REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 268 OF 2019

JUMA IYATI.....APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. F. Mutuku (SRM)

in Kibera Chief Magistrate's Criminal Case No. 415 of 2012

dated 20th December 2019

JUDGMENT

1. The appellant, *Juma Iyati* was charged in Kibera Criminal Case No. 415 of 2012 with the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (2)* of the *Sexual Offences Act*. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to *Section 11(1)* of the *Sexual Offences Act*.

2. The particulars in the main charge of defilement were that on 14th January 2012, at [particulars withheld] within Nairobi County, the appellant unlawfully and intentionally inserted his male organ into the vagina of *N.A.O.*, which caused penetration to the said child of 11 years.

In the alternative count, it was alleged that on the same date and place, the appellant unlawfully and intentionally committed an indecent act by touching the female genital organ (vagina) of *N.A.O.*, a child aged 11 years.

3. After a full trial, the appellant was acquitted of the main charge but was convicted of the offence charged in the alternative count. He was sentenced to serve ten (10) years imprisonment.

He was dissatisfied with the trial court's decision. He lodged an appeal to this court challenging his conviction and sentence.

4. In his petition of appeal filed on 24th December 2019, the appellant advanced nine grounds of appeal in which he mainly challenged his conviction on grounds that the learned trial magistrate erred in law and fact by; convicting him on the basis of the complainant's testimony yet she did not have the opportunity to observe her demeanor and character at the time she was testifying; failing to treat the complainant's evidence with caution and finding it credible after it was contradicted by medical evidence; finding that the complainant's evidence was corroborated yet the evidence by other prosecution witnesses was hearsay evidence; convicting him on unreliable evidence which did not prove the charges beyond any reasonable doubt.

5. At the hearing, both the appellant and the respondent chose to prosecute the appeal by way of written submissions. Those of the appellant were filed on 30th June 2021 by the firm of *Daniel Orenge & Company Advocates* while those of the respondent were filed on 22nd June 2021 by Learned Prosecution Counsel *Ms Kibathi.* The submissions were highlighted before me on 22nd November 2021 by learned counsel *Mr. Ongeri* for the appellant and learned prosecuting counsel *Mr. Chebii* for the respondent.

6. The gravamen of the appellants written and oral submissions was that the learned trial magistrate in convicting the appellant erred by failing to carefully evaluate the victim's evidence and by relying on the proviso to *Section 124* of the *Evidence Act* (the *Act*) without giving reasons why she believed the minor's evidence. Reliance was placed on *inter alia*, the case of ***Arthur Mshila Manga V Republic, [2016] eKLR*** in which the Court of Appeal held that before a court can rely on the proviso to *Section 124* of the *Act*, it must first believe that the witness was telling the truth and secondly, it must record the reasons for such belief.

7. In addition, counsel submitted that the victim (PW1) was unreliable having stated in her *voire dire* examination that she at times lied and considering that her evidence on penetration was debunked by the medical evidence adduced during the trial. He contended that there was no evidence on which the appellant could have been properly convicted and urged me to find merit in the appeal and allow it in its entirety.

8. The appeal was contested by the state. In opposing the appeal, *Mr. Chebii* submitted that the appellant was properly convicted as the prosecution had proved all the elements of the offence charged in the alternative count beyond any reasonable doubt; that the appellants appeal lacked merit and ought to be dismissed.

9. This being the first appeal to the High Court, it is an appeal on both facts and the law. I am fully aware and guided by the principle regarding the duty of the first appellate court which is to revisit and to consider afresh all the evidence presented before the trial court to draw my own independent conclusions remembering that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses. See: ***Okeno V Republic, [1972] EA 32; Soki V Republic, [2004] 2 KLR 21***.

10. I have carefully considered the grounds of appeal together with the rival submissions made on behalf of the parties and the authorities cited. I have also considered the evidence on record and the judgment of the trial court.

Having done so, I find that only one key issue emerges for my determination which is whether the prosecution adduced cogent and credible evidence sufficient to prove beyond reasonable doubt that the appellant committed an indecent act with the victim as charged in the alternative count.

11. An "*indecent act"* is defined in *Section 2* of the *Sexual Offences Act* as:

> ***"… An unlawful intentional act which causes:***
>
> ***(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.***
>
> ***(b) Exposure or display of any pornographic material to any person against his or her will."***

12. To determine this issue, it is important to revisit the evidence placed before the trial court. I will start by noting that from the evidence on record and the parties' submissions, it was not disputed that the victim was a child aged 11 years at the time the offence was allegedly committed as shown by her birth certificate produced as *Pexhibit 2*. It was also not disputed that the appellant and the victim's family used to live in the same neighbourhood and that the identification of the appellant as the victim's neighbour was correct.

13. After a brief *voire dire* examination in the fresh hearing that proceeded before *Hon. Mwinzi (SRM)* after the initial trial magistrate *Hon. Mwangi* apparently proceeded on transfer, the child victim who testified as PW1 narrated how she went to the appellant's home on 14th January 2012 to borrow a bottle. The appellant pulled her and laid her on his bed, removed his thing (penis) which he inserted into her vagina; that she felt pain and told the appellant so who then promised to insert 'the thing' slowly. When leaving the house, she was seen by her two neighbours *N* and *R*. *R* reported to her mother (PW6) who in turn interrogated PW1. According to PW6, PW1 admitted that she had been going to the appellant's house and he had been defiling her and touching her breasts. However, she never reported any of these to her parents until she was questioned by PW6.

14. After interrogating PW1, PW6 recalled that she reported the matter to her husband (PW2) on 18th January 2012 and together they took PW1 to Nairobi Women Hospital for examination. She was examined by a *Dr. Thuo* whose medical report was produced on his behalf as *Pexhibit 1* by PW3. The medical report dated 19th January 2012 shows that no tear or laceration was found on PW1's genitalia but the hymen was missing.

15. However, a P3 form *(Pexhibit 2)* documenting results of PW1's examination on 20th January 2012 by a police doctor namely, *Dr. Kamau* shows that upon examination, PW1's genitalia had no physical injuries and the hymen was intact. The appellant was later arrested by members of the public and handed over to the police at Kabete Police Station where the charge subject of his conviction was preferred by PW5.

16. Upon being placed on her defence, the appellant denied having committed the offence as alleged and just narrated how he was arrested.

17. When convicting the appellant, the learned trial magistrate stated as follows:

> ***"The complainant's evidence is that she was defiled. The same was corroborated by her parents PW2 and PW6 who only got to know about the incident from a neighbour by the name R. The said witness was however never called to testify yet she was a crucial witness. The complainant's evidence is corroborated by the medical report from the Nairobi women's hospital which clearly shows that the hymen was absent. However due to the contradictions of the said medical report and the P3 Form, I only find that the aforesaid evidence discloses the alternative charge of indecent act with a child."***

18. From my own appraisal of the evidence, I find that only PW1 gave direct and material evidence in support of the prosecution case as all the other witnesses did not witness commission of the offence. *N* and *R* who allegedly spotted PW1 leaving the appellant's house on the material date were for undisclosed reasons not availed as prosecution witnesses to confirm or deny PW1's allegations that she had gone to the appellant's house on the date stated in the charge sheet.

19. In my view, the learned trial magistrate misdirected herself when she made a finding that in view of the contradictions in the medical

evidence, the evidence on record fell short of proving the offence of defilement but disclosed the offence of committing an indecent act with a child without giving any reason for that finding. I say so because the offence of committing an indecent act with a child though charged as an alternative count in this case is a different and distinct offence which required to be proved beyond doubt by the evidence adduced in the trial so that if the evidence was insufficient to prove the main charge of defilement, then the appellant could safely be convicted in the alternative count.

20. In this case, the learned trial magistrate ought to have specified which aspects of the prosecution's evidence proved beyond doubt that the appellant had committed an act against the child victim which amounted to an indecent act as defined in *Section 2* of the *Sexual Offences Act.* The fact that the evidence adduced in this case failed to establish the offence of defilement did not in my view automatically mean that the evidence on record disclosed the lesser offence charged in the alternative count.

21. The appellant in his submissions challenged the trial court's decision on grounds that the learned trial magistrate based his conviction on the evidence of PW1 alone relying on the proviso to *Section 124* of the *Evidence Act* which empowers a court, in sexual assault cases involving minors, to convict an accused person on the uncorroborated evidence of the victim *if for reasons to be recorded, the court was satisfied that the victim was speaking the truth*. There is however no indication in the trial court's record that the learned trial magistrate relied on the aforesaid provision in convicting the appellant.

22. The court record shows that in convicting the appellant, the learned trial magistrate did not expressly seek to establish whether or not PW1 was a truthful and reliable witness. She apparently accepted her evidence after finding that it was corroborated by the testimonies of PW2 and PW6 as well as the medical report from Nairobi Women's Hospital. This was another misdirection on the trial court's part because PW2 and PW6's evidence for the most part amounted to hearsay and the medical report did not have any evidence showing that any part of the appellant's body had come into contact with the victim's private parts. The medical report confirmed that the victim's genitalia was normal and had no physical injuries except that the hymen was missing.

23. The fact that the hymen was missing did not by itself amount to evidence that the child had been involved in sexual activity. As noted by the Court of Appeal in ***P.K.W V Republic, [2012] eKLR***, it is not the case that a girl's hymen can only be ruptured through sexual intercourse. The court held that scientific and medical evidence had proved that some girls are not even born with a hymen and that a hymen can be broken when a girl engages in vigorous physical activity. The absence of a hymen did not therefore amount to proof that on the date alleged, the appellant had subjected the child victim to some sexual assault in the course of which parts of his body would have come into contact with the complainant's private parts.

24. On my part, I find that PW1's evidence was not corroborated by any cogent evidence on record. The learned trial magistrate should have evaluated the victim's evidence with great caution considering her admission that she sometime lied and considering that her graphic narration describing how she had been defiled was materially contradicted by the medical evidence adduced during the trial.

25. Given the victim's age and the appellant's apparent age, if it is true that she had been defiled on 14th January 2012 as claimed in her evidence before *Hon. Mwinzi* on 16th December 2015 or a week later as claimed before the initial trial magistrate *Hon. Mwangi*, one would reasonably have expected that the medical officers who examined her would have noted evidence of some injury on her genitalia.

26. It is not lost on me that by virtue of the proviso to *Section 124* of the *Evidence Act*, the learned trial magistrate was entitled to convict the appellant on the victim's uncorroborated evidence if she was satisfied that she was speaking the truth and recorded her reasons for that belief. This is not what the learned trial magistrate did in this case.

27. There are good reasons why courts should be cautious and should convict an accused person on the uncorroborated evidence of a minor only upon being satisfied that the minor was speaking the truth. This is because due to their age, children of tender years are vulnerable and susceptible to many influences. This was well captured by *Hon. Justice Ngugi* in ***Fappyton Mutuku Ngui V Republic, [2012]*** where the judge quoted *J Heyden Evidence: Cases and Materials 2nd Edition Butterworths London 1984, 84* where the learned author stated thus:

> ***"…. First, a child's powers of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. …… A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations."***

28. The appellant denied having committed the offence. The onus therefore fell on the prosecution to prove the offences he was facing beyond any reasonable doubt.

For the reasons given hereinabove, I am not satisfied that the prosecution in this case discharged its burden of proof to the standard required by the law.

29. In the premises, I find that the appellant's conviction was unsafe. I accordingly find merit in this appeal and it is hereby allowed. The appellant's conviction is consequently quashed and the sentence set aside. He shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021.

C. W. GITHUA

JUDGE

IN THE PRESENCE OF:

MR. ONGERI FOR THE APPELLANT

MS NDOMBI FOR THE RESPONDENT

APPELLANT PRESENT IN PERSON

MS KARWITHA: COURT ASSISTANT