REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 44 OF 2019

CHARLES MUSAU MANG'ELI….....APPELLANT

VERSUS

REPUBLIC.....…… RESPONDENT

(*Being an appeal from the conviction and sentence of the Senior Magistrates Court at Mavoko delivered on 10.5.2019 by the Senior Principal Magistrate C.C. Oluoch in Mavoko PMCC Criminal Case SO.10 of 2017***)**

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. C.C. Oluoch SPM, in Criminal Case SOA No. 10 of 2017** delivered on **10.5.2019**. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty to both charges.

2. There are two records of appeal lodged on 15.5.2019 and 20.5.2019 and the 2nd memorandum is one day out of time. However in absence of any challenge, the same is deemed to be properly on record. The appellant's case is that the conviction and sentence are not supported by evidence and are based on contradictory evidence; that no independent witness was called; that the trial court relied on extraneous factors and did not call a DNA test; that the appellant's defence of alibi was not regarded and that the sentence was excessive.

3. Learned counsel for the appellant submitted that the prosecution's case was riddled with inconsistencies. Counsel pointed out that the complainant testified on cross examination that the appellant never defiled her. Counsel also pointed out that whereas Pw1 and Pw2 told the court that the complainant contracted a venereal disease, the evidence of Pw3 never mentioned any venereal disease. It is in light of the foregoing that counsel in placing reliance on the case of **Robert Peter Kazawali v R (2018) eKLR** submitted that the inconsistencies were grave and went to the root of the case and urged the court to reject the prosecution evidence. Counsel submitted that crucial witnesses like the aunt and the neighbor were not called hence the same should be considered adverse to the prosecution case; he placed reliance on the case of **R v George Onyango Anyang & Another (2016) eKLR.** Counsel assailed the trial court for failing to consider the alibi raised by the appellant and cited the case of **Elias Kiamati Njeru v DPP (2015) eKLR**. On the issue of extraneous factors, counsel challenged the reliance on the birth notification that was produced by the investigating officer and not the maker; reliance was placed on the case of **Joseph Makau Katana v R (2018) eKLR.**

4. The state conceded to the appeal vide submissions dated 7.11.2019. Learned counsel's singular issue for determination was whether the prosecution proved their case beyond reasonable doubt. Learned counsel submitted that the matter was reported three days after it occurred on 4.10.2017 and applied the test in the case of **Hassan Annata v R (2019) eKLR** and questioned the reliability of the witnesses who reported the matter after three days. Counsel submitted the genitalia of the victim was reported as normal hence penile penetration was not proven.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was **WM** who testified that the complainant is her six year old daughter and she tendered her birth notification. She testified that on 4.10.2017 the victim complained of pain in her private parts and on 6.10.2017 she noticed that the victim's sweater had semen like and blood stains and her private parts were stolen. She told the court that on 7.10.2017 that was Saturday, she beat the child who confessed that she had been defiled by the appellant. She reported to Athi River Police Station where the OCS referred her to Nairobi Women Hospital where it was found that the child was suffering from a venereal disease. She testified that she was issued with a P3 form as well as a PRC form and that the victim identified the appellant whom Pw1 knew as the person who repaired sufurias. When recalled for cross examination, she testified that she noticed the stained sweater on 6.10.2017 and reported the matter on 7.10.2017.

6. **PW2** was **CM**, a voir dire conducted on her satisfied the court that she had sufficient intelligence to understand the nature of an oath and was sworn in. It was her testimony that she went home and found the door locked hence she pitched at a neighbor's house where whilst playing the appellant called her, put her on a bench inside his house and removed her trousers and did tabia mbaya by penetrating her and that she felt pain as well as felt a watery substance poured on her private parts; that the appellant used her sweater to wipe her. She testified that she saw the appellant repair sufurias and that she did not remember the day when the event occurred. When recalled for cross

examination she testified that she did not tell anyone of the event as she was scared but that she knew the appellant and used to see him repair sufurias.

7. **Pw3** was **Peter Ngatia Wawi**, an emergency clinician based at Nairobi Women Hospital. He testified of an examination that was carried out on 7.10.17 on CMM by Dr Ruth Lengete who has since left Nairobi Women Hospital. He told the court that he was familiar with Ruth's handwriting and the PRC form was tendered in evidence. The examination was in respect of Pw2 with a history of renal-vaginal penetration and it was reported that the genitalia and anus was normal and that the vagina had a foul smelling discharge. However the hymen was partially broken. It was reported that the urine sample had leucocytes and pus cells. He testified that the P3 form was signed by Dr Ruth and had consistent remarks hence produced the P3 form as an exhibit. On cross examination he testified that penetration could be partial or complete and explained that a hyperemic vagina is reddening of tissues after injury. He testified that the urine test confirmed that Pw2 had an infection and leucocytes indicated that the area was trying to heal however the cause of the infection was not determined. He gave the opinion that the infection could be a urinary tract infection that was common to children.

8. **Pw4** was **Cpl Florence Ngomoli** the investigating officer in the case who testified that she received a report on 7.10.2017 that Pw2 had been defiled on 4.10.2017. She testified that Pw2 identified the appellant who was a scrap metal dealer and investigations revealed that meetings for Misoni Microfinance were held at slaughter area from 2 to 3 pm and that the meetings did not go beyond 3 pm. She testified that her investigations revealed that the students left school at 3 pm and that the school was 20 minutes away from the child's home. The prosecution closed its case.

9. The court was satisfied that a prima facie case had been established against the appellant who was placed on his own defence. Section 211 Criminal Procedure Code was explained to the appellant and he opted to give sworn evidence**.** He testified that on 4.10.2017 he went for a microfinance meeting and stayed in the meeting till 5 pm and he reached his house at 7 p.m.

10. **Dw2** was **Rose Kamene** who testified that she was with the appellant in a meeting at Musoni Microfinance on 4.10.2017 till 5 pm. She tendered a copy of the minutes of the said meeting. When cross examined she testified that the time when the meeting began was not shown.

11. **Dw3** was **Abdul Ali** who testified that he was the appellant's work neighbour and that on 4.10.2017 the appellant did not go to work but he saw him on 5.10.2017. On cross examination he testified that he did not see the appellant on 4.10.2017 but on 5.10.2017.

12. The court found that penetration was proven vide medical evidence of the PRC and P3 form; that age was proven vide the birth notification and that there was an eye witness account of the incident and after examining the minutes of the Musoni Microfinance was not satisfied that the meetings end at 5 pm as analysis revealed that the same ended at between 3 and 3.30 pm; the court found that the evidence of the appellant was incredible and saw no reason to disregard the child's evidence on identity. The court was satisfied that this was not a case of mistaken identity and the appellant was convicted of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. The trial court upon receiving the past records and mitigation of the appellant sentenced him to life imprisonment under Section 8(2) of the Sexual Offences Act.

13. Having looked at the Appellant's and State's written submissions, the grounds of appeal and the evidence on the court record the following are the issues for determination:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

b. Whether there were material inconsistencies in the prosecution case.

c. Whether court rightly rejected the appellant's alibi.

d. Whether the sentence was excessive.

e. What orders the court may issue.

14. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a. That the victim was below 18 years of age.

b. That a sexual act was performed on the victim.

c. That it is the accused who performed the sexual act on the victim.

15. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See **Ssekitoleko v Uganda [1967] EA 531**). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence of defilement which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

16. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case. The prosecution conceded to the appeal and submitted that the prosecution had not proved its case. A perusal of the list of exhibits presented to the trial court showed a birth notification in the names of **CMM** as the victim born on 27.11.2010, a P3 form dated 7.10.2017 as evidence of penetration in

the names of **CMM** that reported that the victim had a partially torn hymen as well as a PRC form on an even date in the same names. There is an eye witness account of the incident from the victim who was PW2. In the case of **Mshila Manga v R (2016) eKLR** the court observed that under the proviso to Section 124 of the Evidence Act for a conviction to be made the court ought to be satisfied that the witness was truthful and record reasons thereof. From the evidence on record it was established that the appellant was at the scene of crime from the account of Pw2.

17. The appellant has disputed that he was at the scene on the material day. His account as well as the documentary evidence tendered was that he was in a Microfinance meeting till 5 pm. The trial court rejected the evidence of the meeting having ended at 5 pm because she noted that on average meetings ended at 3 pm and I agree with her. The evidence of the investigating officer corroborated the fact that meetings could not have ended at 5 pm as contended by the appellant. I find that the appellant's alibi was untruthful since the evidence of the complainant placed him at the scene of crime. I am convinced that he was at the scene on the material day. I believe the account of Pw2 and I am satisfied that she was telling the truth. She had no reason to frame the appellant and further it transpired that there was no bad blood between the appellant and the complainant's parents and it was highly unlikely for the complainant's parents to use their vulnerable daughter as a victim of a sexual offence so as to get at the appellant. It is noted that the mother of the complainant came to learn of the incident three days later after cajoling her daughter. The complainant was aged six years and from her evidence she had been threatened by the appellant not to say a word of what had happened. This explains why it took three days for the issue to come into the open. The circumstance of the complainant is distinguishable from that of the complainant in **Hassan Annata v. R (2019)eKLR** who was then aged twelve years and more knowledgeable and who took four days to report the defilement where this court held that such a report is unreliable. In the present circumstances the complainant is far much younger and she has given reasons for the delay that she had been threatened. The complainant was able to point out the appellant as her assailant. Going through her testimony it emerges that she gave a fairly candid view of what had happened to her and further her answers on cross examination left no doubt that she was steady and candid. On the whole I am satisfied that the prosecution had proved its case beyond any reasonable doubt. The conviction arrived by the trial court was safe. I find no need to interfere with it.

18. The evidence as listed above is direct and cogent evidence pointing irresistibly to the appellant as the defiler. From the record, the birth notification is sufficient proof of age meaning the evidence with regard to age has met the test. The said notification was tendered without objection by the appellant and in purporting to challenge the same in his submissions on appeal on the grounds that the same were not tendered by the maker then the appellant seems to be blowing hot and cold at the same time. His belated challenge cannot stand

19. It is the direct evidence of Pw2 that tells of the event and I see no reason to disbelieve her and I am satisfied that her account of events was free from error. I am satisfied that she was telling the truth and that the appellant was correctly identified as the perpetrator. The appellant's defence did not shake the evidence of the prosecution which was quite overwhelming against him.

20. The P3 form and the PRC form as well as evidence of Pw4 is indicative of penetration though partial. In **George Owiti Raya vs. Republic [2013] eKLR** it was held:-

> ***"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane."***

21. I find that there is no inconsistency with regard to the elements of the offence and this ground raised by the appellant has no merit. The inconsistency as to the condition of the house of the complainant is not material as it has no effect on proof of the elements of the offence as listed in paragraph 14 above.

22. The appellant in his memorandum of appeal has assailed the trial court for failing to consider his defence. The trial court indeed considered the defence evidence and found that it did not shake that of the prosecution and properly rejected it.

23. The appellant has challenged the non- performance of a DNA test. **Section 36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> ***"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."***

24. Similarly, in **AML vs. Republic [2012] eKLR** the Court expressed the view that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

25. The evidence on record is satisfactory to sustain a charge against the appellant. The appellant's plea for a DNA test was not necessary since the issue of penetration could be proved by oral evidence which was presented herein and which placed the appellant at the scene of crime.

26. The appellant challenged his sentence as being excessive. He was convicted under Section 8(2) of the Sexual Offences Act that provides as follows

> "(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"*

27. From the evidence on record the victim was aged 6 years at the time of commission of the offence and thus the sentence passed was within the law. However following the decision of the Supreme Court in Francis Karioko Muruatetu and Another v. R (2017) several persons serving statutory minimum sentences have petitioned the courts for review of their sentences. The Court of Appeal in **Jared Koita Injiri v. R (2019) eKLR** reduced a sentence of life imprisonment for an offence of defilement under section 8(2) of the Sexual Offences Act to thirty years. The appellant's circumstances are similar to the above case and I find it is fair and just that he should benefit as well. Consequently the sentence imposed by the trial court ought to be interfered with. I will substitute therefor with a sentence of thirty years imprisonment from the date of conviction.

28. In the result the appeal partly succeeds. The conviction is upheld. The sentence of life imprisonment imposed is set aside and substituted with a sentence of thirty (30) years from the date of conviction.

It is so ordered.

Dated and delivered at Machakos this 29th day of January, 2020.

D. K. Kemei

Judge