REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 5 OF 2019

BRIAN FURAHA MUMBA..……...…….…….……..……APPELLANT

VERSUS

REPUBLIC…...…….....…..……..RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. L. N. Wasige, SRM, delivered on 24.1.19 in Kaloleni in Criminal Case No. 12 of 2017)

JUDGMENT

1. The Appeal before me arises from a judgment delivered by Hon. L. N. Wasige, SRM, delivered on 24.1.19 in Kaloleni Criminal Case No. 12 of 2017 in which Brian Furaha Mumba, the Appellant, was sentenced to 15 years imprisonment.

2. The Appellant was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The particulars of the offence are that on 1.6.17, at [particulars withheld] village, Kayafungo location, Kaloleni Sub County, Kilifi County, the Appellant intentionally committed an act which caused penetration of a male genital organ namely penis into a female genital organ namely vagina of SKC, (the Complainant) a child aged 16 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this offence were that on the same day and in the same place, the Appellant intentionally caused his male genital organ namely penis to touch a female genital organ namely vagina of the Complainant.

3. The Appellant denied the charges and the matter proceeded to trial. After 4 witnesses testified for the prosecution, the trial Magistrate found the Appellant had a case to answer and placed him on his defence. The Appellant made a sworn statement but did not call any witnesses. In her judgment of 24.1.19, the Appellant was convicted of the main charge. He was sentenced to serve 15 years imprisonment.

4. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. The summarized grounds of appeal as set out in his Petition of Appeal dated 7.2.19 are that the trial Magistrate erred in fact and in law in that she:

i) convicted the Appellant on insufficient and untenable evidence which did not meet the threshold of proof beyond reasonable doubt.

ii) relied on evidence that was not before the Court.

iii) convicted the Appellant when the evidence on record was manifestly inconsistent, contradictory and had glaring gaps incapable of sustaining a conviction.

iv) convicted the Appellant against the weight of evidence on record.

v) failed to give due and adequate consideration to the Appellant's evidence in defence.

vi) failed to properly consider all the evidence as well as the submissions by the Appellant.

5. The Appellant urged the Court to allow the Appeal, and quash the conviction and sentence.

6. In her testimony, the Complainant stated that she was 16 years old and in Form 3. The Appellant was her boyfriend for 2 years. They are also neighbours. The Complainant had been unwell and had gone home from school. On 30.5.17 on her way back to school, the Complainant met the Appellant who persuaded her to stay with him and go to school the following day. She stayed with him from Tuesday to Saturday. On Thursday, the Appellant forced the Complainant to have sex with him. He used a condom. When the Complainant was informed by the

Appellant's cousin Shauri, that the family was looking for her, she left the Appellant's home and went to her grandmother's home in Kiembeni who informed her parents that she was at her home. When the Complainant told her uncle WK that she had been with the Appellant, she was taken to the police station. She recorded her statement and was issued with a P3 form which was filled at the hospital.

7. In cross examination, she stated that she had been having sex with the Appellant even before she stayed at his house. She further stated that she did not write the statement but the same was written by a police officer. Upon medical examination, she was found to have gonorrhea. She stated that she stayed at the Appellant's home of her own free will.

8. PW2 WK stated that on 30.5.17, he gave some money to the Complainant who is his niece, to go back to school. This was after she had received treatment as she had been unwell. On 3.6.17, PW2 attended an academic clinic at the Complainant's school and was informed that she had not been in school for 2 weeks. Upon his return home he informed her parents and other relatives of the missing girl and a search was mounted. PW2 reported the matter at Kaloleni Police Station. At about 10:00 pm, the Complainant's grandmother called him and said that the Complainant was at her house. The following day he went for the Complainant and took her to the Police Station. He produced her birth certificate indicating that she was born on 3.9.01.

9. PW3 No. 95368, PC Rukia Guyo testified that she was present when the matter was reported at Kaloleni Police Station. She stated that the Complainant told him that the Appellant was her boyfriend and it was usual for them to have sex. She further stated that she had stayed at his house for 5 days. She recorded the Complainant's statement and issued her with a P3 form which was duly filled. After completion of her investigations, she arrested the Appellant and charged with the offences herein. PW3 further stated that from the P3 form, the Complainant was found to be suffering from an STI but the Appellant had no STI. The P3 form indicated that there was penile penetration.

10. PW4, Mwangolo Chigulu a clinical Officer at Mariakani produced the P3 form and treatment notes which he had filled on 6.6.17. His examination of the Complainant revealed a well-kept external vagina with no bruises or lacerations. There was no hymen. He then confirmed that the Complainant had been defiled. On cross examination, PW4 stated that he could not remember whether he examined the Complainant and whether she had an STI. He could not tell when she had had sex. The approximate age of the injuries was weeks. He had examined the Complainant 5 days from the date of the incident. He further stated that no harm was inflicted on the Complainant. Additionally, he stated that if a victim tests positive for an STI then the culprit will also possibly test positive for the same.

11. After the close of the prosecution case, the Court ruled that the Appellant had a case to answer and was put on his defence. The Appellant gave a sworn statement in which he denied committing the offence or being with the Complainant prior to 1.6.17. He confirmed that he and the Complainant were neighbours. He denied that he is the Complainant's boyfriend. He stated that on 8.6.17, after hanging election posters at Mwana Mwinga, he went to a friend's house to relax. He was arrested at 12:00 noon. He was examined for HIV and STI at Mariakani Hospital and was found to be negative. He further stated that he resides with his grandmother, uncle and cousin in the same homestead with 3 occupied houses and 1 under construction. .

12. Both parties filed their written submissions which I have considered. I have also subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that I neither saw nor see the witnesses. In this regard I am guided by the holding in the case of Okeno v. Republic [1972] EA 32 where the Court of Appeal stated:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434)"***

13. On the evidence, the Appellant submitted that while it is not disputed that the Complainant is a minor and that her hymen was broken, it is seriously disputed that it was the Appellant who defiled the Complainant. While the Complainant was suffering from an STI, the Appellant was not, yet her testimony was that they had unprotected sex. It is not known from whom she contracted the STI. It is also not known where the Complainant was for a period of 1 week. She could have been anywhere and with anyone other than the Appellant. It is further not known how long she was out of school. Further, the Appellant submits that the Complainant's unnamed grandmother ought to have been called to confirm that the Complainant indeed went to her house. According to the Appellant, the investigating officer failed in the duty of filling in these gaps. The other discrepancy pointed out by the Appellant is that the alleged offence took place on 1.6.17 and the medical examination was done on 6.6.17. Yet the P3 form says that the approximate age of the injuries was weeks. Though the trial Court stated that this was an estimate, the Appellant submits that 5-6 days cannot by any stretch of the imagination be approximated to weeks. PW4 also stated there were no injuries or lacerations on the Complainant's vagina. The Appellant therefore argues that the only inference that can be drawn is that no sexual intercourse took place between the Appellant and the Complainant on 1.6.17 or at all. The Appellant asserted that there was no connection between the Complainant's broken hymen, defilement and himself. This being the case, the Court erred in finding that the Appellant defiled the Complainant.

14. For the Respondent, it was submitted that the prosecution proved its case beyond reasonable doubt. The three elements of defilement of penetration, age and identification were proved. The fact that the Complainant had and STI and the Appellant did not, is not proof that there was no penetration. It was argued that even DNA is not proof of penetration as held in the case of Fappyton Mutuku Ngui v Republic [2014] eKLR.

15. On sentence, it was submitted that the Court's hands cannot be fettered by the minimum sentence provided in law and must be able to exercise its discretion on sentencing based on the circumstances of each case. It was submitted that before sentencing, the Court ought to have considered the Complainant's character and behavior as well as the fact that the Appellant was a first offender. Having considered the foregoing as well as the Appellant's mitigation, a lesser sentence ought to have been imposed. Reliance was placed on the case of Francis Karioko Muruatetu & another v Republic [2017] eKLR, a copy of the judgment of which was availed for the Court's consideration. The

Appellant also relied on Criminal Appeal No. 92 of 2017, Raphael Mutunga Mutinda v Republic and Criminal Appeal No. 32 of 2015, Martin Charo v Republic. The copies of the judgments in these 2 cases were not availed so the Court did not consider them.

16. For the Respondent, it was submitted that the Court exercised its discretion in sentencing as it found that the Appellant intentionally and continually had sex with the Complainant in full knowledge that she was a school going minor. The Court further found that from her demeanour, the Complainant was trustworthy. The Appellant ought to have known better than to have sex with a child. In this regard, reliance was placed on the case of Nehemiah Kiplangat Ngeno v Republic [2018] eKLR.

17. I have carefully re-evaluated the evidence presented before the trial Court and considered the submissions by the Appellant and the Respondent.

18. For an accused person to be convicted of the offence of defilement, the ingredients set out in Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 must be established. The Court in that case stated:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

19. From the evidence, it is clear that the Complainant was a minor. Her birth certificate which was produced in evidence indicated that she was born on 3.9.01 and was 16 years old. The P3 form indicated that her hymen was broken. The Complainant also informed the Court that on examination, she was found to have gonorrhea, a sexually transmissible infection. In this regard, I am satisfied that there is evidence of penetration. These 2 factors are not in disputed. What is disputed however is whether the penetration of the child was by the Appellant.

20. As I consider the evidence, the questions that the Appellant has asked in his submissions, linger in my mind. Where was the Complainant for the period of 5 or so days she was neither at home nor in school? If indeed the Complainant was at the Appellant's house for the 5 days, how is it that no one else in the other 3 houses in the compound knew of her presence there? If, as the Complainant says, the Appellant's cousin Shauri was aware that the Complainant was with the Appellant during the period in question, and alerted her that she was being looked for, why was he not called as a witness to confirm that the Complainant had indeed been at the Appellant's house? If as the Complainant said, the Appellant used a condom when he had sex with her on the Thursday, from where did she get the STI she was found to have, given that the Appellant tested negative for the same? If she was examined about 5 days after the alleged defilement, why did PW4 indicate in the P3 form that the approximate age of the injuries was weeks? If indeed the injuries were weeks old, was the Complainant defiled on 1.6.17, the material date, as alleged? It would seem not. These questions plant doubt in the mind of the Court as to the culpability of the Appellant.

21. The conclusion that I draw from the record, is that the Complainant is a minor and that she was defiled. When and by whom cannot be ascertained from the evidence on record.

22. I have considered the case of Nehemiah Kiplangat (supra) relied on by the Respondent. I am in agreement with Ngugi, J. that an adult who is found to have had "consensual" sex with a minor cannot escape criminal liability. This is obviously because a minor has no capacity to give consent to sex. The case is however distinguishable in that, in that case, there was no doubt in the mind of the Court that the appellant therein, was the perpetrator of the offence, whereas in the instant case, I find nothing in the evidence to connect the Appellant to the offence.

23. In the end, I find that the prosecution did not discharge its burden of proof of beyond reasonable doubt. The evidence adduced was not sufficient to sustain the conviction. In the premises, I quash the conviction and set aside the sentence. The Appellant is hereby set at liberty unless otherwise lawfully held.

24. It is so ordered.

DATED this 27th day of February 2020

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M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28th day of February 2020

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NJOKI MWANGI

JUDGE

In the presence of: -

…… for the Appellant

…… for the Respondent

…….…….. Court Assistant