REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 7 OF 2019

YAHYA HUSSEIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 11 of 2018 in the Principal Magistrate's Court at Lamu before Hon. T. A. Sitati (PM) in chambers dated 14th September 2019)

CORAM: Hon. Justice Reuben Nyakundi

Mr. Mwangi for the State

Appellant in person

J U D G M E N T

On appeal before this Court the appellant complains against the Judgment of the trial Court on allegation of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act stated to be proven beyond reasonable doubt by the prosecution to warrant an order of conviction and a sentence of life imprisonment.

Submissions on appeal by the appellant

The appellant relied on his written submissions in which he urged the Court as follows that the ingredients of the offence more so on penetration was never proved contrary to what the Learned Magistrate stated in his Judgment. The appellant further invited the Court to evaluate the evidence by the complainant against the backdrop of the legal provisions in Section 109 and 110 of the Evidence Act. The appellant trajectory to convince this Court that the offence was never proven to the required standard revolved around the fatal contradictions between the complainant **(PW3)** the corresponding medical evidence by **(PW4).** The significance of the inconsistencies appellant highlighted were on nature of the injuries suffered by **(PW3)** as a result of the alleged penetrative sex. That **(PW4)** found as a fact lack of lacerations to the anal orifice contrary to the testimony of **(PW3).**

It was also the contention by the appellant that **(PW3)** testimony could not stand the test laid down under Section 124 of the Evidence Act of having the capacity to tell the truth to proof existence on existence or non-existence of a fact. For this legal proposition, appellant cited and placed reliance on the following authorities **Woolmington v DPP {1935} AC; Okethi Okale v R {1965} eKLR; Fuad Dumila Mohammed v R (CR. Appeal No. 210 of 2003).**

Appellant further submitted that, the life imprisonment sentence was punitive and excessive. He submitted that the Learned trial Magistrate failed to be guided by the principles in **Openya v Uganda {1967} EACA 752; Eliud Waweru v R CA No. 102 of 2016; Miuthu v State of Punjab CR. Appeal No. 7450 of 1980**. That its settled in Law for the trial Court to consider mitigation before exercising discretion to pass any sentence argued the appellant. The appellant prayed for the appeal to be allowed in its entirety.

Submissions by the respondent

Learned prosecution counsel for the respondent on the other hand, opposed the appeal. He supported the decision of the trial Court. He submitted that from the evidence, the trial Court did not make any error in finding the evidence of the witnesses being sufficient to proof the charge beyond reasonable doubt. Learned prosecution argued that there were no contradictions between the evidence of **(PW3)** and **(PW4)** on proof of penetration.

He further submitted that the conduct of the appellant was that of a person identified and placed at the scene as the one responsible for the crime. It was also the submissions by Learned prosecution counsel that this Court should bear in mind that the Learned trial Magistrate observed the witnesses when testifying, an advantage not availed the appeals Court. Therefore, argued Learned counsel that the inferences and conclusions drawn on demeanor or truthfulness of the witnesses ought to be resolved in favor of the prosecution. Learned counsel prayed to this Court to dismiss the appeal and uphold the conviction and sentence against the appellant.

Consideration of the appeal

The duty of the first appellate Court is well articulated in **Pandya v R {1957} EA 336 and Okeno v R {1973} EA 32.** That is to re-evaluate the material evidence presented before the trial Court and materials thereto including documentary evidence. Thereafter, the Court must make up its mind independently without however disregarding the Judgment of the trial Court, but carefully weighing and considering its strength within the parameters of the Law. By this indictment, the prosecution was required legitimately to proof the charge of defilement beyond reasonable doubt against the appellant. There was no duty on the part of the appellant to prove his innocence even if he does not offer a convincing defence. **(See Woolmington v DPP {1935} 1 AC 462)**

The offence in question against the appellant revolved around penetrative sex as defined in Section 2 of the Sexual Offences Act. The person who engages in an act of sexual intercourse with a child commits an offence of defilement as categorized under Section 8 (1), (2), (3) and (4) of the Sexual Offences Act. A child in this context means a person under the age of 18 years. Who is incapable of giving consent to the act of sexual intercourse. Therefore, what the prosecution was required to proof before the trial Court was the fact of penetration to either the vagina or the anus by the use of penis. It is the Law in Kenya that penetration may be either be partial or complete insertion of the penis to the genitals of the victim.

The lead evidence on penetration came from **(PW3)** who told the that on the material day he was asleep in the same house with the appellant. The witness further told the Court that it was at the very night, appellant seized the opportunity to sexually penetrate his anal orifice by force. In the course of that any attempts made to scream were thwarted by the appellant. As a result of that penetration **(PW3)** testified that it became difficult to bear the pain, even walking to school as it's the case in normal circumstances. The incident was first to be reported to **(PW2),** who took it over and in turn informed the Chief of the location **(PW1).**

The Chief **(PW1)** upholding the complaint called for the complainant for purposes of further inquiry. It was at that interrogation it came to light that the appellant had been committing acts of sodomy against the complainant. From the aforesaid statement, **(PW1)** and **(PW2)** caused the complainant to be examined by a medical doctor at King Fahd Hospital. It is clear from **(PW4)** evidence that an examination conducted revealed the following mortice bacteria in the complainant's rectum, alongside the red blood cells. The P3 was produced and admitted as documentary evidence.

Finally, on compilation of the evidence, **(PW5)** caused the appellant to be charged with the offence of defilement. What can be deduced from the prosecution evidence was a sexual violence that is unwarranted and carried out against the complainant, without his consent. There is evidence of physical force as stated by the complainant as corroborated with medical evidence on existence of red blood cells. The defence narrative in answer to the charge beginning with the appellant was to the effect of a trumped charge from a truant and diligent child. That there was indeed no basis in which the trial Magistrate made that positive findings on penetration. That was also the argument by **(DW2)** and **(DW3)** respectively. With regard to this ingredient, the complainant was with the appellant in the same house the acts of sodomy continued unabated until the time when he had to report to **(PW2).**

In this appeal, the appellant basically urged the Court to scrutinize the inconsistencies and contradictions between the lead testimony on the complainant sexual assault with that of the medical doctor. In my opinion, there could be some areas of inconsistencies and contradiction in the evidence of the complainant with that of the medical doctor on the P3 positive findings, but here the same cannot vitiate the entire evidence of **(PW1).** Amplifying on this point, by the appellant did not render the complainant testimony as unreliable. As is clear, even the evidence of a single witness if believed would be sufficient to prove a fact in issue and essential to secure Judgment on conviction. In the case of **Alex Kapunga & 3 others v R CR Appeal No. 252 of 2005 the Court of Appeal Tanzania** revisited the issue and stated that:

> **"The fact that there are discrepancies in a witness testimony does not straight away make him or her unreliable witness and make the whole of his or her evidence unacceptable."**

In view of this dicta, the claims made by the appellant are not tenable in Law. There is also no evidence that the charge was a fabrication for reason that the complainant had refused to go to school. I find no compelling evidence of truancy as a result of which the Director of Public Prosecution had to initiate an indictment on false allegation by the complainant.

On age of a victim of defilement, the Court of Appeal in **Kaingu alias Kasono v R CR Appeal No. 54 of 2010** handed down a powerful Judgment on this issue:

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

To those urgings the same Court in **Richard Wahome Chege v R (CR Appeal No. 61 of 2014)** held that:

> **"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate, but also by the parent or the doctor who examined the complainant." (See also Francis Omuroni v Uganda CR Appeal No. 2 of 2000)**

In the instant case, the fact of the matter is that the trial Court relied on the captured age in part 1 of the P3 Form. There was no medical assessment report on the age of the complainant. In the first instance part 1 of the P3 its to be completed by the police officer requesting examination and not the medical doctor or qualified clinician. That being the position under Section 48 of the Evidence Act, the police officer who filled the content to that part 1 of the P3 was not qualified to assess the age of the complainant. In holding that the complainant was aged 11 years, the Learned trial Magistrate was not availed trite sufficient evidence as to the element on the age of the complainant. There, the Court hit the final nail on unresolved issue of age beyond reasonable doubt. So to speak the question, in the present case, therefore is not whether the complainant was penetrated, but as to what age was that crime committed against him on the material day.

First, that evidence stands as a departure from the known precedents. On the model Law to proof the age of a sexual victim, while it is acknowledged that Courts have laid down various sources to proof age a police officer is not one such source who lacks the knowledge and expertise to form an opinion on age. The trial Court would not have compromised the enforceability of this ingredient by inevitably relying on untested evidence. As a reliable measure to ensure that the prosecution discharges its obligations as stipulated in the Law, a medical age assessment report was indispensable.

The minimum core was described by the Court in **Francis Omuroni, the Kaingu case**. It was expected that the state in order to comply with this ingredient would have adduced evidence from the guardian, parent, birth certificate or other verifiable documentary evidence. It is extremely difficult for the police officer to provide the text on the age of the complainant without the necessary qualifications and appropriate circumstances on how that opinion was formed to give effect to the legal requirements as to proven age beyond reasonable doubt.

This Court had further occasion to exercise its judicial power over the contents of the part B and C of the P3 Form ordinarily filled by the medical doctor or clinician. In both columns the medical doctor makes no mention as to the estimated age of the complainant. In terms of the Law it is right to rule that age as a critical element of the offence which counts to the definition and punishment for those found culpable remains in the realm of unknown.

For this reason, I am of the view that defilement may have been committed but under the Act, the offence is restricted to victims under the age of 18 years. What is even more disturbing is the aspect of the trial Magistrate not making any observations on which to draw inferences of the likely age of the complainant therein to form as a guide for the appellant to be criminally punishable.

In terms of the Law, in any event the types of defilement under Section 8 (1) (2) (3) and (4) of the Sexual Offences Act are classified and structured within the purview of age. It was on this basis that the legislature enacted the Sexual Offences Act on defilement with punishment graduated explicitly pegged at the age of the complainant. The younger the complainant's age, the stiffer the penalty.

It is clear, that by the Court using the P3 as the admitted credible evidence on exact age of the complainant committed a reversible error of fact. It is also worthy pointing out that the rectum is significantly different from the vagina with regard to suitability for penetration by a penis. In other words, it was not designed to take anything in, but was designed to be a conduit or expelling substance out of the body.

Consequently, without proof of age conclusively, the trial Court could have experienced difficulties in assessing the trauma, friction and the stretching that took place during the anal intercourse complained of by the complainant. The sad consequences of this is that the holding responsibility on penetration may also be suspect as a result of this failure on proof of age. The trial Court expressed itself on this issue on assumption, yet no medical evidence certainly which dealt with assessment on age. That omission gave room for uncertainty.

It is a promise of the constitution that in the realm of criminal law an accused person is presumed innocent until the contrary is proved beyond reasonable doubt. It is appropriate at this juncture for purposes of the appeal to draw inferences in the adjudication of this matter and the evidence rendered to discharge the burden of proof of beyond reasonable doubt. In the context of this appeal, it was ultra vires for the trial Court, in its eager and zealous endeavor to accede to proof of age from a source in the P3 filled by a police officer and not a medical doctor.

Reverting to one order issue, this Court reads into the text of the Judgment. In the evidence of the complainant and **(PW2)** it was contended that at the scene of the crime there were other next of kin who could have been summoned to testify at that trial. The objective was to satisfy the criteria in **Bukenya & others v Uganda {1972} EA 549.**

In my view, the failure to call the key witnesses in the same house where the defilement was committed did affect the outcome of the trial, therefore occasioning a miscarriage of justice. Accordingly, the Judgment of the trial Court is set aside and it is ordered that this appeal be and is hereby allowed. The upshot appeal against conviction and sentence is allowed forthwith. The appellant shall be at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the State

2. The appellant