REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 48 OF 2019

ANK.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the Judgment of Hon. J.O Magori (SRM) in Makindu Principal Magistrate's Court Criminal Offence No. 1483 of 2014 delivered on 28th September, 2018).

JUDGMENT

1. **ANK** the Appellant herein was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 28th day of August 2014 in Kibwezi sub-county within Makueni county intentionally caused his penis to penetrate the vagina of **RMK** a child aged 16 years.

2. After a full trial, the trial court found him guilty, convicted and sentenced him to 15 years' imprisonment. He filed this appeal through the firm of Mukururi & Co. advocates on the following grounds:

a) **That,** the learned Magistrate erred in law in that he shifted the burden of proof from the prosecution to the accused.

b) **That,** the learned Magistrate erred in law by failing to consider that the complainant and the Appellant had a sexual relationship.

c) **That,** the learned Magistrate misdirected himself in fact and in law by failing to appreciate, consider and weigh the following loopholes considering the Appellant was unrepresented: -

i. The accused was not subjected to a medical examination immediately after the arrest. No P3 form was produced in respect to the accused person.

ii. The semen that was alleged to have been found on the clothes was not examined to establish if the DNA matched that of the accused person.

iii. The complainant may have presented herself as being of age hence conceding to the boyfriend – girlfriend relationship.

d) The evidence adduced can be explained upon other reasonable hypothesis inconsistent with the guilt of the Appellant.

e) A reasonable doubt was established which must be weighed in favour of the Appellant.

3. The Appellant later amended the said grounds to read as follows:

a) **That,** the plea taken on 1-9-2014 was invalid.

b) **That,** his fundamental right to a fair trial as enshrined by article 25(c)of the constitution was violated hence his conviction was manifestly unsafe.

c) **That,** the entire evidence admitted by the court violated article 50(4) of the constitution

d) **That,** the prosecution was not proved beyond reasonable doubt.

4. The prosecution case was premised on the evidence of four (4) witnesses. Pw2 **SMN** a businessman and an uncle of Pw1 (RMK), had gone for a funeral leaving Pw1 at home. He sent the Appellant (*his nephew*) to his home to bring him his phones which he had forgotten there. The Appellant did not return as expected since he took the phones for charging.

5. After the funeral he went to the shops where the phones were charging. While there he received a call from his niece (Pw1) who reported that the Appellant defiled her when he went for the phones. Pw2 reported to the Administration police at Ivingoni and action was taken.

6. It was Pw1's evidence that she was at home on 28th August 2014 at 10:00 am when the Appellant (*whom she knew*) came there. He told her he had been sent by Pw2 to collect his phones. She entered the house to pick the phone from the bedroom. On her return with the phones she found the Appellant in the sitting room.

7. He grabbed her by force and carried her to a bed in the bedroom. He covered her mouth with rugs and removed her under pants. He unzipped his trouser and removed his penis which he inserted into her vagina. He had sex with her for 30 minutes. When he finished he ran out and rode off with his motorbike.

8. At around 12:00 noon after being unable to relieve herself she went to sit outside. While there she saw the Appellant coming again and she ran into the house and locked herself in. At 5:00pm her friend Mumo came visiting and she borrowed her phone which she used to call Pw2 and reported to him what had happened.

9. Later police officers came and she narrated to them what the Appellant had done to her. She was taken to Ivingoni police station and after 30 minutes the Appellant was arrested and brought to the same station. They were taken to Mtito Andei police station for statement recording. The next day she was treated at Mtito Andei hospital and a P3 form filled.

10. In cross examination she denied living together with the Appellant nor having agreed to having sex with him. She denied having invited him for the purpose of having sex.

11. Pw3 **Sylvester Waita** is the clinical officer in charge of Mtito Andei sub-county hospital. He examined Pw1 and also filled the P3 form (EXB2). He found the following: -

i. Semen stains on her innerwear.

ii. Semen bloodstains on her skirt.

iii. She had pain in passing urine

iv. Had an extended vaginal wall tear

v. Freshly perforated hymen which was tender

vi. On the examining finger there was blood and semen stains

He concluded that there was pelvic penetration.

12. Pw4 **No. 90637 Corporal Naimata Mohamed** testified that on 28th August 2014 9:00 pm, he re-arrested the Appellant from A.P officers. The officers accused the Appellant of defilement. He sent Pw1 and Appellant to hospital where EXB2 was filled by the doctor. He also produced Pw1's birth certificate (EXB1) showing she was aged 16 years.

13. The Appellant in his defence gave a sworn statement saying he was a bodaboda operator. He discredited the evidence by the prosecution witnesses saying it was false. He then asked the court to have mercy on him.

14. The appeal was canvassed by written submissions. The Appellant has submitted that the plea was equivocal having been taken in the absence of an age assessment report or anything to prove age. This to him violated Articles 25(c) and Article 50(2)(j) of the constitution. It is his submission that the evidence of the witnesses was not taken in the manner accepted by the law and was hence a violation of Article 50(4) of the constitution. He did not submit on any other issue.

15. The appeal is opposed by the Respondent which filled submissions through learned counsel Mrs. Anne Gakumu. She submits that age was proved by production of the birth certificate (EXB1). Further that penetration was proved by the evidence of Pw1 and the medical evidence by Pw3. She however added that even without the medical evidence, the court could still convict based on the *proviso* to section 124 of the Evidence Act.

16. She cited the case of **Geoffrey Kioji-vs- R Criminal Appeal No. 270 of 2010 (Nyeri)** where it was stated that:

> "*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the*

court believes the victim and records the reason for such belief."

17. It is her submission that the Appellant was well identified as the perpetrator by the evidence of Pw1 and Pw2. Secondly there could not have been a sexual relationship between Pw1 and the Appellant since the former was a minor (*see Article 260 of the constitution)*. She further submits that failure to subject the Appellant to a DNA is not fatal to the case. She referred to the case of **Koo vs- Rep Criminal Appeal No. 45 of 2017 (Siaya).**

18. Finally, she argues that the defence was a mere denial and the sentence should not be disturbed as section 8(4) of the Sexual Offences Act provides for a mandatory minimum sentence.

Analysis and determination

19. This being a first appeal, the court has a duty to re-analyse and reconsider the evidence on record and come to its own conclusion. The court should also bear in mind that it did not see nor hear the witnesses. This is supported by the case of **Patrick & Anor –vs- Rep (2005) 2 KLR 162** where the Court of Appeal stated 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 court's own decision on the evidence. It is not the function of the first Appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions."***

20. I have considered the evidence on record, grounds of appeal, submissions and authorities cited. I find the following to be the issues for determination: -

i. Whether the Appellant's right to fair trial as envisaged under Articles 25(c) and 50(2) were violated.

ii. Whether the prosecution proved its case beyond reasonable doubt.

Issue no. (i) Whether the Appellant's right to fair trial as envisaged under Articles 25(c) and 50(2) were violated.

21. The Appellant has argued that failure to serve him with documents to prove age and witness statements violated his rights to a fair trial. Infact, according to him he should have been presented with documents to prove age before he took plea.

22. Article 50(2) (c) provides:

> **Every accused person has the right to a fair trial, which includes the right –**
>
> ***(c) to have adequate time and facilities to prepare a defence.***
>
> **(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.**

23. There is no requirement that an accused person must be supplied with all documents to be used in a case before plea is taken. The requirement is that the same should be provided in advance to enable him or her prepare for his or her defence. A perusal of the record herein shows that the Appellant upon taking plea on 1st September 2014, was granted bond and was released on bond on 5th September 2014. He never turned up in court on 15th September 2014 for mention.

24. When he turned up for the first hearing on 26th November 2014 the prosecution was ready to proceed with two witnesses. The Appellant confirmed that he too was ready to proceed. It was at that point that the prosecutor requested for an adjournment to enable him get a document to prove the complainant's age. The hearing of the case did not take off until 3rd March 2016 because of non-availability of the police file or the Appellant's absence. At no point did the Appellant raise the issue of witness statements and / or documents to prove age.

25. During the time he was on bond he had all the time and liberty to get witness statements from the prosecution. This would obviously not appear on the court record. Having been on bond and having told the court on the first date of hearing (*on 26th November 2014*) that he was ready to proceed with the two (2) witnesses he cannot now turn round to claim the trial was not fair.

26. He was throughout the hearing given an opportunity to cross-examine the witnesses which he did. He never raised any difficulty in doing so based on unavailability of age documents and witness statements. I find no merit in this ground.

Issue no. (ii) Whether the prosecution proved its case beyond reasonable doubt.

27. In a case of this nature, there are three (3) ingredients which must be proved. Namely: -

i. Age of the complainant.

ii. Penetration of the complainant's genital organ.

iii. Identification of the perpetrator.

Age of the complainant

28. The charge sheet indicates Pw1's age as 16 years. This age was confirmed by Pw2 who is the minor's uncle cum father. Pw1 who testified on 3rd March 2016 said she was 18 years as at that date. She never said she was 18 years old as at the date of incident. A birth certificate (EXB1) produced herein shows that Pw1 was born on 12th February 1998. This clearly means that as at 28th August 2014 when this alleged incident occurred she was 16 years and 6 months.

29. This confirms she was a child by virtue of section 2 of the Children's Act which defines a child as:

> ***"any human being under the age of eighteen years."***

There would therefore be no issue of there being a sexual relationship between Pw1 and the Appellant as long as Pw1 remained a child. She could not give consent. My finding is that Pw1 was confirmed to be a child aged 16 years.

Penetration of Pw1's genital organ

30. Section 2 of the Sexual Offences Act No. 3 of 2006 defines penetration as:

> ***"Penetration"*** **means the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

Pw1 (RMK) described in detail what was done to her. She was taken to hospital the same day. Pw3 treated her and examined her for purposes of filling the P3 form. The findings by Pw3 confirm the testimony of Pw1. The child was indeed defiled.

Identification of the perpetrator

31. This whole episode started when Pw2 sent a young man he identified as the Appellant to pick and take to him his phones which he had left at home. The Appellant in his evidence said he was a bodaboda operator. Pw1 explained that after the incident the perpetrator took off on his motorbike. It was also Pw2's evidence that the Appellant whom he had sent for the phones took long to come and he did not bring him the phones. He instead took them to the shops to charge. He left the funeral without the phones.

32. It is also on record that Pw1 knew the perpetrator prior to the incident. She explained that her mother and the perpetrator's mother are cousins. That means Pw1 and the perpetrator are cousins and so they knew each other.

33. Pw2 identified the person he sent for his phones to be the Appellant. Pw1 identified the perpetrator as the Appellant herein. It was Pw1's evidence that the Appellant had again returned to the home a second time and she locked herself in the house.

34. When Pw1 got access to a phone she immediately called Pw2 and reported to him what the Appellant had done to her. She gave the same report to the police and that's how the Appellant was arrested shortly thereafter. She would not have done that if she had called the Appellant for that business, as claimed by the Appellant.

35. I have read through the cross examination of Pw1 and by the Appellant. The answers tend to point to the fact that the Appellant was not denying having had sex with Pw1. He did not deny having been sent to Pw2's home where Pw1 lived to pick phones.

36. In his defence he said the evidence given was false. He did not say what was false about it and why pw1 and Pw2 would falsely accuse him. At the same time, he was asking the court to have mercy on him.

37. Section 36(1) and (2) of the Sexual Offences Act provides:

> ***(1) "Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.***
>
> ***(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored to an appropriate place until finalization of the trial."***

38. A DNA test is not a mandatory requirement unless really found necessary. There is no evidence that the semen on the Pw1's had been properly stored for a DNA test to be done on it.

39. After analyzing the evidence on record, I do find it to clearly point at none other than the Appellant as the person who committed this offence. I therefore uphold the conviction.

40. The Appellant has not challenged the sentence and neither has he submitted anything on it. He was sentenced to 15 years' imprisonment.

The court took note of the prevalence of the offence in its area of jurisdiction. I will therefore not interfere with the sentence.

41. The upshot is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge