REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 114 OF 2018

MAURICE WAFULA WAMALWA……..……APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 4037 of 2015 at Chief Magistrates Court Bungoma by (Hon. J. Kingori – CM on 19th February 2018)

JUDGMENT

1. **Maurice Wafula Wamalwa**, the Appellant, was charged with the offence of defilement Contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual offences Act (Act). The particulars of the offence were that on the 12th December 2015 at about 1600hrs at Kisiwa location within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of **CW** a child aged 9 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. Particulars being that the Appellant intentionally and unlawfully caused his penis to come into contact with the vagina of **CW** a child aged 9 years against her will.

3. Having been taken through full trial, he was found guilty and convicted for the offence of defilement and sentenced to life imprisonment.

4. Aggrieved, he appeals against conviction and sentence. The Petition of Appeal was filed by the firm of M/S Were & CO. Advocates on grounds that the court erred in law and in fact in convicting the Appellant on a charge sheet that was defective; having admitted the uncorroborated evidence of PW1 and convicted the appellant without recording reasons in the proceedings as to why the court was satisfied that PW1 a sole witness was telling the truth; It failed to find that PW1 was not truthful, her testimony was neither trustworthy nor reliable and it was unsafe to accept her evidence; failing to find that the prosecution concealed the testimony of and /or failed to call crucial witnesses; failing to find that the prosecution witnesses' evidence was contradictory hence unreliable; and that the court meted out a sentence that was harsh in the circumstances, having dismissed the Appellants defence that was consistent and truthful. In addition thereto, at the point when the Appellant was appearing in person, he filed supplementary grounds of appeal, where it was stated that the court also failed to accord the Appellant fair trial by denying him a chance to avail his witnesses.

5. The prosecution case was that the Complainant, **PW1 CNW,** had been sent to the Posho Mill by her grandmother, when she encountered, the Appellant, their neighbor who lifted her up and took her to the sugar plantation by the roadside belonging to Benja. He molested her and warned her not to divulge the information to anybody lest he killed her. As a result of the act, she was not able to walk properly. **PW2 RW**, her grandmother who sent her to grind maize waited and noting that she had overstayed, consulted with her grandfather then decided to follow her. She found her along a footpath between sugarcane plantations and noted that she looked sick and she was crying. The complainant told her what befell her. They went home and subsequently reported to the area chief who advised them to take her to hospital which they did and after examination and treatment they were referred to the police. Following the report to the police the Appellant was arrested and charged.

6. Upon being put on his defence the Appellant gave sworn evidence and stated that on 12th of December, 2015, when the offence is alleged to have been committed, it was Jamhuri day and he had guests at home. He denied having met the complainant that day, having defiled or indecently touched her. That he was arrested on 14th December 2015, two days later at 4;00pm, taken to Nalondo Police Post, placed in cells and later transferred to Bungoma Police station at 8;00pm, where after he was charged the next day. He denied having understood the charges and argued that he was framed. That he had misunderstandings with the area chief; he had another defilement case but did not know if the complainants in the two cases were related.

7. The trial court considered evidence adduced and reached a finding that there was no doubt that the complainant was defiled and the assailant was the Appellant, hence the conviction.

8. The appeal was canvassed by way of written submissions. It was urged by the Appellant that following cross examination it tuned out that the complainant was a friend to **L**, a complainant in another case that he was being accused of, therefore, there was a possibility of there having been a confusion hence an infringement of his constitutional rights. That PW1 was a hostile witness and her evidence was contradictory. The contradiction alluded to was in respect of the date and time the offence was alleged to have been committed and the fact of the offence having been committed.

9. That it could not be true that everything happened at 4:00pm, as it was a festive day and in broad daylight, where there could have been witnesses, therefore the Appellant was framed. He pointed out a contradiction between evidence of the complainant and PW2, PW3 with respect to the day the complainant was taken to hospital; and circumstances in which the complainant's grandmother allegedly found her.

10. He questioned the authenticity of the treatment chits which were given to the complainant's grandmother; and the document which was given to the court officer by PW5 a clinical officer, yet no copies were left in the hospital register.

11. On the question of essential witnesses having been left out, he argued that the complainant's grandfather was alleged to have picked the P3 form from hospital and the posho mill attendant should have been called as witnesses to clarify whether the complainant went to the posho mill and confirm the timing as well.

12. And that having told the court that he would call three witnesses in defence, he was denied an opportunity to call them, and the trial court misdirected itself on shifting the burden of proof to the him being an accused person.

13. In response thereto, the State/Respondent submitted that essential ingredients of the offence were proved; the evidence of PW1 on penetration was corroborated by that of PW5 who produced the P3, and treatment notes; that according to Section 124 of the Evidence Act such evidence did not require corroboration, and the Complainant's evidence as to the assailant was credible and consistent.

14. On the defect on the charge sheet it was urged that it did not cause any injustice and the sentence meted out was legal.

15. This being a first appellate court, I am expected to analyse and evaluate a fresh evidence adduced before the trial court and come to my own conclusions bearing in mind that I neither heard nor saw any witnesses who testified. In **Okeno vs Republic (1972) EA 32**, the Court of Appeal stated that:

> **""An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala Vs. R., [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see Peters v. Sunday Post, [1958] E. A. 424."**

16. The jurisdiction of the first appellate court was also set out in the case of **Pandya-Vs- Republic [1957] EA 336** where the Court of Appeal stated thus:

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

17. On the question of the charge being defective, Section 134 of the Criminal Procedure Code provides as follows:

> **Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.**

18. The purpose of a charge is to let an accused person know what he is being accused of. When a charge is framed in a manner that makes it impossible for an accused person to understand what the case is all about such that defending himself becomes impossible, then the charge is deemed prejudicial and fatal to the prosecution's case. But, where it appears simply technical but the accused person, when informed, understands precisely and clearly what the case is about, such a charge cannot be dismissed as being defective.

19. **Section 8(1)** of the sexual offences Act (Act) defines defilement as follows:

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

20. Looking at the charge as framed, it has captured the fact of the complainant having been a child, the alleged against penetration and the purported culprit. This was sufficient information to enable the Appellant understand the allegation against him. In the premises, he was not prejudiced.

21. To prove the case, the prosecution was required to prove ingredients of the offence thus**:**

a) The fact of the complainant having been a child (Age)

b) The act of penetration

c) Positive identification of the assailant

22. In the case of **Charles Wamukoya Karani Vs Republic, Cr. 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."

23. On the issue of age, In the case *of* ***Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000*** the court held:-

"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"

24. An age assessment report was adduced in evidence which placed the minor's age at 9 years, PW2, her grandmother and guardian stated that her grandchild was 9 years and the court also observed the demeanor and appearance of the minor and established that she was below 11 years. This evidence was not in dispute. The contention of the Appellant is that the court relied on uncorroborated evidence of a minor. **Section 124** of the *Evidence Act* enacts that:

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.

25. The court has power to rely on the evidence of the victim in convicting the accused. It must however comply with the requirement that the reasons for its belief that the victim is telling the truth which must be recorded in the proceedings.

In the case of ***Mohamed Vs. Republic (2006) 2KLR 138***, it was stated:

"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 if it is satisfied that the child is truthful"*. And* ***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."***

26. It is important to note that the complainant who gave unsworn evidence, was extensively cross examined by the defence counsel. Following the exception to the requirement for corroboration to evidence adduced by children of tender years, the learned trial magistrate was elaborate as to what made him believe the complainant. He recorded that the complainant stated that she was penetrated in her "chipoto" her urinating thing by the Appellant who used his urinating thing. That she explained how she felt pain and when taken hospital she was found to found to have an inflamed vagina, a fact well captured in treatment notes. With regard to identification of the perpetrator, the court recorded that the complainant was credible, hence it found her truthful in her claim that it was the Appellant who penetrated her.

27. With regard to penetration, it is defined by **section 2** of the Act as follows:

Partial or complete insertion of the genital organs of a person into the genital organs of another person;

28. The minor described how the Appellant inserted his thing of urinating into hers, an act that left her in pain; and after the Appellant left, having used leaves to wipe himself, she was unable to walk until she was found by her grandmother. **PW5 Wilfred Mutai**, a Clinical Officer, stated that upon examination, the complainant's vagina was inflamed, there was presence of vaginal discharge, hence the conclusion that she had been defiled. The evidence of penetration adduced by the complainant was corroborated by medical evidence.

29. On the issue of identification of the perpetrator, for reasons recorded by the court, the minor's testimony was believable as to the assailant. **PW4 No. 77813 Corporal Morris Ogolla**,stated that the minor knew the assailant as a neighbour and indicated his name as MWW. This was also stated in her direct evidence during examination in chief. PW2 was also told by the minor what had happened, therefore, the burden of proof was not shifted to the accused (Appellant).

30. The Appellant alludes to inconsistencies in the prosecution's evidence on the date of the offence. According to him, PW1 stated that the act was committed on 12th December, 2015 which was inconsistent with that of PW2 who stated that the offence took place on 14th December, 2015. That the grandmother later testified that she took her to hospital on 14th December 2015, and the Investigating Officer said that the minor informed the grandmother that she had been defiled on 14th December, 2015. In her testimony, PW1 was silent on the date but told the court the time the incident happened. The inconsistencies on the date of the offence are clarified by the medical records. Medical records produced indicate that she was defiled on 12th December, 2015 but she was treated on 14th December, 2015.

31. On the issue of time of the offence, the two witnesses were clear that the complainant had gone to the posho mill and that the offence took place at 4.00pm. The contradiction in the evidence was not fatal as it did not go to the root of the case, it did not affect the particulars of the offence stated in the charge sheet nor did it alter the fact that the Appellant had defiled the minor.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."***

32. The prosecution has also been faulted for failure to call crucial witnesses. Section 143 of Evidence Act provides that:-

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.

33. The principle used to determine the consequences of failure to call witnesses was succinctly stated in the case of **Bukenya & Others Vs. Uganda [1972] EA 549; where the Court held that:-**

> ***"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) That Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

34. The offence is stated to have been committed while the complainant was on her way home after she had left the Posho Mill, therefore, as correctly pointed out by the trial court, the grandfather of the Complainant and the Posho Mill attendant were not eye witnesses to the act, hence failure to call them was inconsequential.

35. After the court complied with the provisions of section 211 of the Criminal Procedure Code, the Appellant indicated that he would give sworn evidence and call 3 witnesses, in the result, the case was adjourned for him to prepare for the defence. Thereafter the case was adjourned three times. He finally testified on 3rd August 2018 under the guidance of his counsel, who closed the defence case. Having been given appropriate time to defend himself, and having not asked for an adjournment to call other witnesses as indicated earlier, the step taken by his counsel was binding on him and it is assumed that counsel was acting with full instructions when he opted to close the defence case after the Appellant's testimony. The defence he put up having been analysed and disregarded no prejudice was suffered by the Appellant.

36. On sentence, the Judiciary Sentencing Policy Guidelines appreciate that whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice but courts should be guided by sentencing policy guidelines 2016 which states that sentences are imposed to meet the following objectives;

> ***a. Retribution: To punish the offender for his/her criminal conduct in a just manner.***
>
> ***b. Deterrence: To deter the offender for his/her criminal conduct in a just manner.***
>
> ***c. Rehabilitation: To enable the offender reform and discourage or prevent him from committing similar offences.***
>
> ***d. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Further to promote sense of responsibility through the offender's contribution towards meeting the victims' needs.***
>
> ***e. Community protection: To protect the community by incapacitating the offender.***
>
> ***f. Denunciation: To communicate the community's condemnation of the criminal conduct.***

37. **Section 8(2)** of the Act provides thus:

> ***(2) 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.***

38. The Appellant was heard on his mitigation, the court also noted that he was a first offender but he faced a serious offence and the presentencing report showed that he had a bad reputation of defiling children in the neighborhood, one being a 15 years old physically challenged girl who got pregnant. In the case of **Bernard Kimani Gacheru vs. Republic [2002] eKLR** the Court of Appeal stated that:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not***

sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

39. Following the provision of the law, the sentence imposed having been legal cannot be interfered with. In the result the appeal is devoid of merit. Accordingly, it is dismissed.

40. It is so ordered.

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

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Ms. Mukangu - ODPP

Court Assistant - Brenda