REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 43 OF 2019

MOHAMED OKASH ALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. P.N Areri in Mandera Criminal Case No. 163 of 2019 dated 6/11/2019)

JUDGEMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. He was also charged with an alternative count of indecent act with a child contrary to Section 11 (1) of the Sexual offences Act. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:

> **1) THAT the trial court erred in facts and law by failing to caution itself before convicting the appellant on unsworn evidence of the complainant contrary to section 124 of the Evidence Act Cap 80.**
>
> **2) THAT the trial court erred in law and in facts by believing the prosecution's case over the appellants sworn defence which was plausible and that impeached the prosecution's case.**
>
> **3) THAT the trial court erred in law in failing to give reasons for convicting the appellant contrary to section 169(i) of the Criminal Procedure Code.**
>
> **4) THAT the trial court erred in law and facts by convicting the appellant on evidence that was insufficient, contradictory and that was marred with doubt.**

2. The appeal came up for hearing on 14/7/2020 where the appellant submitted in support of their appeal and relied in their written submissions. Mr. Mulati for the State submitted orally in opposition to the instant appeal.

PROSECUTION CASE

3. The particulars of the main charge against the appellant were that on the 5th day of April 2019 in Mandera East Sub County within Mandera County the appellant intentionally caused his genital organ to penetrate the genital organ of LMA a girl child aged 8 years old. The particulars in respect to the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act were that on the same day and time and place the appellant intentionally caused his genital organ to touch the genital organ of LMA with his genital organ.

4. The prosecution in advancing their case called 5 witnesses, a summary of the evidence tendered were as follows. PW1 the complainant testified after a voire dire exam, where she told the court that she is a pupil at [Particlars withheld] Primary School and doesn't know her age. She recalled that on 5/4/2019 in the afternoon she was raped by the appellant. She stated that she had gone to the appellant house to play with other children when the appellant called her to his room, told her to lie on a bed, removed her trouser and inserted his genitalia into her genital organ, afterwards he left her and she wore her trouser and left the appellants house. She did not tell anybody, however, when her mother saw her crying because of pain, she told her what had happened and she was taken to hospital and informed them that she had been defiled by the appellant.

5. PW2 a clinical officer was stood down after the Appellant objected to him testifying on behalf of the clinician who attended to the complainant. PW3 FAM told the court that she the mother of PW1 and that she is a vegetable vendor and that on 5/4/2019 at 6.00pm she left the market and returned home and found her daughter crying and on enquiring what the problem was she told her that she had an headache, stomachache and sometimes body ache, she slept but continued crying and at 2am she decided to check on her private parts and she discovered that her vagina was torn and she was bleeding, PW1 told her that she had been raped by the appellant. She informed the KPR who came an arrested the appellant and took him to Mandera Police station. She was later accompanied by police officers to Mandera hospital

where the minor was examined. She produced PW1 birth certificate showing that she was 8 years old. On cross examination she stated that the appellant defiled PW1 at 9.00am.

6. PW4 Kiprotich Nicholus testified that he is a clinical officer at Mandera County Referral Hospital, he recalled that on 6/4/2019 he examined the minor PW1 who had been brought to him with history of being defiled. On examining her he established that she had bruises in the vagina wall. The vagina was red, the labia majora was not affected. The labia manora was broken. There was penetration and a vaginal smelly discharge and that he concluded that the Child's genital organ had been penetrated by a blunt object. She gave her antibiotics and PEP.

7. PW5 Cleophas Kibet testified as the Investigating Officer in the matter. He recalled that on 6/4/2019 he took over the matter and where he escorted the minor to hospital for examination and it was established that she had been defiled. She recorded PW1 statement where she told him that on 5/4/2019 at 16.40 Hours PW1 was playing within the appellants compound when the appellant asked her to go bring him tea from the kitchen, the appellant followed her to the kitchen where he defiled her on a bed there and gave her a packet of biscuits imploring her not to tell anyone of what transpired. She later in the evening suffered pains and was crying and she told her mother that she had been defiled by the appellant, she was taken to hospital and the appellant was arrested and charged.

DEFENCE CASE

8. When placed to his defence the appellant gave a sworn statement and called two witnesses. He testified that he was a Clerk as at a Miraa Market and his testimony was that of an alibi, where he alleges that on 5/4/2019 between 3.30pm to 5pm he was at Bula Mpya pitch watching a football match, thereafter he passed by the mosque and went to his home where at 3.00am he was arrested on the alleged rape allegation, which he denies. He pointed the contradictions in PW1 and PW3 statements on the time of the incident where the former alleges it was at 9.00am and the latter stating that it was 4.00pm. Additionally, he told the court that the minor mother framed the allegation to fix him after he turned away his attempted seduction and that he paid the Investigation officers and KPR officers to fix him.

9. DW2 Rashid Maalim Mohamed and DW3 Mohammed Hassan Shora both in their testimonies told the court that on 5/4/2019 between 4.0pm and 6.00pm they were in the company of the appellant where they were at the football field together. However, they stated that they didn't know his whereabouts prior to their meeting.

10. The learned trial magistrate found that the charge against the appellant was proved beyond reasonable doubt.

SUBMISSIONS

11. Vide their submissions the appellants reiterated the above grounds of appeal. Counsel submitted that the appellant defence of alibi was credible as it has been collaborated by DW2 and DW3, and that the prosecution witnesses PW1 and PW2 contradicted themselves in time the offense occurred.

12. Additionally, counsel faulted the court for convicting the appellant on uncorroborated and unsworn evidence of a minor. They argue that the prosecution ought to have called the other children who allegedly were playing with PW1, stating they may have been above 10 years. Counsel also submitted on the issue of identity, where he submitted that PW1 never stated how she knew the appellant and therefore the conviction might have been based on wrong identity.

13. Further, Counsel submitted that the appellant at pg 16 of the record established the complainant's motive for framing him up, being sex and the failure of PW3 to get the same from the appellant. Therefore, the fact that PW1 never screamed despite her mouth not being covered indicates that PW1 might have been couched.

14. In sum, they submitted that the age of minor is not contested but Identity and penetration was not proved and sought the court to allow the instant appeal and that the trial court erred in law by failing to apportion low probative value to her testimony noting that she was a child of tender age. The court failed to warn itself of this danger and adopted her evidence as truthful without caution. This is so because the Appellant testified that the PW3 the mother of the complainant wanted to get back at him for refusing to have intimate relationship with her. It was therefore incumbent upon the court to carefully consider the rival positions taken and come up with an informed determination. It is submitted that the court erred by failing to do so and as such arrived at an unsafe conviction.

15. The Prosecution Counsel in their submission opposed the instant appeal supporting the conviction and sentence. In respect to the Identity of the appellant, Counsel submitted that the same was clear as the complainant identified him by name as a person she knew. In regard to penetration Counsel submitted that the same was proved by the evidence of PW4 the Clinical Officer who examined PW1.

16. On the issue of alibi and the sex frame up, Counsel submitted that the same were raised at the defence stage and not during cross-examination and therefore lacks substance. In sum they urged the court to dismiss the appeal.

ANALYSIS AND DETERMINATION

17. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a 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. 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, see (Peters V Sunday Post 1978) E.A. 424."

18. This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of **George Opondo Olunga v Republic [2016] eKLR,** it was stated that the ingredients of an offence of defilement are; ***identification or recognition of the offender, penetration and the age of the victim.***

19. It is trite that the courts are not hamstring by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthfu**l.** This was reaffirmed in the case of **J.W.A. v Republic** [2014] eKLR, the Court of Appeal observed: -

"We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

20. I have carefully considered the submissions of the appellant and the oral submissions in response by the state and the entire record herein. I note that the complainant was a child of tender years, being born on 22.11.2011, thus she was 8 years when testified. Indeed, before a child of tender years is allowed to testify in court the court is required to satisfy itself that the child understands the duty of speaking the truth and whether he/she is of sufficient intelligence to allow his/her evidence being taken. This is done by conducting a *voire dire* examination before the evidence is taken. In the instant case the trial magistrate indeed undertook the same on the complainant PW1 and satisfied herself that the witness evidence was tenable, which position I agree with.

21. The Complainant in her testimony recalled categorically that she was raped by Mohamed Okash when she had gone to play with other children outside his house in the afternoon. The appellant called her to his room where he told her to lie on the bed, he removed her trouser and defiled her while covering her mouth for her not to scream. It was the pain that made PW3 who is the complainant mother notice the rape incident and subsequently made the report to the police leading to the arrest and charging of the appellant. It is therefore clear that the identity of the appellant was not mistaken as it is someone known to the complainant, as he is their neighbor. The fact that she cannot recall the date of the incident being on 5/4/2019 can be forgiven being that this was a child of tender years who had undergone a traumatic experience, and I do not think the mistake in her evidence on the date the events occurred in any way weakens the prosecution case.

22. Furthermore, the complainant statement made to PW5 the Investigating Officer the day after the incident was also categorical that she had been defiled by the appellant. As such if that be the case, this court must always remember that it is the trial court that had the benefit of seeing the demeanour of the complainant and all other witnesses including defence witnesses and made an evaluation as to the complainant's truthfulness. The trial court in its judgment stated that it was convinced that the child was telling the truth and that her evidence was consistent.

23. In respect to penetration, it is clear from the evidence of PW4 that upon examining the complainant, he established that she had bruises in the vagina wall. The vagina was red, the labia manora was broken, concluding that there was penetration as there was a vaginal smelly discharge. I therefore have nothing before me to doubt this evidence and therefore find that the learned trial magistrate rightly concluded that penetration happened.

24. On the age of the victim, a birth certificate serialized as No. [....] was produced, having been issued in the year 2011 and which confirmed that the victim was 8 years of age.

25. It is apparent that the appellant in his defence seem to be latching onto some contradictions in respect to the time the incident happened. The Complainant PW1 said it was in the afternoon and the mother PW3 stated that it was at 9. 00am.In my view, however, these are not material, as the evidence of the minor seemed believable. Further, this does not help the appellant case, in light of the glaring evidence and testimonies of the prosecution witnesses as a whole.

26. Further, In **Twehangane Alfred vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** it was held that it is not every contradiction that warrants rejection of evidence. As the court put it:

"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."

27. The appellant also in his defence raised an alibi, alleging that at the material time of the incident he was at Bulla Mpya football field with DW2 and DW3. However, this defence should have been raised at the earliest opportune time as was held in the case of **R vs Sukha Singh S/O Wazir Singh & Others (1939) 6EACA 145** that:

" if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

28. Therefore, I agree with the Respondent State Counsel that the appellant defence in this regard lacks substance as it was raised too late in

the day and that the same is an afterthought. He ought to have brought it earlier.

29. Finally, the appellant argues that he was framed by PW3 the mother of the complainant for turning down her sexual seduction. This in my view does not hold as nothing was put forward to establish the same.

30. Having considered the appellant's grounds of appeal against the evidence adduced against him, I am unable to find any merit in his appeal. The child was 8 years at the time of the defilement. Section 8(1) and (2) of **Sexual Offences Act,** under which the appellant was charged, provides that:

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

31. A birth certificate was produced which showed that the child was born on 22nd November, 2011. She was therefore below 8 years. Penetration was proved by the medical evidence produced by PW4. The identity of the perpetrator was not in doubt: tragically, it was their neigbour. Therefore, the appeal on conviction has no merit.

32. On sentence, it is apparent to me that the above provision providing a life imprisonment is prima *facie* mandatory minimum sentence. In my view under the current constitutional dispensation, the same is not tenable as was noted by the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

33. In view of the foregoing, it is my finding that the appeal on conviction lacks merit. However, on sentence I find that the life imprisonment which seems mandatory under the Act cannot stand and therefore a sentence of 15 years would suffice in the circumstances of the appellant's case.

34. Thus, the court makes the following orders;

> ***i) That the appeal on conviction is dismissed and conviction upheld.***
>
> ***ii) The sentence for life imprisonment is set aside and substituted with sentence of 15 years.***

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JULY, 2020.

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C. KARIUKI

JUDGE