REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 22 OF 2020

MONE MWERI KARISA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Principal Magistrate's Court at Kilifi by Hon R. K. Ondieki (SPM) delivered on 27th July 2017 in Sexual Offence Case No. 70 of 2017)

CORAM: Hon. Justice Reuben Nyakundi

Appellant in person

Mr. Mwangi for the DPP

JUDGEMENT

The appellant, **Mone Mweri Karisa**, was arraigned in court on the 15th October 2017 and charged with the offence of defilement of a girl contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 3rd July 2017 and 1st August 2017 in Ganze District within Kilifi county, the appellant caused his genital organ namely penis to penetrate the genital organ namely vagina of one **AKK** a child of 17 years.

In the alternative charge, the accused was alleged to have committed an 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 diverse dates between 3rd July 2017 and 1st August 2017 in Ganze District within Kilifi county, the Appellant intentionally caused his penis to touch the vagina of one **AKK** a child of 17 years.

The accused denied the charges and the matter was set down for trial where the prosecution presented 3 witnesses in aid of its case. The appellant was subsequently found to have a case to answer and put on his defense whereupon he gave sworn testimony and did not call any additional witnesses.

Hon. R. K. Ondieki in a decision delivered on 27th July 2018, found that the offence of defilement contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act had been proven beyond reasonable doubt and convicted the appellant accordingly. Noting the accused was a first offender and that he was the sole breadwinner, the trial court in consideration of the nature of the offence and the fact that the accused was an adult at the time of commission of the offence, sentenced him to 20 years imprisonment.

In the instant appeal, the appellant urges a number of grounds in his petition of appeal that can be restated as the learned trial court magistrate erred in law and fact by:

1. **Failing to consider sharp contradictions by the prosecution on breach of Section 163 of the Evidence Act.**

2. **Failing to consider that the conviction was against the weight of the evidence hence harsh and excessive.**

3. **Failing to consider that the age of victim was not properly established beyond reasonable doubt as required by law hence in contravention of Sections 109 and 110 of the Evidence Act.**

4. **Failing to consider that the Appellant had a valid defence.**

In essence the appellant is convinced that the case against him at trial was proven beyond reasonable doubt.

Submissions on Appeal, Analysis and Determination

I have dutifully considered the import of the submissions made on appeal by the **Mr. Karisa** the appellant. No submissions were filed on behalf of the state. I will refer to the necessary points in the submissions in the forthcoming analysis. Being the first appeal, it is my duty to analyze the evidence afresh and arrive at my own independent conclusions. I must remain cautious in my analysis as I do not have the luxury of the trial court to observe the demeanor of the witnesses. **(See Okeno v Republic (1972) EA 32).**

The case at trial was advanced by 3 witnesses. **PW1 Dr. Aslam Ahmed** testified that she was a medical officer attached to Kilifi County Hospital and that she had worked with **Dr. Zenat** and thus understood her handwriting and signatures. She stated that the victim was 17 years old. She further stated that the victim had no history of ailment, there were no injuries to the head, thorax and neck. However, stated **(PW1),** the victim's hymen was absent. That the weapon used was blunt and she had not received medication. Her testimony was that there was consensual sex and a pregnancy test came out negative. She produced the P3 Form as Exhibit 1. N questions were put to her on cross examination.

PW2 RKK the complainant's father testified that on 29th June 2017 he had gone for a wedding at Bamba and was informed that the accused person had a relationship with his daughter, **(PW3).** He stated that he interviewed his daughter and she agreed that she was a girlfriend to the Appellant. He stated that the accused was also interviewed and that he took the complainant to the hospital for examination. It was his testimony that **(PW3)** was born on 27th November 1999 as his fourth child. On cross examination, he stated that the victim had conceded that the Appellant was her boyfriend.

PW3 AKK was first put through a voire dire examination. When asked what her name was, she replied with her name and age. Asked about her school details, she stated that she was in class 8 at [Particulars Withheld] Primary School. Asked about her religion, she answered that she was a Christian. Finally, when she was asked whether she understood the consequences of lying to the court, she did not reply. On this basis, the court found that she was intelligent enough and understood the nature and meaning of an oath.

Her testimony was that she was 18 years old having been born on 27th November 1999. That the appellant was a bodaboda rider who in June 2017 had sent one **Chengo Katana** to express his love for her. According to her, he proposed to her and she gave in on 3rd July at 9.00pm. it is on this day that she averred they met in a thicket at night and engaged in sexual intercourse. According to **(PW3),** the next sexual encounter was on 1st August 2017 at 9.00pm, again in a thicket.

She testified that much later, her father got wind of their relationship and reported to the Chief and they subsequently went to Bamba police station in the company of **(PW2)** and they were referred to hospital for examination and the P3 Form was filled. She also produced a birth notification when she was born.

On cross-examination, she stated that Chengo was at home and that her father had instructed her to come to court and tell the whole truth. She stated that she was examined wand fund to be okay with a negative pregnancy test.

This marked the close of the case by the prosecution. The learned trial magistrate found the accused had a case to answer and placed him on his defence. In his sworn testimony, the appellant averred that in July 2017 he was summoned to the office where he met **(PW2)** who alleged that he had engaged in intercourse with the victim. He denied the allegations stating that he did not even know the victim. According to him, he was next summoned to Bamba police station where he continued to dent the charges. He was then arrested and booked in the cells for one week. He stated that he was still in the dark as to the charges he was facing. He testified that he was threatened by the area chief to concede to committing the offence. The assistant chief demanded a bribe from him which he declined to give. He stated that maybe if he had paid the bribe he would not have been taken court.

On cross examination, he stated that the accused's home was five kilometers away, that he did not have sex with the complainant and did not know why the chief was demanding monies from him.

With the rehashing of the evidence at trial, what follows is an analysis of the same. This appeal turns on whether the prosecution proved its case beyond reasonable doubt and whether, in the circumstances, the sentence imposed by the trial court was sound. The burden placed on the prosecution is as set out in Section 107 (1) of the Evidence Act which provides:

> **"(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**
>
> **(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".**

This duty is expressed in the English authority of **Miller v Minister of Pensions 1947 2 ALL ER 372-274** as: -

> **"That 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 proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be described with the sentence of course it is no doubt nothing short of that will suffice."**

Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006 provides:

"8. (1) A person who commits an act which causes penetration *with a child is guilty of an offence termed defilement.*

> **(3) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."**

The crucial elements for a charge of defilement are proof that the victim was below 18 years, proof of penetration and the positive identification of the accused person as the person that caused the penetration. **Charles Wamukoya Karani v Republic Criminal Appeal No. 72 of 2013** and **Festus Kandu Ngome v Republic Criminal Appeal No. 18 of 2019 [2019] eKLR**.

As far as the age of the complainant goes, in **Francis Omuroni v Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000** that court held that:

> **"In defilement cases, medical examination, 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 parents and by observation and common sense."**

The age of the victim in sexual Offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. **Rule 4 of the Sexual Offence Rules of Court 2014** provides that:-

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

(PW2) the victim's father testified that his daughter was born on 27th November 1999. This was corroborated by **(PW3)** who also produced a birth notification in attestation of this fact. Per the cited authority, age may also be proved by the victim's parents. While (**PW1)** the doctor testified that the victim was 17 years old, this statement was made without reference to any medical examination such as an age assessment. In any case, since the victim's father was able to state her age, I am inclined to agree with the learned trial magistrate that proof of age had sufficiently been met.

Regarding positive identification, the Court in **Anjononi & Others vs Republic, (1976-1980) KLR 1566** held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other. In the instant case, the complainant testified that she knew the appellant when he sent one **Chengo** to approach her and they thereafter engaged in sexual intercourse on two different occasions. The learned trial magistrate in finding that this aspect had been proven, opined that the accused upon his arrest stated that he knew the complainant well as she hailed five kilometres from his home. I therefore concur with the trial court that the aspect of identification was well proven.

On the question of penetration, Section 2 of the Sexual Offences Act defines penetration to mean the *'partial or complete insertion of the genital organ of a person into a genital organ of another person.'*

The testimony of the victim **(PW3)** was that the Appellant in June 2017 sent one Chengo Katana to express his love for her. According to her, he proposed to her and she gave in on 3rd July at 9.00pm when they met in a thicket and engaged in sexual intercourse. According to **(PW3),** the next sexual encounter was on 1st August 2017 at 9.00pm, again in a thicket. For the learned trial magistrate, the preceding sequence of events taken together with the evidence of the medical officer that upon examination the complainant's hymen was found to be absent, was conclusive proof of penetration. I am of a different view.

For starters, let us consider the evidence of **(PW1),** the doctor. She produced the P3 Form on behalf of its maker, **Dr. Zeinat** whom she confirmed having worked with and understood her handwriting and signatures. Her evidence was based on the P3 Form and it was to the effect that the complainant had no injuries but her hymen was absent. The Court of Appeal has held that a ruptured hymen alone is not conclusive proof of defilement. In **John Mutua Muyoki v R [2017] eKLR** it stated:

> **"Therefore, in order for the offence of defilement to be committed, the prosecution must approach each ingredient beyond reasonable doubt. The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration."**

Going forward, **(PW1)** stated that there was consensual sex and that a pregnancy test conducted had a negative result. She further states that a blunt weapon was used. This in and of itself is contradictory to the statement that the complainant had no injuries. The appellant has challenged the veracity of the P3 Form and on closer scrutiny, one begins to understand why; but first, let me rehash some facts. According to the testimony of **(PW2)** the father of the complainant, he found out about the relationship between his daughter and the appellant on 29th June 2017 and he thereafter took her to hospital for examination. There are no treatment notes or post rape care form to show the result of the examination but only the P3 Form. The evidence of the complainant is that she first engaged in intercourse with the appellant on 3rd July 2017, four days after she was apparently taken for examination. The contradictions do not end there. Upon scrutiny, the P3 Form shows the date at the top to be 30th August 2017. This date also appears as the date the matter reported to the police, the time is also specified as 1345 hours. Curiously however, the date the victim was apparently sent to hospital is indicated as 13th October 2017. This is the same dated **Dr. Zeinat** signed and Kilifi County Hospital stamped on the P3 Form. It is also noteworthy that from the exhibit on the record, Section C of the P3 Form that describes the nature of the alleged sexual offence that occurred is missing. While this may be inadvertent, it only adds up to the

inconsistencies in the P3 Form. In the face of these inconsistencies, I find refuge in the Court of Appeal decision in **Erick Onyango Odeng' v. Republic [2014] eKLR** where it cited with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

> **"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 case."**

Based on the authority cited, I take the view that the inconsistencies alluded to above are grave as they go to the defining element of penetration. As such, I am disinclined to accept the testimony of the medical officer.

Being of the preceding persuasion, it follows that the only evidence as to penetration is that of **(PW3)** where she admits to having engaged in sexual intercourse with the accused person on two occasions. The position of the law is that under the proviso to Section 124 of the Evidence Act, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded that the child is being truthful. This position was taken in **Mohamed v Republic [2006] 2 KLR 138** where the court stated:-

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

The same position was also taken in the case of **J.W.A. v Republic [2014] eKLR,** where the Court of Appeal observed:-

> **"We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."**

In the instant case, the learned magistrate conducted a *voire dire* examination. When asked what her name was, the complainant replied with her name and age. Asked about her school details, she stated that she was in class 8 at [Particulars Withheld] Primary School. Asked about her religion, she answered that she was a Christian. However, when the complainant was asked what the consequences of telling lies to the court were, the record shows that she did not answer. Nonetheless, the learned trial magistrate found the complainant sufficiently intelligent and that she understood the nature and meaning of an oath. This, in my view, was an erroneous conclusion. If the victim was indeed truthful, she would have had no difficulty answering the question with regard to the consequences of lying. That said, I arrive at the conclusion that the element of penetration was neither proven conclusively by the evidence of the complainant and neither was it by the evidence of the medical officer.

In addition to the foregoing, it is also of note, which issue has been pointed out by the Appellant, that no investigating officer was called to testify. Failure to call witnesses is not necessarily fatal as per the provisions of Section 143 of the Evidence Act. In **Julius Kalewa Mutunga v Republic**, **Criminal Appeal No.32 of 2005**, the court stated:-

> **"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

The Court of Appeal again addressed that issue in the case of **Benjamin Mbugua Gitau v Republic [2011] eKLR** thus: -

> **"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys"**

However, a crucial material witness such as the investigating officer would have been able to shed light on the gaps in the case by the prosecution. Over and above the contradictions as regards proof of penetration, a number of other issues are notable. From the charge sheet on record, the accused was arrested on 9th October 2017 but he took plea on the 16th October 2017, a week later. No explanation was advanced for this delay. Being unrepresented, the accused did not raise this issue. However, this circumstance augurs with the contention by the appellant that he was booked into the cells without knowing what offence he had committed and asked for a bribe. There is also no record of whatever investigations were done to establish the culpability of the appellant for the offence he was charged with. The point I am making is that all these issues would have been easily explained away had the investigating officer been called to testify.

In the absence of the evidence of the investigating officer, I am inclined to draw a negative inference that whatever evidence he would have brought would have been detrimental to the case by the prosecution. I am guided by the principles set out on in **Bukenya & Others v Uganda [1972] EA 549** where the court held that:

> **"The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent the court has the right and the duty to call any person whose evidence appears essential to the just decision of the case where the evidence call barely is adequate the court may infer that the evidence of uncalled witnesses would have tendered to be averse to the prosecution."**

The long and short of it is that for the reasons advanced in the anterior postulations, I am not convinced that the prosecution proved its case to the required standard, not least to the extent required by **Miller vs Minister of Pensions [supra].** To that extent, the appeal succeeds and appellant set free unless otherwise lawfully held for any reason brought to the attention of the court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF OCTOBER ,2021

…….

R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for DPP