REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 32 OF 2017

DKY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate

Court at Garsen Criminal Case No. 8 of 2017 by Hon. E. Kadima (RM) dated 5th October 2017)

JUDGMENT

1. The Appellant was originally charged with incest contrary to section 20(1) but the charge sheet was amended by the prosecution and he was charged with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 22nd February 2017 at about 23500hrs at Salama Location in Tana Delta Sub-County within Lamu County, the Appellant intentionally caused his penis to penetrate the anus of AGD a child of 14years old.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 22nd February 2017 at about 23500hrs at Salama Location in Tana Delta Sub-County within Lamu County, the Appellant intentionally touched the anus of AGD a child of 14 years old.

3. The prosecution called six witnesses in support of its case. PW1 AGD, the victim was sworn after a *voire dire* examination. She told the court that on 22nd February 2017, when she arrived home from school at around 4:00pm she did not find her mother (DW2) at home. She inquired from the Appellant, her father, her mother's whereabouts but the Appellant told her it was not important. PW1 said that her father further told her that she (PW1) had to fulfil the promises she had made to him. She said that she tried to inquire what the promises were but the Appellant told her that she would know.

4. PW1 said that later that night while she was asleep, she felt someone grab her mouth and nose. She struggled with the assailant but he overpowered her. The assailant tore off her vest, removed her biker partially up to her buttocks and pushed her onto the mud floor. She then felt a penis penetrating her anus. It was extremely painful. That the assailant had sex for almost 4 minutes and she felt a watery substance on her after which the assailant left. PW1 further stated that she managed to stand and put on the solar lights and she saw someone entering her mother's room. She saw the assailant take a towel and wrap it around his waist. He warned her not to tell anyone.

5. PW1 further told the court that the next morning, she showered and went to school. She met the school chairperson at school and she told him what had happened to her. The chairperson took her to a class parent to whom she also narrated her ordeal. They took PW1 to the chief (PW3), Salama location, and she narrated her ordeal to him. The chief gave her a letter dated 23rd February 2017 which she took to her uncle, CM, at Hewani. On 24th February 2017, her uncle took her to Gamba police station where she recorded her statement. Her uncle was given the P3 form and they went to Garsen Health Centre where she was examined and treated. She further told the court that her mother was not at home on the 22nd February 2017 but she saw her on the 24th February 2017. She said that after the incident she crawled and sat on the veranda crying and it was then that she saw the Appellant come out of his room.

6. Buya Said Shevo (PW2) was the clinical officer at Garsen Health Centre who examined the victim. He told the court that he examined the victim's anus and found that the sphincter was normal and there was no bruise but there was mild pain. He concluded that there was mild penetration. He did not examine her vagina. He prepared the treatment notes which he produced as P.Exh 4. He then filled the P3 form which he produced as P.Exh 3. He captured the offence as sodomy.

7. Peter Jillo (PW3) was the chief of Salama Location at the time of the offence. He told the court that on 23rd February 2017, Nahashon, the chairperson of the board of management of [Particulars withheld] Primary School, and a school parent brought the victim to his office. That the victim, who was crying, told him that the Appellant had torn her clothes and slept with her. He then gave her a letter (P.Exh 2) to deliver to CM, who was her relative. He stated that he knew the Appellant who lived in Wema.

8. PW4 RNWi used to be PW1's teacher. She told the court that PW1 was not in school on the 23rd February 2017 but that on the 24th February 2017, she heard teachers saying that PW1 had come to school crying. She told the court that on 20th February 2017, PW1 had gone to her home and told her (PW4) that she wanted the head teacher to promote her to class 8 because the Appellant was seducing her. That PW1 said to her that the Appellant had sent the other children away and told PW1 that he (the Appellant) would do anything for her as long as she slept with him.

9. PW4 further said that PW1 had told her mother but the mother told her to persevere so that she would complete school and leave home. PW4 said that she raised the issue with the head teacher and at a staff meeting on 23rd January, 2017. That on 24th February 2017, the Appellant went to school to look for PW1. He spoke to a teacher, R, who told him that PW1 had complained of being beaten by the Appellant the previous day.

10. HEK (PW5) was the head teacher at [Particulars withheld] Primary School. He knew the Appellant as a parent. He told the court that on 23rd February 2017, the school chairperson, NO and a class parent representative, ML went to see him with PW1, who was crying. That PW1 told him that the Appellant was seducing him from time to time. He said that PW4 had hinted at an illicit relationship in an earlier meeting.

11. Inspector James Munuve (PW6) of Gamba police station was the investigating officer. He told the court that on 24th February 2017 one CM brought PW1 to the police station. That he instructed PC Mwenda to book the report while he changed into civilian clothing to escort the victim to Garsen Health Centre where she was examined. He said that PW1 told him that it was the Appellant who defiled her. He then called the child welfare officer and they decided to take her to a rescue centre in Malindi. PW6 later went to Hewani and an informer pointed out the Appellant. He arrested the Appellant and drew a sketch plan of the house (P.Exh 5). He informed the court that he obtained the original copy of the victim's birth certificate from the mother and he made a copy which he certified and produced as P.Exh 6. He said that the victim's mother refused to record a statement.

12. At the close of the prosecution case, the trial court found that the prosecution had established a *prima facie* case against the Appellant and placed him on his defence. The Appellant called four witnesses in his defence.

13. The Appellant elected to give a sworn statement . He told the court that on 24th February 2017 while he was at home he saw a police vehicle passing and that the occupants pointed at his house. That they went to his house and asked him to surrender because he had beaten and strangled his child accusing her of stealing Ksh. 1000/- and that the child had been hospitalized. That they took him to the police station and placed him in the cells. That they told him that he had defiled someone and refused to believe his version of events. He told the court that the child had stolen Ksh. 1000/- and he punished her as a parent. He disputed that he had defiled the victim.

14. DW2 PKLK a married daughter of the Appellant stated that she was not aware of the events of 22nd February 2017 although she was aware that the victim had ran away from home to her (DW2's) house and told her that she had been caned by her parents. That she took the victim back home to her parents and that on arrival, her sister did not repeat the allegation on beating but only kept quiet. She said that she was aware that the victim could disappear from home sometimes even for three days.

15. DW3 ALD, was the victim's brother aged 12 years. The court after conducting a *voire dire* examination formed the opinion that he (DW3) possessed sufficient knowledge and appreciated the importance of telling the truth he gave a sworn statement in which he told the court that on 21st February 2017 his mother (DW4) had gone to Mpeketoni. That the victim had stolen Ksh.1000/- belonging to their father and she was canned and ran away. That the following day they went to school but the victim never told him anything. DW3 alleged that the victim had been seen in the company of a boy.

16. DW4, HHM, was the victim's mother and the Appellant's wife. She told the court that on the 21st February 2017 she had travelled but returned home on the 22nd February 2017 when she was informed that the victim had stolen Ksh.1000/- and had been caned. She said that she went to school to check where PW1 was but she was not in school. She returned the next day to school to find out why PW1 never attended school when PW1told her that some money had been stolen. DW4 told the court that a teacher, one madam R asked PW1 where she was. That PW1 told her she was at Hewani which DW4 said was a lie and she canned PW1. DW4 threatened to report her to the chief but madam R intervened and said that she would deal with the matter. She told the court that PW1 never returned home that day but went back the following day.

17. DW4 further stated that when she asked PW1 where she was, PW1 stated that she had been at N's house. DW4 said that PW1 was later seen at Idsowe at her sister's (DW2's) place. DW4 claimed that PW1 started being truant the previous year and that she informed her husband. She would cane her but PW1 never changed. She also told the court that PW1 claimed that she (DW4) was the one who taught her how to move around with men. DW4 denied that there had been a settlement at home in respect of defilement allegations against her husband earlier.

18. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to 20 years imprisonment.

19. The Appellant being aggrieved by the conviction and sentence lodged his home made amended petition of appeal on 30th September 2019. His four grounds of appeal were that the charge sheet was defective; that the prosecution did not prove its case to the required standard; that crucial witnesses were not called to testify and; that the trial magistrate failed to consider his defence.

20. When the matter came up for hearing on the 5th November 2019, the Appellant relied on his written submissions filed on the 30th September 2019. His submissions were to the effect that the charge sheet was defective for omission of the word 'unlawful'. He urged that section 214 of the Criminal Procedure Code (CPC) was not complied with. He relied on **Harrison Mirungu Njuguna vs Rep Cr. App 90 of 2004 (UR); Yongo vs Rep [1983]KLR5 and Mutinda Mwai Mutana vs Rep [2011] eKLR.**

21. Secondly, the Appellant submitted that the prosecution failed to prove its case beyond reasonable doubt as there were contradictions and

inconsistencies in the prosecution case. He argued that the victim was a person of doubtful integrity and it created suspicion, as she did not see her assailant. He also submitted that PW2 did not inform the court whether the tenderness on the victim's sphincter was recent or it was healed. He relied on the case of **Maina Mwangi vs Rep (2006) eKLR.** He faulted the medical evidence as it did not link him to the offence and that the injuries were not consistent with sodomy for lack of lacerations. He claimed that he was framed

22. It was the Appellant's further submission that the prosecution failed to call CM, the victim's uncle from Hewani who took the victim to the police station, to testify as he was a key witness. He relied on the case of **Bukenya vs Uganda [1972] EA**. Finally, the Appellant submitted that the trial magistrate failed to consider his defence. He contended that his defence that he had caned the victim on the day of the said offence had created doubt in the prosecution case. He quoted the case of **Uganda vs Sebyala & Others 1969 E.A 204** and **Solomon Kirimi Mukaria vs Rep (2014) eKLR.**

23. The Respondent opposed the appeal in its entirety through its submissions dated 5th November 2019. In summary, the submissions of the Respondent were that the charge indicated the offence as being under section 8(1) as read with section 8 (2) of the SOA instead of section 8(1) as read with section 8(3) of the SOA. That the mistake did not vitiate the proceedings as the Appellant was able to participate in the trial and cross-examined the witnesses. Furthermore, it was argued that the defect was curable under section 382 of the CPC. Reliance was placed on the case of **Daniel Oduja Oloo vs R (2018) eKLR.** Secondly, it was the Respondent's submission that the prosecution proved its case beyond reasonable doubt as the victim saw the Appellant entering the room and that the medical evidence proved mild penetration. Finally, the respondent submitted that there was no need to call other witness as the victim was the only eye witness.

24. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, It did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

25. I have considered the grounds of appeal, the record and the respective submissions. The only issues for determination are whether the charge sheet was defective; whether the prosecution proved its case beyond reasonable doubt and whether the Appellant's defence was considered.

26. The first issue is whether the charge sheet was defective. The Appellant contended that the charge referred to section 8(2) of the SOA instead of section 8(3)of the SOA and that the term 'unlawful' was omitted from the particulars of the offence.

27. Section 134 of the Criminal Procedure Code provides that:-

> ***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

28. A perusal of the charge sheet shows that the victim was stated to be 14 years old and therefore the Appellant was to be charged under section 8(1) as read with section 8(3) of the SOA. The charge sheet was therefore defective. The question that follows is whether the defect was curable under section 382 of the CPC.

29. Section 382 of the CPC provides that:-

"Subject to the provisions hereinbefore contained, 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 inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

30. The Court of Appeal in **Benard Ombuna v Republic [2019] eKLR** pronounced itself on the issue thus:-

> ***"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."***

31. In this case, the charge sheet outlines the ingredients and particulars of the offence facing the Appellant. There was no prejudice occasioned to the Appellant as he clearly understood the allegations facing him well enough to cross-examine the prosecution witness and prepare a defence. I find that the error was curable under section 382 of the CPC.

32. Dealing with the issue of the omission of the term unlawful in the charge sheet in **Daniel Oduya Oloo v Republic** ***(Supra)*** Ngenye-Macharia J held that:-

> ***"On the same issue the Appellant submitted that the particulars of the offence were fatally defective as they failed to disclose that the act of defilement was unlawful. It is true that the word unlawful was not included in the particulars of the offence. The offence of defilement represents a situation in which the key elements requiring proof are age of the victim, identification of the perpetrator and penetration. It is an offence perpetrated to children. Given the fact that children cannot consent to the acts that form the basis of the offence implies that as long as the elements of the offence are proved, the offence itself is deemed unlawful.***

Therefore, the mere omission of the word "unlawful" does not, in the circumstances, render the charge sheet defective."

33. I am persuaded by the authority above that the omission of the word "unlawful" cannot render the charge sheet defective as such an omission cannot convert an 'unlawful' act into a lawful one. I find that the Appellant was not prejudiced by the omission of the term unlawful from the charge sheet as he was aware of the charges against him and was able to put up an appropriate defence. He cross-examined the prosecution witnesses and even led his own defence witnesses. This ground therefore fails.

34. On whether the prosecution proved the case beyond reasonable doubt, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

35. It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement, and; secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

36. Rule 4 of the Sexual Offence Rules of Court 2014 provides that:-

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

37. Evidence of the victim's age was adduced by PW6, Inspector James Munuve. He told the court that he got the victim's original birth certificate from the victim's mother (DW4). He produced the certified copy of the birth certificate (P.Exh6) which indicated that the victim was born on 11th April 2002 was therefore 14 years old at the time of the offence.

38. On the issue of penetration, the Appellant has disputed that the victim was penetrated on the basis that there were no lacerations or bruises on the anus.

39. Section 2 of the SOA defines penetration as:-

"the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

40. In **Mark Oiruri Mose v Republic [2013] eKLR** the Court of Appeal pronounced itself thus:-

"...So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

41. It is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."

42. In this case, it was the victim (PW1) evidence that on the night of 22nd February 2017, she was attacked while she was at home sleeping. That her assailant covered her mouth and nose, tore her vest, partially removed her biker and pushed her onto the mud floor. That the assailant the put his penis into her anus and proceeded to sodomise her for about 4 minutes. That she felt a watery substance on her after which the Appellant left. Medical evidence was produced by Buya Said Shevo (PW2), the clinical officer at Garsen Health Centre who examined the victim. He produced the P3 form (P.Exh.3) which indicated there were no cuts or bruises on the anus and that the anal sphincter was firm but tender. He reached a conclusion that there were mild signs of penetration. In cross-examination, PW2 stated that from the pain it was evident that there was penetration which could only have been occasioned by penetration. It is my finding from the evidence that penetration was proved.

43. It was the Appellant's submission that the prosecution had failed to call CM the victim's uncle who was a crucial witness.

44. The court is alive to the provisions of section 143 of the Evidence Act which states that:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

45. In the case of **Keter V Republic [2007] 1 EA 135** the court held inter alia that:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

46. Flowing from the above evidence, this court find that there no reason to call CM as a witness. The victim was the only witness of the offence as it happened at the dead of the night in their home. The victim narrated her ordeal to the chairperson of the school, the class parent, the chief (PW3) and the investigating officer (PW6). The only reason the uncle was mentioned was because PW3 sent the victim to him with

a letter directing him to take the victim to the police. His evidence would be similar to that of PW3 and PW6. There was no reason therefore to call him. This ground also fails.

47. On the issue of identification, the victim told the court that she did not see her assailant's face during the attack. After the attack, she managed to put on the solar light and she saw her assailant enter her parents' room. She concluded that it could only be her father. The victim was able to identify the Appellant and from these circumstances, and; the court proceeded to convict on the basis of the circumstantial evidence.

48. With respect to circumstantial evidence, the Court of Appeal in **Sawe V Republic [2003] eKLR,** stated as follows:-

> ***"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."***
>
> See **Abanga Alias Onyango V. Rep Cr. A No.32 Of 1990(UR)**

49. In this case, it is not in doubt that the Appellant was at home on the night of the offence. Apart from the victim's younger brother there was no other person in the house. The victim stated that she saw her assailant go into her parents' room. From the sketch plan (P.Exh 5) of the house produced by PW6, it is evident that the house had only three rooms being the girls' room, the boys' room and the parents' room. The Appellant could only have slept in the parents' room.

50. In addition, before the incident, the victim had told her teacher, PW3, that the Appellant wanted to have sexual intercourse with her and had attempted to defile her once. Furthermore, on the night of the offence, the Appellant had told the victim that she must fulfil her promise to him on that day. After the ordeal, he told her not to tell anyone. I find that the circumstantial evidence points to the Appellant and no one else as the one who defiled PW1. All the circumstances unerringly point to him.

51. Finally, the Appellant contended that his defence was not considered. In his judgment, the trial magistrate considered the Appellant's defence and found that it was a denial and an attempt by the Appellant and his witnesses to taint the character of the victim as a truant and a thief. I have looked at the evidence on record and I agree with the trial magistrate. The Appellant stated that on the day of the offence he had caned the victim for stealing KSh. 1000/- from him. This was corroborated by DW3 and DW4. In addition DW4 stated that she was at home on the night of the offence. However, there are material inconsistencies in the defence case.

52. Firstly, DW4 claimed to have been at home on the night of the offence while none of the other defence witnesses including the Appellant alluded to that fact. DW3 in cross-examination stated that his mother had travelled on the 22nd February 2017 and this corroborated the evidence of PW1. Secondly, the Appellant and DW4 alleged that the victim was caned on the 22nd February 2017. However, DW4 stated that the victim ran away to her sister's (DW2) place after she was caned. This was in contradiction with the evidence of DW2 the victim's sister who had stated that the victim had gone to her place on the day of the offence and not later as alluded by DW4. In addition, DW3 in cross-examination stated that the Appellant beat them on 21st July 2017.

53. In totality, I find that the contradictions made the defence unbelievable and failed to cast doubt on the prosecution case. Indeed what shines through the defence case are concocted lies by the family members to cast the victim as a young girl of loose morals while painting the accused now Appellant as a caring disciplinarian parent. Such a defence could only have been mounted through pressure by the family patriarch. I dismiss the same as a sham. The complainant's truancy (if at all) did not give her father licence to force her into an incestuous relationship.

54. As I end this judgment however, I must observe that the Appellant was charged and convicted of the offence of defilement while the evidence showed that the victim was his daughter. Since this was apparent at the end of the trial the learned trial magistrate erred in failing to apply the provisions of section 186 of the Criminal Procedure Code which empowered him to convict the Appellant for the offence of incest and mete out the proper sentence which is life imprisonment.

55. In the end I find that case against the Appellant was proved beyond reasonable doubt. The appeal is therefore without merit and is dismissed. I uphold both the conviction and sentence.

56. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 26th day of February, 2020.

.....

R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Onderi for the Respondent