REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 188 OF 2018

HILLARY OCHIENG ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence in Butere SRMC Criminal Case No. 336 of 2016 by F. Makoyo, SRM, dated 19/12/2018)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. He was aggrieved by the verdict and filed the instant appeal. The grounds of appeal are:-

> *(1) That the trial magistrate erred in law and fact in convicting the appellant on the evidence of a single identifying witness when there was insufficient evidence on identification.*
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> *(2) That the trial magistrate erred in law and fact in convicting the appellant against the weight of the evidence on record.*
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> *(3) That the trial magistrate erred in law and fact in failing to evaluate the evidence on record before reaching a decision to convict the appellant.*
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> *(4) That the sentence meted out on the appellant was excessive.*
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> *(5) That the trial magistrate erred in law and fact in failing to appreciate that no proper investigations were carried out before the arraignment of the appellant.*
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> *(6) That the trial magistrate erred in law in failing to comply with the mandatory requirements of Section 200 (3) and (4) of the Criminal Procedure Code.*

2. The prosecution relied on the record of the lower court.

3. The particulars of the offence against the appellant were that on the 5th May, 2016 at [particulars withheld] Village, Khusiku Sub-Location of Khwisero Sub-County within Kakamega County intentionally caused his penis to penetrate the genital organ of RA, (herein referred to as the complainant) namely vagina, a child aged 7 years.

Prosecution Case -

4. The case for the prosecution was that the complainant was in 2016 a primary school pupil. That on the material day she was at school. At 4 p.m. she and her school pupils were having a cross-country run outside her school. She lagged behind other pupils. A person grabbed her and took her to the bushes where he defiled her. The person left her there and went away. Other pupils found her there. She walked home. Her teacher PW3 received a report from other pupils. PW3 went to the home of the complainant and informed her mother, PW2. PW2 examined her and observed sperms on her vagina and thighs. Her mother took her to Munduli Health Centre where a laboratory examination revealed presence of spermatozoa. She was referred to Yala Level 4 Hospital where she was examined by a clinical officer PW4 who found her with redenned vaginal orifice. PW4 formed the opinion that she had been defiled. They reported at Khumusalaba Police Post. A P3 form was issued. It was completed by PW4. The appellant was charged with the offence. During the hearing the clinical officer produced the treatment notes, the P3 form, Post Rape Care form and the birth certificate as exhibits, PEx.5, 6, 7 and 4 respectively. The investigating officer produced as exhibits the clothes that the girl had been wearing during the incident – green checked dress, yellow petty coat and soiled panty, PEx.1 – 3 respectively. The birth certificate indicated that the girl was born on 31/7/2008 which made her age at 7 years at the material time.

Defence Case –

5. When placed to his defence, the appellant gave a sworn statement in which he stated that between 2 - 5 p.m. he was at the home of a person called Inda. That his housemate Thomas called him to fix a fluorescent tube at the home of a certain woman. He went there and stayed there upto 9 p.m. The women he was with escorted him home. At 10 p.m. the complainant's parents went to his house with the complainant and the complainant's uncle called Ray. The complainant's father started to beat him using a rungu. They accused him of defilement. He was taken to Khumusalaba Police Post. He was examined and then charged with the offence.

6. The appellant called two witnesses, Henry Olando DW2 and Thomas Okello DW3. Henry testified that he was an electrician. That the accused was his apprentice. That on the material day he was with the appellant from 2 p.m. to 5 p.m. That he was training him on electrical matters. On the following day the appellant did not turn up for work.

7. Thomas DW3 testified that the appellant was his friend. That he was living with the appellant in one house. That on the morning of the material day he was with the appellant in their house. That at 2 p.m. he took the appellant to the house of Inda. At 5 p.m. he called him to fix electricity at the home of two women. At 5.30 p.m. he saw him at the house of mama Julia which is in the same compound with his house. At 9.30 p.m. mama Julia and mama Mareba escorted him to his house. After the appellant ate supper and slept the complainant's father went to their house with the complainant. The father of the child asked the child as to who was responsible and she pointed at the appellant. They told him that the appellant had defiled the child. They took the appellant to the police station while beating him.

Submissions -

8. The advocate for the appellant, **Dennis Otieno Oduor**, submitted that there was inconsistency between the evidence given by the complainant on 31/8/2016 and 1/3/2017. That in the evidence tendered in court on 31/8/2016, the witness started her evidence by stating that the incident took place at 7 p.m. when she was coming from school. That in her evidence of 1/3/2017 she stated that the incident occurred at 4 p.m. That the complainant in her evidence stated that when they went to the scene they found a young man who upon being asked if he had seen who had defiled the complainant gave them a direction to a certain house where they found the appellant. That in cross-examination she stated that the person was only asked whether he had seen someone with a black trouser and stripped shirt. That the complainant's mother to the contrary stated that it is the complainant herself who gave the direction to the house of the appellant. That the investigating officer PW4 stated that it is the complainant who showed her parents the appellant's homestead. That the P3 form indicated that the complainant was defiled by a person known to her. That the complainant stated in her evidence that the appellant was not known to her. That the discrepancies in the evidence could mean that the complainant was mistaken on the identity of the defiler or otherwise invented the appellant's involvement. That it could mean that she was influenced by her parents in framing the appellant. That in face of the discrepancies the trial court did not evaluate the evidence in coming to the conclusion that the complainant was a credible witness. That the evidence was insufficient to form the basis of a conviction. That the appellant was entitled to an acquittal.

9. The advocate submitted that the magistrate who took over the case from the preceding magistrate did not comply with the provisions of Section 200 (3) of the Criminal Procedure Code which require an accused person to be informed of the right to have witnesses who have testified to be re-summoned and re-heard.

10. It was further submitted that the sentence meted out on the appellant was excessive. That the trial court erred in sentencing the appellant to life imprisonment considering that he was aged 18 years. That the life sentence was not the only available sentence as observed by the trial magistrate.

Analysis and Determination –

11. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing witnesses testify – See **Okeno –Vs- Republic (1972) EA 32** and **Kiilu & Another –Vs- Republic (2005) IKLR 174**.

12. The complainant in her evidence stated that she had not known her defiler before the date of the incident but that she had marked his face and the clothes that he was wearing. The question then is whether she had identified the appellant as the perpetrator of the offence.

13. It is trite law that evidence on identification has to be treated with a lot of caution so as to avoid convicting an accused person on evidence of mistaken identity. The manner of dealing with evidence of identification was stated in the case of **Cleophas Otieno Wamunga –Vs- Republic (1989) KLR 424** where the Court of Appeal held that:-

> ***"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them…… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said:-***
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> ***'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'"***

14. The complainant was the only identifying witness in the case. It is trite law that the court can convict on the evidence of a single identifying witness but after satisfying itself that the evidence of such a witness is free from the possibility of error. In **Kiilu & another – Vs- Republic** (Supra), the Court of Appeal held that:-

> ***"In the well-known case of Abdalla Bin Wendo –Vs- Republic (1953) 20 EACA 166 it was held that:-***
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> ***'Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.'"***

15. The history indicated in the P3 form by the clinical officer who completed it was that the complainant was defiled "*by a person well known to her at around 4 p.m. on 5/5/2016*." Part 1 of the same document that was filled by the police officer who issued the document indicated that the allegation was that she had been "*attemptedly defiled by a person known to her*." The persons who gave this information to the clinical and to the policeman are not stated. If it is the complainant who did so, then it is clear that her information was false as she said in her evidence that she never knew the appellant before. If it is her parents who gave the report then they either cooked up the report themselves or that their daughter had given them a false report. Either way the report given to the police and to the clinical officer was false as the complainant stated in her evidence in court that she did not know the appellant before the date of the incident.

16. The evidence of the investigating officer PW4 was that the complainant told her classmates that she did not know the name of her assailant but that she could recognize him. However PW4 was allocated the case for investigations on 29/3/2017 which was long after the case had been reported to the police and P3 form completed on 5/5/2016. All the same it is clear that there was contradictory report as to whether the complainant knew her assailant before the date of the incident.

17. The complainant in her evidence-in-chief stated that when she went to the scene with her parents they found a young man called Ray who said that he had seen the person who had defiled the complainant and that he directed them to a certain house where they found the appellant. However in cross-examination she stated that no one saw the appellant defile her. That Ray was questioned as to whether he had seen a person with a black trouser and stripped shirt that she had described as having been worn by the assailant. That Ray then led them to the appellant. However the complainant's mother PW2 disputed this evidence and said that it is the girl who led them to the house of the appellant. She said that she does not know the person called Ray. If the complainant had identified the appellant by the clothes that he had been wearing, the witnesses did not inspect the appellant's house to check whether he had such kind of clothes. The investigating officer did not seem to have been aware of such piece of evidence.

18. The conviction on the appellant entirely depended on the credibility of the complainant as to whether she had identified the appellant at the time of defilement. Section 124 of the Evidence Act allows a court in cases involving sexual offences against minors to convict in reliance of evidence for minors where the court is satisfied that the minor is telling the truth. In convicting the appellant of the offence the trial magistrate held that:-

> ***"The court satisfied itself that the complainant understood the importance of being truthful. The court is convinced that the witness is truthful. The complainant did not have a reason to give false testimony against the accused person. Her reaction upon seeing the accused person later on at his houses confirms that she positively identified him as the defiler. The incident took place during the day and the complainant had time to discern and decipher the accused person. He committed the offence."***

19. Though the trial magistrate stated that he was aware of the dangers associated with convicting on the uncorroborated evidence of minors, he did not consider the disparities in the evidence of the prosecution witnesses. He did not consider whether there was a person called Ray who either witnessed the incident or led to the arrest of the appellant. He did not resolve the issue whether the appellant was a total stranger to the complainant or he was a person known to her before.

20. In **Ndungu Kimani –Vs- Republic (1979) KLR 282**, the Court of Appeal considered the issue of credibility of a witness and held that:-

> ***"The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his truthworthness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."***

21. Considering that the minor was only aged 7 years at the time of defilement and that she was the only witness in the case on identification there was danger in relying on her evidence to convict the appellant of the offence. There was no any other evidence to support the evidence of the complainant that the appellant is the person who defiled her. In face of the inadequacy of the evidence for the prosecution the appellant's defence on his whereabouts on the material day could not just be dismissed. The appellant was in the circumstanced entitled to the benefit of doubt.

22. The upshot is that the charge against the appellant was not proved beyond all reasonable doubt. The appeal is thus merited. The conviction on the appellant is quashed and the sentence set aside. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 29th day of January, 2020.

J. NJAGI

JUDGE

In the presence of:

No appearance for appellant

Mr. Mutua for state/respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.