REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 47 OF 2019

LAWRENCE MBOLU NZIOKA..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Appellant in person

JUDGMENT

The appellant has approached this court challenging both conviction and sentence of life imprisonment arising out of a Judgment in **Criminal Case No. 342 of 2013** pronounced by **Hon. Shikanda SRM** on 25.4.2014.

In brief the appellant was charged with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act and in the alternative indecent act contrary to Section (11) (1) of the Sexual Offences Act. His trial proceeded on both counts but on conviction, the evidence by the prosecution is deemed to have proved the main count of defilement beyond reasonable doubt.

The appellant dissatisfaction with the Judgment is based on the following grounds of appeal:

> ***(1). That the Learned trial Magistrate erred in Law and fact by finding my conviction and sentence without considering that the sentence of life imprisonment was unlawfully for the age of the complainant was not proved beyond any reasonable doubt.***
>
> ***(2).That the Learned trial Magistrate erred in Law and fact by convicting and sentencing me to life imprisonment without considering that the evidence made in court was contradictory.***
>
> ***(3). That the Learned trial Magistrate erred in Law and fact by failing to note that the Section 150 of the CPC was not considered for the alleged mob justices alleged to have arrested me were never summoned to testify.***
>
> ***(4). That the Learned trial Magistrate erred in Law and fact by failing to considered my defence statement.***

In proving the charges against the appellant at the trial court, the prosecution case was depended upon the evidence of five witnesses which shortly can be summarized as follows:

PW1 – EMM the victim stated to be ten (10) years old of the defilement all gave an account that on 19.5.2013 on or about 6.00 p.m. he was in the field at [particulars withheld] Primary School. As he played with **K** and **S** two boys approached them and got hold of **S** but at the same time fearing for the worse he took flight from the scene. He ended up at [particulars withheld] School where he met the appellant and decided to seek assistance on how to access his home.

According to the testimony by the victim, appellant made a few inquiries whether he had telephone contacts and when he declined, it was decided that he spends a night at the appellants' home.

In the course, the appellant went to a palm wine bar to take some alcohol leaving the victim in his brother's house. It happened that after finishing with the social evening he went for the victim at the brother's house, woke him up and they both went back to his house for the rest of the night. Further, the victim stated in court that the appellant prepared the facilities for them to spend the night together by undressing and simultaneously also removing his underwear. Indeed, in the victim own words the appellant did bad manners and when he was done with the sexual act, it became necessary for him to escape from the house.

Following from this, the victim testified that he managed to open the door under the excuse that he was going to answer a call of nature, only to seek safety at a neighbour's house. At the neighbour's apparently he did not disclose where he was coming from and what had happened prior to his visit to the home. The remaining evidence concerns a report to his father and later to the police station.

The next witness called for the prosecution was **(PW2)** he was informed of the different incident at that time involving the victim **(PW1)** and the alleged suspect. According to **(PW2)** he was shown the crime scene by the victim and as a consequence the house was identified to belong to one **Simeon Karani**, with several tenants. PW2 further testified that he decided to nip any plan in the bud by the suspect escaping by shortly effecting an arrest.

PW3 – LM testified as the father of the victim with regard of him missing from home the previous night. He further explained the court that a search of his whereabouts was launched, including an inquiry from the other children he played with on the fateful day. What the children informed **(PW2)** was that **(PW1)** had left for home. That therefore, made (PW2) to widen the scope of search all around Kisumu Ndogo looking for their son (PW1) but it did not bear fruits until the following morning when **PW2** came with **PW1** and being joined by PW3 they did proceed to the police station.

It is at the police station after booking the report a P3 Form and post rape care form was issued by PW5 to use in the medical examination to be conducted at the Malindi Hospital. **PW5** stated that an investigation was commenced on the incident which showed that the appellant was involved in the defilement of the victim **(PW1).**

In particular PW5 told the court that he managed to secure the birth certificate from (PW3) which was produced in court as exhibit 1.

PW4 – DSM before the trial court testified that on 19.5.2013 the appellant had gone to his house in company of **(PW1)** alleging he was trying to contact the father to **(PW1)** so that he could escort him to their home. By this time the appellant said that the telephone call was not going through leaving **(PW1)** in the house which they lived together with the appellant. Having known each other with the appellant **(PW4)** further explained that he took temporary custody of **(PW1)** as he went out to look for food. It transpired according to PW4, the appellant returned with no food but made a request to him that he be allowed to carry away his personal belongings including a mattress for another house.

He also asked **(PW4)** to wake up the child (PW1) so that they could leave together at that time estimated to be approximately 10.00 p.m. PW4 evidence was to the effect that he never came to see the appellant or the child (PW1) thereafter until the 21.5.2013 when the village elder (PW2), the appellant and other village vigilante group visited his house. The result was that PW4 was to be arrested but on completion of investigations released and made a prosecution witness.

According to **(PW6) Ibrahim Abdillahi**, the clinical officer at Malindi Sub-county testified in regard to the medical examination conducted upon the victim of defilement (PW1). PW6 stated that both the physical and medical examination showed bruises on the anal orifice and tenderness. He stated that in addition the victim had difficult in walking. In support of this he produced treatment notes exhibit 2, PRC exhibit 3, laboratory test exhibit 4 and P3 Form exhibit 5 considering the sequence of events, and the evidence it was the trial court decision to place the appellant on his defence. The appellant elected to remain silent.

Submissions on appeal

The appellant arguing the appeal relied on his written submissions. In the first instance, he contended that the evidence by PW6 on medical evidence and that of the victim (PW1) remained at variance in respect with the facts narrated in court to prove penetration.

In reference to the record, appellant submitted that there was no direct evidence linking him with the commission of the offence. On the other hand, the appellant explains that the trial court failed to take into account material contradictions in the testimony of (PW1) which in all aspects impeached his credibility.

Further, the appellant submitted that the victim in his evidence before court mentioned some key witnesses in attendance at the time they were playing in the field. According to the appellant contention, the failure by the prosecution not to call those witnesses by the trial court. Further, under Section 150 of the CPC would have been resolved in his favour as creating a gap on positive identification at the scene useful for his acquittal. The evidence urged the appellant failed the test in the cased of **Dumia Mohammed v R CR Appeal No. 210 of 2003** and **Denkeri Pandya v R {1950} EACA 93, Terekel & Another v R {1952} EACA.**

Regarding the severity of the sentence, appellant submitted that imposition of life imprisonment was unjust and prejudicial for lack of proportionality and rationality. His contention was on the basis that despite mitigation being a mandatory sentence the discretion of the court would always remain unfettered. It is therefore reasonable for the court to consider the sentence afresh taking into account mitigation factors. He now appeals that conviction and sentence be set aside on the grounds set out which he summarized in his submissions.

Unfortunately, the respondent was given an opportunity to reply but as the time of drafting this Judgment nothing had been filed in our digital platform. I take it that they were content with the trial court Judgment and nothing useful to add on appeal.

Analysis and determination

> ***"It is of course the duty of the court on first appeal to evaluate the evidence for itself bearing in mind that the trial court had the advantage of seeing and hearing the witnesses."*** **(**See **Pandya v R {1957} and Ruwala v R {1957} EACA {1957} 570)**

The merits of this appeal, would be drawn on the strength or weakness of the evidence to proof the offence of defilement contrary to Section 8 (1) as read with (2) of the Sexual Offences Act beyond reasonable doubt.

The essential ingredients which must be proved in a case involving defilement is now trite that:

(1). The appellant committed an act of penetration against the victim who in this case was a male minor.

(2). The victim age was under eighteen years old.

(3). That the appellant was the one who committed the offence.

In **Charles Wamukoya Karani** v R CR Appeal No. 72 of 2013 the court held:

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

It is well to remind oneself at the outset of the cardinal principle in Criminal Law expressly provided for under Article 50 2(a) of the Constitution that:

"Every accused person has a right to be presumed innocent until the contrary is proved."

This means that the prosecution discharging the burden of proof beyond reasonable doubt or an accused person gives in by pleading guilty to the charge.

This much is not contentious what is in contention in this appeal is the nature of evidence which the Learned trial Magistrate used to make a findings on guilty against the appellant. It is helpful in this appeal to entitle the appellant the existing definition on penetration as provided for under Section 2 of the Sexual Offences Act. This offence commonly committed in secrecy is deemed to be complete when the act of penetration of another female or male genitalia is proved to be partial or full insertion as a means to amount to sexual intercourse.

On this element, whether or not there was sufficient evidence to sustain the charge, to me the starting point should be what the victim told the trial court with regard to proof as evaluated from the record and impugned Judgment.

The following salient features seem not to be in doubt. The defilement was said to have taken place in the night of 20th May 2013 at Muyeye area. The victim testimony on reflection showed the sequence of events from the time he made an encounter with the appellant seeking help to be escorted to his home. The facts as presented describes the appellant who set in a plot in his mind that the victim was going to spend an intimate night with him instead of the help to try and assist to get him to the parents' home. The alleged intention to commit the illegal and unlawful act was manifest when the appellant temporarily shifted house in which he stayed with PW4 to unknown destination so as to commit the offence. That in furtherance of the intention PW4 evidence provided a shred of connecting corroborative circumstantial evidence to beef up the victim testimony connecting the appellant. In this matter the appellant was the last person to pick the victim from (PW4) house on or about 10.00 a.m. carrying with him a mattress and some of the personal effects.

The broad observation of the victim while in his house made by PW4 relating to the physical appearance or any other disposition as pointed did not show any signs of distress, anxiety or enactment stress essential to make an impression that a crime had been committed against him. The paucity of the evidence by PW4 goes to show that the sexual act must have taken place after the duo left his house.

It is the case for the prosecution that the fact of the appellant and the victim seen together prior to the defilement establishes a close proximity between the time of crime and when the victim reported the incident. As clearly described by PW4, taking the victim away from his house to unknown area at 10.00 p.m. was to create an opportunity to commit the allegedly offence. The appellant owes an explanation under Section (111) of the Evidence Act with regard to the circumstances in which the defilement may have taken place. In view of the fact he was the last person who safely left from PW4 house with the victim (PW1). The last seen theory comes into play where the time gap between the point the victim was picked from PW4 house and the primafacie evidence sex act alluded to by (PW1) on defilement.

As was said in **R v Taylor, Weaner and Donovan {1928} 21 CR Appeal R 20**, the testimony of PW4 fits this principle that:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics."

In addition to these observations in **R v Kipkering Arap Koske & Another {1949} 16 EACA 135, Simon v Musoke {1958} EA 715** on circumstantial evidence the Law postulates:

"That in order to justify, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon only their reasonable hypothesis than that of guilt and the burden of proving facts which justify the discussing of the inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

From the evidence the prosecution has established every link in the chain of the circumstances necessary to establish the guilt of the appellant as from the time (PW1) left the field to a neighbours house, secondly the encounter with the appellant who was supposedly to walk him to the parents' home. The change of plan when they ended up in the house of the appellant shared with PW4 and have him picked up later at 10.00p.m. from the aforesaid house to unknown reside, is no doubt evidence of intention under Section 43 of the Sexual Offences Act.

All these circumstances are consistent only in pointing at the guilt of the appellant. Further, besides the testimonies of (PW1) and (PW4), in this appeal the prosecution provided the medical evidence by PW6. One **Abdullahi**, in answer to the question on penetration. On examination bruises and tenderness to the anal orifice was confirmed a necessary positive indicator to lay credibility and reliability on penetration.

I take it that this evidence and that of PW4 forms part of the probative value evidence on corroboration as enunciated in the case of **DPP v Kilborne {1973} 1 ALL ER 440 and Mutonyi v R {1982} KLR 203.** I note that this independent evidence tend to connect the appellant in a precise manner with the commission of the offence.

The other keystone of the prosecution case is the element on age of the victim. Reliance on this is placed on the principle in the case of **Kaingu K. Kasamo v R CR Appeal No. 504 of 2010** where the Court of Appeal stated:

> ***"Age of the victim of the sexual assault under the Sexual Offences act is a critical complaint. It forms part of the charge which must be proved the same way as penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will depend on the age of the victim."***

It is legally permissible that age is proved by medical evidence, birth certificate, guardian or parents and by observation or common sense. **(See Francis Omuroni v Uganda CR Appeal No. 2 of 2000.)**

In sum, the requirement of age was proved by a birth certificate exhibit 1 coupled with the testimony of the father to the victim (PW3). Definitely as already stated, age of the victim is not in dispute.

The appellant's case was also build on the submissions that prosecution case was riddled with inconsistences and contradictions to disclose no offence. The first assumption in Law is that not every contradictions or inconsistency is fatal to the prosecution case. The case of **Twehanga Alfred v Uganda {2003} UGCA 6** held that:

> ***"With regard to contradictions in the prosecution case, the Law as set out in numerous authorities is that grave contradictions unless satisfactory explained will usually but not necessary lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate unfruitfulness or if they do not affect the main substance of the prosecution's case."***

As far as the assumptions on inconsistencies and contradictions are concerned, none of the six witnesses referring to the nexus between the commission of the offence and participation of the appellant contains any species of contradictions. On a formal level within the requirements and compliance with the Evidence Act as a pre-condition of admission and relevance the answer to the question is in the affirmative, that the evidence satisfies the evidential burden. That the trial court reasoning and the test whether the prosecution established its case beyond reasonable doubt given against the appellant were all given due consideration and cannot be revisited in this case with a view to interfere with the Judgment.

Undoubtedly, the hardest and most onerous task of an appellate Judge sitting on appeal in any proceedings is to evaluate and to decide upon the facts in a trial he did not participate, inorder to render a verdict and possibly a proper Judgment about facts that happened in the past and another tribunal has ruled on them.

However, as it results from the wording of **Sir Clement De Lestang V.P in Mbogo v Shah {1968} EA 93**:

> ***"This court cannot interfere with such an exercise except the exercise of discretion by an inferior court and its decision are clearly wrong or because it has misdirected itself or because it acted on matters on which it should not have taken into account and in doing so arrived at a wrong conclusion."***

In my evaluation these compelling principles do come into play when the question in respect of this appeal is asked and on the other side justice also demands that not every decision of a trial court should be overturned or corrected unless it meets the threshold issue.

On sentence

It was stated in the case of **Ogolla S/o Owuor v R {1954} EACA 270** that:

> ***"In order to interfere with exercise of discretion by the sentencing court, an appellant in addition to the principles in Mbogo v Shah must demonstrate that the sentence is manifestly punitive and excessive in view of the facts of the case."***

The penalty prescribed for the offence of defiling a minor aged ten years is at a maximum of life imprisonment. In determining the appropriate sentence, the court considered the mitigation given by the appellant inspite of the fact that parliament among others laid emphasis of the sentence being mandatory minimum. Since the Supreme Court in the case of **Francis K. Muruatetu v R {2017} eKLR** it has been found plausible to interfere with such mandatory sentences. Borrowing a leaf from the decision in **Jared Koita Injiri v R CR Appeal No. 93 of 2014 and Christopher Ochieng v R CR Appeal No. 202 of 2011,** in the premises, I hereby sentence the appellant to thirty (30) years imprisonment to commence from the date of remand with effect from 4.6.2013.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 28TH DAY OF FEBRUARY 2020.

.....

R. NYAKUNDI

JUDGE