REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 60 OF 2015

(Being an Appeal from conviction and sentence in Criminal Case No 790 of 2014

at the Chief Magistrates Court at Embu)

JOSPHAT NAMU NJUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant was convicted of the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the Sexual Offences Act and sentenced to fifty (50) years imprisonment. Dissatisfied with the conviction and sentence the appellant lodged this appeal vide the petition dated 10/07/2015. He relied on six (6) grounds which were later sort of expanded in his written submissions. The grounds in summary are that the prosecution failed to discharge the burden of proof of the offence of defilement and that his defence was not considered.

2. Directions were taken to the effect that the appeal be canvassed by way of written submissions and the parties duly complied.

B. Submission by the parties

3. The appellant submitted that the prosecution did not tender sufficient evidence to the required standards so as to warrant conviction for the offence of defilement. It was argued that the evidence by the complainant PW1 was that the appellant touched their private parts with his hands which does not amount to the elements that would prove the offence of defilement. He relied on the case **Ndegwa –vs- Republic (1985)** and **Joseph Ateka Kinanga –vs- Republic Nyamita HCCA No. 13 of 2015** where it was held that the appellant ought to be given the benefit of doubt.

4. It was further argued that the P3 form and the PRC form did not indicate any penetration and that the appellant's co-accused was acquitted in Criminal Appeal 46/2015 and this was a prove that the case was not proved beyond any reasonable doubt. According to the appellant, the P3 form indicated that the victim's hymen was intact meaning that there was no penetration and further that a child of tender years could not have been defiled by two men and still have her hymen intact. It was further contended that the whole scene was orchestrated due to a family grudge and bad blood between himself and the complainant's family. Finally, the appellant submitted that his defense was not considered by the trial court.

5. Ms. Mati for the respondent filed her written submissions wherein she conceded to the appellant's first and second grounds of appeal but submitted that the prosecution's evidence was sufficient to prove the alternative count of indecent act of a child and invited this court to invoke the provisions of Section 179 of the Criminal Procedure Code and substitute the charge of defilement with the alternative charge. It was the respondent's submissions that the appellants defense was considered by the trial court and the same amounted to mere denials and was an afterthought. The respondent prayed this court to dismiss the appeal in all other grounds save for the ground on conviction on the main count (defilement).

C. Applicable law

6. The duty of this court while exercising its appellate jurisdiction is to submit the evidence tendered before the trial court as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. 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 **Okeno v. Republic [1972] E.A. 32** and **Kiilu and another vs. R (2005) 1 KLR 174).**

7. Further the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (S*ee* **Gunga Baya & another v Republic [2015] eKLR).**

8. In the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depends on the circumstances of each case and the style used by the first Appellate Court. What matters in the analysis is the substance and not its length. (See the Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)** as was quoted with approval by Odunda J in **Alex Nzalu Ndaka v Republic [2019] eKLR)**.

D. Issues for determination

9. I have considered and analyzed the evidence tendered before the trial court. In compliance with the holding in the case of **Okeno v. Republic (supra)** and the re-instatement in **Kiilu and another vs. R (supra)), I have also considered** the amended grounds of appeal and the written submissions by the parties herein and it is my considered opinion that the issue for determination is whether the prosecution proved the offence of defilement to the required standards in criminal cases.

E. Analysis of Evidence application of the law and determination

10. It is trite law that in criminal cases, the burden of proof is always on the prosecution to establish the elements of an offence. The standard of proof is always that of beyond reasonable doubt (See Section 107 of the Evidence Act Cap 80 Laws of Kenya, **Woolington v DPP 1935 AC 462** and **Miller v. Minister of Pensions 2 ALL 372-273** and fortified by the law of evidence that he who alleges must prove.

11. As I have earlier stated, the appellant submitted that the prosecution did not tender sufficient evidence to prove the offence of defilement arguing that the evidence by PW1 and PW2 did not connect him to the offence. He also challenged the medical evidence that it did not prove penetration.

12. Under Section 8 of the Sexual Offences Act, two key elements of the offence is penetration and proof of age of the complainant. The trial court having conducted *voire dire* and found PW1 competent to give unsworn testimony being a child of tender years.

13. The evidence of PW1 was to the effect that she and two other minors were walking home from school when they met the appellant who told them to get into a nearby maize plantation. He then instructed them to undress and they did so. The appellant then touched the private parts of PW1 and of the other girls in turns using his hands.

14. PW2 was in the company of PW1 and corroborated PW1 evidence in her unsworn testimony. She said that the appellant took her, PW1 and another girl to the maize plantation and touched their private parts. The appellant then made PW2 lie down and lay on top of her. At no time did the minors talk about penetration of the appellant's male organ into the female organ of the complainant.

15. The evidence of PW8 was that the labia majora and minora were bruised while the hymen was intact. The P3 form and the post rape form were produced in evidence to support PW8's evidence.

16. The appellant faced the charge of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act with an alternative charge of indecent act with a child contrary to Section 11(1) of the same Act.

17. In defence, the appellant alleged that there existed a grudge between his family and that of the complainant and that this led him being framed in this case. He explained that his own sister wanted to be married in the complainant's family but the father of the appellant refused.

18. The trial court considered and rejected this defence on ground that it was three minors who were sexually assaulted and that it cannot be true that there was a grudge between the appellant's family and that of the complainant.

19. I have analyzed the defence of the appellant and note that his defence came as an afterthought in that he did not introduce it in cross examination either to PW1 or to her mother PW5. The defence was in my view an afterthought and does not make sense in that there were two other minors who were sexually assaulted during the incident.

20. The appellant said that the evidence of PW1 and PW2 did not connect him with the offence. This is not correct in that it is that evidence of the two minors that was crucial and key in this case. The said evidence was corroborated by the medical evidence of PW8 and that of the other witnesses being the relatives of the minors who took them for medical examination and others who saved the appellant from being lynched by a mob.

21. On identification, PW1 and PW2 positively identified the appellant whom they had seen during the incident. PW4 the complainant's mother upon getting the report from the neighbours and from the victims identified the appellant.

22. For the offence of defilement, the prosecution have a burden of proving under Section 8 of the Act that the complainant was below eighteen (18) years in age and that penetration took place which was caused by the male organ of the appellant.

23. From the evidence on record the complainant was aged 4½ years as shown by the birth certificate and the P.3 form. She was therefore under the age of eighteen (18) years.

24. The next issue for determination is whether penetration took place. The evidence of the minors PW1 and PW2 was that the appellant instructed them to undress and touched their private parts in turns using his hands. PW8 the doctor tried to explain that there was attempted defilement. For attempted defilement, there has to be an overt act by the appellant that amounts to an attempt to penetrate the female organ. From the evidence of the minors, this overt act did not take place. The evidence is clear that the hymen was intact and that only the labia majora and minora were bruised. This leads me to a finding that there was no penetration and that the prosecution's evidence falls short of proving the offence of defilement under Section 8(1) as read with Section 8(2) of the Act.

25. As for the alternative count, the evidence of PW1 and PW2 is crystal clear that the appellant used his hands to touch PW1's female organ. PW8 confirmed bruises on the labia majora and minora. I come to a conclusion that this evidence taken as a whole proves the offence of an indecent act with a child contrary to Section 11(1) of the Act which was against the weight of evidence.

26. In conclusion, I find the appellant guilty of the offence of indecent act with a child contrary to Section 11(1) of the Act and convict him accordingly.

27. Section 11(2) provides for ten (10) years imprisonment which in this case of a minor victim may be enhanced to twenty (20) years imprisonment. The victim herein was aged four and half (4 ½) years, a minor of tender years. The minor must have been traumatized by the indecent act at her tender age and that may haunt her for many years o0f her life.

28. The appellant spent one (1) year and two months in custody which period ought to be considered in sentencing under Section 333(2) of the Criminal Procedure Code.

29. The appellant is hereby sentenced to serve twenty (20) years imprisonment to commence from 22/05/2014 being the date of arrest.

30. The conviction of the offence under Section 8 is hereby quashed and sentenced of fifty (50) years imprisonment set aside.

31. The appeal is only partly successful.

32. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 29th day of September, 2020.

F. MUCHEMI

JUDGE

Judgment delivered via Video Link in the presence of: -

Ms. Mati for the Respondent

The Appellant