REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 77 OF 2020

KIWANUKA SHAMALA MASINDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the original sentence in Criminal Case No. 67

of 2019 at the Senior Principal Magistrates Court Kimilili by

(Hon. I. G. Ruhu (RM)

J U D G M E N T

1. **KIWANUKA SHAMALA MASINDE,** the appellant, was charged with the offence of defilement contrary to **Section 8(1) (2)** of the Sexual Offences Act. Particulars being that on the 21st day of June 2019 at [particulars Withheld] Village Kamkunywa of Kimilili Sub-county in Bungoma County, intentionally caused his penis to penetrate the vagina of **VNW** a child aged 5 years and 8 months old.

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. Particulars were that on the 21st day of June 2019 at [particulars Withheld] Village Kamkunywa of Kimilili Sub-county in Bungoma County, intentionally caused his penis to intentionally touched the vagina of **VNW** a child aged 5 years and 8 months old.

3. Having been subjected to full trial he was convicted for the offence of defilement and sentenced to serve twenty (20) years imprisonment.

4. Aggrieved, the appellant appeals on grounds as per amended petition, that: Evidence relied upon by the court to convict was full of contradictions; key witnesses were not availed; the medical report had a lot of irregularities that called for acquittal of the appellant.

5. The prosecution's case was that the complainant, **VN** was at home when their neighbor, the appellant herein called her, she went to his home and he offered her tea and mandazi. Then he told her to remove her underwear and molested her by inserting his genital organs into hers. She however did not cry as he told her to keep quiet. Upon finishing committing the act, he told her to leave. When she returned home a certain lady called her and sought to know what happened to her.

6. In the meantime, **PW2 Elizabeth Nambengele Barasa**, the landlady of both the accused and the complainant's mother was at home washing clothes and as she started cooking, a certain lady, Mama Joan went and told her about a child who had been defiled by the appellant. She went out and found a crowd of people who alleged that the appellant had defiled the complainant. The child was inside the house of mama Joan being examined. She participated in examining the complainant and saw some discharge in her vagina. The child mentioned the appellant popularly known as 'Guka' as the person who had defiled her.

7. **PW3 Samuel Juma Wabomba** member of community policing went to the scene, interrogated the suspect (appellant) and took him to Kamukunjwa Police Patrol Base where he was re-arrested by **PW5 No. 39935 PC Michael Kumbai**. He issued the complainant with a P3 form and accompanied her and her mother to Kimilili Sub-County Hospital.

8. **PW4 Catherine Akiru**, a Clinical Officer examined her and found her having tenderness on her vagina, her hymen was missing and she had bruises on her vagina.

9. Upon being put on his defence the appellant acknowledged the complainant as his neighbour. He stated that on the material date, the 21st June, 2019, he went to work and returned home at 5.00pm. His wife, Christine prepared supper which they ate. Thereafter, PW3 went to their house and sought to know whether something had happened. He went out only to find his landlady PW2, PW1 and her mother. He was arrested and taken to the police station where he was re-arrested despite denying the allegations.

10. The trial court considered evidence adduced and concluded that the complainant laid bare the sexual ordeal that occurred and the appellant was positively identified as the perpetrator; hence the conviction that resulted.

11. The appeal was canvassed by way of written submissions.It was urged by the appellant that the complainant contradicted herself by stating that she didn't know the assailant's name and also called him "guka". That the village elder alleged that the appellant denied having committed the offence but eventually confessed having defiled the girl four (4) times.

12. On the question of failure to call key witnesses, it was argued that the rumor was started by a neighbor who informed PW2, a lady known as Mama Joan. This particular person was however not called to testify to shed light before a court of law. In this regard he cited the case of **Bukenya vs. Uganda (1972) EA 549**. He faulted PW3 to have come up with the allegation because he had not paid her rent.

13. It was also the contention of the appellant that there was a contradiction in evidence adduced by the Medical Practitioner and that of PW3 and PW1 as to whether the complainant's vagina had dirt, spermatozoa or no discharge at all.

14. In response thereto, the Respondent/State opposed the appeal. The response filed was based on the initial grounds of appeal such that whatever was raised in the amended grounds of appeal was not addressed save that it was argued that the appeal lacked merit, was bad in law such that it ought to be treated with the contempt it deserved.

15. This being a first appellate court, its duty is to assess and analyze evidence adduced afresh to reach independent conclusions. And in doing so, this court must warn itself of the fact of not having had the benefit of seeing or hearing witnesses who testified. In the case of ***Kiilu & Another Vs. Republic (2005) 1 KLR 174,*** the court of appeal stated that:

> ***"i. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***ii. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

16. The appellant is accused of having molested a minor in contravention of Section 8(1) of the Sexual Offences Act (Act) which provides thus:

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

17. In order for the court to return a verdict of guilty, it was expected to reach a finding that the prosecution proved the following ingredients:

> *(i) The age of the complainant*
>
> *(ii) The fact of penetration*
>
> *(iii) Positive identification of the assailant/perpetrator*

18. In the case of ***Kaingu Elias Kasomo Vs. Republic, Cr. Appeal No. 504 of 2010*** the court of appeal stated that:

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".***

19. In the case of **Francis Omuroni Vs. Uganda, Criminal Appeal No. 2 of 2000** the court of appeal held 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"***

20. The complainant was subjected to age assessment. The report was addressed in evidence which established that she was approximately 6 – 7 years old. The doctor who carried out the examination used the dental formula method to assess the age. This evidence was not in dispute. The appellant was the complainant's neighbour. He knew her very well therefore evidence adduced in respect of her age was not controverted.

21. Penetration is defined by **Section 2** of the Act as:

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

22. The complainant was subjected to medical examination in an endeavor to prove the element of penetration. The hymen was missing and there was slight laceration on the vulva. A laceration or tear on the tissues of the vagina can be caused by damage during sex or when a

foreign object is inserted into the vagina. A laceration having occurred on the vulva was proof penetration.

23. The argument advanced by the prosecution was that the appellant was the one responsible for the act of penetration. This is vehemently denied by the appellant. Evidence as to what transpired was of a child of tender years. **Section 124** of the Evidence Act provides thus:

> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, 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.***

24. A court has power to rely on uncorroborated evidence of a child of tender years in convicting the culprit if it has reason to believe that the child is truthful. 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 hamstring by requirements of corroboration where the victim of a sexual offence is a child of tender years <u>if it is satisfied that the child is truthful"</u>. <u>And</u> on the provisions of 124 of the Evidence Act in respect to evidence of a child in sexual offences to state that it believed the child was telling the truth."***

25. The trial court which had the opportunity to observing the demeanor of the complainant had this to state:

> ***"In the case, the sexual ordeal was laid bare by the complainant, PW1. She articulately described how the accused called her to his house on the material. She then narrated how the accused gave her strong tea and mandazi before sexually violating her. She was resounding and explicit in describing the sexual ordeal. To use her words, the accused "alimfanyia tabia mbaya kwa kupaka mate kitu yake ya kukojoa na kuiweka hiyo kitu kwa kitu yake ya kukojoa." She was loud and clear that the accused forcefully inserted his penis into her vagina. She was also resolute that she didn't scream although it was painful because the accused told her not to scream.***
>
> ***She further testified that she disclosed what the accused had done to her to a lady who interrogated her immediately she left the accused house and was subsequently taken to the hospital and the matter reported to Kimilili Police Station.***
>
> ***During cross-examination, the accused failed to raise any material evidence that could disprove, confute or rebut the testimony by the complainant as regards the ingredients of penetration."***

26. In the result, the court found the complainant truthful and believed that the assailant who molested her was the appellant.

27. The appellant however argues that evidence adduced by the complainant was riddled with contradictions. He cites a statement made by the complainant that she did not know his name then later stated that she knew him as "guka". It is clear that the complainant was able to identify the appellant as their neighbor and a person she knew as "guka" such that she told PW3 that "guka" had violated her severally and went ahead to identify him by pointing him out to the court. The appellant did not dispute that he was popularly known as "guka". In the case of ***Twehangane Alfred vs. Uganda (2003) UGCA 6*** it was stated 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's case."***

28. The alleged contradiction was inconsequential therefore the evidence adduced by the complainant cannot be rejected on that ground. Secondly, whether the appellant denied having committed the offence at the onset and ultimately purportedly admitted is immaterial since investigations were carried out prior to an opinion being formed to have the appellant charged.

29. The appellant also contends that a key witness was not called to testify. **Section 143** of the Evidence Act provides as follows:

> ***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.***

30. In the case of ***Julius Kalewa Mutunga Vs. Republic*** ***Criminal Appeal No. 31 of 2005*** it was held that:

> ***"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."***

31. Although Mama Caro was not called to testify, evidence adduced by the complainant was elaborate and not shaken. Therefore, failure to call the lady was not fatal to the prosecution case.

32. On sentence imposed, **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.

33. In the case of **Ogola s/o Owuora (1954) 24 EACA 70** it was stated thus:

"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice."

34. It was proved that the minor's age was below eleven (11) years. The trial court used discretion that it had then. In the premises, the sentence was lawful. This court would therefore not be seized of jurisdiction to interfere with it.

Therefore, the appeal is devoid of merit. Accordingly, it is dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 15TH DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Brenda

Ms. Mukangu for ODPP

Appellant.