REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 70 OF 2017

JOHN NZOMO WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrates Court at Kithimani delivered on 5.12.2016 by the Senior Resident Magistrate G.O. Shikwe in Kithimani PMCC Criminal Case SO.48 of 2015)

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. G.O. Shikwe SRM,** in Criminal Case **SOA No. 48 of 2015** delivered on **5.12.2016**. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) 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. The appellant's case is three-fold. Firstly that the prosecution did not prove its case beyond reasonable doubt. Secondly that the evidence on record was riddled with inconsistencies. Thirdly that crucial witnesses were not summoned. The appellant added further grounds wherein he challenged his conviction for being based on a defective charge sheet and also averred that he was not given a fair trial.

3. The appellant submitted on the issue of a defective charge sheet that he was charged under Section 8(3) of the Sexual Offences Act yet he was convicted under Section 8(4). On the issue of corroboration, the appellant submitted that the evidence of age and penetration were not corroborated. On the issue of proof of the prosecution case, the appellant submitted that the failure to conduct an age assessment was fatal to the prosecution case and he placed reliance on the case of **Hillary Nyongesa v R (Eldoret Criminal Appeal 123 of 2009).** The appellant added that age was not proven nor was penetration proven. On the issue of fair trial the appellant submitted that he was not supplied with witness statements. No submission was made in respect of inconsistencies or the need to summon crucial witnesses.

4. The state opposed the appeal. Vide submissions dated 3rd August, 2018 learned counsel for the respondent addressed three issues namely: whether the prosecution proved their case beyond reasonable doubt: whether the charge sheet was defective and whether the appellant was accorded a fair trial. On the issue of proof of the prosecution case, learned counsel submitted that age was proven vide the baptismal certificate and the evidence of the mother of the victim. Counsel submitted that penetration was proven by medical evidence and identification of the appellant was easy as he was well known to the victim and in this regard placed reliance on the case of **Anjononi & Others v R (1981) eKLR**. On the issue of a defective charge sheet, counsel placed reliance on the case of **Sigilani v R (2004) 2 KLR 480** where it was observed that the litmus test is whether the accused was charged with an offence known in law and the facts were presented in a manner so as to enable him prepare for his defence. It was counsel's submission that the appellant knew the charge he was facing and he participated in the trial in a manner suggestive that he understood the charge he was facing and there was no miscarriage in the failure to include the word unlawfully. Counsel cited Section 382 of the Criminal Procedure Code. On the issue of fair trial, counsel submitted that the appellant took plea on 8.9.2016, trial commenced on 26.9.2016, and at no point did he raise the issue of witness statements. Counsel in addition addressed the issue of legal representation and in citing the case of **Karisa Chengo & 2 Others v R (2015) eKLR** he submitted that the appellant was not charged with a capital offence and was thus not entitled to legal representation.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was **MM** who testified that the victim is her first child aged 13 years who was born on 12.5.2003. She produced the baptismal card. She testified that on 5.9.2015 she left her children at home and on return she found the victim seated and she was informed by TU that the herdsman had taken the victim to a bush and that she had witnessed the herdsman having sex with the victim. She testified that the victim was treated at Thika Medical and later at Masinga Hospital.

6. **PW2** was **TU** and a voir dire was conducted whereupon the court was satisfied that the witness was competent to testify on oath and she was put on the witness stand. It was her testimony that she was in class three and aged seven years old and could not tell when she was born. She told the court that on 5.9.2015 she was at home and after chasing cattle upon instructions from the appellant she returned home to find that the appellant had stripped the victim and he lay on top of her. She told the court that the appellant boiled water and bathed the victim.

7. **PW3** was **Mathenge Ndungu** a clinical officer who testified that the victim was mentally challenged and that he filled a P3 form on 7.9.2015 in respect of Abigael Koki. He testified that a vaginal examination revealed that the victim had a torn hymen and he formed the opinion of defilement of a 12 year old girl. The P3 form and treatment notes were tendered with no objection from the appellant.

8. **Pw 4** was **Pc Eliud Busienei**, the investigating officer who testified that on 6.9.2015 a defilement case was reported and he recorded statements and that the appellant was arrested. He added that the victim was traumatized.

9. The court was satisfied that a prima facie case had been established against the appellant who was placed on his own defence. He opted to give unsworn evidence. He denied commission of the offence and testified that he was arraigned in court on 6.9.2015. The court found that penetration was proven vide medical evidence; that there was an eye witness account of the incident and that the appellant's defence did not shake that of the prosecution and he was convicted of defilement contrary to Section 8(4) of the Sexual Offences Act and sentenced to 20 years imprisonment.

10. 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 the appellant was accorded a fair trial

d. Whether the appellant was convicted on the basis of a defective charge sheet

e. What orders the court may issue.

11. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case. The prosecution opposed the appeal and submitted that the prosecution proved its case. A perusal of the list of exhibits in the trial court showed a baptismal certificate in the names of **AKT** as the victim born on 13.3.2003, a P3 form as evidence of penetration in the names of **AKT** that indicated that the victim had a torn hymen as well as a discharge summary from Masinga Hospital in respect of **AK** who was reported to have a torn hymen. There is an eye witness account of the incident. 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 as the evidence on record proves that he tended to cows within the area that the victim lived.

12. The appellant has neither disputed nor admitted that he was at the scene on the material day. The trial court relied on the P3 and discharge summary to reach a finding that there was penetration. The forms were filled in on 7.9.2015 that was two days after the incident.

13. 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.

14. 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 with 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**).

15. The evidence as listed above is direct and cogent evidence pointing irresistibly to the appellant as the defiler. From the record, the baptismal certificate is sufficient proof of age and is indicative that the victim was 13 years at the time of commission of the offence. The appellant seems to have taken issue specifically with the issue of age of the victim and it suffices to cite the case of **Musyoki Mwakavi v Republic [2014] eKLR where it was** held that:_

"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".

16. In the case of **Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000**, it was held 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..."

17. The evidence with regard to age has met the test and hence I see no merit in the appellant's challenge over the same.

18. 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. She stumbled upon the appellant and the complainant in flagrant delicto. This is because the incident occurred during the day and further the appellant was sell known to her and she had ample time to observe what he was doing. She had no reason to frame the appellant. I associate myself with the finding in **Ogeto v Republic (2004) KLR 19** where the court observed that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult. According to the Court:

> "*It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be honest but to be mistaken."*

19. The P3 form and the discharge summary as well as evidence of Pw3 is indicative of penetration and the identity of the appellant has been proven. 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.

20. The appellant in his memorandum of appeal has assailed the trial court for convicting him despite failing to call essential witnesses under Section 150 of the CPC. However Section 143 of the Evidence Act provides that: "**Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.**"(emphasis added). A conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. From the evidence on record, the court received cogent evidence from the victim, the eye witness and the condition of the victim was corroborated by the medical evidence. I note that the trial court did not satisfy itself of the danger of a conviction based on evidence of a single witness and the need for corroboration as well as did not satisfy itself that the single witness was telling the truth. The Proviso to Section 124 of the Evidence Act is that "***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***."

21. I agree with the finding in the case of **Bukenya & Others v Uganda (1972) EA 549** and find that the prosecution was not obligated to call any number of witnesses and hence this ground raised by the appellant has no merit since the witnesses who turned up gave sufficient evidence which supported the charges.

22. On the issue of a defective charge sheet, counsel for the state addressed it in a manner that was not raised by the appellant who took issue with the fact that he was convicted under a different section from that which he was charged. However I note that the word unlawfully was not included in the charge sheet. In this regard, this court would have to direct itself as to whether or not the charge sheet did not specify the offence that the appellant was charged, did not give information as to the nature of offence charged and whether the appellant was prejudiced or the same occasioned any miscarriage of justice. A perusal of the charge sheet indicates that the charges were in my view clearly elaborated. In addition the Appellant was fully present during his trial, was aware of the charges facing him and that at no point did he raise any objection regarding the charges that he faced. I am satisfied that the charge sheet was not defective just because the word "unlawful" was missing and in any event the omission of the same is minor and curable under Section 382 of the Criminal Procedure Code Act. It is instructive that the appellant pleaded to the charges and cross examined witnesses and later tendered his defence and hence he is deemed to have had knowledge of the charges he faced. I find there was no miscarriage of justice.

23. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, I find that the conviction of the appellant was safe as the prosecution ably met its standard of proof.

24. The appellant had assailed the trial for not being fair as he was not given witness statements. I have noted that the appellant had raised this issue during trial. However he was present during trial and had every opportunity to cross-examine the witnesses and did not challenge the evidence of the witnesses or ask any questions that would cast doubt on the prosecution case and cannot be seen to belatedly raise this issue. In this regard, I am not satisfied that the appellant was not accorded a fair trial. The process was by all standards fair.

25. The appellant has challenged his conviction on a different section from which he was charged. I note he was charged under section 8(3) of the Sexual Offences Act and yet convicted under Section 8(4). The said provisions are as follows

> ***"(3) 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.***
>
> ***(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."***

26. From the evidence on record the victim was aged 13 years at the time of commission of the offence and hence Section 8(4) is not applicable. Section 382 of the Criminal Procedure Code provides, in material part that:…. no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. I find that there was an error made by the trial magistrate in the final analysis of the judgment when section 8(4) of the Sexual Offences Act was indicated instead of section 8(3) of the said Act. Indeed the sentence of 20 years meted out was correctly in respect of section 8(3) of the Act and which had been preferred against the Appellant. The fact that the appellant was eventually sentenced to twenty years imprisonment is a clear indication that the trial magistrate had based the same under section 8(3) which was the main charge and hence the conviction under section 8(4) must have been an honest mistake in which the appellant suffered no prejudice because he was eventually sentenced for the charge that had been preferred against him. I find the error curable under section 382 of the Criminal Procedure Code as there is no prejudice suffered by the appellant. The appellant's

objection on the conviction must fail.

27. On sentence the appellant was ordered to serve twenty years imprisonment. His mitigation was duly received. The sentence imposed is the minimum possible in law and I see no reason to interfere with it.

28. In the result the appeal lacks merit. It is dismissed. The conviction and sentence by the trial court is upheld.

Orders accordingly.

Dated and delivered at Machakos this 28th day of January, 2020.

D. K. Kemei

Judge