REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 54 OF 2020

ALEX ACHUTI ONGUTI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the decision of; Hon. Mutuku (SRM), delivered on 31st January 2020, vide Chief Magistrate's Criminal Case S.O. No. 5 of 2014, at Kibera Nairobi.)

1. The appellant was arrested on 21st January, 2014 and arraigned in court on 23rd January, 2014, charged vide Criminal Case No. S.O. 5 of 2014, with offences of; defilement contrary to; section 8(1) as read together with section 8(3) of the Sexual Offences Act No. 3 of 2006 (herein "the Act") in the main count and the offence of; committing an indecent act with a child contrary to; section 11(1) of the Act, in the alternative count.

2. The particulars of each count are that, on the 17th day of November, 2013, [Particulars Withheld], within Langata sub-county in Nairobi county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of; "SA" a child aged 13 years and "AA" a child aged 14 years. That, in the alternative, he intentionally and unlawfully touched their vagina.

3. The charges were read to the appellant and he pleaded not guilty to all the charges. The case proceeded to full hearing. The prosecution called a total of; seven (7) witnesses. The prosecution case in a nutshell is that, on 17th November, 2013, the appellant called the two children who are cousins to his house. He invited them to watch a movie.

4. That, there was no electricity in the house but he lit a lamp, generally well known as 'koroboi'. He then removed the pant of the 1st complainant, "SA" and had sex with her. That, she pushed him off as she was feeling pain. He fell down and then took "AA" and had sex with her too.

5. The 2nd complainant, "AA" told the court that, when the appellant ordered her to lie on the sofa set, where he was defiling them, she refused but the appellant pushed her onto the sofa and reminded her that he had a knife and would hurt her, if she resisted his advances. He then pulled her skirt and removed her pant. He inserted his penis into her vagina. That, she was crying and when she screamed he got off her. He then gave the complainants Kshs.100 and warned them not to tell anyone of what had happened and released them to go home. The complainants went home and slept.

6. The following day the 1st complainant informed her mother of what had happened and her mother informed the father, who apparently had travelled up country. He then returned to Nairobi and took the complainants to; MSF Hospital, where they were treated and discharged. Subsequently, the matter was reported to the Police officers. The appellant was arrested and charged accordingly.

7. At the close of the prosecution case, the appellant was put on his defence. He told the court that, on the material date of the alleged incident, he travelled from Kisumu to Kibera where he was residing. He received a report from the wife that one of the tenants occupying their house had refused to pay rent. He tried to trace her but in vain. That, he wanted to report the matter to the police but she promised to pay.

8. That, he left for Kisumu and returned after one month. He got a letter from the chief that he was required at Serang'ombe Chief's camp. He attended and was referred to Kilimani Police Station. He reported to the Investigating officer one Susan, and was arrested and charged. He maintained and that he was innocent.

9. At the conclusion of the entire case, and after considering the evidence adduced alongside the submission, the learned trial Magistrate,

delivered a judgment dated; 31st January, 2020, in which the appellant was found guilty as charged on the alternative counts. He was then convicted accordingly under section 215 of the Criminal Procedure Code.

10. Subsequently after considering the records provided by the prosecution, which indicated the appellant was a first offender, and the mitigation he offered, the appellant was sentenced to serve ten (10) years imprisonment on each count. The sentence was ordered to run consecutively.

111. However, the appellant is aggrieved and has filed a petition of appeal herein on the grounds as here below reproduced: -

a. That the conviction was manifestly unsafe and unjustified as the same was based on medical evidence which did not conclusively link the appellant to the commission of the offence;

b. That, the learned trial Magistrate erred in law and fact by relying on evidence which was full of contradictions and inconsistences;

c. That, the learned trial Magistrate erred in law and fact by failing that the credibility of the complainant's evidence was doubtful and questionable hence not worthy to have been relied on;

d. That, the learned trial Magistrate erred in law and fact by failure to summon essential witnesses for the just decision of the case;

e. That, the learned trial Magistrate erred in law and fact by shifting the burden of proof to the appellant;

f. That, the learned trial Magistrate erred in law and fact by failing to find that the investigating officer did not conduct any investigations of the case yet this was a serious matter and the Magistrate failed to observe that this case was conducted by different magistrates;

g. That, the learned trial Magistrate erred in law and fact by failing to give the defence adequate consideration and further to comply to the provisions of section 169(1) of the CPC;

12. However, the Respondent opposed the appeal through grounds of opposition dated 2nd December, 2021 in which it states that: -

a. The appeal lacks merit and is unsubstantiated;

b. The appeal is an abuse of the court process since the applicant was properly convicted before the trial court and the prosecution did discharge its burden of proof beyond reasonable doubt;

c. That, the appeal lacks merit and the same should be dismissed in its entirety.

13. The appeal was disposed of vide filing of submissions which I have considered alongside, all the materials placed before the court. In that regard, I note that, the role of the appellate court is to evaluate the evidence adduced in trial court and arrive at its conclusion. In so doing, it should be borne in mind that, the court did not have the benefit of the demeanour of the witnesses.

14. The aforesaid position was well articulated by the Court of Appeal in the case of; *Okeno v R (1972) EA 32*, as follows: -

"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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post (1958) E.A 424."

15. The appellant in the instant matter was convicted on both alternative charges of; committing an indecent act with a child contrary to; section 11(1) of the Penal Code (Cap.63) laws of Kenya. The provision thereof states as follows:

"(1) Any a child person who commits an indecent act with a child is guilty of the offence of committing an indecent act with and is liable upon conviction to a term of not less than ten years.

16. It follows from the aforesaid that, for an offence of indecent act with a child to be proved, the prosecution must prove the victim was a child and that the appellant intentionally and voluntarily caused his private parts to come into contact with the private parts of the child.

17. Pursuant to the aforesaid, the 1st element to examine is whether the prosecution proved that, the complainants herein are children as defined under the law. In a report, the Children Act defines a child as, a human being below 18 years.

18. In the instant matter, the charge sheet indicates that, "SA" was aged 13 years and "AA" was 14 years old. AA testified that she was 14 years old, whereas SA stated that she was 15 years old. (PW3) EOO testified that, his daughter "SA" was 13 years old at the time of the alleged offence. PW4 Dr. Joseph Maundu testified that, he examined "SA", who was aged 13 years and also "AA", 14 years old.

19. PW6, No.83788 Corporal Susan Ndungu, told the court that, she investigated the matter herein and discovered that "SA" did not have a birth certificate. However, she was taken to Mbagathi Hospital on 22nd January, 2014, for age assessment and was found to be 14 years old, as evidenced by the report to that effect, produced in court. The age of "AA: was based on the immunization card which was produced as prosecution exhibit No.5. It confirmed that, she was 14 years old having been born on 12th September, 1999.

20. The learned trial Magistrate evaluated the evidence produced and found that, the age of the children was established by these documents. I concur with her findings and hold that, the evidence proved beyond reasonable doubt that, both complainants were children. Even then, the appellant was not convicted of the offence of defilement, where the age is material, for ascertainable of an appropriate sentence upon conviction.

21. As regards the element of appellants contact with the complainants, I find that, each victim gave evidence at length. Their version of evidence was quite consistent and/or similar in almost all aspects. In particular, both of them testified that, it is the appellant who called them to his house to watch a movie. That, he forcibly put them on the sofa set and defiled each one of them. That, the appellant released them as they attempted to scream and warned them not to disclose the incident to anyone and then gave them Kshs.100.

22. The evidence of these victims was supported by PW3, EOO, the father of, PW2 "SA" who testified as follows:

> "I left home (Migori) and travelled back to Nairobi. I arrived on 20th November, 2013. I called the girls (PW1) and (PW2) who told me Alex gave them Kshs.100/= then slept with them. I saw the prudent thing was to take them to Hospital they be treated and examined. I took them to MSF Olympic Kibera"

23. Similarly, (PW4) Dr. Joseph Maundu who examined both complainants testified that, they gave a history of defilement by someone known to them; that each one of them had been treated at MFS Hospital. In addition, (PW5) Tabitha Oyoo, a nurse at Kibera South Hospital, who examined both complainants told the court that, they said they had been defiled by a neighbour.

24. Finally, the Investigating officer; No.83788 Corporal Susan Ndungu, equally testified that, the report received from the complainants was that, on 17th November, 2013, they had been defiled by their neighbour and they had been treated at; MSF Hospital and later P.3 forms were filed at Nairobi Area Police Station.

25. The aforesaid evidence reveals that, throughout their versions of events of the particular date, 17th November, 2013, the complainants maintained that, it was their neighbour who lured them to his house to watch a movie and then defiled them one after the other. The complainants stated that, he used his private parts to defile each one of them, therefore, there was body contact between the appellant and the complainants as defined under section 11(1) of the Act.

26. The question that arises is whether; the defence by the appellant that, he is being framed because the complainants (SA''s) father owed him rent and when the appellant demanded for the same, he refused to pay and opted to plant the charges on him, holds water.

27. In addressing the defence advanced, the learned trial Magistrate stated as follows:

> "Though he denied the charges herein and said that PW3 filed the case against him after he went to demand rent from him a position confirmed by his wife PW2, I am not convinced of the same, as the accused never cross-examined the said witness when he testified and neither did he raise it at any time when all the other witnesses including the investigating officer testified"

28. I have gone through all the evidence adduced by the witnesses and I find that, at no time did the appellant raise the issue of rent with any of the prosecution witness. To that extent, I entirely concur with the finding of the learned trial Magistrate and find the defence was an afterthought.

29. Even then, the further question that arises is whether; the two complainants herein conspired with (PW3) to fix the appellant. I find the answer in the negative. This is informed by the fact that, as aforesaid, the complainants maintained consistently that, the appellant defiled them.

30. In fact, the trial court's record indicates that, on 18th March, 2015, the court was informed by; No.93414 PC Rumbe Oyie as follows: -

> "I pray for production order for the complainant ("SA") who is at the Kabete Childrens Home. I took the child there as when the accused was released on bond, the complainant ran away from home. With the help of an NGO we traced her at Siaya. I took her to Milimani Children's Court as a child in need of care an"

31. Furthermore, when the child eventually testified, the record indicates that, she broke down and when identifying and/or on seeing the appellant and avoided eye contact. The records read that while she testified, the court observed.

> "Witness keeps holding her hands and legs and eventually prays to be excused to go for a short call.

After two minutes she returns.

Then she went on to testify as follows:

> "He then pulled my skirt, he then removed my panty. He then slept on top of me (unable to look up) He then pulled his thing for urinating and put in me (crying) He placed his thing inside my thing for urinating, I was crying"

32. The evidence of this child, in particular reveals, a highly traumatized child. She cannot therefore, be said to have staged and/or framed the offences or appellant herein. The evidence completely confutes the appellants' defence that he was framed. I therefore dismiss the defence evidence as a mere denial and an afterthought. Neither did the appellant prove the alleged tenancy relationship proved anyway.

33. Finally, the appellant confirmed in his evidence that, he was residing at Kibera where the children were residing with their parents. Therefore, the children correctly and positively identified him as their neighbour. There is indeed evidence that, there were several houses in the same plot. However, (PW1) "AA" candidly testified that, the appellant was a neighbour of her uncle E (PW3). During a the relatively lengthy cross-examination by the appellant, she identified each tenant in the plot by their names. She testified as follows: -

> "Our house is No. 5. The first house is mama Cathy, the baba Peter, the 3rd is mama Kerubo, the 4th is mama Atis, the 5th is mama Atis, ours is 6th but I counted baba and mama Atis as one"

34. It is clear that, this child was well versed with the occupants of all the houses in the plot. In fact, in further cross-examination, she responded to the appellant by saying; "Your house does not lock using a key" Therefore, the issue of mistaken identity does not arise.

35. The 2nd complainant "SA" in identifying the appellant stated as follows; "I know the accused (looking down) He is Alex".

In cross-examination she stated

> "You used to be our neighbour at Soweto. I used to live with my father. I used to visit your house severally and would even eat. I have never seen you chase children from your home. I never stole your mat or sack. Your home is the first then ours and mama Atis is the last tenant. There are (sic) seven houses in total all occupied. There is a gate separating us"

Again, this evidence confirms that, the appellant was well known to the complainants and I believe they both positively identified him

36. In conclusion I find that, as the medical evidence adduced did not adequately prove the element of the offence of defilement, the learned trial Magistrate correctly acquitted the appellant on the same. The finding of guilty on the alternative counts of committing an indecent act with a child is safe and sound and I accordingly uphold it.

37. As regards, the sentence meted out, I find that, the same is the minimum sentence provided for under the law. The question that, arises is whether it should run concurrently or consecutively. The provisions of law that governs sentencing under the Penal Code, are provided for under section 24 to 39 of the Penal code. In particular, section 24, recognizes different types of sentences. Whereas, section 26, provides for the punishment of imprisonment and section 37, deals with sentences when cumulative.

38. It suffices to note that, none of these provisions takes away the discretion of the court to order that, any sentences run concurrently. In fact, section 37 that deals with cumulative sentences states that, the court can direct that, any of the cumulative sentences shall be executed concurrently with the former sentence or any part thereof.

39. In the instant matter, the offences were committed at the same time. They are of course very serious offence. However, the appellant records indicate that, he was a first offender. He was on trial for a period of about six (6) years from, 23rd January, 2014 to 31st January, 2020. He has served sentence for a period of one (1) year.

40. The purpose of sentence should be both preventive, deterrence and/or reformative or rehabilitation. I therefore find that, it is in the interest of justice that, the sentence imposed upon the appellant run concurrently. If he committed the offence and has taken time to reflect on the same, the period he will spend in custody should be adequate to teach him all the necessary lessons.

41. In that regard, the appeal on sentence succeeds only to the extent that, the custodial sentence imposed on the two alternative counts, shall run concurrently. The appeal on conviction is dismissed.

42. Those, then are the orders of the court.

It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 23RD DAY OF DECEMBER, 2021

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant in person

Ms Chege for the Respondent

Edwin; Court Assistant