REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 40 OF 2019

NUHU OMAR BWANAADI……..……..……APPELLANT

VERSUS

REPUBLIC……...……...……..…..RESPONDENT

(Appeal from Original Conviction and Sentence in S.O No. 5 of 2019 of the Principal Magistrate's Court at Lamu Law Court-Hon. T.A Sitati, PM dated 23rd September 2019)

CORAM: Hon. Justice R. Nyakundi

Chacha Mwita advocate for the appellant

Mr. Mwangi for the State

J U D G M E N T

The Appellant was charged with defilement contrary to Section 8(1) as read with subsection (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 24th November 2018 in Lamu east Sub County within Lamu County the accused intentionally and unlawfully caused penis penetrate the vagina of SA a child aged 17 years. The accused was charged with an alternative charge of indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 24th November 2018 in Lamu East Sub County within Lamu County intentionally touched the buttocks and vagina of SA a child aged 17 years.

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

1. That the learned Hon. Magistrate erred in both law and fact in convicting the appellant on insufficient evidence, in the absence of any direct evidence and by relying on disjointed circumstantial evidence which was never corroborated to confirm defilement.

2. The learned hon. Magistrate erred in both law and fact by convicting the appellant despite the complainant denying that she was defiled by the appellant and having been declared a hostile witness and her plain statement admitted as evidence.

3. The learned Hon. Magistrate erred in both law and fact by convicting the appellant after admitting evidence which was tendered irregularly and in violation of the evidence act and the principles of criminal practice by excluding the appellant.

4. The learned hon. Magistrate erred in both law and fact by convicting the appellant against the overwhelming evidence that the subject presented herself to be an adult and the biological father having legitimized the same. In brief the prosecution clearly failed to prove their case beyond reasonable doubt.

5. The learned Hon. Magistrate erred in both law and fact by failing to make a finding that the prosecution evidence was unprocedurally adduced in court to the prejudice of the appellant who was unrepresented, in clear violation of Article 50 of the constitution which evidence failed to link the appellant to the alleged offence.

6. The learned Hon. Magistrate erred in both law and in fact in convicting the appellant despite the prosecution's failure to call material witnesses to avail critical evidence to the detriment of the prosecution's case and an inference ought to have been drawn in favor of the appellant.

7. The learned Hon. Magistrate erred in both law and fact by convicting the appellant without considering the evidence tendered by the appellant which was supported and substantiated by the subject in this case.

8. The learned Hon. Magistrate erred in both law and in fact by allowing himself to be held hostage by legislation and in awarding a harsh sentence in disregard of the appellant been youthful and the mitigation tendered.

In light of the above grounds, the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

Background

PW1 SOB complainant's mother gave sworn evidence. She informed the court that her daughter was 17 years old when the accused took her by force and married her against her will and that of her parents.

She states that on 22/11/2018 at around 4pm her daughter went missing from home. She followed her daughter's shoe prints which led her to the accused father's farm. She would later find the accused together with her daughter. When they saw her approaching, the accused jumped on her to restrain her urging the complainant to flee. She then went back without the complainant and when the complainant failed to go home, she reported the matter to the chief which yielded no results. She did not return home until she was brought to court after having been rescued by the OCS.

PW 2 gave sworn evidence after a voire dire. She informed the court that on 22/11/2018 she was with her friend NM. She was having trouble with her mother and uncles and therefore went to a bush which is someone's farm to escape from the pressure at home. That she did not know the owner of the farm. Her mother then followed her to the farm and when she saw the accused, she misperceived situation. She had done nothing wrong.

She was declared a hostile witness upon the prosecution's application and upon cross examination she admitted that she had recorded and signed the statement before court. She denied that she had been married off to the accused and neither had she been living with him as husband and wife. That it was also untrue that she had sexual intercourse with the accused.

She denied having submitted to a medical examination and rejected the PRC.

In her testimony, she remained adamant that she had done nothing wrong nor had sexual intercourse with the accused.

PW4 C.I Zakary Odongo, of force No. 236557 informed the court that at the time of the subject offense he was the OCS of Kizingitini. That on 23/11/2018 while on duty at the station, he came across a report in the O.B by one S that her daughter had gone missing after going to fetch water. On 24/11/2018 the mother asked for police help to arrest the accused who was suspected of holding the complainant.

That later, they received a police alert that an assistant Kadhi Suleiman had wed the complainant to the accused person in an Islamic wedding ceremony. The police dashed to the wedding but on their arrival the wedding was over.

That the Assistant Kadhi Athumani Suleiman and 2 other men who had presided over the wedding of the complainant were arrested and charged with procuring a marriage for an underage person.

That it was upon the arrest and arraignment of the three men when the minor resurfaced. She was booked and recorded a statement and confirmed that she had only had sexual intercourse with the accused after the wedding ceremony.

PW4 Moses Rimba of Faza sub county hospital, produced PEx-3, PEX -4 and PEX-5.

The prosecution closed its case and the trial magistrate ruled that the accused person had a case to answer and placed the accused on his defence. The accused elected silence in his defence, called no witness and closed his defence.

The submissions

The appellant submitted that the evidence tendered by the prosecution was insufficient for a conviction because the evidence has to be beyond a reasonable doubt. The appellant anchored his grounds on that the complainant stated that she was never married nor defiled by the appellant and her denial of the medical report.

They further submit that documents are produced in court as exhibits by their makers and the trial court allowed the prosecutor to produce the witness statement of the complainant as exhibit which according to them is unprocedural. That the said statement was obtained unprocedurally after the complainant had been imprisoned for one week. They relied on the case of ***Republic V Felix Kanila Pula [2016] eKLR.***

They submit that the evidence of a hostile witness must be corroborated if it is to be relied upon citing the case of ***Pacificah Kenyansa Samuel & 3 Others [2016] eKLR*** and that in the present case the same was not corroborated.

The appellant submits that he stood prejudiced throughout the trial for reason that the prosecution was ably represented by counsel while the Appellant remained unrepresented throughout the trial and nowhere was, he informed of his right to legal representation as per Article 50 (2) (g) & (h) of the Constitution of Kenya 2010.

They submitted that the prosecution had not proved its case beyond reasonable doubt and it is for that reason that they pray the appeal be allowed, sentence quashed and the conviction set aside.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. The task of the 1 st appellate Court on first appeal from a conviction or acquittal, was declared by the decision of the Court in ***Pandya v R {1957} EA 336 at pg. 337*** where the Court held as follows:

> ***"On first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellate is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the Judge or Magistrate with such other materials as it may have decided to admit. The appellate court must then make up its mind not disregarding the Judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or Magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant the court in differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate Court has not seen. On second appeal it becomes a question of Law as to whether the first appellate Court in approaching its tasks, applied or failed to apply such principles." …… (See also Shantilal M. Ruwala v R {1957} E.A 570)."***

The Appellant is accused of committing the offence of defilement. Section 8 (1) defines defilement as; -

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

Three ingredients must be established for one to be convicted of defilement, which are:

> ***1. Age of the Complainant***
>
> ***2. Proof of penetration***
>
> ***3. Proof that the perpetrator of the offence was the Accused person.***

See ***Charles Wamukoya Karani v Republic Criminal Appeal No.72 of 2013.***

On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. ***See Moses Nato Rapheal v Republic (2015) eKLR.***

It has been held that the age of the victim in sexual offences can also be proved by the direct evidence of parents or guardian or by observation by the court. ***In Thomas Mwambu Wenyi v Republic (2017) eKLR*** cited with approval ***Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000*** which held that:

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

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

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

Turning to the present case, the complainant stated that she was seventeen years old at the time of testifying. A birth certificate PEx-2 was produced showing the date of birth as 15th July 20101 therefore placing her at 17 years old at the time of the alleged defilement.

On the element of penetration, **Section 2** of the Sexual Offences Act defines penetration as:

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

Section 9 (1) of the Sexual Offences Act provides as follows;

> ***"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed as attempted defilement."***

The prosecution has a duty to establish that the Appellant attempted to defile the victim. In determining attempted penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in ***Dominic Kibet Mwareng v Republic (2013) EKLR*** where the court stated that:

> ***"In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence…"***

In the present case, the complainant remained adamant in her evidence at the trial court that she had not been defiled by the appellant. She stated that it was untrue that she had had sexual intercourse with the accused as his wife. I find it troubling that the evidence of the complainant seems to have been procured by duress from the police.

PW4 produced a PRC form (PEX-4) dated 28/12/2018 whose findings were; normal body features, female genitalia-hymen not broken but the rest normal, obstetrics and gynecological history showed no prior pregnancy, digital examination showed prior penetration had taken place.

He also produced a P3 form (PEX-5) dated 27/11/2018 whose findings were; head and neck were normal, normal thorax, abdomen and all limbs, no treatment given prior to examination, labia minora, labia majora showed normal distribution of hair. Digital examination using finger showed ease of penetration without resistance. No blood or discharge seen.

I have analyzed the evidence on record and the P3 Form and PRC form produced. They both show that there was prior penetration. There is however no disclosure of where the said penetration was from and neither any link to the appellant. The medical report does not rule penetration by the appellant and there was no evidence adduced showing whether or not the appellant had sex with the complainant at any given time. I am not satisfied that the prosecution prove beyond reasonable doubt that there was penetration from the appellant.

On identification, where identification is based on Recognition, this is where the complainant knows the accused and it has been held to be more reliable than identification of a stranger. The court of Appeal in ***Francis Muchiri Joseph v Republic (2014) eKLR*** held that:

> ***"In LESARAU v R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name".***

In this case, the appellant seems well known to the accused and this has not been disputed. To this end the only issue that remains in dispute is whether the alleged defilement did take place.

I have taken into consideration the circumstances of this case and I am not satisfied that the prosecution proved its case to the required threshold of beyond reasonable doubt.

In the upshot, the appeal succeeds in its entirety and the Appellant shall therefore be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 30TH DAY OF JULY, 2021

……

R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for the state