Republic [2017] eKLR** on the discretion on the trial court in matters sentencing are that the mandatory sentences are unconstitutional only in so far as they fetter the judicial discretion of trial courts in sentencing taking into account the seriousness of the offence, the mitigations and circumstances under which the offence was committed.

58. In the present case, the appellant took advantage of a minor child aged 12 years and defiled her severally before the incident that led to this case. The appellant is a sex pest who had no mercy. He had defiled her over five times prior to the 21/6/2018. Although he was said to be a first offender, he does not deserve the mercy of the court to reduce the sentence further. The trial Magistrate's discretion in sentencing was not fettered. She exercised her discretion properly. I find no reason to interfere with that discretion.

59. I further note that as soon as the complainant had testified in the lower court, on 9/8/2018 the prosecutor reported to the trial magistrate that the complainant had been brutally murdered on 31/7/2018.

60. Accordingly, I find this appeal against conviction and sentence devoid of merit. I dismiss it. The appellant to serve the twenty years sentence imposed.

61. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 27TH DAY OF APRIL, 2021

R.E. ABURILI

JUDGE

In the presence of:

Appellant virtually from Kisumu Maximum Prison

Mr. Kakoi Principal Prosecution Counsel

CA: Modestar and Mboya