REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 23 OF 2020

FMW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

(*Appeal against the original conviction and sentence in Criminal Case No. 96 of 2019 at the Chief Magistrates Court Bungoma by (Hon. G.P. Omondi -SRM on 13/2/2020)*

1. **FMW,** the Appellant, was charged with defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act No. 3 of 2006. Particulars being that on 9th day of September 2019 at [particulars withheld] Village in Marakaru Sub-location within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of **AJ** a child aged 7 years.

2. In the alternative he faced a charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act. No. 3 of 2006. Particulars being that on 9th day of September 2019 at [particulars withheld] Village in Marakaru Sub-location within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of **AJ** a child aged 7 years.

3. At the outset, he denied the charges; he was taken through full trial, found guilty, convicted for the main count and sentenced to serve twenty-five (25) years imprisonment.

4. Aggrieved, he appeals against both the conviction and sentence, on grounds that: the learned trial magistrate erred in law and fact by basing the conviction against information on medical evidence that could not warrant a conviction; the fact of the complaint's parents having had a grudge against the Appellant was not considered and that the sentence meted out was harsh and excessive in the circumstances.

5. The prosecution case was that on the 9th day of September, 2019, **PW2 AJ** the complainant herein was at home with Baby R when the Appellant went and asked her where her mother was. He entered the house and requested for a glass of water which the complainant gave him. After drinking water, he asked her where her bed was and she showed him the bed that was behind the seat. It was her testimony that their house was two (2) roomed, and one was her mother's room. That the Appellant took her to her bed, removed her trouser and pant that she had worn. He told her that if he put his thing for "suz suz" a term she understood to be for urinating, into hers, he would give her money. He therefore proceeded to act as stated. In the meantime, **PW3 EM**, her elder sister aged eleven (11) years arrived home from school and found them on the bed. On seeing her the Appellant pulled up his trousers and went to the room that he was constructing for them. The complainant dressed up and told her that the Appellant was putting his 'Thing" into 'hers" having promised to give her money.

6. **PW4 CW**, their mother who had gone to church returned home at about 8:00 pm and found the children asleep. The following morning the complainant did not wake up like the rest to prepare so as to go to school. It was after the others returned from school that they informed her of what happened. She checked the complainant genital organ and noticed presence of some blood hence took her to hospital.

7. The complainant was examined by **PW1 Elias Adoka**, a Clinician, who found her hymen partially torn with inflamation on the edges with foul smelling discharge, urinalysis done showed numerous extension of cells. He concluded that it was a case of defilement.

8. The matter was reported to the Police. The Appellant who had been doing some casual work for the complainant's parents disappeared but was found days later at Chwele**.** He was taken to the Police Station and re-arrested. **PW6 No. 218758 Sergent Patrick Kuloba**, investigated the case and caused the Appellant to be charged.

9. Upon being put in his defence the Appellant stated that the complainant's mother asked him to construct her a structure on the 28th August, 2019. They reached an agreement and she was required to pay for the work. She then made sexual advances at him and even made

a proposal to him that they go elsewhere and purchase land. That he declined and explained that he had surgery hence he could not perform as a man, that on the 27th September 2019 as he worked at Chwele Market he was arrested by the County Council Constables and taken to their offices only to find the complainant's mother. He was re-arrested by the Police.

10. The trial court considered evidence adduced which proved that the complainant was a minor, she was defiled and the Appellant was the assailant having been found red handed, hence the conviction and sentence that followed.

11. The appeal was disposed of through written submission.

It was submitted by the Appellant that his right as envisaged by Article (2)(j) of the Constitution of Kenya was breached as he was not furnished with statements in advance so as to prepare for the case. In this respect he cited the case of ***Thomas Patrick Gilbert Cholmondeley Vs. Republic (2008) KLR; CRA NO. 116 OF 2007 NRB.***

12. That the voire dire examination failed to test the intelligence and ability of PW2 to tell the truth pursuant to the holding in the case of ***Johnson Muiruri Vs. Republic (1983) KLR.***

13. That the minor's evidence was not corroborated as stated in the case of ***Chila Vs. Republic 1978 EA; the*** age assessment report was inadmissible as it was not produced by the maker and that the case was full of contradictions, discrepancies and inconsistencies.

14. He called upon the court to receive additional information pursuant to **Section 358** of the CPC regarding his state of health at the time of the incident. That he had undergone scrotum and stomach operations therefore he was not able to erect or engage in sex, an issue that he raised in his defence but it was not well captured and that he is HIV positive while the complainant is HIV negative.

15. On sentence he called upon the court to exercise discretion and consider a more lenient sentence.

16. In response thereto the Respondent/State called upon the court to uphold the conviction and sentence. It was urged that the prosecution proved identification and penetration to the required standard. That PW2's Evidence was corroborated though corroboration is not a necessity as per the provisions of Section 124 of the evidence Act, having been corroborated by the Doctor's evidence as well as that of PW3 and PW4. That evidence of age was established through the age assessment report and the sentence meted out was lenient as the court acted pursuant to the decision of ***Francis Muruatetu & Another Vs. Republic (2017) eKLR*** and imposed a sentence of 25 years imprisonment instead of life imprisonment.

17. This being a first appellate court, it must reconsider evidence afresh so as to reach independent, conclusions bearing in mind that it did not have the opportunity of hearing and seeing witnesses who testified. In the case of ***Odhiambo Vs. Republic Cr. Appeal No. 280 of 2004 (2005) KLR*** the court of Appeal stated that:

> ***"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor."***

18. The offence the Appellant was found culpable of is created by **Section 8(1)** of the Act which provides thus:

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

19. To prove the offence to the required standard of proof beyond any reasonable doubt, the prosecution was required to prove:

> *(a) The age of the complainant*
>
> *(b) The Act of penetration*
>
> *(c) Positive identification of the assailant*

20. In the case of ***Charles Wamukoya Karani Vs. Republic,Criminal Appeal No. 72 of 293*** *the court stated that:*

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

21. In the case of ***Francis Omuroni Vs. Uganda, Criminal Appeal No. 2 of 2000*** the court stated that:

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

22. In the case of ***Mwalango Chichoro Mwanjembe Vs. Republic (2016) eKLR,*** the court of Appeal state that:

> ***"The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by***

documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

23. It is argued by the Appellant that evidence adduced by the prosecution in respect of the complainant's age was inadmissible as it was not adduced by the maker. The impugned document was produced in evidence by PW1 Elias Adoka the clinical Officer who examined the complainant. He told the court that the report was authored by Doctor Sunya a dentist, a person he had worked with for 1½ years hence he was conversant with his handwriting and signature. It is not indicated if the Appellant was granted the opportunity of raising an objection prior to the evidence being admitted but on cross examination did not raise the issue. The question would be whether he was prejudiced?

24. According to **Section 77** of the Evidence Act, the courtmay act on a document signed by a medical practitioner without necessarily calling him for purposes of examination on the same. The Appellant herein having not objected to the production of the age assessment report of the complainant, he failed to contest the evidence at the time. He also failed to raise it in his defence therefore he suffered no prejudice.

25. That notwithstanding, evidence of the age of the complainant was also tendered by PW4, her mother. She told the court that the complainant, her 4th born child was born on 4th August 2008. Following the decision of Omuroni (Supra) and Mwalango (Supra) being the victim's parent she was better placed to prove the age of the complainant. In his defence the Appellant testified to have known the complainant as he did some casual work for her parents. He did not dispute the apparent age of the complainant. Therefore the complainant's age was proved to the required standard.

26. The appellant faults the court for relying on the minor's evidence and also argues that it was not corroborated. Prior to testifying the complainant was subjected to voire dire examination as required. Although the child was of tender years, having answered questions put to her to test her intelligence, the court concluded that she understood the duty of telling the truth hence she could be sworn. This meant that the child was seized of sufficient intelligence that would justify reception of evidence despite her age.

27. Section 124 of the Evidence Act provides as follows:

"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

28. Corroboration is no longer a requirement in sexual offences as long as the court for reasons recorded concludes that the child is telling the truth. In the case of ***Mohamed Vs. Republic (2006) 2KLR 138*** it was stated that:

"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

29. It is clear that the complainant herein did not give uncertain evidence. She was subjected to cross examination. Similarly, PW3 a child aged (11) years was also taken through voire dire examination and the court found her to have sufficient intelligence therefore directed her to testify under oath.

30. On the issue whether there was corroboration? Such evidence is what tends to connect the person accused to the crime that he is being accused of committing. PW3 testified to have found the Appellant and the complainant on the bed and upon the Appellant seeing her he put on his trousers and left. The minor, PW2, explained to her what had befallen her, that she had been molested. The following day when PW4 checked her there was some presence of blood in her vagina. **PW5 Tom Barasa Juma,** a clinician, treated the complainant the following day, the 10th September 2019. He sent her to the laboratory for purposes of tests being done. A high vaginal swab done revealed presence of some blood and the hymen was not intact as she had a tear on the vagina. This was proof of penetration.

31. The Appellant faults PW2 to have contradicted herself when she said that the Appellant was at their home building for them a room while the complainants mother allegedly stated that she left him building a room inside her house. Then, that PW1 said he (Appellant) did not have a wife while PW4 said that he had a wife. In the case of ***Alfred Twehangane Vs. Uganda (2003) UGCA 6*** the court stated that:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

32. The contradictions alluded to were of no consequence to what was done by the Appellant who was positively identified as the perpetrator of the act.

33. This court has been called upon to admit additional evidence. The High Court has power to admit new evidence under **Section 358** of the CPC that stipulate as follows:

(1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.

(2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.

(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.

34. This power is discretionary and is governed by principles as set out in the case of ***Elgood Vs Regina (1968) EA at page 274*** where the Court of Appeal held that:

"(a) The principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal are:-

· the evidence that it is sought to call must be evidence which was not available at the trial;

· it must be evidence relevant to the issues;

· it must be evidence which is credible in the sense that it is well capable of belief;

· the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial (R. V. PARKS [1961] 3 ALL E.R. 633 applied; statement in JOHN HASAKWA V. R. CR. A. NO. 132 OF 1954 (U R) disapproved);

(b) It is only in very exceptional cases that the Court of Appeal will permit additional evidence to be called;

(c) In the circumstances, in the interest of justice the application should be allowed;

(d) The affidavit in support of an application to admit additional evidence should have attached to it a proof of the evidence sought to be given;

(e) On consideration of the evidence, the charges could not be said to have been proved beyond a reasonable doubt."

35. In the instant case the Appellant did not file a formal application, he sought it at the trial end of his submissions. There was no way this court could interrogate what he had not introduced. If evidence that he underwent surgery such that he was incapable of engaging in sexual intercourse existed, he should have introduced it in cross examination at the onset to enable the prosecution to counter it and he would have raised it in his defence. This was an afterthought that could not be brought at the appellate stage; The issue raised that was not part of the grounds of appeal does not meet the threshold of principles that guide the court in considering admitting additional evidence.

36. With regard to the allegation of the Appellant's rights having been breached, no complaint was raised of the Appellant having not been furnished with prosecution witness statements to prepare for his case. Even at the point of defending himself he sought for time to prepare for his defence, a prayer that was granted but he did not indicate that no statement had been supplied.

37. **Article 50 (2) (j)** of the Constitution provides thus:

(2) Every accused person has the right to a fair trial, which includes the right—

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

38. In the case of ***Thomas* Patrick Gulbert Cholmondely Vs. Republic (2008) eKLR** the court of Appeal stated thus:

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified. The position is the same in various commonwealth countries. The United Kingdom does not have a written constitution as we in Kenya do, but even there on the issue of disclosure of evidence, their law is the same."

39. Following what transpired at trial that I have alluded to above the trial that took place cannot be alleged to have been unfair.

40. On sentence, **Section 8(2)** of the Act provides thus:

> ***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life*.**

41. In passing the sentence the court was guided by the case of ***Muruatetu and Another Vs. Republic (2017) eKLR.*** An appellate court cannot interfere with a sentence of the trial court unless the Appellant demonstrates that the court acted on some wrong principles in the process ***(See Ogolla s/o Owour Vs. Republic (1954) EACA).*** This is a case where the court did not fall into error in reaching the decision to convict the Appellant, which I affirm.

Similarly, the sentence meted out was lawful.

42. The upshot of the above is that the appeal lacks merit.

Accordingly, it is dismissed.

43. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 22ND DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Immaculate

Mr. Ayiekha for ODPP

Appellant