REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 70 OF 2019

GEDEON NJOROGE ....APPELLANT

VERSUS

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

(Appeal from original conviction and sentence dated 21st November 2019 (Hon. C. Ndumia, RM) in Criminal Case No. 12 of 2019 at Principal Magistrate's Court, Loitokitok)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act, (No. 2 of 2006). Particulars were that on the 12th day of May, 2019 in Loitokitok Sub County within Kajiado County, he intentionally caused his male organ to penetrate the female organ of **SNL**, a child aged 13 years.

2. He denied the charge, and after trial in which the prosecution called 5 witnesses, and his defence, he was convicted and sentenced to 8 years imprisonment. Being aggrieved with both conviction and sentence, he filed this appeal raising the following grounds, namely:

> **1. That the learned magistrate erred in law and fact for pronouncing judgement of eight (8) years without considering whether the evidence before court was beyond reasonable doubt.**
>
> **2. That the learned magistrate erred in law and fact for failing to consider whether the D.N.A was done as required under section 36 of the Sexual Offences Act.**
>
> **3. That the learned magistrate erred in law and fact for failing to consider whether the birth certificate of the complainant was produced in court during the proceedings.**
>
> **4. That the prosecution side failed to corroborate the first report and investigation diary that was written on charge of a missing child.**
>
> **5. That the prosecution failed to corroborate evidence that the child was defiled or the child was missing.**
>
> **6. That the learned magistrate knew very well that the evidence before court was not enough for sexual offences as there is no section of the C.P.C that deserves less that ten (10) years sentence.**

3. The appellant filed amended grounds of appeal raising the following grounds:

> **1. THAT the learned trial magistrate erred in both law and fact by convicting him appellant on evidence, which did not meet the minimum threshold as required by law.**
>
> **2. THAT the learned trial magistrate failed to appreciate the material discrepancies, inconsistencies and contradictions, which were inherent in the case, which were incurable.**
>
> **3. THAT the key elements and ingredients of the offence of defilement were not well established.**
>
> **4. THAT the learned trial magistrate erred in law and fact by convicting simply because the complainant's demeanor and her act of evading questions gave a different impression whereas the same should have been held in his favour.**

5. THAT the learned trial magistrate relied heavily on circumstantial evidence and went ahead to render and opinionated judgement.

Appellant's submissions

4. During the hearing of the appeal, the appellant relied on his amended grounds of appeal filed together with submissions. He submitted that the prosecution's case was marred with material discrepancies, inconsistencies and contradictions. According to the appellant, PW1 testified that she did not sleep at his place on 12th May, 2019. She stated that she slept at a construction site, because she was late to go home after watching a game.

5. She also testified that she met the appellant coming from mama Nyambura but she did not go to his house. She denied telling the police that she had sex with the appellant. She was categorical that she lied in her statement, because she did not do anything with the appellant.

6. The Appellant again submitted that PW1 stated that she was taken to Kimana police station because she did not sleep at home and that she was examined and agreed that she had sex with the appellant on 13th May, 2019. It was her testimony that she had known him for a long time but had not had sex with him before.

7. The appellant argued that there were contradictions, material discrepancies and inconsistencies in the prosecution's case which cast PW1 as an untruthful witness, but one who was under pressure to lie either form the prosecution or from other external forces to implicate him. He relied on ***Kimani Ndungu v Republic*** [1979] 1KLR and ***Philip Nzaka Wati v Republic*** [2016] eKLR for the argument that to find conviction in a criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt and the prosecution's evidence must be cogent, credible and trustworthy.

8. It was his argument that the Prosecution's evidence was so underwhelming and way below the minimum threshold required by law to support a conviction. Referring to section 124 of the Evidence Act, the appellant submitted that it is important for this court to interrogate the evidence of PW1, critically analyze, re-evaluate and scrutinize it so as to establish whether or not, PW1 was telling the truth. He submitted that the contradictions, inconsistencies, inadequacies and material discrepancies should have been held in his favour. He relied on ***Pius Arap Maina v Republic*** [2013] eKLR.

9. The appellant also submitted that there was no proof of penetration and identity of the perpetrator. According to the appellant, PW2 testified that he examined the complainant on 14th May, 2019 and found her calm with no injuries on her genitalia. She however had bruises on her labia Majora, her hymen was raptured and her vagina had a smelly discharge, which was a sign of an STI.

10. The appellant submitted that during cross-examination PW2 estimated the injury to have been 24 hours old, which meant the act might have been committed on 13th May, 2019. He argued that from the evidence of PW3 and PW5, he was arrested on 13th May, 2019, while PW1's evidence was that he did not do anything to her on Sunday, Monday, 12th may, 2019 or 13th May, 2019, it meant he was not in any way culpable.

11. Regarding identification of the perpetrator, the appellant submitted that PW1's evidence was contradictory and inconsistent and therefore, could not be relied on. He argued that the trial magistrate admitted that there were inconsistencies as to when defilement happened, thus he deserved an acquittal.

12. The appellant further submitted that PW1's evidence was inconsistent and self–contradictory and should have been resolved in his favour. He argued that no evidence was produced to make the court believe that he was either directly or indirectly responsible for PW1's defilement. He maintained that PW1's demeanor was that of someone who was under pressure from external forces.

13. He argues that it was erroneous for the trial magistrate to conclude that the complainant lied to court to protect him when their relationship was not proved. He relied on section 25 A of the Evidence Act to argue that although PW5 asserted during cross examination that PW1 confessed that she slept with him, and showed PW5 where she slept, the confession was inadmissible.

14. He also argued that the fact that PW3 was directed to him while searching for PW1, did not mean he was culpable of the offence. This, he submitted, was purely circumstantial evidence and he should not have been convicted simply because he went to the same church with the complainant. It was his submission that a court of law does not act on mere allegations, assertions or presumptions. The evidence adduced must be cogent, detailed and watertight to warrant a conviction. He relied on ***Muiruri Njoroge v Republic*,** (Criminal Appeal No. 115 of 1982).

15. The appellant submitted that the person who directed PW3 to him was not called as witness. He also blamed the trial magistrate for concluding that PW4, the complainant's mother, may have been aware of the relationship between him and PW1 when there was no evidence. He maintained that he should have benefitted from the inconsistencies and contradictions in the prosecution's case. He relied on ***Bonface Chitsango Ngoba v Republic*** [2018] eKLR and urged this court to apply the same principles and allow his appeal.

Respondent's submissions

16. The respondent opposed the appeal and supported both conviction and sentence. It was submitted that the prosecution was required to prove age, penetration and identity of the aggressor.

17. On age, it was submitted that age assessment was conducted and the complainant was found to be 13 years old hence a minor. Regarding penetration, the respondent submitted that during re-examination, PW1 stated that she had sexual intercourse with the appellant. Further, PW2 examined PW1 and found bruises on her labia majora and her hymen had been raptured. The probable weapon was a male organ.

Penetration was therefore proved.

18. As to the identity of the attacker, the prosecution submitted that the appellant was well known to the complainant and according to PW3's evidence, she used to visit him. It was argued that the complainant testified that she had sex with the appellant, thus identifying the perpetrator. D.N.A test was not necessary.

19. I have considered this appeal and submissions by both sides. I have also read the trial court's record and considered the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that.

20. In **Okeno v Republic** [1972] EA 32, it was held that:

> **An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion... 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 finding and conclusion; 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.**

21. In **Kiilu & Another vs. Republic** [2005]1 KLR 174, the Court also held that:

> **An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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.**

22. PW1, a girl aged 13 years, testified that on 12th May, 2019 after church, she went to look for her friend Zainabu but did not find her. She then went to Mama Nyambura's home. Later, she went to look for the appellant and found him in church. they later went together to mama Nyambura's home where she left the appellant and went home. Later, she went to look for a book from her classmate. She found the appellant dancing. He asked her to take him to look for his mother where they had tea and then she left for home. She testified that she did not go to the appellant's home and did not sleep there. She slept at a construction site because she was late to go home. She had watched a game until late; that she had seen the appellant that day coming from mama Nyambura's house she did not have sex with him. She stated that she had lied in her statement and maintained that she did not do anything with the appellant. She testified that she was taken to Kimana police station because she had not slept at home. She was later taken to hospital where she was examined and she admitted that she had sex with the appellant on 13th May 2019. She knew the appellant but they had not had sex before that day.

23. In cross examination, she told the court that she had known the appellant since 2018, but that they had not agree where to meet. She denied that she was forced to go to the appellant's place. She also stated that the appellant did not do anything to her. She maintained that she slept at a construction site on both days.

24. PW2 Abdul Hussein, a senior clinical officer attached at Loitokitok Sub County Hospital, testified that on 14th May 2019, he examined PW1 who was taken to hospital with a history of defilement. She was calm with no physical injuries in her genitalia. She however had bruises on her labia majora and her hymen was raptured. She also had a smelly discharge from her private parts which was a sign of an STI. He concluded that she had been defiled and assessed the injuries as grievous harm. He produced the P3 form and PRC as exhibits.

25. PW3, JL the complainant's father, testified that on 12th May, 2019, the complainant went to church but she did not come back home. He inquired from her mother and sibling where she but they did not know. He went to look for her. He returned at 7pm but she had not come home. He called Zainabu's mother who informed him that the complainant was not there although Zainabu was at home. He went and asked Zainabu where the complainant should be. Zainabu told him that they usually go to church or to a certain house. They went to the house but found that the occupant had moved out. They were directed to another house but they were informed that the complainant was there at 4.00pm. Zainabu told him that the complainant also goes to the appellant's home and he was directed to the place. They found the appellant's mother but the complainant was not there. They were shown another house but did not find anyone in. As they were leaving, they saw three young men going to the house. They asked them who Gideon(appellant) was, he identified himself and informed him that he knew the complainant but did not know where she was. He called the police who arrested the appellant. The following morning at about 7.45 am, one of the three young men called and informed him that they had found the complainant. He asked her where she had slept and she told them that she slept at the construction site. He took her to Kimana police post.

26. PW4 PL, mother to the complainant, testified that on 12th May, 2019, she went to church and when she returned home at around 7. 00 p.m., the complainant was not at home. She asked her siblings about her but they said they did not know where she was. She called PW2 and informed him about the complainant's absence. The following day, they went looking for her but did not find her. PW2 later found the complainant in town. When she asked her where she had slept, the complainant told them that she slept at a house near their home because she was late and was afraid to go home. PW1 was fine when she went home. The witness told the court that she did not know if anyone was with the complainant.

27. PW5 No. 84151 CPL Christopher Ekale, testified that on 12th May 2019, PW2 called saying that his daughter was missing. He had tried looking for her without success and he needed police assistance. They went in search of the complainant. They found the appellant and PW2 said he was a friend to the complainant and she last seen with him. The appellant confirmed that he was with PW1 until 5.00 pm, when

he escorted her to the construction site and he left her. He went home while she went her way. They took the appellant to the police station and began investigations.

28. The following day, PW2 informed him that he had found the complainant who had been brought by the appellant's brother. He advised PW2 to take her to the station for interrogation. Upon interrogation, the complainant stated that she was with the appellant; that he escorted her to the construction site, but she was afraid to go home and slept at the site. She was taken to the hospital for examination. The appellant's age was assessed to be 18 years and the complainant was 13 years. She was found to have been defiled. The witness also told court that PW3 did not want to disclose some facts and she appeared to defend the appellant.

29. When put on his defence, the appellant gave unsworn testimony and testified that on 13th May, 2019 he woke up and went about his business for the day until around 10,00pm. When he and his friend went back to the house, he found 8 people, including the complainant's parents waiting for him. He was asked if he had seen the complainant. He told them that he saw her leaving her mother's house but did not know where she was. The complainant's father called the police who came and arrested him and took him to Kimana police post. He was later taken to court and charged. He admitted that he knew the complainant but denied defiling her.

30. The trial court considered the above evidence and was satisfied that the prosecution had proved its case against the appellant, convicted and sentenced him, prompting this appeal. The appellant argued that the prosecution did not prove its case as required by law. He also submitted that the prosecution evidence was full of inconsistencies and contradictions which should have been resolved in his favour. it was his case that there was no evidence that he defiled the complainant. The prosecution on its part argued that the ingredients of the offence were proved beyond reasonable doubt and, therefore, the appellant's conviction was sound.

31. I have considered the arguments of both sides, the evidence on record and reevaluated it. The offence the appellant was charged with required the prosecution to prove age, penetration and identity of the perpetrator. The complainant stated during ***voire dire*** examination that she was 13 years old. The age assessment report on the complainant (Pex5) also put her age at 13 years. There was no argument that she was not 13 years. This ingredient was, therefore, proved.

32. Regarding penetration, the most important evidence here was that of PW2, the clinical officer who examined the complainant. He testified that he examined the complainant and found her calm. There were no physical injurie to her genitalia but she had bruises on her labia majora. The hymen was raptured and she had smelly discharge. The witness produced the P3 form and PRC which confirmed what the witness told the court. This evidence was clear therefore, that the complainant had sexual indulgence.

33. The final and most important ingredient was that of identity of the attacker. The prosecution's case was that the appellant was the perpetrator of the crime. The prosecution was required to prove beyond reasonable doubt that it was the appellant who defiled the complainant. On this ingredient, the trial court believed the prosecution's evidence had discharged its duty in proving that ingredient.

34. I have gone through the trial court's record and considered the evidence. Except the evidence of the complainant, there was no other evidence to connect the appellant with the crime he was charged with. All other witnesses did not witness commission of the offence. In that regard, therefore, this was the case of a single witness. The proviso to section 124 of the Evidence Act allows the court to convict on the sole evidence of a victim of sexual assault if it believes that the witness is telling the truth.

35. This appeal turns on the evidence of PW1 alone regarding her defiler. The trial court considered her evidence and concluded that her evidence proved that the appellant defiled her. I have read the complainant's evidence as recorded by that court. She was not consistent in her evidence. The record shows that immediately she started testifying, the prosecution requested to stand her down so that she could compose herself. When she resumed her testimony on a different day, the prosecution again sought to invoke the provision of section 152 of the Criminal Procedure Code and have her declared a hostile witness. the idea was abandoned when she agreed to testify.

36. This fact was appreciated by the trial court when it stated that the complainant's evidence kept on changing in respect of what may have happened and in the process the prosecution produced the statements she recorded with the police. Further in the judgement, the trial court stated:

> **PW1 at some point in her evidence in chief stated that she had sex with the accused person. I say at some point because the complainant was really un co-operative in giving her evidence.**

37. The question that arises is; did the prosecution prove beyond reasonable doubt that the appellant defiled the complainant? If the complainant was uncooperative, and at some point stated that she had sex with the appellant, what did she also state at some other time? The trial court having noted that the complainant's evidence kept on changing, and that she was uncooperative, was her testimony believable and could it be the basis of a conviction?

38. The principle of law in criminal trial has never changed. The prosecution bears the burden to prove its case beyond reasonable doubt. In ***Bakare v State (***1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, stated:

> **Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.** (emphasis)

39. In **Stephen Mulili v Republic** (CRA No. 90 of 2013), the Court of Appeal held that;

> **The degree is well settled; it need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable**

doubt does not mean beyond a shadow of doubt…If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.

40. Further, in ***Pius Arap Maina v Republic*** [2013] eKLR, the Court of Appeal stated that the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused.

41. I have carefully considered the complainant's evidence. She was not candid on who defiled her. As the trial court correctly noted, the complainant kept on changing her testimony. She was in fact recorded to have stated that she lied to the police that she had sex with the appellant. The prosecution produced the statements she recorded to the police as exhibits and the trial court referred to them in its judgment and concluded that the appellant had defiled her. That statement was not made on oath. It was not evidence that could be believed on its own except if supported by her testimony before the court. Where she contradicted herself and the trial court noted as much, there was no basis for believing her.

42. In *Philip Nzaka Wati v Republic* (supra), the Court of Appeal stated on contradictions:

It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

43. In **Dickson Elia Nsamba Shapwata & Another v. Republic,** (Cr. App. No. 92 OF 2007)**,** the Court of Appeal of Tanzania stated:

In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.

44. From the evidence on record, I agree with the appellant that the complainant's evidence was not credible to warrant his conviction. She told the trial court that she lied to the police that the appellant defiled her. PW5, the investigating officer also told the court that PW3, the complainant's mother was hiding something and appeared to defend the appellant. PW3 had told the court that she did not know where the complainant was. She also testified that the complainant was fine when she went home.

45. PW2, testified that the complainant was taken to him by the appellant's brother. That person did not testify and therefore it was not clear where he found the complainant. PW2 was only suspicious that the complainant was with the appellant. Suspicion however strong, cannot be the basis of a conviction.

46. In the end, I am satisfied that this appeal has merit. Consequently, this appeal is allowed, conviction quashed and the sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 16TH APRIL 2021

E C MWITA

JUDGE