REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 4 OF 2019

JUSTUS MUKENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Sexual Offences Case No. 30 of 2016

at the Chief Magistrates Court Bungoma by *Hon. J. Kingori – CM on 28th December 2018)*

JUDGMENT

1. Justus Mukenya, the Appellant, was charged with defilement of a child contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences **Act No. 3 of 2006**. Particulars being that on the 5th day of October 2016 at [Particulars Withheld] Village in Bumula Sub-County within Bungoma County, intentionally and unlawfully caused his penis to penetrate the anus of **SS** a child aged 13 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 No. 3** of 2006. Particulars being that on the 5th day of October 2016 at [Particulars Withheld] Village in Bumula Sub-County within Bungoma County intentionally and unlawfully touched the buttocks of **SS** a child aged 13 years with his penis.

3. Having been taken through full trial, the appellant was found guilty, convicted for defilement and sentenced to serve twenty (20) years imprisonment.

4. Dissatisfied with the conviction and sentence the appellant appeals on grounds as amended that:

> **The prosecution evidence was contradictory, insufficient, hilarious thus rendering prejudice to the appellant; the court erred in law and in fact in failing to observe that the circumstantial evidence was unlawful and that it did not meet the standard; The court failed to observe that all benefits of doubt were guaranteed to the appellant; The court erred in failing to evaluate the entire prosecution evidence thus arriving at an erroneous conclusion; The trial magistrate failed to note that the charge sheet was incurably defective contrary to section 214 of the Criminal Procedure Code; The court failed to consider the appellant's plausible defence and Statement of DW2; The clinician did not state whether the anus was intact or defiled; The anus in this case was intact in absence of indication of defilement; The court failed to note that PW1 stated he was not taken to hospital and also failed to state how it believed his evidence, and, that the age of the complainant was not proved as required by law**.

5. In a nutshell, the prosecution's case was that on the 5th October 2014, **PW2 AN**, the complainant's grandmother sent him to borrow some cooking oil from Gladys, their neighbour. Prior to reaching the home of Gladys he passed through the appellant's tobacco farm. Upon the appellant finding him, he took him to his house and made him to sit on a seat then went out to ease himself. He returned to the house, removed is clothes and those of SS the complainant, then inserted his genital organs into his anus. On finishing he told him to leave but not to pass through Glady's home. He returned home and informed PW2 what had befallen him. She examined his anus which was wet and whitish. In company of **PW3 Geffrey Singolo Mulongo** they went and reported the matter to the village elder, **PW4 Irene Nekesa Barasa.** She sent "Nyumba Kumi Agents" among them, **PW5 Benjamin Boyagi Mukhabi** who arrested the Appellant. She interrogated him and caused him to be taken to the Police Station where he was re-arrested and placed in custody by **PW7 NO.** [Particulars Withheld] **Sergeant Duncan Warutumo.** The complainant was examined by a Clinical Officer at Kocholya Health Centre and confirmed to have sustained lacerations on the anal region. On cross examination **PW6 Pauline Sirengo** the Clinical Officer opined that the assault in question was sexual penetration.

6. Upon being placed on his defence the appellant stated that at 10.00 am on the material date he left going to a neighbour's home, one

Maikuma but he did not find him. His wife, Mama Makokha asked him to wait for her husband and he stayed until 11-12:00 pm. Francis arrived and he stayed with him until 3.00 pm-4.00 pm. That it rained and he returned home at about 7.00 pm. At 8.00 pm he heard a knock on the door. He opened only to see Godfrey and Alex. It was alleged he had assaulted a child. He was taken to the village elder and the complainant was called. He was taken to the Police Station and subsequently charged. He urged that the complainant was his relative and there were no grudges in the family.

7. He called a witness **DW2,Francis Maikuma Matiasi**, who stated that on the material date he returned home at midday and found the accused, his neighbour waiting for him as he wanted a lamp, and he left his home at about 3.00pm.

8. The trial court analyzed evidence adduced at trial and found that the complainant was thirteen (13) years old. That the complainant was defiled as he had testified with innocence and clarity and his evidence was corroborated by evidence of the Clinical Officer who found him to have lacerations in the anus and that being a relative, there was no mistaken identity as to the person who defiled the complainant. Hence the conviction.

9. The appeal was canvassed through written submissions. It was urged by the appellant that the learned magistrate relied on circumstantial evidence that was insufficient as the complainant having been taken to hospital and the treatment notes Police purported to rely on were not signed by the author. That the circumstantial evidence in question was unlawful. In this regard he relied on the case of ***Ann Waithera Macharia & 5 others (2019) eKLR*** where the court held that :

> **"It is trite that (sic) in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt; see Simon Musoke v Republic [1958] EA 715 where the following extract from Teper v R [1952] AC 480, 489, was quoted [1958] EA at page 719:-**
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> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference?"**

10. The appellant faulted the court for accepting evidence of a Clinician who did not fill the P3 form. That the complainant having alleged that the appellant was his father's brother he should have been charged with incest, which makes the charge defective. That the complainant alleged that the appellant used his testis to penetrate his anus which is not possible.

11. The appellant also complained that the court relied on **Section 124** of the Evidence Act in convicting the appellant, yet, the stated law was not observed and that the court failed to protect justice pursuant to the jurisponderice that has emerged from the case of ***Peter Karioba Ndegwa Vs. Republic (1985) KLR*** where the court stated that:

> **"…No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration"**

12. It was submitted by Respondent that the trial court relied on credible evidence of the complainant as he clarified the name of the Hospital that he attended. That PW4 was clear and consistent in her testimony that the complainant was assessed on two (2) occasions when he was treated and when the P3 form was filled. That the prosecution relied on direct evidence and not circumstantial evidence and pursuant to **Section 124** of the Evidence Act, the trial court found that the victim was telling the truth.

13. This being a first appellate court its duties were set out in the case of ***Okeno Vs. Republic 1972 EA 3*** 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] 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. Rulwala Vs. Republic [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."**

14. It is urged that the charge sheet was defective. **Section 134** of the Criminal Procedure Code (CPC) provides thus:

> **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.**

15. In the case of ***Sigilani Vs.Republic (2004) 2KLR 480*** the court held that:

> **"The principal of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principal of the law has a constitutional under pinning."**

16. The offence of defilement is created by **Section 8(1)** of the Sexual Offences Act which states as follows:

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

17. The particulars of the offence were that the appellant unlawfully and intentionally caused his penis to penetrate the anus of **SS** At trial the appellant was represented by counsel who guided him throughout the trial which enabled him to participate in the trial. Following legal advice of his advocate he participated in the trial and tendered the defence. In the premises the charge sheet was not defective.

18. In the case of ***Hillary Nyongesa Vs. Republic (2010) eKLR*** the Court stated thus:

> **"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim"**

19. In the case of ***Francis Omuroni Vs. Uganda, Criminal Appeal No. 2 of 2000*** the Court of Appeal stated 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, a child in Standard 2 did not know his age. However, PW2 his guardian and great grandmother stated that he was 13 years old. The complainant was also subjected to age assessment and his age estimated to be thirteen (13) years. The complainant was known to the appellant since childhood and he did not dispute his age. The prosecution therefore proved the fact of the complainant having been of an apparent age of 13 years.

21. To prove the offence the prosecution was obligated to prove the fact of penetration. **Section 2** of the Sexual Offences Act defines penetration as:

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

22. The complainant testified that the appellant penetrated his anus using "lineke" and went on to explain that it was the thing used to play sex. This was the term he used to describe the appellant's genital organs in his own language. The issue of "lineke" having been used to molest him was not challenged in cross examination which was proof of the accused and Counsel who represented him having understood what the complainant meant. Section 2 of the Sexual Offences Act defines genital organs to include the anus.

23. PW2 the grandmother of the complainant testified to have examined him and noted presence of some discharge. Subsequently he was examined by a Clinical officer and his anal area was found to have lacerations. The Clinician concluded that it was as a result of defilement. Treatment notes by the first clinician who saw the complainant were adduced in evidence. It is the contention of the appellant that the notes were not signed and PW6 did not treat the complainant. PW6 Pauline Sirengo testified that the treatment notes were authored by Emily Ekisa, a person whose handwriting she was conversant with. The treatment notes were made at Kocholya Hospital, and the outpatient number of the complainant was given as 7841/16 dated 6/10/16 and it was duly stamped. PW6 explained that the Clinician could not be found to testify as she was away. According to Section 33 of the Evidence Act where the maker of the document is not available, and the write up was made in the course of business then such a document can be produced in evidence. Needless to add that the appellant was represented by counsel and no objection was raised

24. At the point of examination for purposes of filing the P3 Form, PW6 confirmed the visible injuries that were still evident. The complainant confirmed having been taken to Kocholya Hospital. Even if it were that treatment notes were lacking, **Section 124** of the Evidence Act provides thus:

> **Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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:**
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> **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. In the case of ***Kassim Ali -vs- Republic, Cr. App No. 84 of 2005*** (Mombasa) the court stated that:

> **"… Examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

26. It is alleged that the court relied on circumstantial evidence to convict the appellant. In the case of ***Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR,*** the Court of Appeal had this to say:

> **"Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence."**

27. Evidence adduced by the complainant was direct and it was corroborated by medical evidence. There was proof of penetration of the complainant's anus.

28. Regarding the perpetrator of the offence the trial court had the opportunity of observing the demeanor of the complainant. It believed him and gave reasons for the belief and applied the discretion judiciously. The court indicated that the minor testified with innocence and clarity and was impressive.

29. The appellant faults the trial court for relying on contradictory evidence that was alleged to have been unreliable. In particular, that the complainant denied knowing Kocholya Hospital and said that he did not go to Hospital. In the case of ***Twehangane Alfred Vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UGCA 6*** it was stated that:

> **"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."**

30. The complainant was re-examined and he clarified that he went to hospital with "Baba" Wesonga the clarification having been satisfactorily explained, the alleged contradiction was not fatal.

31. The appellant put up a strenuous defence of not having been home when the incident is alleged to have happened. The learned trial magistrate considered the defence put up and rightly so disregarded it. He called a witness who said he was with him up to 3.00pm, therefore, he had the opportunity of finding the complainant in his tobacco farm and molesting him as proved by the prosecution.

32. On the sentence meted out, the appellant endeavored to prove that he has reformed having acquired knowledge while in prison and matured in religion matters. **Section 8 (3)** of the Sexual Offences Act provides thus:

> **A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

33. The trial court imposed the minimum prescribed sentence for the offence. Therefore, I find the appeal lacking merit which I dismiss in it's entirety.

34. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 17TH DAY OF DECEMBER, 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Immaculate

Ayekha for the ODPP

Appellant