REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 140 OF 2018

KASELO MASAI….....APPELLANT

VERSUS

REPUBLIC.....…… RESPONDENT

(*Being an appeal from the conviction and sentence of the Principal Magistrates Court at Kithimani delivered on 21.4.2016 by the Senior Resident Magistrate G.O. Shikwe in Kithimani PMCC Criminal Case SO.34 of 2015***)**

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. G.O. Shikwe SRM, in Criminal Case SOA No. 34 of 2015** delivered on **21.4.2016**. 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. The appellant was sentenced to life imprisonment. He has now lodged the present appeal. The appellant's case is four-fold: firstly that the prosecution did not prove its case beyond reasonable doubt: secondly that the court failed to comply with Section 26 and 36 of the Sexual Offences Act; thirdly that the charges were defective and finally that the trial court dismissed his plausible defence. The appellant sought leave under Section 350 v of the CPC and added further grounds wherein he challenged his conviction for being based on evidence that was riddled with inconsistencies. He also averred that he was not given a fair trial and that the trial was a nullity.

3. The appellant made no submission on the issue of a defective charge sheet. On the issue of proof of the prosecution case, the appellant submitted that vital witnesses were not called and he placed reliance on the case of **Wendo v R (1953) EA.** The appellant added that the court did not interrogate the fact that there was an existing grudge. On the issue of fair trial, the appellant submitted that he was not given an opportunity to mitigate and added that he was charged under Section 8(2) of the Sexual Offences Act and yet convicted under Section 8(4). On the issue of constitutional infractions the appellant reiterated the issue of the discrepancy between the charge framed and the one in which he was convicted as well as failure to give him a chance to mitigate. He added that he was not supplied with witness statements. Vide supplementary submissions, the appellant argued that the failure to call crucial witnesses showed that the case was a frame up and that the prosecution evidence was weak.

4. The state opposed the appeal vide submissions dated 26.9.2019. Learned counsel addressed six issues namely: whether the prosecution proved their case beyond reasonable doubt: whether the conviction was based on inconsistent evidence: whether the court considered the appellant's defence: whether the court complied with Section 216 of the Criminal Procedure Code: whether the charge sheet was defective and whether the appellant was accorded a fair trial.

5. On the issue of proof of the prosecution case, learned counsel submitted that age was proven vide the clinic card 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. On the issue of inconsistencies, counsel submitted that the litmus test is whether or not the same are material to the case. Counsel placed reliance on the case of **Philip Nzaka Watu v R (2016) eKLR** and added that the evidence of the witnesses could not be the same. On the issue of consideration of the appellant's defence, counsel submitted that the appellant did not offer any. On the issue of compliance with Section 216 of the criminal procedure code, counsel submitted that the appellant was granted an opportunity to mitigate before the sentence was passed. On the issue of a defective charge sheet, counsel placed reliance on Section 134 and 137 of the Criminal Procedure Code as well as the case of **BND v R (2017) eKLR** and submitted that the typo in the charge sheet did not render it defective. On the issue of violation of constitutional rights, it was counsel's submission that 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 **Dominic Kariuki v R (2018) eKLR** submitted that the appellant was not charged with a capital offence hence was not entitled to legal representation.

6. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was **MMM** who testified through her appointed intermediary that she is aged 8 years and resided with her grandmother. It was her testimony that on 24.5.2015 at 7 pm, she left for home and on arrival the appellant entered the home and she was able to recognize him as he was her grandmother's employee. She testified that the appellant closed the door, removed her clothes and opened his trouser and laid atop her and inserted his penis

in her vagina. It was her testimony that her grandmother opened the door and saw the appellant who was arrested. She was taken to Masinga Hospital and there was a P3 and PRC form and examination sheet that were tendered in evidence. A report was lodged at Kikumini Police station.

7. **PW2** was **RMM** the victim's grandmother who testified that on 24.5.2015 she found the appellant in flagrant delicto with the victim inside her house.

8. **PW3** was **AJM** the victim's mother who testified that the victim was born on 11.3.2007 and presented her clinic card. She testified that she received a report on 25.8.2015 she received a report that her daughter had been defiled.

9. **Pw 4** was **Edwin Mutembei**, a clinical officer based at Masinga Sub-county hospital. He testified of an examination that was carried out on 25.5.2015 on MMM aged 8 years who had a history of defilement on 24.5.2015 at 7 pm. He testified that he formed an opinion of defilement after noting that the hymen was absent and he produced the P3 form as an exhibit.

10. **Pw5** was **Pc Mohammed Isoka** the investigating officer in the case who testified that he received a report that the appellant had been found defiling the victim on 24.5.2015. The prosecution closed its case.

11. The court was satisfied that a prima facie case had been established against the appellant who was placed on his defence. Section 211 Criminal Procedure Code was explained to the appellant and he opted to give unsworn evidence. He testified that he was arrested on 25.5.2015. The court found that penetration was proven vide medical evidence; that age was proven vide the clinical card and that there was an eye witness account of the incident and that the appellant did not challenge the evidence against him. He was thereby convicted of defilement contrary to Section 8(4) of the Sexual Offences Act. The appellant was given a chance to offer mitigation but said nothing in mitigation and was sentenced to life imprisonment under Section 8(2) of the Sexual Offences Act.

12. 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?***

13. 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 they proved their case. A perusal of the list of exhibits in the trial court showed a health card in the names of **MM** as the victim born on 11.3.2007, a P3 form dated 25.5.2015 as evidence of penetration in the names of **MMM** that reported that the victim had an absent hymen as well as an outpatient record from Masinga Hospital in respect of **MMM**. 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 had been sent to pick medication from Pw2's house and that was where he was found committing the offence (in flagrant delicto).

14. The appellant has neither disputed nor admitted that he was at the scene on the material day. The trial court relied on the P3 form and the evidence of the doctor to prove that there was penetration.

15. 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.

16. 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 was charged and that the prosecution had 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**).

17. The evidence as listed above is direct and cogent evidence pointing irresistibly to the appellant as the defiler. From the record, the health card is sufficient proof of age and is indicative that the victim was 8 years at the time of commission of the offence. The evidence with regard to age has therefore met the test.

18. It is the direct evidence of Pw2 gives a graphic description of how the incident took place. I see no reason to disbelieve her and I am satisfied that her account of events was free from error. The victim knew the appellant who was then an employee of Pw2 and who found him red handed defiling the minor inside Pw2's house.

19. The P3 form 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 failing to consider his defence. However he did not set up any as he merely denied the charges and which the court found did not weaken the prosecution's evidence. Hence this ground raised by the appellant is of no merit.

21. On the issue of a defective charge sheet 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 or 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 and was aware of the charges facing him and that at no point did he raise an application regarding the charges that he faced. I am satisfied the charge sheet was not defective. In any event the defect if any was curable under section 382 of the Criminal Procedure Code.

22. The appellant has also assailed the trial court for not being fair as he was not given witness statements. I have noted that the appellant raised this issue once during the trial but thereafter the record confirms that he indicated to the court that he was ready and the hearing kicked off in earnest and that the said issue appeared to have been settled since the appellant fully cross examined the witnesses until the close of the prosecution's case. Suffice to add that he was present during the 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's case and cannot be seen to belatedly raise this issue. In addition he was given an opportunity to mitigate and said nothing. Hence the court complied with section 216 of the Criminal Procedure Code. In this regard, I am not satisfied that the appellant was not accorded a fair trial. The process was by all standards fair.

23. The appellant has challenged the non-compliance with Section 26 and 36 of the Sexual Offences Act. Whereas **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. On the other hand Section 26 creates an offence of deliberate transmission of HIV or any other life threatening sexually transmitted disease and the appellant has not expounded how this section was not complied with. In any case he was not charged with an offence under that section and therefore it beats logic as to why he wished to be taken through such provision when the prosecution did not see the need to charge him with the same. I am certain that the appellant might have just plucked the said section in error as most appellants who act in person usually engage in copy and paste while preparing their pleadings.

26. The appellant has maintained that his conviction was based on a different section from which he had been charged. I note that he was charged under Section 8(2) of the Sexual Offences Act and yet convicted under Section 8(4). The said provisions are 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.*
>
> *(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."*

27. From the evidence on record the victim was aged 8 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 the trial magistrate erred in convicting the appellant under section 8(4) of the Act. It is obvious that the said section 8(4) of the Act must have been a typing error which is curable under section 382 of the Criminal Procedure Code. I am persuaded to find so because the appellant had been charged under section 8(1) and 8(2) of the said Act. Indeed the learned trial magistrate proceeded to sentence the appellant to life imprisonment as provided under section 8(2) of the Act. The error did not cause a miscarriage of justice since upon conviction the minimum sentence possible in law is life

imprisonment. I find the conviction was safe and I see no reason to interfere with it. Suffice to add that the appellant was actually caught in the act (flagrant delicto) by the complainant's grandmother. He was squarely placed at the scene of crime.

28. On sentence I note that the appellant was sentenced to life imprisonment as that is the minimum sentence possible in law. Following the Supreme Court's decision in **Francis Karioko Muruatetu and Others (2017) eKLR** the courts now have discretion to interfere with minimum sentences. This became unavoidable as convicts serving long minimum sentences feel that they have been discriminated against from those convicted under capital offences. The Court of Appeal in the case of **Jared Koita Injiri (2019) eKLR** reduced a sentence of life imprisonment to a period of thirty (30) years. In that case the appellant had been charged and convicted under section 8(1) and 8(2) of the Sexual Offences Act. The present appellant's circumstance are similar to those of the appellant in the above authority. Being guided by the said authority I am persuaded that the sentence by the trial court must be interfered with. Consequently I find that a sentence of thirty (30) years imprisonment would be appropriate which should commence from the date of arrest namely 25.5.2015 as he remained in custody for the entire period of the trial.

29. In the result the appeal partly succeeds. The appeal on conviction is upheld while the sentence of life imprisonment is set aside and substituted with a sentence of **Thirty (30) years** imprisonment from the 25.5.2015.

It is so ordered.

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

D. K. Kemei

Judge