REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO 53 OF 2019

BCC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*From original conviction and sentence in Criminal Case(S O) Number 29 of 2017 in the Principal Magistrate's Court at Kithimani delivered by Hon G. Shikwe (SRM) on 11.12.2018*)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

BCC.....ACCUSED

JUDGEMENT

1. The Appellant herein, **BCC**, was tried and convicted by Hon G.O. Shikwe, Senior Resident Magistrate at Kithimani of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No 3 of 2006. He was also charged with the alternative charge of the offence of committing an indecent act with a child contrary to section 11(1) of the said Act.

2. He was sentenced to serve 30 years imprisonment for the offence of defilement. The learned trial magistrate made no finding on the alternative charge.

3. Being dissatisfied with the said conviction and sentence, the Appellant filed his Petition of Appeal and raised the following grounds of appeal as amended and summarized as follows: -

a. ***THAT the trial magistrate erred by convicting him on inconsistent, insufficient as well as contradictory evidence.***

b. ***THAT the prosecution case was not proven beyond reasonable doubt.***

c. ***THAT the medical evidence was tendered in contravention of section 77 of the Evidence Act.***

d. ***That the trial court erred in dismissing the appellant's defence.***

e. ***That essential exhibits were not availed in court.***

4. In support of the prosecution's case in the trial court, they relied on the evidence of four witnesses. **Pw1** was **PMM**; a voire dire was conducted on her and that the court was not satisfied that she understood the nature of an oath but she was permitted to testify. It is not clear from the court record whether or not she gave evidence on oath. She testified that she does not go to school and that she lives with her father and her mother. She told the court that the appellant found her in the house waiting for her mum and that he closed the door, took off his clothes and inserted his penis in her vagina. It was her testimony that her Aunt M came and washed her and took her to hospital then later to the police. When recalled and sworn in, she testified on cross examination that the appellant used to live with her and her mother.

5. **Pw2** was **MNM**. She testified that on 14.8.2017 when she was washing the victim, there was a whitish discharge on her vagina and that

the vagina was swollen. She told the court that she reported the matter to the Children's office and then took her to Matuu Level 5 Hospital. She told the court that an age assessment was done on the victim and that there was a P3 form that was issued. The age assessment report and the P3 form were marked for identification. When recalled, she testified that she saw that Pw1's vagina was swollen and that Pw1 indicated that it was the appellant who was responsible.

6. **Pw3** was **Benjamin Maingi**, a Senior Clinical Officer at Matuu Level 4 Hospital who testified on oath of the medical examination that was conducted on Pw1 on 25.8.2017. The witness testified that the victim was aged 5 years as per the assessment that was made by Dr Jane whose handwriting he was familiar with. The age assessment was tendered as an exhibit. According to the examination, the victim's hymen was torn and there were high epithelial cells. He concluded that the victim had been defiled. He told the court that the appellant was examined but there were no abnormal findings. He produced the P3 forms as exhibits. On cross-examination, he testified that Pw1 was brought on 24.8.2017 with allegation of defilement that was said to have occurred between 11th to 12th August, 2017.

7. **Pw4** was **Sgt Geoffrey Mboga** who testified that that on 24.8.2017, the complainant aged 5 years was brought to the police station and it was reported that she was defiled by the appellant. It was reported that Pw2 had noted the same on 14.8.2017 when she was washing the complainant. He told the court that he referred Pw1 to Matuu level 4 Hospital where it was confirmed that the appellant had been defiled and as a result the appellant was arrested and taken to hospital where he was also examined and a P3 form issued. He told court that Pw1's mother was later charged with child neglect. On cross examination, he testified that the incident occurred when Pw1 was in the custody of the appellant.

8. The court found that the appellant had a case to answer and he was put on his defence. He opted to give unsworn evidence. He testified that he was arrested because of a land dispute with his wife as he had refused to construct a house on a piece of land that his wife had given him and as a result false charges were brought against him. He testified that the child's mother brought the child to his home on 10.8.2017 yet all along she was living with the child; that on 13.8.2017 the child's mother picked the child and went with her to Mwea. He told the court that he was arrested on 24.8.2017. After considering mitigation, the trial magistrate sentenced the appellant to 30 years' imprisonment.

9. The appeal was canvassed vide written submissions.

10. The appellant submitted that penetration was not proven by evidence. In placing reliance on the case of **George Kuria Mwaura v R (2019) eKLR,** it was submitted that the epithelial cells could be indicative of an infection. The appellant pointed out that there was no compliance with section 77 of the Evidence Act and in placing reliance on the case of **JA v R (2016) eKLR,** the appellant took issue with the fact that the person who initially treated Pw1 did not testify. On the aspect of consistencies in placing reliance on the case of **Kavoo Kimonyi v R (2018) eKLR**, it was submitted that there was inconsistency in the evidence as to who threw away the victim's undergarments; Pw1 told the court that it was her mother who threw them away whereas Pw4 told the court that it was reported that the appellant threw them away. The appellant took issue with non-production of exhibits namely the clothes of Pw1. The appellant also took issue with the non-consideration of his defence; reliance was placed on the case of **Michael Mumo Nzioka v R (2019) eKLR** in arguing that had the court considered that the matter was a frame up because the child was brought back so as to fabricate the case due to a marital dispute caused by sale of land, then the matter would have been resolved in his favour.

11. Learned counsel Mr Mwongera for the respondent in submissions filed on 5.3.2020 opposed the appeal and framed two issues for determination. Firstly, whether the conviction was proper and secondly whether the sentence was proper.

12. On the first issue, counsel in placing reliance on the case of **FOD v R (2014) eKLR** submitted that penetration was proven vide the testimony of Pw1 and Pw2 and medical evidence in the P3 form vide the testimony of Pw4; age was established vide the age assessment report (Pexh 1). On the 2nd issue it was submitted that sentence of 30 years was mandatory and the court was urged to uphold the same.

13. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "***On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour*".**

14. Having looked at the submissions, the appeal and amended grounds of appeal as well as the evidence on record, the following issues are necessary for determination namely: -

a. **Whether or not the prosecution had proved its case beyond reasonable doubt.**

b. **Whether there were contradictions in the evidence of the prosecution and whether the same could be cured by section 382 of the Criminal Procedure Code.**

c. **Whether there were procedural infractions that would vitiate the trial and conviction against the appellant.**

d. **What orders may the court make?**

15. On the issue of proof of the prosecution case, I shall combine the same with the aspect of contradictions. The respondent submitted nothing in support of the ground that the prosecution case was riddled with contradictions. A perusal of the list of exhibits produced showed an age assessment report as evidence of age which indicated the age of the complainant as 5 years.

16. With regard to evidence of penetration, the trial court relied on the evidence of Pw1, as corroborated by Pw2 who was not an eye

witnesses and the medical evidence from Pw3. The said medical evidence was based on a P3 form. Pw3 testified that the complainant had a torn hymen, and the same could be explained as per the evidence of Pw4 that the victim was in the custody of the appellant when the incident occurred. The appellant on the other hand told the court that the child was brought to him in a manner that seemed to suggest that he was being set up. The victim did not give a vivid account of the incident. When I look at the evidence in totality, I do confirm that there was penetration but however the same is too scanty for one to be satisfied that the same was occasioned by a male organ or that the appellant had an opportunity to meet Pw1 and therefore defile her. There is no hard and fast rule that the absence of hymen is conclusive proof of penetration by a male genital organ as there could be other causes. Again, the presence of vaginal discharge could as well be due to various infections.

17. The appellant has assailed the trial court for failing to consider his defence. His evidence is to the effect that he was framed. This court would have to make a finding as to whose evidence is believable. As it is, this court is not sure whose evidence to believe, hence casting doubt on the prosecution case as the burden of proof lies on its shoulders and not for the appellant to prove his innocence. I have also taken note that other than the evidence of Pw2 who was an aunt to the minor, the mother was not called to testify so as to buttress the evidence of her daughter regarding the minor's condition before and after she had been brought to the house of the appellant. Even though the complainant's mother was reported to have been charged, the prosecution could still have sought for a production order if at all she was in custody to enable her to testify. The complainant's evidence on cross examination that she was angry after the appellant denied her food cast doubt on her claim of having been defiled in the absence of corroborating evidence such as non-production of her undergarments that was alleged to have been thrown into a toilet. This then leaves only the evidence of the complainant and appellant to be considered so as to establish whose evidence is credible. It transpired from the evidence that the appellant's marriage to the complainant's mother was a topsy turvy and dysfunctional one as it was claimed that the mother to complainant was an alcoholic who spent most of her days in bars within Kithimani Township. Further, it transpired that the complainant had been staying with her mother until the 10.8.2017 when it is alleged that the minor was taken to the appellant only for the allegations of defilement to arise. The evidence of the mother to complainant was crucial as it could have established the complainant's condition prior and after the alleged incident and to bring to the fore the way the appellant related with his wife. This was necessary in view of the fact that the appellant raised an issue that he had been framed over his frosty relationship with his wife. As the said evidence did not materialize, then there is some doubt as to the appellant's involvement in the crime.

18. I have considered section 124 of the Evidence Act as well as the case of **Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166** cited with approval **in Roria v. R. (1967) EA 583** where the court made a number of observations with regard to the evidence of a single eye witness: —

(a) The testimony of a single witness regarding identification must be tested with the greatest care.

(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge advises himself to the danger of basing a conviction on such evidence alone and is satisfied that the witness was truthful.

19. In the case of **Dinkerrai Ramkrishan Pandya v R [1957] EA 336** where the East Africa Court of Appeal cited the case of ***Coughlan v Cumberland (3) (1898) 1 Ch. 704 where Lindly MR, Rigby and Collins L.JJ observed*** that "when the Question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; **and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen**. The learned trial magistrate in his judgement did rely on the provisions of section 124 of the Evidence Act when he stated that ''**She is a five-year-old child and the accused did not give me any reason as to why a child that young could be lying.''** I find this was a misdirection on the part of the trial magistrate since he shifted the burden of proof upon the appellant to prove his innocence yet it was upon the prosecution to prove his guilt. It is common knowledge that young children are prone to lying as can be seen in the evidence of the complainant when she admitted that she was angry at the appellant for denying her food. It was therefore not unusual to believe that the child might have lied and therefore it was erroneous for the learned trial magistrate to have held that a child aged 5 years old cannot tell lies under any circumstance. Suffice to add that the said child had been found via a voir dire examination not to understand the meaning of an oath and as such the unsworn evidence ought to have been treated circumspectly.

20. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, I find that the evidence on record is not satisfactory to convince this court that the appellant is the perpetrator of the offence. By dint of section 382 of the Criminal Procedure Code, I disagree with the appellant that the inconsistency in evidence as to who threw Pw1s clothes away was material as to go to the root of the case. The same is too minor as to go to the proof of the prosecution case and has not occasioned injustice to him.

21. On the issue of procedural infractions and their effect, the appellant pointed out that there was evidence that was tendered in contravention of section 77 of the Evidence Act. The P3 form was tendered by Pw3 who was the author and therefore this argument lacks merit. The age assessment report on the other hand, was not tendered by the author, however I am satisfied with the manner it was tendered, because Pw3 laboured to give a background to the assessment and the manner that he was familiar with the handwriting of the author. I equally find that there was no infraction in the manner that it was tendered that offended section 77 of the Evidence Act. In addition, the appellant was present during trial and had an opportunity to object to its production, and belatedly raising the issue on appeal will not come to his aid.

22. Looking at the evidence as a whole, it is clear that there was doubt created as to the involvement of the appellant in the alleged offence. Such doubt ought to have been resolved in his favour. Consequently, I find that the prosecution did not prove its case against the appellant beyond reasonable doubt.

23. In view of the above reasons, the appellant's appeal has merit. The same is allowed. The trial court's conviction is quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 29th day of September, 2020.

D.K. Kemei

Judge