REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NUMBER 3 OF 2020

EK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. 659 of 2015 at Kilgoris Law Courts before Hon. R.M. Oanda (P.M) delivered on the 30th July 2019)

JUDGMENT

1. The appellant was charged, convicted and sentenced to 15 years' imprisonment for the offence of defilement contrary to **section 8(1)**as read with **section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. He was found guilty of the offence of intentionally causing his penis to penetrate the vagina of CN a girl aged 15 years on 10th June 2015 at Kilgoris Township in Transmara West District within Narok County.

2. Dissatisfied by his conviction and sentence, the appellant filed this appeal on 6th January 2020. The grounds of appeal as set out in his petition of appeal are that the complainant did not produce her birth certificate even when the matter had been adjourned to allow her to do so. He complained that he was not supplied with statements in the course of the trial and also claimed that he was arraigned in court past the 24 hours provided by the Constitution. The appellant also claimed that his medical examination was only conducted to ascertain his HIV status and did not establish whether he had committed the alleged offence.

3. The appellant's counsel discussed the grounds set out in the petition of appeal in her written submissions. She addressed the appellant's complaint that he was not supplied with statements before hearing and also expounded on his contention that the complaint's age was not proved during trial. In addition, counsel argued that the appellant's right to a fair trial was grossly violated as he was a minor when the offence was allegedly committed. She relied on various cases to support the appellant's appeal.

4. Counsel for the state conceded that the trial court had not taken into account the appellant's age in sentencing him. He submitted that although the minor was 21 years old at the time he was sentenced, the charge sheet reflected that he was 17 years old when the offence was committed. It was submitted that the court could interfere with the sentence.

5. As a first appellate court, this court will first analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions bearing in mind that it did not see or hear the witnesses. (See **Okeno vs. Republic [1972] EA 32**.)

6. After *voir dire* examination, the complainant CN (PW1) gave an unsworn statement of what transpired on 10th June 2015. She recalled that after her sister, PW2, had left for work that day, she met the accused on her way to the bath house. She testified that she had seen the accused on several occasions and knew that he did welding with his uncle along the road near their house. The complainant testified that the accused said he wanted to do "bad manners" to her and she refused. She returned to the house and after taking her shower and dressing up, she heard a knock at the door. She thought the person knocking was her sister but it was infact the accused person.

7. The complainant told the court that the accused person barged in, pushed her back to the chair, pulled her jeans down to her thighs and did "bad things" to her. She recalled that the accused had also pulled off his clothes and locked the door from within before he had sex with her. PW1 testified that she had not raised an alarm because she was afraid. She went out after the accused had finished and met PW2. PW2 insistently asked her why she was crying and the complainant told her that there was someone in the house.

8. The PW2 recalled that on that day, she had left the keys to her place of work at home. She went back to the house and found the complainant outside the house barefoot. When she questioned her, the complainant tearfully told her that there was someone in the house. PW2 went in and found the accused seated on the sofa. She testified that she knew the accused as she had seen him welding on the roadside. PW2 asked him what he was doing in the house and he started to push her towards the door. She testified that she called PW3 who came and arrested the accused with his colleague PC. Massoud.

9. PW2 told the court that the complainant had been born in the year 1999 and was 15 years old at the time. She however admitted that an age assessment had not been carried out to ascertain the complainant's age. She testified that after the incident, they took the complainant to hospital where treatment notes were issued and a p3 form was filled the following day.

10. KFS Esac Otieno (PW3) who was attached to the land Manager Forest Office in Transmara testified that he had rushed to the scene after getting a call from PW2. He found the accused struggling with PW2 and after learning that the accused had defiled the complainant, he called PC Massoud and had the accused arrested.

11. The clinical officer, Richard Lemiso (PW4) gave evidence on behalf of a colleague who had examined the complainant after the incident. He stated that the complainant was 15 years old. He also testified that from the examination of the complainant it was observed that her labia majora was hypermic and her labia minora was reddish. The examination also revealed a whitish discharge from her private parts. It was also noted that her hymen was broken but not freshly. The conclusion reached was that the complainant had been defiled.

12. CPL Andrew Bett (PW5) received the report of the case on 11th June 2015. He stated that he took the complainant to hospital where the P3 was filled after which the accused was charged with the offence.

13. The accused person elected to give a sworn statement when he was placed on his defence. He stated that on 9th June 2015 he was busy doing a welding course in Kilgoris. After putting away his tools, he met the complainant who called him and they started talking. As they talked, the complainant's sister came accompanied by the forest officer and wanted to know what they were doing. The accused said that the complainant's sister started shouting and saying that she had seen him there on several occasions. She instructed the officer to arrest him. They called officer Massoud and he was taken to the police station and later on arraigned before the court. He stated that he knew the complainant but denied committing the offence.

14. David Keter (DW2) testified that he saw the complainant and the accused talking to each other on 9th June 2015 while he was splitting wood. Later on, the complainant's sister came with another man and arrested the accused for unknown reasons.

15. DC (DW3) also testified that she saw the accused and the complainant conversing at about lunch time on 9th June 2015. She testified that the complainant's sister came in the company of someone and they began quarrelling and accusing the accused of raping the complainant. The accused was thereafter arrested by police officers.

ANALYSIS AND DETERMINATION

16. The main issues arising for determination herein are;

a. Whether the trial court erred in finding that the prosecution had proved the offence of defilement contrary to section 8 (3) of the Sexual Offences Act;

b. Whether the appellant's Constitutional rights were infringed in the course of his arraignment and trial as submitted; and

c. Whether the sentence imposed by the trial court was lawful.

ANALYSIS AND DETERMINATION

17. The appellant was charged and convicted for the offence of defilement contrary to **Section 8(3)** of the **Sexual Offences Act** which provides;

8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

18. The key ingredients to be proved by the prosecution in order to sustain a conviction for the offence of defilement are the age of the victim, penetration and the identification of the accused. The appellant contends that no independent document was produced to establish the complainant's age. The prosecution relied on the evidence of the complainant's sister PW2 and the clinical officer, PW4, to prove the complainant's age. PW2 admitted that no age assessment had been done and the complainant was also unable to tell the court how old she was during *voir dire* examination.

19. Contrary to the appellant's argument, a birth certificate is not the only means by which a minor's age can be established. In **Evans Wamalwa Simiyu vs R *Criminal Appeal No. 118 of 2013 [2016] eKLR*** the Court of Appeal held that;

"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

20. Guided by the above authority, I find that the complainant's apparent age was proved to be 15 years old asthat was the age indicated in Part C of the P3 form produced by PW4.

21. The appellant also contended that no medical test was conducted to ascertain whether he was offender. My view on this is that although **section 36 (1)** of the **Sexual Offences Act** empowers a court to direct that an accused person provides samples for tests to ascertain whether he committed the offence, the provision is not couched in mandatory terms. Other evidence may be adduced to ascertain whether the offence was committed by the accused. The Court of Appeal in the case Williamson ***Sowa Mbwanga v Republic Criminal Appeal No. 109 of 2014 [2016] eKLR*** stated as follows;

> "In ROBERT MUTUNGI MUMBI V. REPUBLIC, CR. APP. NO. 5 OF 2013 (Malindi), this Court stated thus regarding section 36(1) of the Act:
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> "Section 36(1) of the (Sexual Offences) Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

22. In this case, the evidence of the complainant that she had been defiled was corroborated by the medical evidence of PW4 which concluded that she had been defiled.

23. As for the appellant's identity, the complainant's testimony that the appellant was her assailant was supported by the evidence of PW2. Both PW2 and the complainant testified that they knew the accused person. Their identification of the appellant was therefore recognition when contrasted to the identification of a stranger. Moreover, the accused person also confirmed that he was acquainted to the two in his defence. The appellant was also arrested at the *locus in quo* soon after the incident. The trial court was right in finding that the appellant had been positively identified. All this evidence taken cumulatively, I find that the prosecution proved that the accused had defiled the minor.

24. I will now turn to the appellant's contention that his constitutional rights were violated at the time of his arrest and in the course of the trial. The appellant contends that he was not arraigned in court within 24 hours of being arrested as stipulated in the Constitution. He also argues that he was not supplied with statements and laments the trial court's failure to assign him an advocate at the State's expense.

25. On the first issue, the appellant argues that he was kept in the police cell for more than 24 hours after his arrest in violation of **Article 49 (1) (f)**. The charge sheet indicates that the accused was arrested on 10th June 2015 and arraigned in court on 12th June 2015. The Court of Appeal. whilst dealing with a similar issue held as follows;

> *"[14] Therefore, although that provision required that an arrested person be brought before court within 24 hours of his arrest, failure to which he should be released, there was an exception where the detainee was suspected to have committed a capital offence, in which case the detaining authority was allowed a maximum of 14 days within which to charge the suspect and if there was delay, provided the reason for the delay could be accounted for to the satisfaction of the trial court.*
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> *[15] We are aware that there have been conflicting decisions regarding the consequences of pretrial detention beyond the allowed period. For instance, in Albanus Mwasia Mutua v Republic [2006] eKLR and Gerald Macharia Githuku v Republic [2007] eKLR the convictions of the appellants were quashed on account of the unlawful pretrial detention of the appellants. And in Samuel Ndungu Kamau & Anor v Republic High Court Criminal Appeal No. 223 of 2006 (Nairobi) and Republic v David Geoffrey Gitonga High Court Criminal Case No. 79 of 2006 (Meru) (both decisions unreported) the court rejected attempts to have the criminal trials of the appellants declared a nullity on account of violation of their rights under section 72(6) of the retired Constitution. These conflicting decisions and others were exhaustively addressed in Julius Kamau Mbugua v Republic (supra), where the court took the following position:*
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> *"lastly had we found that the extra judicial detention was unlawful, and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate, and draconian remedy seeing that the public security would be compromised. If by the time an accused makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under section 84(1) would be an order for compensation for such breach. The rationale for prescribing monitory compensation in section 72(6) was that the person having already been unlawfully arrested or detained such an unlawful arrest or detention cannot be undone and the breach can only be vindicated by damages".*

26. Guided by the above authority I find that even though the appellant was held beyond 24 hours the delay even though not explained the conviction cannot be upset solely on account of violation of the appellant's constitutional right, the appellant can sue for damages. The appellant is not absolved of any criminal liability for the offence he was committed.

27. The appellant further argued that his Constitutional right to be assigned an advocate at the State's expense was violated. **Article 50 (2) (c)** of the Constitution provides that;

> *Every accused person has the right to a fair trial which includes the right to:-*
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> *(h) to have an advocate assigned to the accused person by the State andat State expense, if substantial injustice would otherwise result, andto be informed of this right promptly.*

28. The phrase ***"substantial injustice,"*** is not defined in the Constitution. Prior to the coming into force of the Legal Aid Act on 10th May 2016, the courts relied on provisions of international conventions to determine what amounted to substantial injustice. (See ***David Macharia Njoroge V R, Criminal Appeal No.497 of 2007 [2011] eKLR***).The appellant's trial was in 2015. Legal Aid Act came into force in 2016. It provided the framework for giving effect to Article 50(2) (h) in 2016. The said law cannot apply retrospectively. Further nowhere in the proceedings did the appellant seek legal representation and he was denied. In my view there is basis for nullifying the appellant's conviction on the arguments advanced in this ground of appeal.

29. The appellant also contended that his right to a fair trial had been infringed due to the failure by the prosecution to supply him with witness statements in accordance with **Article 50 (2)(j)**of the **Constitution.** The importance of supplying an accused person with witness statements has been emphasized in numerous cases including ***Richard Munene v Republic Criminal Appeal No. 74 of 2016[2018] eKLR***, ***Thomas Patrick Gilbert Cholmondeley v Republic, Criminal Appeal No. 116 of 2007*** and ***Simon Githaka Malombe V R, Criminal Appeal No. 314 of 2010.*** I have perused the record before the trial court and found that there was no indication that the appellant was supplied with witness statements at any point during the course of the trial. The court record show that the appellant informed the court at every stage of the trial that he was ready to proceed and he cross-examined the witnesses extensively and even testified in his defence. I find that being a minor his right to be informed in advance of the evidence the prosecution intended to rely on was vital. However, I find that his right was not violated as the record shows that he fully participated without any complaint.

30. The last issue is that the appellant was detained and sentenced as an adult in contravention of **Article 53 (1) (f)** of the Constitution which provides that;

> *"Every child has the right not to be detained, except as a last resort, and when detained, to be held –*
>
> *(i) for the shortest appropriate period of time*
>
> *(ii) separate from adults and in conditions that take account of the child's sex and age.*

31. In the case of ***DKC v Republic Criminal Appeal No 184 of 2009 [2014] eKLR***, the appellant was found guilty of committing the offence of murder. He was aged 15 years old at the time of the commission of the offence and was 20 years old at the time of sentencing. The Court of Appeal held that much as the best interest of a minor offender ought to be given paramount consideration, when passing a sentence, the minor must also be rehabilitated particularly where the offence committed is a grave one. The Court allowed the appeal against the life sentence imposed by the trial court and substituted it with imprisonment for a period of 10 years.

32. In the case of ***A. W. M vs R Criminal Appeal 156 of 2006 [2009] eKLR***, the appellant was 17years old. She was convicted of murder and was sentenced to detention under the President's pleasure. The Court of Appeal set aside the sentence and held as follows: -.

> *" In view of the foregoing, we are satisfied that the appellant was wrongly convicted before the superior court on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Accordingly, the conviction is set aside and substituted with one of a finding of guilty of infacticide contrary to Section 210 of the Penal Code. We also set aside the order of detention under President's pleasure apparently imposed pursuant to Section 25(2) of the Penal Code and it its place we substitute a discharge under Section 191(1) (a) of the Children Act taking into account the long period the appellant has been in custody. The appellant is to be set free forthwith unless otherwise lawfully held".*

33. The appellant was properly convicted for the offence of defilement contrary to ***Section 8 (3)*** of the ***Sexual Offences Act***. I have considered the appellant's submission on the sentence and the cases relied on. The facts of the said case were different from the facts of this case even though the victim and the offender were both minors. Indeed, the appellant was 17 years old, however he barged into the house of the complainant and defiled her. I uphold the conviction but not the sentence of 15 years. I set aside the sentence of 15 years. Before I sentence the appellant I shall call for a pre-sentence report. This court shall sentence the appellant upon receipt of the said report.

Dated, Signed and Delivered at Kisii this 4th day of August 2020.

R.E. OUGO

JUDGE

In the presence of;

EK Appellant

Ms Gogi For the Appellant

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Ms. Rael Court Assistant.