REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 6 OF 2019

BENSON NJERU NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal from the judgement of Siakago Senior Resident Magistrate delivered on 30th January 2019.

2. 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 No. 3 of 2006. The particulars of the offences were that on 28/12/2017 at [Particulars Withheld] village of Embu County the appellant was alleged to have intentionally caused his male genitalia organ to penetrate female organ of the complainant a child aged eight (8) years old. The appellant was convicted of the charge and sentenced to life imprisonment.

3. Dissatisfied with both the conviction and sentence, the appellant lodged this appeal based on the following grounds: -

a) The trial magistrate erred in law by failing to consider that crucial witnesses who were informed of the alleged incident never testified thus violating section 150 of the C.P.C.

b) The trial magistrate erred in law under section 36 (1) when he failed to consider that the medical report in regard to the examination of the complainant did not connect the appellant with the offence and further that no D.N.A evidence was conducted to prove the defilement charges.

c) The trial magistrate erred in law when he failed to inform the appellant of the right to an attorney yet it was the appellant's first time in court thus violating Article 50 of the constitution.

d) The trial magistrate erred in law convicting the appellant against the weight of evidence whereas the prosecution failed to prove their case beyond reasonable doubt.

4. The parties filed submissions to dispose of the appeal.

B. Appellant's Submissions

5. It is submitted that the appellant was convicted on a defective charge sheet as regards the date of the

offence indicated as 28/12/2017 while the date of the report in the Occurrence Book (OB) was 2/01/2018. He argued that the discrepancies of the dates are evidence that the charges against him were made up. He relied on the cases of **R v Mohamed Bin Alui [1924] EACA 72** and **Tekelali & Others v R [1952] EACA 182-186**.

6. It is submitted that the P3 form relied on by the prosecution is defective in that there are dates that were corrected which is against the law and further that the names of the complainant on the P3 form are different from the names on the charge sheet and different from the names of the patient attended by the clinical officer whom treated the patient and filled the form.

7. It is submitted that there was contradicting evidence relied on by the prosecution in that the recorded evidence shows that the appellant was arrested on 2/01/2018 whereas the charge sheet indicates the date of arrest was 3/01/2018. The appellant also cites contradictions in the clinical officer's statement that the injury examined was one day old whereas the trial magistrate in his judgement concluded that the injury was two days old.

8. The appellant also raises the issue of contradiction in that the record shows that there are two different hospitals where the alleged incident was dealt with, this is Siakago Provincial Hospital and Mbeere District Hospital.

9. It is also submitted that the appellant was not subjected to a medical examination to establish whether he was the one who committed the offence. The appellant also alleges that he was arrested on the 2/01/2018 and taken to court on the 4/01/2018 in violation of the 24 hrs constitution provision under Article 49 (1).

10. The appellant further submits that he was not provided with legal representation which is against his constitutional rights under Article 50 (2) (h). It is further submitted that though PW2, the clinical officer claimed the hymen was broken, there was no trace blood which meant that the appellant was framed for the offence.

C. Respondent's Submissions

11. The respondent opposed the appeal but conceded to the prayer in respect to the *ratio decidendi* set in the case of **Dismus Wafula Kikwake v Republic [2018] eKLR** where it was held that the weight of the prosecution evidence could not be dislodged by the unsworn defence of the appellant in his defence.

12. It is submitted that the disparity in the date on the charge sheet and the OB number is explained by the complainant's failure to report the incidence immediately and that this cannot be a reason to deem the charge sheet as defective.

13. It is submitted that a charge sheet can only be defective if it does not allege an essential ingredients of the offence. Reliance is placed on the case of **Sigilani v Republic [2004] eKLR.**

14. It is submitted that the prosecution evidence was sufficient as section 124 gives the trial court power to allow a conviction based on the evidence of a single witness if it is satisfied that the said witness is telling the truth and further that the medical report of PW2 confirmed that the offence did take place.

15. It is submitted that the appellant had not demonstrated that substantial injustice was occasioned to him by the failure to appoint him an advocate. It is further submitted that the appellant failed to inform the court that he was incapable of making his own defence and as such though the failure to appoint him an advocate is a genuine one, it would find better consideration if the court was moved by way of constitutional petition given the many interested parties that would emerge from this concern. Reliance is placed on the case of **Criminal Appeal 94 of 2012 eKLR, H. Omondi J.**

D. Analysis of the Law

16. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno v Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) 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 V. R [1957] E.A. 570. It is not the junction 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 1978) E.A. 424."***

17. The prosecution evidence as laid out in the trial Court was that PW1 the complainant's mother testified that on the 20/12/2017 at about 6pm she arrived home to find the victim outside the compound and the victim proceeded to inform her that the accused removed her clothes and inserted his male genital organs into her female genital organs. She subsequently took the victim to Siakago General Hospital for medical attention and reported the matter at Siakago Police Station.

18. PW2, a medical officer at Siakago General Hospital, testified that he examined the victim and found the hymen was forcibly broken with physical hymeneal tags leading him to form the opinion that there was actual vaginal penetration. He accessed the age of injuries at about 2 days and tendered the P3 and PRC as exhibits.

19. The victim testified as PW3 after a *voire dire* examination. She said that the accused asked her to go with him for firewood which she did. The accused then asked her to remove her skirt and lie down. The accused unzipped his trousers and removed it then removed his male genital organ and inserted it into the victim's female genital organ. The accused then asked the victim to wear her clothes which she did then took the firewood home where she subsequently informed her mother.

20. PW4, the investigations officer testified that he took over the investigations after his colleague PC Esther had been transferred. He testified that when he took over the case file, there was a P3, PRC form and birth certificate which he produced in court as evidence.

21. On being placed on his defence, the appellant gave unsworn evidence and denied committing the offence and that on the 2/01/2018 he was arrested and taken to Siakago Police Station where he learnt of the charges against him.

22. The trial court convicted the appellant upon satisfying itself that the prosecution had proved their case against the appellant beyond reasonable doubt.

23. Having carefully considered the appellant's grounds of appeal, it is my considered view that the issues for determination are as follows;

> *a) Whether the charge was defective;*
>
> *b) Whether the prosecution proved its case beyond reasonable doubt,*
>
> *c) Whether the failure to provide the appellant with an advocate during his trial was a violation of the appellant' right to a fair trial.*

24. The appellant's claim that the charge was defective will be addressed on looking at the particulars of the offence which were as follows: -

> *"On the 28th day of December 2017 at [Particulars Withheld] village, Mbeere North sub-county,*

Embu County, intentionally caused his penis to penetrate the vagina of CJM, a child of 8 years."

25. I do note that as alleged by the appellant, the date of the OB report in the charge sheet was 2/01/2018. Evidence from the witnesses was that the accused was arrested on 2/01/2018 while the offence was committed on 28/12/2017. PW4 the investigating officer confirmed this in cross-examination. That date of the arrest on the charge sheet was amended to read 3/01/2018 from 2/01/2018. The amendment was not explained but it is clear from the evidence that the accused was arrested on 2/01/2018.

26. Evidence was to the effect that the offence was reported late because the complainant did not tell the mother of her predicament on the same day it happened. The evidence on record explains the discrepancies on the dates of the offence, that of reporting and the date of arrest. It is trite law that a charge sheet can only be defective if it does not state the essential ingredients of the offence.

27. I have perused the charge sheet and I note that the ingredients of the offence are all included and that all other particulars are in order. It is my considered view that the charge sheet was not defective and any discrepancy that has been noted herein is not fatal to the case.

28. On the allegation that the complainant was treated in two different hospitals, I make some observation. The P.3 was filed by the "medical officer of Health, Mbeere District. In my view, there were no two hospitals but just one namely Siakago Sub-county hospital in Mbeere.

29. The name of the complainant in the charge sheet was Claudia Jezeli Mwende. In the P.3 form it read CJM and in the PRC form it read MCJ. Two of the names "M" and "J" were misspelt. This does not mean that the complainant had two different names. In court, the complainant testified on oath and gave her name as CJM. She was identified by her mother PW1. The court had no doubt as to the identity of the complainant as it heard the case.

30. On correction of dates in the P.3 form from 28th to 29th December 2017, this must have been a clerical error. The accused never put any question on the issue to the person who produced the P.3.

31. In the case of **Sagilani Vs Republic [2004] eKLR**, it is submitted that a charge sheet can only be defective if it does not allege an essential ingredient of the offence.

32. Section 8 of the *Sexual Offences Act* provides as follows:

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

33. The first ingredient required to be proved is whether there was penetration of the complainant's genitalia; the second is the age of the complainant; and finally, whether the penetration was by the appellant. See the case of **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

> *"**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

34. As regards the age of the complainant, in **Dominic Kibet v Republic Criminal Appeal No. 155 of 2011** it was held that:

> ***"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."***

35. The importance of establishing the complainant's age in defilement cases cannot be over-emphasised. In the case of **Francis Omuroni v Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> ***"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."***

36. It was held in the case **of Kaingu Elias Kasomo v Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010** stated as follows:

> ***"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 the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."***

37. The Court quoted with approval its own decision in **Alfayo Gombe Okello v. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said: -

> ***"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)…***

38. However, in the case of **Francis Omuroni v Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** was observed as follows:

> ***"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

39. PW2 the clinical officer who examined the complainant testified that the complainant was aged eight (8) years at the time of the offence. PW1 the mother gave the age of the complainant as eight (8) years also and produced the birth certificate. In my view, the age of the complainant was satisfactorily established.

40. With respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the court of appeal in **Martin Nyongesa Wanyonyi v Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga & A. K. Murgor JJA** citing **Kassim Ali v Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated that:

> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"***

41. In this case upon examination, PW2, a medical officer at Mbeere District Hospital, testified that he examined the victim and found the hymen was forcibly broken with physical hymenal tags leading him to form the opinion that there was actual vaginal penetration. He assessed the age of injuries at about 2 days and tendered the P3 and PRC forms as exhibits.

42. The evidence of PW2 together with that of the complainant PW3 was sufficient to establish penetration.

43. The complainant knew the appellant well-being her mother's employee whom she identified in court and explained in detail what he did to her in the bush having lured her to go with him to collect firewood.

44. The trial court which had the opportunity to see and hear PW3 the clinical officer who testified that there was penetration. This evidence corroborated the evidence of the complainant that she had been sexually assaulted by the accused. There was therefore no need for the accused to be medically examined or for DNA to be conducted in that regard.

45. PW1 the complainant's mother corroborated PW3's testimony and under cross examination affirmed the appellant's identity as being known to the victim and herself given that PW1 had been employed at their home since early 2017.

46. Section 124 of the Evidence Act (a proviso thereof) is clear that a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (*See George Kioyi v R Cr. App. No. 270/2012 (Nyeri) and Jcob Odhiambo Omumbo v R. Cr. App No. 80 of 200 (Kisumu).*

47. Moreover, an alibi defence which is raised at the defence hearing or during submissions on appeal without indicating where the appellant was during the period it is alleged he defiled the complainant is no defence at all. The Court of Appeal has stated over and over that it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise.

48. The Court of Appeal has also held that even when the defence is raised late in the day, it must still be addressed. See (**Ganzi & 2 Others v R [2005] 1 KLR 52**. However, in the present case, and as already observed above, the appellant's belated alibi is weighed against the evidence adduced by the prosecution which was accepted by the trial court and which I wholly concur with, the conclusion I make is that the alibi defence is and was effectively displaced.

49. Finally, it has been contended by the appellant that the failure to provide him with legal representation constituted an unfair trial. The respondent on their part submitted that the appellant had not demonstrated that substantial injustice was occasioned to him by the failure to appoint him an advocate. Legal aid for offenders is still work in progress and depends on availability of funds. At the moment, only murder suspects are provided with a counsel on *probono* basis. Other offences will be covered at a later stage when funds are available. I find that the appellant has not demonstrated that his constitutional rights were violated in this regard.

50. Having analysed the evidence of the prosecution witnesses leading to the arrest of the appellant, I am persuaded that the prosecution proved their case against the appellant beyond any reasonable doubt before the trial court. The appellant has not demonstrated that the evidence by the Prosecution against was insufficient unconstitutional, incredible, unreliable, fabricated, speculated, conjecture and/or that it lacked probative value to justify the conviction of the appellant with the offence of defilement of the complainant herein.

51. The appellant also alleged that his constitutional rights were violated in that he was locked in police custody for more than twenty four (24) hours. The mere violation, if any of a right does not entitle the appellant to an acquittal as it has been so held by superior courts in several cases. He is at liberty to file a constitutional petition in this respect and claim compensation.

52. Regarding the sentence meted out on the appellant of life imprisonment as provided under section 8(1) as read with section 8(4) of the ***Sexual Offences Act.*** The said provision states:

> ***"8 (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

53. It is clear that the said provision provides for *prima facie* mandatory minimum sentence against the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

54. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the *Kenya Judiciary Sentencing Policy Guidelines* where it is appreciated that:

> *"Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders."*

55. I associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri v Republic [2019] eKLR** where it held that:

> ***"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by*** *section 8 (1)* ***of the*** *Sexual Offences Act****, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in*** *Francis Karioko Muruatetu & Another vs Republic (supra)****, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."***

56. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violates the right to dignity as the offenders are thereby treated as a bunch rather than as individuals. This does not mean that the court ought not to mete out the mandatory maximum sentence but that the circumstances of the offence must be taken into consideration which the learned magistrate did when imposing sentence.

57. The question is whether this case for this appeal court to review sentence. It is noted that the appellant took advantage of a minor to who was left in his custody by the mother. The whole experience must have been very traumatising for the complainant. In my view, the appellant does not deserve any leniency from the court and should serve the life imprisonment.

58. Having considered the circumstances under which the offence was committed as well as the appellant's defence, I find no reason to interfere with the sentence meted against the appellant.

59. In the premises, this appeal fails and is hereby dismissed.

60. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Appellant present