REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 65 OF 2018

BERNARD MBINDYO KITHEKA….....APPELLANT

VERSUS

REPUBLIC.....…… RESPONDENT

(*Being an appeal from the conviction and sentence of the Principal Magistrates Court at Kithimani delivered on 20.7.2018 by the Resident Magistrate E.W. Wambugu in Kithimani PMCC Criminal Case SO.4 of 2017)*

JUDGEMENT

1. This is an appeal from the conviction and sentence of **Hon. E. W. Wambugu RM, in Criminal Case SOA No. 4 of 2017** delivered on **20.7.2018**. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) 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 appeal was lodged on 31.7.2018 that is within 14 days after delivery of judgment in the trial court and admitted on 18.4.2019. The appellant has on record an application for leave to file the appeal out of time and it was lodged on 13.3.2019 but however the appellant withdrew the same. The appellant's case is two-fold. Firstly that the prosecution's case was not proven to the required standard and secondly that the court did not consider the appellant's defence. The appellant amended the grounds of appeal and challenged the charge sheet as being defective.

3. The appellant submitted that the charge sheet did not include the word "unlawfully" in the particulars of charge and in addition that the charge sheet did not specify a date when the offence was committed meaning that the same was defective. Reliance was placed on the case of **Uganda v Wagara (1964) EA 366**. It was the appellant's submission that penetration was not proven and that absence of hymen is not evidence of penetration. Reliance was placed on the case of **Fappyton Ngui v R Cr App. 296 of 2010 t**ha**t** was an unsuccessful appeal**.** The appellant assailed the medical report for failing to make a finding of spermatozoa and added that same could not corroborate penetration. Though not included in the grounds of appeal, the appellant challenged the legality of the mandatory sentence of 15 years that was meted on him.

4. The state opposed the submissions filed on 27.9.2019. Learned counsel addressed two points; that is whether the prosecution proved their case beyond reasonable doubt and the legality of the sentence. On the issue of proof of the prosecution case, learned counsel submitted that Pw1's evidence on age was corroborated by Pw2 and Pw3 which proved all the elements of the offence; that is age, penetration and identification of the appellant. Counsel added that the defence was an afterthought and it was not raised in trial. On the issue of legality of sentence, counsel in placing reliance on the case of **Jared Koita Injiri v R (2019) eKLR** where life sentence was reduced to 30 years submitted that the trial court erred in passing a mandatory sentence.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was PMM who testified on oath that she was aged 17 years and that the appellant was her boyfriend. It was her testimony that in January, 2016 she went to live with the appellant and that the following day a lady who identified herself as the appellant's wife came and reprimanded her for taking her husband. She testified that she was examined at Matuu Hospital and issued with a P3 form.

6. **PW2** was **Dominic Matheka,** who received a report that the appellant had married a school girl and on cross examination, he told the court how he followed up the matter and received directions to the appellant's home where he was able to apprehend him.

7. **Pw3** was **Richard Kimei** who testified that he had an age assessment in respect of Pw1 that was done by Philip Njaramba wherein it was opined that Pw1 was aged 16 years old. He had in court the P3 form of Pw1 who had a history of defilement by a person known to her. He testified that Pw1 had claimed that she was married to the appellant and that they had sexual intercourse for three days, the last day being 28.1.2017. It was his testimony that her hymen was not intact, her genitalia was like that of an adult and that she had no lacerations and further that there was no evidence of forceful penetration. The P3 form and age assessment reports were tendered in evidence.

8. **PW3** was **Edna Kimaru** who took over investigation of the case. She testified that on 2.6.2017 the appellant was brought to the station together with the Pw1 on complaints that the appellant was living with a minor. They were both examined at Matuu Hospital and P3 forms were filled and after it was established that the appellant defiled Pw1, the appellant was charged.

9. The court was satisfied that a prima facie case was 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 told court that he worked as a shoe vendor and that no one saw him defiling Pw1. The court found that the age of Pw1 was proven vide the age assessment report and that at the time of commission of the offence, Pw1 was 17 years; that penetration was proven vide medical evidence on the PRC form, P3 form and the account of Pw2; that the appellant was properly identified by Pw1 as her boyfriend who sold soup and in placing reliance on the case of **Evans Odhiambo Anyanga v R (2015) eKLR** found that the prosecution proved its case against the appellant and he was convicted of defilement and sentenced him to 15 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 the charge sheet was defective***

c. ***Whether the appellant's defence was considered***

d. ***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 and his defence was not considered. The prosecution opposed the appeal and submitted that it had proved its case. A perusal of the list of exhibits produced before the trial court showed an age

assessment, a P3 form as evidence of penetration in the names of **Pw1**. There is no eye witness account of the incident save for the account of Pw1 who gave evidence professing her sexual escapade with the appellant.

12. The appellant has neither disputed nor admitted that he was at the scene on the material day. However he is reportedly a friend of the victim and the identity of the victim has been proven. There is evidence of a victim aged below 18 years. The appellant denied commission of the offence and he has claimed that he was framed. The trial court relied on the P3 form to establish that there was penetration as the P3 form indicates that Pw1's hymen was not intact.

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. This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see **Rex v. Summers, (1952) 36 Cr App R**).

15. The prosecution had 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 appellant 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. The evidence as narrated by Pw2, 3 and 4 is largely hearsay and circumstantial. The direct evidence is the account of Pw1 as corroborated by Pw3 who examined her and tendered in court the P3 form and the age assessment that the appellant has not objected to or controverted. In this regard I find that there is no doubt as to the identity and age of the victim as well as the element of penetration.

17. 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, I am satisfied that the victim was telling the truth, because she told the court that she and the appellant were budding lovers and even confessed the same to Pw3. However the court is aware of the need for corroborative evidence. 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***."

18. With regard to the identity of the appellant there is circumstantial evidence in addition to the account

of Pw1 that is available. However before drawing the inference of the accused's responsibility for the offence from circumstantial evidence it is necessary to ensure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

19. The circumstantial evidence that is available is that the appellant and the complainant were budding lovers; Pw1 was found at the appellant's house and the appellant has given no explanation for his movements on the material day and this seems to be what was used to pin him down. The circumstances are suggestive that there was a meeting between the appellant and Pw1 that gave an opportunity for sexual contact and penetration between the sexual organs of the appellant and the victim. Again the evidence of Pw2 that Pw1 was found at the appellants home plus her account that she had sex with the appellant is corroborative evidence that cast no doubt in the prosecution's case. The appellant's evidence appears not to have shaken that of the prosecution regarding his involvement with the complainant. The complainant clearly told the court that the appellant was her boyfriend with whom she was cohabiting at the time she was arrested. She also told the court that they had sex the previous day and that they had lived like man and wife.

20. I am cognizant that the absence of a hymen cannot in itself prove penile penetration but having considered the evidence on record the same has left no doubt in the minds of a reasonable and prudent person with respect to the elements of penetration and the involvement of the appellant in the offence charged and a real possibility that the unlawful sexual act did indeed take place.

21. The appellant in his submissions has assailed the trial magistrate for failing to allow him benefit from the provisions of section 8(5) and 8(6) of the Sexual Offences Act. He maintained that the complainant had behaved like an adult when she agreed to have a relationship with him and therefore he should be given the benefit of doubt. Learned counsel for the Respondent has submitted that the appellant did not raise such a defence during the trial so as to enable the prosecution to cross examine him and as such the same is an afterthought. I have looked at the record and note that the appellant did not raise the issue of statutory defence which he now seeks to raise in submissions. Section 8(5) and (6) of the Sexual Offences Act provides for circumstances when an offender can raise statutory defence to an offence of defilement on the ground that the victim had misrepresented about her age. It provides as follows:

> Section 8(5)**-"It is a defence to a charge under this section if:**
>
> *a)* ***It is proved that the child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence, and***
>
> *(b)* ***The accused reasonably believed that the child was over the age of eighteen years.***
>
> *(c)* ***The belief referred to in subsection 5(b) is to be determined having regard to all the circumstances including any steps the accused person took to ascertain the age of the complainant"***

From the above, it is quite clear that even if the complainant had presented herself to the appellant to have been over 18 years of age, the onus was on the appellant to ascertain the said age was correct. This was mandatory as the provision above was introduced so as to protect victims from sexual molestation and it raised the bar on the perpetrator to ensure that they were indeed dealing with adults and not minors. The appellant in his defence did not give evidence on any steps that he took to establish the age of the complainant nor did he give evidence to invoke the statutory defence under section 8(5) of the Act. Even though the complainant is reported to have informed the clinical officer who examined her that she had been married by the appellant for two weeks and had had sex for three days, this did not absolve the appellant from criminal culpability as the complainant being a minor had no capacity to consent to the sexual intercourse. The appellant therefore cannot benefit from the statutory defence. It is obvious that the appellant took advantage of the hapless complainant who was seeking for employment at his butchery. The conviction of the appellant by the trial court was sound and I see no reason to interfere with it.

22. As regards sentence I note that the appellant was sentenced to 15 years imprisonment. I find the said sentence passed pursuant to section 8(4) of the Sexual Offences Act was the minimum possible in law. The appellant's mitigation was duly received by the trial court. I do not see any reason to interfere with the sentence.

23. In the result I find the appellant's appeal lacks merit. The same is dismissed. The conviction and sentence by the trial court is upheld.

Orders accordingly.

Dated and delivered at **Machakos** this **27th** day of **January, 2020.**

D. K. Kemei

Judge