REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 81 OF 2018

OBED INGOSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence in Kakamega CMC Sexual Offence Case No. 82 of 2016 by E. Malesi, SRM, dated 30/5/2018)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve life imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal. The appeal was based on grounds filed by the appellant in person and further grounds filed by **Mr. Malalah**, advocate. The grounds raised by the appellant in person were that the conviction was based on fabricated, malicious and doubtful evidence; that the trial magistrate did not consider his defence but instead shifted the burden of proof to him; that the prosecution witnesses were not credible and that the trial did not meet the threshold of Article 50 (2) (g), (h) and (j) of the Constitution. The further grounds of appeal by Mr. Malalah were that there was no evidence to prove penetration; that the prosecution witnesses were contradictory, lacked credibility; that the advocate who represented the appellant during the trial did not have a practicing certificate and that the trial court erred in not subjecting the appellant to a mental examination.

2. The particulars of the offence against the appellant were that on 3rd August, 2016 in Kakamega Central District in Kakamega County, he intentionally caused his penis to penetrate the vagina of BAK (herein referred to as the complainant), a girl aged 8 years.

3. The case for prosecution was that in the year 2016 the complainant was a standard 3 pupil at [particulars withheld] School in Kakamega town. She was staying with her mother RM PW3 at Amalemba estate in Kakamega town MAO PW2 was a teacher for the complainant at the said school. The appellant was a pedal cyclist boda boda operator. He had been ferrying the complainant to and from school since when she was in Class 1.

4. It was the evidence of the complainant that on the material day the appellant went and picked her at her school at 1 p.m. On the way home the appellant did not take the usual route. He took her to an abandoned building that was under construction. He inserted his penis in her vagina while they were standing. After he was through he took her home. The complainant did not report the incident to her mother. On the following morning the appellant went and picked her and took her to school. She started to experience pain in her vagina. She informed her teacher PW2. PW2 tried to call her mother but she did not pick her call. PW2 took the girl to Kakamega County Referral Hospital. The complainant's mother found them at the hospital. The girl was examined by a doctor. A Post Rape Care form was completed. They reported at Kakamega Police Station. PC Christine Kemunto PW5 investigated the case. She issued a P3 form to the girl. It was completed at Kakamega County Referral Hospital. On examination she was found with reddish (hyperaemic) labia majora and broken hymen. The appellant was charged with the offence. During the hearing the victim's mother PW3 produced the birth certificate of the child as exhibit, P.Ex 1. The clinical officer PW3 produced the P3 form and the Post Rape Care form as exhibits, P.Ex 2 and 3 respectively. The birth certificate indicated that the girl was born on 24/10/2007. She was therefore aged 8 years at the time of defilement.

5. In his defence the appellant gave a sworn statement in which he stated that he is a boda boda operator. That he had been ferrying the complainant to school but her mother had not paid him for 6 months. That on the day the complainant's mother had promised to pay him he was arrested and charged with defilement. He said that the charges were fabricated by complainant's mother.

6. The appellant called one witness, his brother DW2 whose evidence was that the appellant was married with 3 children. That he did not believe that the appellant could commit the offence he was accused of.

7. In his submissions Mr. Malalah submitted that there was no evidence to prove penetration. That the trial magistrate relied on the evidence of the clinical officer that the vagina's outer walls were reddish and that the hymen was broken. That there is no evidence that when a vagina has reddish colour is a sign of penetration. That a broken hymen is not proof of penetration as it can be broken by factors other than sexual intercourse and also by natural tearing – See **P. K. W. –Vs- Republic (2012) eKLR**.

8. Counsel submitted that the trial magistrate wrongly admitted evidence of bad character against the appellant when he admitted evidence that the appellant had previously defiled the girl. That the evidence was incendiary and calculated to paint the appellant as a criminal who had committed a bad act again.

9. Counsel submitted that the charge was not proved beyond all reasonable doubt. That the complainant said that the appellant defiled her while they were standing. That PW2 said that the complainant told her that the appellant had slept on her on the previous day. That the trial court failed to consider the height of an 8 year old and the appellant's height to determine if it was possible to have sex in a standing position as alleged by the complainant. That the disparity in height made the act impossible. That the discrepancies on the evidence call into question whether the act took place or was all a fabrication.

10. Counsel further submitted that the appellant exhibited abnormal behavior during the proceedings which should have called for a mental examination to avoid jailing a mental patient.

11. The State did not make any submissions in the case. They instead relied on the record of the lower court.

12. This being a first appeal the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the lower court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1972) EA 32** and **Kiilu & Another –Vs- Republic (2005) 1 KLR 174**.

13. The trial court concluded that there was penetration on the basis of the medical evidence that the hymen was broken and that there was redness on the labia majora. However it was not clear whether the hymen was recently broken. Evidence of a broken hymen without supporting evidence that it was recently broken is not conclusive proof of defilement.

14. The position of the law is however that medical evidence is not the only evidence that can prove defilement. The same can also be proved by oral and circumstantial evidence. In **AML –Vs- Republic (2012) eKLR** the Court of Appeal held that:-

> ***"The fact of rape or defilement is not proved by DNA test but by way of evidence."***

In **Kassim Ali –Vs- Republic, Msa COA Cr. App. No. 84 of 2005** the court held that:-

> ***"(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."***

15. The complainant said that the appellant defiled her while they were standing. PW2 said that the complainant told her that the appellant had slept on her.

16. The way to treat contradictions in a case was stated by the Court of Appeal in **Jackson Mwanzia Musembi –Vs- Republic (2017) eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6** where it was held that:

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

17. In this case, I do not think that it was a material contradiction that PW1 said that the appellant defiled her while they were standing while PW2 said that the complainant told her that the appellant slept on her. PW2 was not questioned whether the complainant told her that the appellant defiled her while they were standing. The evidence cannot be said to be a contradiction when it was not clarified. Similarly the complainant was not questioned as to how the appellant inserted his penis into her vagina when they were in the standing position. I do not agree with the submission by the advocate for the appellant that it was impossible to do so when the complainant was not asked to demonstrate how it happened.

18. The complainant stated in her evidence that the appellant had defiled her in the previous year when she was in Class 3. This evidence was admissible as being evidence of a fact in issue. I do not agree with the counsel for the appellant that the evidence was not admissible.

19. Counsel for the appellant further submitted that the advocate who represented the appellant during the hearing, Mr. Oscar Munyendo had not taken out a practicing certificate in the year of representation and in subsequent years of 2017 – 2019. That the appellant was subjected to negative repercussions through adverse representation by a non-lawyer.

20. The court proceedings indicate that Mr. Munyendo appeared only once on the 11/1/2017 when directions were taken for the matter to start afresh as the initial trial magistrate had gone on transfer. He did not appear again for trial. In **Kajwang –Vs- Law Society of Kenya (2002) eKLR** it was held that proceedings are not invalidated merely by reason that an advocate appearing in a case is unqualified. The appellant herein did not suffer any prejudice by being represented by Mr. Munyendo. After all it is the appellant who addressed the court and stated that he wanted the matter to start afresh. Nothing stands out in the urguement.

21. There is no record that the appellant exhibited any signs of mental disability. No documents have been filed to show that the appellant suffers from a mental disability. There was then no basis for the trial court to call for a mental examination report on the appellant. In my considered view the appellant was accorded a fair trial in accordance with the Constitution.

22. The trial magistrate analysed the evidence adduced before the court and came to the conclusion that the complainant was telling the truth that the appellant had defiled her. The complainant was a child of 8 years of age. The proviso to section 124 of the Evidence Act allows a court in defilement cases to convict singly on the evidence of a child if the court is satisfied that the child is telling the truth.

23. The appellant stated in an unsworn statement that the matter was fabricated by the complainant's mother so as to escape paying his dues of ferrying her daughter to school. However this cannot be true as it is not the complainant's mother who came up with the complaint of defilement. It is the complainant herself who did so by reporting to her teacher PW2. Besides that the appellant never questioned the complainant's mother during cross-examination that she owed him money. The defence can only have been an afterthought. I have no reason to doubt the findings of the trial magistrate that the complainant was telling the truth.

24. In my view, the fact that the complainant was found with hyperaemic walls of the vagina coupled with her evidence that the appellant had defiled her puts credence to her evidence that the appellant committed the offence. The charge against the appellant was proved beyond all reasonable doubt. It is my finding that the trial court was correct in returning a verdict of guilty on the appellant. The conviction is thereby upheld.

Sentence -

25. The appellant was given the mandatory minimum sentence of life imprisonment for defilement of a girl aged 8 years. In **Evans Wanjala Wanyonyi –Vs- Republic (2019) eKLR** the Court of Appeal while considering the constitutionality of the mandatory minimum sentence under Section 8 (3) of the Sexual Offences Act held the mandatory sentence to be unconstitutional as it deprives the court of its inherent jurisdiction not to impose the minimum sentence in an appropriate case. The net effect is therefore that courts have discretion to impose a sentence other than the mandatory sentence in a case of defilement where minimum sentence is prescribed. In the above referred to case the court cited the case of **Christopher Ochieng –Vs- Republic (2018) eKLR** where the said court reduced a sentence of life imprisonment for defilement to 30 years imprisonment.

26. The appellant had mitigated at the lower court that he had a wife and young children. I am of the view that a sentence of life imprisonment is not appropriate in the case. The sentence of life imprisonment is thereby set aside. Considering that the complainant was aged only 8 years, I sentence the appellant to serve thirty years imprisonment.

Delivered, dated and signed in open court at Kakamega this 27th day of February, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Miss Mburu for appellant

Mr. Mutua for state/respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.