REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 114 OF 2019

BETWEEN

GEOFFREY OCHIENG OKOKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(An Appeal from the original conviction and sentence of the Chief Magistrate's Court at Kibera Sexual Offence Case No. 94 of 2017 delivered by Hon. Kamau, RM on the 8th June 2018).

Background

1. The Appellant was charged with defilement contrary to **Section 8(1)(2) of the Sexual Offences Act**. The particulars were that on 20th of December, 2017 at [particulars withheld] in Riruta within Nairobi County unlawfully and intentionally caused his penis to penetrate the vagina of PA a child of 11 years. In the Alternative, he was charged with committing an indecent act with a minor contrary to **Section 11(1) of the Sexual Offences Act** in that he unlawfully and intentionally caused his penis to touch the vagina of PA a child aged 11 years.

2. At the conclusion of the trial, he was convicted on the main count. He was sentenced to serve life imprisonment as prescribed by law. He was aggrieved by the decision and preferred an appeal. He raised the following grounds of appeal:

a. That the charge sheet was defective;

b. That the medical evidence was not properly produced; and

c. That his defence was not considered.

Evidence

3. I am minded that this is a first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

4. The prosecution called seven witnesses to prove its case. **PW1** FN a minor aged 12 years gave a sworn testimony**.** It was her testimony that she was at home on the night of 20th December, 2017 at around 10.00 pm with her mother, HA, **PW2**. **PW2** asked the Appellant, a neighbor, to leave their house so that they could sleep. The Appellant left. She was thereafter sent by **PW2** to get a bulb from the kitchen. As she headed there, the Appellant who had left the house and was outside the compound called out to her. He requested her to give him a key that would allow him to access the toilet. She went and got him the key.

5. After a short while the Appellant called out to her again. This time he requested her to go get the key from the toilet. She obliged and as she headed there he followed. When she approached the toilet he ran past her, grabbed the key to the toilet and yanked her towards himself. She entered the toilet screaming for help but no one responded to her call. There was music in the house and therefore her mother could not hear it as well.

6. The Appellant cupped the mouth of **PW1**. He locked the door by the latch and reinforced it using a stick. It was then that he removed her undergarments and defiled her. At this point, **PW2** was getting anxious not knowing where her daughter was. She had been looking for her and called out to her. Her daughter respondent albeit faintly and from the toilet. She got concerned and headed to the toilet. The Appellant, fearing being discovered, forced **PW1** to remain mum and threatened to hit her with the stone that he had used to reinforce the door.

7. PW2 forced the door open and found the Appellant with the **PW1**. She grabbed the Appellant by the belt. **PW1** ran into hiding and called out for help. Some neighbors came out. The Appellant however forced himself lose and ran into his house. **PW2** followed him there but he locked himself in. A caretaker locked the compound to keep the Appellant from escaping. **PW7, PC Linet Kirimi,** the investigating officer confirmed that the distance between the Appellant's house and the toilet and **PW2**'s house was relatively short.

8. PW4, APC Bakari Ali Mwalaini received an alert that there had been a defilement incident. He was accompanied by **PW6 APC Robert Wambugu**. They arrived at the house of the Appellant with the help of **PW2**. They gained entry to the house and arrested him. They found three other people in the house.

9. PW1 was taken to hospital at Nairobi Women's Hospital by **PW2** her mother. She was examined by Clinical Officer, Nzamba Simon on 21st December 2017. He was however unavailable to give evidence and therefore a colleague appeared as a witness in court. It was the finding that the Appellant had injured the genitalia of **PW1**. She had torn hymen at the 6 O'clock mark. Pus cells were present in both the outer genital and high vaginal swabs. The hymeneal tears appeared fresh and the remnants were still present. It was his finding that there was fresh penetration, presumably penile.

10. PW5, Dr Kizi Shako of Police surgery confirmed that penetration was conclusively proved by the hymeneal tears at the 3 O'clock mark. However, she refrained from confirming whether it was penile and described it as occasioned by a blunt object.

11. At the close of the prosecution case, the trial court ruled that the prosecution had established a prima *facie case* that warranted the Appellant to offer a defence. He gave a sworn statement of defence. It was his defense that he went to see his sister who had been hospitalized. Thereafter, he went to work and returned home in the evening. He hosted his cousin and his cousin's wife for dinner along with his child. As he was there he got a knock on the door. It was the caretaker and the police. He was then arrested.

Analysis and determination

12. After considering the evidence and the respective submissions, I have arrived at the issues for determination to be, whether the charge sheet was defective and whether the offence was proved beyond all reasonable doubt.

Whether the charge sheet was defective

13. The Appellant submitted that the charge sheet was defective. He argued that the prosecution applied for amendment of the charge sheet after the close of their case. He took issue with fact that at this juncture he was not accorded an opportunity to adduce evidence relating to the amendment. Learned State Counsel, Mr. Momanyi disagreed with Appellant arguing that the amendment only related to the age of the minor, an issue that had been subjected to examination and cross examination of all the prosecution witnesses. He thus submitted that the Appellant was nor prejudiced by the amendment.

14. I have versed myself with the record of proceedings. The amendment was done on 16th February, 2018 just before the prosecution closed their case. It is trite that the amendment was intended to correct the age of the minor to read 11 years as opposed to12 years. Under Section 214 of the Criminal Procedure Code, the prosecution may apply to amend the charge sheet any time before the close of their case. If the court allows the amendment it must accord the accused an opportunity to plead to the fresh charge and further call upon him to elect to recall the witnesses who had earlier testified for either further cross examination of for fresh testimony.

15. A look at the record clearly shows that the learned trial magistrate called the Appellant to plead afresh. She also informed him of his right to elect to recall the witnesses who had earlier testified for the above stated purposes. There was therefore no contravention of the law. As rightly submitted by Mr. Momanyi, the amendment did not at all prejudice the Appellant as all the prosecution witnesses were categorical that the minor's age was 11 years. This ground of appeal is therefore unmerited and I dismiss it.

Whether the offence was proved beyond reasonable doubt.

16. In a case of defilement, the prosecution is enjoined to establish three elements, namely the age of the minor, penetration and identification of the perpetrator. As regards the age of the minor, the prosecution tendered the evidence of the complainant, **PW1**, her mother, **PW2**, and that of the Immunization Card to establish the age. The Appellant challenged the Immunization Card's production. It was his submission that the origin of the Card could not be verified and therefore it should not have been part of the evidence.

17. In my view, the Appellant's contention as to the propriety of the Immunization Card Exhibit 1 was an afterthought. I say so because the Card was adduced by PW7, the investigating without any opposition by the Appellant. Furthermore, the age shown on the card did not all contradict what all other witnesses indicated was the age of PW1. The card was a good document for use to demonstrate the age of PW1. The learned trial magistrate was therefore right in holding that the age of PW1 had been sufficiently proved. Nothing turns on this point in that I conclude that PW1's age was established beyond all doubt

18. Secondly, I am instructed by the case of **Francis Omuroni – versus- Uganda, court of appeal Criminal Appeal No.2 of 2000. The court found that;**

> **"...in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person**

who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

19. On the issue of penetration, the Appellant challenged the production of the PRC Form as well as the testimony of **PW3**, Peter Ngatia, clinical officer and **PW5,** Dr Shako. He contended that the PRC form was not certified and was therefore inadmissible. Secondly, that **PW3**'s evidence and that of **PW5** was not satisfactory and conclusive respectively. It was the submission of the Respondent that the penetration was appropriately confirmed by the evidence of **PW3** and **PW5**.

20. On the above, it trite that PW3 and PW5 testified as experts in their medical field. They were the right persons to confirm penetration. I see nothing warranting the challenge of their expertise. Further, on his contention that the origin of PRC Form was questionable since it was not certified, clearly document was appropriately signed by the Mr. Nzamba Simon, the clinical officer that examined **PW1**. Further, **PW3** testified to having worked with him and was familiar with the signature that was appended on the document. The witness in so adducing the Form complied with Section 72 and 77 (2) of the Evidence Act which allow an expert in the medical field to produce an expert document by presuming that the signature to it was genuine and the person signing it held the office and qualifications which he professed to hold at the time when he signed. The evidence of PW3 was firm on this point.

21. I therefore find that document was properly produced into evidence in line with **Section 72 and 77 of the Evidence Act**. The therefore, that it was inadmissible cannot hold and I dismiss it. I arrive at the conclusion that penetration was cogently established.

22. On the identification of the Appellant, it was his submission that he was not arrested at his house. It was further his submission that **PW4** and **PW6** did not indicate where they arrested him from. Further that he was targeted due to a grudge the mother of the complainant, **PW2**, had against him. He attributed it to the fact that he stopped drinking at the place she vended alcohol. Mr. Momanyi on the other hand submitted that the Appellant was positively identified since he was a neighbor to the **PW2**.

23. There no doubt that it was not the first time that the complainant, her mother and the Appellant met. It is further evident that their interaction on the material date was deliberate and not accidental. It is also clear that from the evidence of **PW1** and **PW2** that the Appellant was in their house on the material night, an assertion the Appellant denied. He also denied being accosted in the toilet by **PW2** and later running into his house. It is also evident from **PW4** and **PW6** that the Appellant was arrested in a house in which there were three other people. As if unaware that he had stated the contrary he gave sworn evidence that he had invited some people to his house that numbered three. Involuntarily, he had admitted that he was indeed arrested in his house.

24. Secondly, it is in evident that the mother to the complainant, **PW2**, led police to the house of the Appellant. I find that this level of familiarity is conclusive that the Appellant was a neighbor. I therefore find that this was a case of identification by recognition.

25. The ordeal happened between the hours of 10.00 pm and 1.oo am. I therefore must not avoid the fact that the identification was in difficult circumstances even when an honest witness can be mistaken. This is because the case of the **Kamau v Republic [1975] EA 139** stated the following**:**

"The most honest of witnesses can be mistaken when it comes to identification."

26. I however find that the Appellant, being a neighbor and repeat customer of **PW2**'s alcohol business, if spotted by **PW1** or **PW2** could be picked out. Better still, it is in evidence that **PW1** and **PW2** saw the Appellant on the material night close enough that **PW2** held him by the belt albeit temporarily before he fled. More so, she chased him down into his house. She remained outside his house and showed the police his house for the purposes of arrest. Indeed, this is a case as good as being caught red-handed. The issue of mistaken identity in those circumstances cannot arise.

27. This was a case of positive identification. In so holding I find solace in the case of ***KARANJA & ANOTHER V. R [2004] 2 KLR 140 at p. 147*** the Court of Appeal sitting at Nyeri said:

> "The law as regards identification under difficult conditions is now well settled. In the case of **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989** at Kisumu, this Court stated as follows:
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> **"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them. ... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extend on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of** *R vs Turnbull[1976] 3 All ER 549 at page 552* ***where he said:-***
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> **'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he k*nows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'***

28. Further, the court in Re Turnbull found that odd coincidence unless explained away is supporting evidence for albeit long observation under difficult identification circumstances. Therefore, despite it being late in the night the fact that the Appellant was followed by **PW2** into

his house from where police extracted him is supporting evidence that he was the perpetrator. I therefore find that the Appellant was properly identified. I refer to the case of **Regina -v- Turnbull and Another WLR [1976] 3 WLR 445** which states that:

> **"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification: for example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's *In our judgment odd coincidences can, if unexplained, be supporting evidence."***

29. I need not add more on identification. I find that the evidence is overwhelming. The Appellant was properly convicted. I accordingly uphold the conviction.

30. On sentence, the Appellant was sentenced to serve life imprisonment. However, the Respondent encouraged this court to review this sentence in line with the **Francis Kariokor Muruatetu and Another V Republic [2017]eKLR**. I find that the guidelines laid out in the case are not supported by the submissions of the Appellant and therefore the aggravating circumstances are overwhelming. It is a case that the Appellant took advantage of his acquaintance with the family of the minor. He instead turned a monster. The scar the minor bore will haunt her for the rest of her life. A deterrent sentence is necessary. I accordingly set aside the life imprisonment and substitute it with 35 years imprisonment commencing from the date of arrest, 21st December, 2017.

DATED and **DELIVERED** this 26th day of **February, 2020**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person for the Appellant.

2. Mr. Momanyi for the Respondent