REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 73 OF 2019

LESIIT, J.

(Being an appeal from the original conviction and sentence in Makadara CM's Criminal Case No. 1285 of 2008 13 by Hon. M.A. Apondo PM)

BENJAMIN KYALO.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with one count of **defilement** contrary to **section 8(1)** as read with **section 8 (3) of the Sexual Offences Act**. In the alternative the Appellant faced the offence of **indecent act with a child** contrary to **section 11 (1)** of the **Sexual Offences Act**. After a full trial the Appellant was convicted of the offence of **defilement** contrary to **section 8(1)** as read with **section 8 (3) of the Sexual Offences Act**. He was sentenced to 15 years in imprisonment.

2. Being dissatisfied with the conviction and sentence, he filed this appeal. The Appellant raises 20 grounds of appeal which I have condensed as follows:

> **i. That the trial court erred by not conducting *voire dire* examination of the Complainant to verify whether she understood that she was in court to testify and whether she was capable of saying the Truth.**
>
> **ii. Failure to ascertain the age of the Complainant.**
>
> **iii. Conviction on the basis of a single eye witness, and failure on the part of the prosecution to avail one Cecilia a crucial witness in the case.**
>
> **iv. That the learned trial magistrate erred and misdirected himself by convicting despite lack of corroboration from medical evidence that the Complainant had been raped.**
>
> **v. That the learned trial magistrate erred in failing to take into consideration the evidence of the doctor and the clinical officer that the spermatozoa found in the Complainant body could have come from anybody.**
>
> **vi. That the allegation that the Appellant drunk paraffin as a sign of guilt when he was confronted over the alleged incident was not proved.**
>
> **vii. That the trial magistrate erred in finding that the Complainant was an emotionally disturbed person yet he did not have the opportunity to see her as he was not the one who took the Complainant's evidence.**
>
> **viii. The learned trial magistrate passed an excessive sentence despite the prosecution indicating he was a first offender.**

3. Whereof the Appellant prays for the following:

> **i. The appeal be allowed in its entirety.**

ii. The judgment and sentence passed on the 17th and 30th January, 2019 respectively of the learned trial magistrate be set aside and the Appellant acquitted.

iii. That the court to give such other or further orders and/or relief as the honorable court shall deem just and expedient.

4. The facts of the prosecution case were that the Appellant hit the Complainant on the head on the second-floor corridor of Huruma flats where they all lived. The Complainant had gone to the sink on second floor to wash a child's flask and bottle as their third-floor sink had no water. The Appellant forcefully dragged the Complainant to his house where he tore her clothes and defiled her. The Complainant said that she lost consciousness during the defilement, and that when she came to, the Appellant was on top of her. She managed to go out of the house. She sought help from watchmen from the neighbouring flats due to fear of repercussions from her mother.

5. The Complainant was eventually taken to her parents and eventually to the police and later for treatment. The P3 form on the Complainant, Exhibit 4, filled two days after the incident by PW3 reveals that her hymen was missing. PW4 was a clinical Officer who testified on behalf of her colleague who examined the Complainant on the same day of incident. From her report, the Complainant had physical bruises on the vaginal wall, while the hymen had irregular margins with bleeding tears. The Complainant's urine and high vaginal swab both revealed presence of spermatozoa. The report was Exhibit 2.

6. The Appellant gave a sworn defence in which he denied having any sexual encounter with the Complainant. He also denied that the Complainant ever went to his house and denied even seeing the Complainant on the material day. In his evidence he stated that he had never seen the Complainant in school uniform, and commented that it was impossible to know her age.

7. This is a first appellate court and as such, it is required to re-consider the entire evidence adduced before the trial court and draw its own conclusions. In the case of **Kiilu and Anor v Republic [2005] 1 KLR pg 174**, the learned Judges of Appeal, **Tunoi, Waki** and **Onyango Otieno JJA**, held, inter alia that:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."**

8. This position was also pronounced in another landmark Case of **Okeno vs. Republic 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"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) EA. 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) EA. 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."**

9. I am well guided. I have analyzed and evaluated afresh the entire evidence adduced by the prosecution and defence, and have drawn my own conclusion, having regard to, and giving due allowance for the limitation of having not seen or heard the witnesses.

10. The appeal was argued by Ms. Masheru for the Appellant. The State was represented by learned Prosecution Counsel Mrs. Kimaru. This appeal was opposed.

11. Ms. Masheru urged the issues she considered existed in this appeal. Counsel submitted that the age of the Complainant was not proved. Counsel submitted that the Complainant, PW1 testified that she was born in 1999, making her 14 years at the time of the offence, while her mother, PW2 testified that the Complainant was born in 1998. Counsel urged that the Complainant's P3 form produced as Exhibit 4 in the case showed that the Complainant was 12 years old. Counsel argued that even though the learned trial magistrate took judicial notice that the Complainant was 15 years or thereabouts, that did not clear doubt as to her age. Regarding the birth certificate of the Complainant, Ms. Masheru urged that the same was obtained on 20th November, 2013, while the offence was alleged to have occurred on 9th February, 2013, and argued that clearly the aim of producing the birth certificate was to produce adverse evidence against the Appellant.

12. Ms. Masheru relied on the case of **Patrick Mutwiri Gikonyo Vs Republic Nyeri HCCR Appeal No 43 of 2015,** for the proposition that age of a victim of a sexual offence is a critical component of the charge and must be proved beyond any reasonable doubt, as should penetration in cases of rape and defilement.

13. Mrs. Kimaru for the State urged that the prosecution had proved that the Complainant was born on 18th August, 1998 vide her birth certificate, produced unopposed as Exhibit 1. Counsel submitted that raising the issue of age at this late stage was an afterthought. Counsel urged that she admits that both the Complainant and her mother, PW1 and 2 were confused in their evidence stating she was born both in 1998 and 1999. Counsel also conceded that the age of a Complainant in a defilement case was critical but urged that the Complainant was below 18 years and so could not have given consent to sexual advancement. Counsel urged the court to disregard the cited cases as the facts in them did not correspond with those in this case.

14. On the issue of the Complainant's age at the time of the incident, the issue raised is that the P3 form Exhibit 4 and the birth certificate Exhibit 1 read different dates. The P3 form was produced by Dr. Maundu who saw the complainant two days after the incident. He was not asked on what basis he wrote the Complainant's age, whether from what he was told or from what the police had written on page 1 of the form. The P3 form in section 1 which is normally filled by the police administratively shows that the Complainant was 12 years old at the

time. The one who wrote that on the Form was not called as a witness. I find it would be irregular to use the police administrative notes on the P3 form to contradict the rest of the prosecution oral and documentary evidence, especially because the one who entered the age on the form was not called as witness. Conversely, I find it will not be just to take the age given by the doctor who filled the P3 form because he was not questioned as to the basis upon which he gave that age.

15. As for the birth certificate Exhibit No. 1, it was produced as an exhibit by the State without any objection being raised by the defence. The authenticity of the document was not in question at the trial. It is rather late to raise it at this stage. The Appellant is challenging the fact that it was obtained after the date of the incident. The date of the certificate is immaterial where, as is the case, the authenticity of it is not in issue, and was never in issue. I agree with the State that the objection raised at the appeal stage was an afterthought. Nothing turns on this point.

16. It was the Appellant's counsel's submission that both the Complainant and her mother, PW2 contradicted each other as to her age. I perused the trial court record. The Complainant in her evidence said she was born in 1999. She identified her birth certificate in court and read the date of birth being 18th August, 1998, yet she did not correct herself against the certificate. As for PW2, she first said that her daughter was born in 1999 but quickly corrected it and said she was born in 1998.

17. Considering this evidence, I find that PW2 corrected herself in her evidence, and therefore gave evidence of Complainant's age which was in tandem with the birth certificate. I consider PW2's mistake a slip of tongue since she corrected the mistake within the same sentence. The only person who made an error on age was the Complainant herself. The variation is by less than a year, is immaterial in my considered view and does not affect the substratum of the prosecution case.

18. Ms. Masheru urged that there was contradiction and inconsistency in the evidence of the prosecution. Counsel urged that the first inconsistency was on the issue of age. We have already dealt with that issue. The second inconsistency was on the issue of how the Complainant was dressed on the day of the alleged incident. Counsel urged that while the Complainant testified that she went back to her parents' home wearing a pair of shorts after the crime, having left her blouse and panty in the Appellant's house; her mother, PW2 testified that the Complainant was fully clothed with blue trousers, black panty, a top and a bottom. Counsel urged that PW5 contradicted both witnesses by stating that the Complainant was wearing a short. Counsel urged that in view of the contradictions, the evidence by the prosecution cannot sustain a conviction.

19. Mrs. Kimaru submitted that it was true that there were contradictions in the prosecution case as alluded to by the Appellant's counsel, however, counsel urged that the contradictions did not discredit the prosecution case as they did not touch on the ingredients of the offence. Mrs. Kimaru urged that the contradictions were minor and did not water down the prosecution case.

20. Regarding the manner in which the Complainant was dressed after the incident, it was the evidence of the Complainant that when she left the Appellant's house, she was wearing shorts as she could not see her pants, and because the Appellant tore her blouse as he forced himself on her. The person who saw her next was the watchman, PW5 who said that all that the Complainant had was a skirt. Taking into account that PW5 saw the complainant at night, mistaking a short for a skirt is not such a significant mistake at all.

21. As for the mother PW2, she said that when PW5 and the other watchman took her daughter home, she was not keen about how she was dressed but noted she had a top and a bottom, and added that she could not recall what kind of a top it was. The Appellant's Counsel had urged that PW2 had said that when the Complainant went back home with PW5, she was wearing blue trousers, a black panty, a top and a bottom. That is not correct.

22. PW2's evidence is clear that she knew the clothes in which her daughter left home wearing before the incident which were, a pair of blue trousers, a black panty with red sides and a top. That evidence is in tandem with that of the Complainant concerning her dressing at the time the Appellant dragged her to his house. What PW2 was not clear about, and she said as much in her evidence, is the Complainant's mode of dressing when PW5 returned her home.

23. I find that PW1 and 2 were honest and credible witnesses. The learned trial magistrate's assessment of the demeanour and probative value of the Complainant's evidence was that she was credible. I see no reason to disagree with that conclusion. The court found that the Complainant had suffered emotional stress due to the defilement, that her breaking down in court twice during her testimony, and her lying on the ground after the incident all supported that finding. I agree with the learned trial magistrates' conclusion. Both the magistrate who took the complainant's evidence and recorded impressions she had of her evidence, and the magistrate who finalized the case and wrote the judgment. In conclusion on this issue, I find that the inconsistencies complained of were immaterial and did not go to the substance of the case.

24. Ms. Masheru submitted that the other issue was that of penetration. Counsel urged that the Clinical Officer PW4 and the doctor who filled the P3 Form, PW3 indicated that no samples were drawn from the Appellant to match the spermatozoa allegedly found on the Complainant's back. Counsel urged that in cross-examination PW3 said that the spermatozoa could have come from anybody.

25. Ms. Masheru urged that the Appellant in his defence told the court that his blood was taken but he did not get any results out of it. Counsel urged that since no DNA was conducted in this case, then the Appellant was not placed at the scene of crime.

26. On the issue of penetration, Mrs. Kimaru urged that PW4 the Clinical Officer, examined the Complainant one day after the incident and noted that on physical examination, there were visible injuries, and that the external genitalia appeared normal. Counsel urged that on further examination, the Officer found visible injuries on the vaginal walls, and that her hymen had irregular margins with tears at 6 and 9 o'clock confirming that penetration had occurred. Counsel urged that the Appellant admitted he lived in the same apartment as the Complainant, and that the Complainant and one Cecilia were washing utensils and chatting on the second floor of the building, one floor below him, at the material time. Counsel urged that the Appellant in so admitting was placed at the scene of the incident at the time it occurred.

27. On the issue of penetration, **Section 2(1)** of the **Sexual Offences Act** defines the same as:

> **''The partial or complete insertion of the genital organ of a person into the genital organ of a person into the genital organs of another.''**

28. In **F O D - v -Republic [2014] eKLR**, it was stated that in order to secure a conviction for the offence of defilement under the **Sexual Offences Act**, the prosecution must establish that the person has committed an act which causes penetration. PW4 a clinical officer examined PW1 one day after the incident. On physical examination she noted no visible injuries and the external genitalia was normal. Internally the vaginal walls had no visible injuries, the hymen had irregular margin with tears at 6 and 9 O'clock.

29. I find that the tears and injuries were proof that penetration did take place. I find that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.

30. The third issue is whether the Appellant is the one who was the perpetrator of the offence. The Appellant was a neighbor to the complainant. The complainant described him by his name. Hence identification was by recognition. When the complainant was escorted back to her house, PW2 enquired what was wrong and she confirmed from the complainant that she had been defiled. The complainant on the first opportunity informed several prosecution witnesses that the Appellant had sexually assaulted her.

31. The Appellant in his defense denied sexually assaulting the complainant. He stated that he did not talk to the complainant that night. The Appellant also raised the issue that no samples were taken from him to confirm that the spermatozoa found in the complainant was his.

32. In the case **Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)** the court stated:

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

33. In this case there was both oral and documentary proof of sexual assault. I agree with the learned trial magistrate's finding that the defense was evasive and did not raise doubts as to the veracity of the evidence given by the prosecution.

34. This court has re-evaluated the evidence adduced before the trial court and submissions made on this appeal by both the Appellant and the prosecution and has come to the conclusion that the Appellant's appeal against conviction lacks merit and is hereby dismissed.

35. In regard to the sentence, **section 8(3)** of the **Sexual Offences Act** provides for imprisonment of a person convicted of defiling a child aged between 12 and 15 years to 20 years' imprisonment. The sentence of 15 years imposed in this case is lawful. Accordingly, I uphold the sentence given by the trial court.

36. In the result, the Appellant's appeal is dismissed in its entirety.

DATED AT NAIROBI THIS 10TH DAY OF MARCH, 2020.

LESIIT, J.

JUDGE