REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. E017 OF 2020

KAHINDI CHARO KUPATA.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from the original SO No. 10 of 2019 in a Judgment delivered on 19.09.2019 by Hon. S. D. Sitati (RM) at the Senior Principle Magistrate's Court at Kilifi).

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

The Appellant in person

J U D G M E N T

This is an appeal against conviction and sentencing of forty (40) years imprisonment imposed on the applicant by the Learned trial Magistrate who was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2003.

The particulars of the offence alleged that on the 25.1.2019 at around 1600 hrs, at [Particulars withheld] village, the appellant intentionally and unlawfully caused his genitals organ namely penis to penetrate the genitals organ of the victim namely **MSK** a child aged nine (9) years.

The prosecution's case was mainly centered on the evidence of four (4) witnesses. **(PW1) – MK** the victim of the offence alleged that she was defiled at the age of 9 years as proven by the birth certificate exhibit. According to **(PW1)** it all happened on 25.1.2019 when she boarded a boda boda being driven by the appellant. In that ride of pick up from school, the appellant did not drop her at home but went down towards the bush, held her throat and did bad things to her while lying on the ground. The bad things according to **(PW1)** involved insertion of his penis to the vagina. In that ordeal **(PW1)** told the Court that she experienced pain and blood oozed out as a result of the penetration.

Further **(PW1)** though in that distressful condition did not manage to divulge the information immediately to the parents. It happened only soon thereafter to **(PW2) – SKK**, identified as a cousin to **(PW1).** In **(PW2)** testimony **(PW1)** arrived at home but displayed unusual personal circumstances of not taking super nor getting out of bed to go to school. The concerns raised by the school of her physical conditions occasioned further inquiry to find the reason for her low energy levels, the remarkable revelation when **(PW1)** was taken to the hospital for test and medical examination. This was done in the presence of **(PW2)** and **(PW3).**

According to the positive findings by **(PW4) Dr. Ndaro** of Kilifi Hospital the victim **(PW1)** came to the hospital with a history of having been defiled. On examination, **(PW4)** established that **(PW1)** suffered hymen rupture and minor perineal tears. As a result, **(PW4)** opined that **(PW1)** suffered harm.

Following successful mounting of the prosecution case, the appellant was called upon to answer the charge in his defence, the appellant denied that he ever had sexual intercourse with the victim **(PW1).** He only acknowledged knowing **S** and **K** whom he had offered his boda boda services but failed to pay the requisite fare. In view of that debt, he threatened them with police action. Before that would take place he freed himself being implicated with the present charge.

Indeed the trial Court examined the evidence before him and found that the prosecution had discharged the burden of proof of beyond reasonable doubt. He proceeded to convict and sentence the appellant according.

Analysis and determination

It is trite that the duty of this Court is to re-evaluate and reconsider the evidence and thereafter redraw independent conclusions. The principles are sanctity stated in **Okeno v R {1972} EA 32**. Furthermore, when re-appraising the evidence the Court has to bear in mind that the trial Court had advantages of seeing, and hearing the witnesses. That due allowance ought to be factored in the conclusions reached by this Court.

The principles in the case of **R v Dyier {1985} 2 KLR and Buru v R {2005} 2 KLR 533** cautions an appeals Court from interfering with the findings of the trial Court which were based on the credibility of witnesses unless, its shown that the findings had no factual or legal basis.

In the case bar on appeal, it's basically anchored on insufficient evidence to prove the elements of the defence by the prosecution. In addition the appellant argues that the evidence on identification was erroneous to squarely place him at the locus in quo of the crime.

The respondent counsel in a rejoinder submitted that the elements of penetration and age as known in Law were all proved beyond reasonable doubt. It was also the case for the prosecution that there was no error on identification of the appellant.

As regards the practical application of the evidence relating to the appeal, I am of the following conceded view. 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, herein male into the general organs of another person."***

In the instant case, that person being a female victim. The prosecution duty under Section 107 (1) of the Evidence Act is to establish existence of either partial or complete insertion of the male penis to the vagina of the named victim. In doing this, the element imprints the characteristics of criminal offences of intention and unlawful acts or omissions. This is as illustrated under Section 43 of the Sexual Offences Act. In the case of **Dominic Kibet Mwamia v R {2013} eKLR** in cases of defilement, the Court will rely mainly on the evidence of the complainant which may be corroborated by medical evidence. It is therefore not necessary to prove penetration through a medical report or a P3 form. The Court can as a matter of legal policy as stipulated under Section 124 of the Evidence Act rely on uncorroborated testimony of the victim to make a finding on this element in absence of medical evidence.

The precautionary principles on the Court warning itself and with reasons of believe and truthfulness of the single identifying witness connect the offender of such crimes against humanity.

In the instant case on penetration, the victim to her best of the recollection told the Court on this ordeal starting from the time appellant picked her from school. She was confident of being in the hands of a trusted person, ready to drop her at home. But that was never to be as the journey ended up in the bush. In that case as narrated by the victim, appellant issued threats of violence and consistent with an intention to commit the crime he proceeded to penetrate her vagina. Having satisfied his appetite, he left the victim to make it home on her own from that scene of the crime. That act by the appellant of tearing the inner wear followed with insertion of his penis into the genitals of **(PW1)** completed the transactional event of penetration as defined under Section 2 of the Sexual Offences Act. That evidence alone without corroboration from any other quarter satisfied the criteria on the standard of proof and the proviso of Section 124 of the Evidence act to enter a verdict of guilty and subsequent conviction of the appellant.

However, and fortunately so for the prosecution case, there was evidence and weight to be given to the medical reports by **(PW4).** The medical report on being reviewed shows the victim having experienced broken hymen and minor perineal tears. To begin with that shows consistency with the evidence of **(PW1)** confronted with the weight evidence on penetration, the appellant and a short answer to the effect that he is being charged because of pursuing a debt owed arising out of boda boda services offered in respect of **(PW1)** pick up from school.

From the prosecution case nothing can be far from the truth that the victim was sexually penetrated which had nothing to do with fare owed on services rendered.

The evidence of **(PW1), (PW2), (PW3)** and **(PW4)** support the fact of defilement and not on some debt due and owing to the appellant. In this one key factor is that opportunity to commit the offence by the appellant. In the case of **Saul Banda v The People CA No. 117 of 2017:**

> ***"The Law on opportunity in defilement cases was aptly discussed in the illustrious case of Nsofu v The People where the Supreme Court stated as follows:***
>
> ***"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case. In Credland v Knowler Lord Goddard C. J. award with approval, the following dictum of Lord Dunedin in Dawson v Mackinure***
>
> ***"Mere opportunity alone does not amount to corroboration, but the opportunity may, be of such a character as to bring in the element of suspicion. That is that the circumstances and locality of the opportunity be such as in themselves to amount to corroboration."***

Equally, in this case the evidence of **(PW1)** demonstrates that the appellant was the last person who picked her from school with his boda boda. The best of that trajectory shows that the victim never arrived home on a boda boda. She was abandoned inside the bush after an unlawful sexual act by the appellant. The entire case for the prosecution based on **(PW1)** testimony and circumstantial evidence and the theory of last together forms a chain within any reasonable doubt of the appellant involvement with the defilement. The term chain of events, now bring us to another important aspect of Law of evidence which is *Res Gestae*. That is when the prosecution forms a chain of

events and such events forms part of the same transaction.

The evidential value of **(PW1)** of the last seen together with the appellant stands unimpeachable in absence of any rebuttal from the appellant.

On the ground whether the prosecution case consists of contradictions or inconsistencies to impeach the trial, I find no specific errors on any of the witness statement of **(PW1) – (PW4)** based on what they stated on oath before the trial Court. As manifested in Law omissions means missing to state something from the earlier statement; whereas contradictions means stating something different from the earlier statement. Save for the submissions by the appellant, there is no proof of probative contradictions placed before this Court to demonstrate that the witnesses called in support of the prosecution case gave two versions at two different points of time an existence or non-existence of a fact in issue to the offence. That ground cannot therefore stand the yardstick of the Law.

In addition to the above in this appeal proof of age of the victim is a condition precedent before the trial Court imposes any of the prescribed sentences.

The narrated procedure of proving age is clearly stated in the case of **Francis Omoroni v Uganda CA No. 2 of 2000**. This Court drawing attention to these principles, laid down of the firm view that the prosecution discharged the burden of proof of beyond reasonable doubt that the victim age at the time of defilement was nine (9) years old. This was discharged by the production of the birth certificate marked as exhibit 1. She was born on 24.9.2008 and defiled on 25.1.2019 at Madamani village. The duty of the trial Court was to discover the truth and to find out whether, the accused is guilty or not. Facts comes before the Court by way of oral testimony of witnesses and other documents.

In appreciation of that evidence and the approach taken by the trial Court, its clear that the prosecution case appeared to have a ring of truth in the matter. This core of evidence has been evaluated on the strength of identification of the appellant by **(PW1).** The inquiry on this element has been subjected to the guidelines in **R v Turnbull {1976} 3 ALL ER 469.** As also observed under Section 143 of the Evidence Act, the appellant can be convicted on the basis of uncorroborated evidence of a single identifying witness. The statement of the witness **(PW1)** has been reviewed by this Court on the aspect of identification. The credibility of the witness was never faulted by the trial Court. The position taken by this Court also is to the effect that no new compelling evidence has been presented to impeach the statement made on oath by **(PW1).** There are no tools of contradiction and omission to effectively shake or shatter the credibility, or consistency of prosecution evidence. As I conclude, I find no error or mistake on identification evidence.

Finally, the sentence was also attacked as excessive and punitive. The general principle on an appeal to sentence is well settled, usually an appeal will not be allowed to correct an error made by the sentencing Court unless there is evidence of error, mistake or application of wrong principles which in the end occasioned prejudice or injustice. In this particular charge, parliament prescribed life imprisonment on criminal act of defilement in which a victim is aged below eleven (11) years. The trial Court went ahead and exercised discretion to convict the appellant to forty (40) years imprisonment. I wish to place it on record that I find no reason to interfere with that sentence imposed against the appellant. Suffice to say, to that extent the appeal is devoid of merit. Its therefore good for dismissal on both conviction and sentence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF AUGUST, 2021

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R NYAKUNDI

JUDGE