REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 74 OF 2019

MRIMA MKEMBI

ANTONY NDAIKWA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court

at Mariakani by Hon S. K. Ngii (SRM) delivered on 24th October, 2019

in S. O. Case No. 27 of 2019)

CORAM: Hon. Justice Reuben Nyakundi

Appellants in person

Mr. Mwangi for the State

J U D G M E N T

The appellants **Mrima Mkembi** and **Antony Ndaikwa** were tried, found guilty, convicted and each sentenced to fifteen (15) years imprisonment for the offence of gang defilement of a child age 16 years contrary to Section 10 of the Sexual Offences act.

Being aggrieved with the conviction and sentence each preferred an appeal to this Court on the following grounds. For Antony thus:

> ***(1). That the Learned trial Magistrate erred in Law by failing to consider that the legal provisions on minimum sentences violates Section 216, 329 of the Criminal Procedure Code and Article 27 (1) (2) (4) of the Constitution on discrimination.***

With regard to **Mrima**, he pleaded as follows:

> ***(1). That the Learned trial Magistrate grossly erred in Law and fact by failing to consider, that no original or certificate copy of the child was produced in evidence in compliance with Section 66 and 64 of the Evidence Act.***
>
> ***(2). That the Learned trial Magistrate erred in Law by failing to consider the legal mandatory minimum sentences under Section 10 of the Sexual Offences Act.***

Litigation history

This was a criminal trial against the appellants depended upon the following witnesses; **(PW1) - UT** – The complainant in this whole episode testified that she is a pupil, aged 16 years of age and currently active in school. On reflection at the trial she told the Court that on 9.3.2019 she met the appellants, initially known to her. Thereafter, a short conversation ensued but suddenly the appellants started to inflict physical harm by use of sticks in their possession.

Further in her evidence, she was overpowered and fell down on the ground. What followed was an act of being undressed by the appellants

having penetrative sex in turns one after another. Having satisfied their need **(PW1)** stated that she was abandoned at the scene as the appellants also took flight. This incident had to be reported to her brother – **N** who then escalated it to the chiefs office for further action.

According to **(PW4),** the report made to the Assistant Chief office assisted in tracing and effecting an arrest upon the appellants. **(PW3) – Chizi,** testified that on the due date of 9.3.2019 specified in the charge sheet, they were walking home in company of **(PW1)** through a pathway comprising some thicket. In the course, **(PW3)** stated that they came into contact with the appellants. It was at that juncture on being stopped the appellant started to assault **(PW1)** inflicting bodily harm. Further, **(PW3's)** evidence, the appellants' unlawful acts did not stop at assaulting the complainant, but they proceeded in furtherance of having sexual intercourse.

Besides the matter being reported to the Chief, its clear from **(PW5) No. 106700 PC. Mallu**, that she did investigate the defilement charge against the appellants. According to **(PW5),** one of the compliance role she played was to issue a P3 to the complainant **(PW1)** for sole purpose of a medical examination. It also emerged that during the investigations. The complainant and her friends were coming from *'a disco matanga'* event when the appellants accosted them and proceeded to commit the offence.

In support of the documentary evidence which came into her possession as an investigator, **(PW5)** produced the child health card to prove the age of the complainant, the letter indicative of her admission at [Particulars Withheld] Primary School. According to **(PW2) Mwaka**, a certified clinical officer at Samburu Health Center recalled as having examined **(PW1)** on 10.3.2019. In **(PW2)** evidence, the complainant came to the hospital with a history of having been defiled by a gang of men. On examination, **(PW2)** confirmed that the complainant suffered bruises to the left side of the neck freshness from the ruptured hymen, lacerations to the labia with mild bleeding. She produced the P3 as an exhibit which captured other elements like the age of the complainant.

At the close of the prosecution case, each of the appellant was placed on his defence. From the record, the 1st appellant **Mrima** gave unsworn statement denying participation in committing a crime as alleged by the prosecution. In the same vein, the 2nd appellant **Antony** also followed the lieu of **Mrima** to deny the elements of the offence. The trial Court on scrutiny and evaluation of the quantum and quality of evidence established as fact the involvement of the appellants in defiling the complainant that finding brought about the verdict on conviction and sentence. Those two orders remain to be crux of the matter in this appeal.

Determination

On this first appeal, I must be guided by the principles laid down in **Ruwala v R {1957} EA 590.** On consideration of the matter both at the trial Court and appeal, the following elements of the offence stand out for discussion.

(1). The act of penetration of a female aged below 18 years old.

(2). That the appellants were positively identified as culpable in committing the crime beyond reasonable doubt.

The 1st appellant **Mrima** delved into these issues in his written submissions that there existed discrepancies and inconsistencies by the witnesses rendering the whole trial fanciful based on conjecture. The appellant went further to submit on the admissibility of the health card as a primary document to proof age, when in essence such evidence contravened Section 64 and 66 of the Evidence Act, was a misapprehension of the Law by the trial Court. That same argument in parenthesis marked the position urged of the 2nd appellant, in support of his appeal.

Truly, as the Law provides the unlawful act of defilement is proved when evidence of the complainant establishes a partial or complete insertion of a male penis into her genitals. The act of penetration is on two fronts considered to be intentional and unlawful. For sexual intercourse with minors is prohibited by Law. It is trite, that evidence of the complainant alone can prove existence of a fact of defilement without the necessity of corroboration.

In the instant appeal, drawing from the inference of the evidence given by **(PW1)** she had been approached, undressed and sexually penetrated by the appellants. It all started with an assault to cause fear and intimidation to the complainant. When the complainant was felled down by the appellants, it was an opportunity for the appellants to undress her so that sexual intercourse can take effect. The evidence of **(PW1)** demonstrates that when the appellants accomplished their mission, each parted ways and she had to find her way home in the middle of the night.

Apparently, fortunately for her on this material day she was walking home with **(PW3) – Chizi** significantly so to speak she was spared the ordeal of sexual intercourse by virtue of carrying a young baby on her back. These two witnesses entirely agree on the chain of events which culminated in the penetrative sex of the complainant by the appellants.

More importantly is the question as to whether the complainant was sexually assaulted? In the present case, **(PW2) Mwaka**, a clinician based at Samburu Health Center examined produced a P3 Form which drew supporting details to the allegations made by the complainant. The vital features conceived on examination of the complainant included bruises of the neck, ruptured fresh hymen and laceration of the labia minora with mild bleeding. It is then said that even though medical evidence in sexual offences of defilement and rape is not mandatory but such credible evidence so adduced corroborates the complainant's narrative of the incident.

The complainant at the trial alleged consummated defilement. The circumstantial corroboration of her story came from **(PW3)** and **(PW2)** on the defilement account. This unlawful carnal knowledge of the complainant as evidentiary constructed by the prosecution was never rebutted by the defence. The fortifying evidence against the appellants' case was equally substantial and this conditions established by the clinical officer concluded that they were caused by sexual intercourse. Without hesitation, the submissions by the appellant trying to discredit the evidence by the prosecution fails. The two offered substantially inconsistent statements as to their whereabouts on the day in question.

On the element of age, the clinical officers finding on examination that the complainant was aged fifteen years and six months remains undisturbed by the defence. The grievances by the appellants on the probative value and admissibility criteria of the health card in consonant with the express provisions under Section 64 and 66 of the Evidence Act is plausible. In the usual circumstances of the case, the evidence of the child health card did not meet the legal qualifications and requirements of the Law as espoused under the aforesaid stated provisions in the Evidence Act. I am not aware of any legal provision or the much cherished Section 48 on expert evidence which can elevate child health card as an instrument made to proof the age of a child.

The conversation we must have as actors in the criminal justice system is on the veracity, credibility and authenticity of that piece of evidence as a symbolic model to proof age beyond reasonable doubt. While conceiving that the child health card might contain useful information but my strong disagreement comes from the nature of its source and the giver of the information which goes to the entries sufficient to prove age. In some cases guardians or house help tasked with the duty of taking minors for immunization may not have the critical facts on the exact date of birth. The statute itself on registration of births did not mandate this tool. Fortunately, there was no legal argument over whether **(PW2)** piece of evidence on the age of the complainant was potentially and blatantly untrue. On appeal, the appellants have not presented credible evidence of rattling off the examination ordained on proof of age as the time the complainant was defiled. That issue is also quickly dispensed with in favor of the prosecution as against the appellants.

On identification, the policy of the Law from time imminent has been to require the Court to subject the evidence to the criterion outlined in **Roria v R {1949} 16 EACA 135; Abdallah Bin Wendo v R 20 EACA 166; R v Turnbull {1976} 2 ALL ER**.

In the instant case, the relationship between the confirming testimony of **(PW1)** and **(PW3)** and the legal requirement for corroboration on identification of the appellants was entirely clear. The substantive evidence that the complainants had prior knowledge of the physical stature and other collateral features of the appellants as neighbours or inhabitants of the same village stands out to prove the element of recognition. The complainant was defiled by persons known to her before the sex act.

At the trial, no potential problems of identification were raised by the appellants to characterize it as a legal battle ground issue between the prosecution and the defence. These facts and that of (PW3) fully corroborate the complainant's identification of the appellants as the men who committed the crime. The formulation of the test in the above cited landmark cases as a matter of Law settles the issues on identification.

This discussion in a sense is not complete without a commentary on the aggrieved order on the sentence of fifteen (15) years imprisonment. The purpose of sentencing as set out in the sentencing policy guideline of the policy include:

(a). Retribution – to punish to an extent or in a way which is just in all the circumstances.

(b). To provide for the rehabilitation of offenders.

(c). To deter the offender from offending again or committing a similar offence.

(d). To show the community that the impugned conduct is to be condemned.

(e). For the protection of the community.

Arriving at a particular type of sentence is a matter within the province of a trial Court. Sometimes there is no formula, save that in mandatory minimum sentences parliament prescribes the terms under which the offender must be punished. Once that discretion has been exercised by the trial Court, an appeal against the sentence imposed lies only if the appellant shows existence of an error, or mistake or the sentence applied a wrong principle or misapplied a relevant factor, or took into account an irrelevant circumstance. **(See Ogolla s/o Owuor v R {1954} EACA 270).** At all levels of the appeal, the appellants have not brought themselves within the scope of **Ogolla s/o Owuor case**.

In this particular case, specific deterrence must apply because the act of gang defilement against a child below eighteen (18) years, and the infliction of injuries is not only barbaric but obvious insatiable appetite for sex. It is against this background I decline to interfere with the appeal on sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE