REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 52 OF 2018

RICHARD NYAKUNDI BONKOKO *ALIAS* AYE....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence by Hon. E. Kagoni, Senior Resident Magistrate, delivered on 25th October, 2017 in Mombasa Chief Magistrate's Court Criminal Case No. 32 of 2017).

JUDGMENT

1. The appellant herein was convicted 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. The particulars of the charge were that on the 5th day of March, 2017 at [particulars withheld] area in Kisauni Sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate into (sic) the vagina and of (sic) MAO [name withheld] a girl aged 13 years.

2. The appellant was sentenced to serve 20 years imprisonment. On 31st May, 2018 he filed a petition and grounds of appeal. On 12th November, 2019 he amended his grounds of appeal, with leave of the court. The said grounds of appeal are as follows:-

i. That the learned Trial Magistrate erred in law and fact by believing the evidence of the victim of the alleged incident without proper finding that the same was not proper in law;

ii. That the learned Trial Magistrate erred in law and fact in convicting him without considering that the prosecution case was marred by massive contradictions and discrepancies that could not form the basis of a proper conviction;

iii. That the learned Trial Magistrate erred in law and fact in convicting him without considering that the doctor's evidence was unreliable thus a conviction should not have been attained;

iv. That the learned Trial Magistrate erred in law and fact in convicting him without considering that crucial witnesses who were adversely mentioned in the prosecution case were never called to testify;

v. That the learned Trial Magistrate erred in law and fact in convicting him without considering that the prosecution case was not proved beyond reasonable doubt;

vi. That the learned Trial Magistrate erred in law and fact in convicting him without considering that the minimum mandatory sentence of 20 years meted on him was harsh, excessive and unfair based on the circumstances of the case; and

vii. That the learned Trial Magistrate erred in law and fact in convicting him without considering his reasonable defence.

3. In his written submissions, the appellant stated that the Trial Court's reliance on the victim's evidence was unfair as she never informed any persons of the incident until when she was confronted by PW1 and that was when she confirmed that he had a sexual affair with her. The appellant suggested that the victim (PW4) could have been promised a gift or could have been beaten by PW1, so as to implicate any person due to fear.

4. The appellant took issue with the fact that when conducting *voir dire* examination, the Trial Court expressed the view that the witness did not look like a person who understood the duty of being truthful and appeared not to be in full control of her faculties. He further said that the Trial Court failed to give the reason as to why it believed her evidence in accordance with the provisions of Section 124 of the Evidence Act.

The appellant claimed that PW4 was not a straight forward witness because she did not complain of the defilement.

5. The appellant submitted that one Nancy who informed PW3 about the incident failed to inform PW1's father of what had transpired. It was also stated that she was not called by the prosecution as a witness.

6. The appellant said that there were contradictions in the accounts given by witnesses and relied on the case of **Moses Mudavadi Kadenge v Republic** [2018] eKLR, to support his submission.

7. He contended that PW1, PW2, PW3 and PW4 were witnesses of doubtful integrity and relied on the case of **Jon Cardon Wagner v Republic and 2 Others** [2011] eKLR.

8. The appellant submitted that PW6 who produced the PRC and P3 forms was not the author of the said documents and that she failed to state if she had worked with Doctor Dombei and/or if she was conversant with his handwriting and signature. The appellant stated that the Doctor found out that the victim was HIV positive but failed to subject him to examination to establish if he had committed the offence. He claimed that the failure to do so contravened the provisions of Section 36(1) of the Sexual Offences Act. He also stated that the P3 form had no remarks and the approximate age of injuries on the victim was not shown. He stated that the Doctor never gave an opinion on examination of the victim. The appellant contended that the P3 form did not support the charge of defilement.

9. He relied on the case of **Moses Kipchirchir v Republic** [2017] eKLR, where the court had difficulties in understanding how the victim therein was sexually penetrated without her sustaining visible external injuries on her genitalia. The appellant in this case stated that PW4 was 13 years old but there was no evidence of injuries on her vagina to prove that she was defiled.

10. The appellant argued that the fact that PW4's hymen was broken was not in itself conclusive evidence of penetration as it could have been torn owing to reasons unrelated to penetration. He was of the view that the prosecution failed to prove that he penetrated PW4's vagina.

11. On the issue of the sentence imposed on him, the appellant indicated that 20 years imprisonment was the maximum sentence under the provisions of Section 8(3) of the Sexual Offences Act. In making reference to the decisions in **Opoya v Uganda** [1971] EA at p. 745 and **DWN v Republic** [2016] eKLR, he submitted that the words *"shall be liable to"* did not require the imposition of the minimum mandatory sentence but gave Trial Courts discretion in sentencing. He stated that the sentence of 20 years imprisonment was excessive. He further indicated that he had pleaded for leniency but the Trial Court stated that his mitigation had been considered and that people who prey on young girls ought to be kept away from them.

12. The office of the Director of Public Prosecutions through Ms Mwangeka, Prosecution Counsel, filed its written submissions on 5th December, 2019. She stated that the victim's father testified that she was 13 years old and that PW6 produced an age assessment report which supported the said fact. Ms Mwangeka relied on the case of **Thomas Mwambu Wenyi v Republic** [2017] eKLR, in submitting that the victim's age was proved.

13. On the issue of penetration, it was submitted that PW4 testified that the appellant did bad manners to her on a bed in his house, by inserting his urinating thing into hers.

14. In regard to the PRC form which was produced by PW6, the Prosecution Counsel stated that it was filled 8 days after the incident and on genital examination, PW1 had a whitish discharge, a broken hymen and she was HIV positive. It was stated that a P3 form was filled on 27th March, 2017 and the findings were that PW4 had been defiled. It was submitted that the oral evidence by PW4 as to the issue of penetration was well corroborated by medical evidence.

15. As to the identity of the perpetrator, it was submitted that the appellant was known to PW4 as *Aye*. Further, it was indicated that while being cross-examined during the defence hearing, the appellant confirmed that the PW4 was his landlord's daughter and that they lived in the same plot. It was submitted that the identification of the appellant was by way of recognition. Ms Mwangeka relied on the case of **Ajononi v Republic** [1980] KLR 54, where it was held that identification by way of recognition was more reassuring than the identification of a stranger.

16. It was pointed out that the Trial Court relied on the provisions of Section 124 of the Evidence Act in holding that PW1 was a truthful witness and that her evidence on identification was corroborated by PW2, who on 5th March, 2017 at 8:00p.m, found the appellant and PW4 naked on the appellant's bed. Ms Mwangeka stated that PW2's evidence remained unshaken even in cross-examination by the appellant. She also submitted that the Trial Court had the benefit of seeing the demeanour of PW4 and other witnesses, including defence witnesses, in making an evaluation as to the complainant's truthfulness. She relied on the decision in **Bernard Odongo Okutu v Republic** [2018] eKLR, to bolster her submissions.

17. In response to the submission by the appellant that key witnesses were not called by the prosecution, Ms Mwangeka relied on the provisions of Section 143 of the Evidence Act which provides that no particular number of witnesses need to be called to prove a certain fact. She further stated that the evidence adduced proved the elements of the offence to the required standard and no negative inference arose.

18. In regard to the alibi defence raised by the appellant, the Prosecution Counsel submitted that the Trial Court held that the appellant failed to prove that he was not at his house on the material day as he did not call his alleged friend as a witness to testify to the said fact. She cited the case of **Hashon Bundi Gitonga v Republic** [2016] eKLR, to illustrate that the alibi defence put forward by the appellant was an afterthought as he never raised it during the early stages of the trial.

19. The Prosecution Counsel stated that the sentence of 20 years imprisonment imposed on the appellant was neither harsh nor excessive as sentencing was a matter left to the discretion of the Trial Court. She prayed for the conviction and sentence against the appellant to be upheld.

20. On 22nd May, 2020 the appellant filed a response to the written submissions by Ms Mwangeka and contended that it was doubtful that the victim was defiled because she could not recall the date of the incident and also the fact that she was beaten before she explained what had happened to her. He cited the case of **Paul Kaja Gitari v Republic** [2016] eKLR, to support his submission.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

21. The victim testified as PW4. She was MA [name withheld]. She stated that the appellant did bad manners to her by inserting his urinating thing in hers after he removed her dress. She could not recall the date. She said that the incident happened on the bed in his house. She indicated that the appellant was her neighbour and she did not like him.

22. PW2 recounted that on 5th March, 2017 when he was living with his uncle and his daughter (PW4), he went to look for her, but he could not find her. The time was 8:00p.m. He indicated that he saw PW4's shoes outside the appellant's house. He knocked on the door but there was no response. He pushed the door open and saw *Aye* and PW4 in bed lying side by side. He got shocked and thought they were having sex. He stated that *Aye* was naked and PW4's dress had been pushed up exposing her nudity. He stated that *Aye's* trousers were at knee length and when he pushed the door, he tried to pull them up. He identified *Aye* as the appellant. PW2 indicated that he immediately informed a neigbour by the name Z who then told another neighbour by the name M. PW2 indicated that his uncle (PW1) by then was not at their home. PW2 stated that the appellant was their neighbour whom he knew as *Aye.*

23. PW3, MND [name withheld] lived in a plot neighbouring the one which the appellant lived in. She knew him. She testified that on 6th March, 2017 a lady by the name Nancy (PW2's mother), informed her that *Aye* had been found sleeping with PW4 the previous day. She pondered on what to do and after some days she decided to take PW4 to hospital for examination but they were not assisted as Doctors were on strike. Her evidence was that she and another lady called M reported the matter to Bamburi Police Station and they were referred to Coast Province General Hospital (CPGH). She identified *Aye* as the appellant whom she described as a conductor.

24. PW4's father, GO [name withheld] testified as PW1. His evidence was that on 11th March, 2017 he went home after work and PW3 who was his neighbour asked him casually if he was aware that the appellant had a sexual affair with PW4. He dismissed her but decided to investigate but unbeknown to him, PW3 had already reported the matter to the police. He indicated that the appellant was his tenant and friend. PW1 stated that when he confronted PW4, she confirmed that the appellant had been sleeping with her. PW1 said that PW4 was his first born child and she was 13 years old as she was born on 10th September, 2004.

25. PW5, Corporal Beatrice Mwongeli of Bamburi Police Station received a report from two ladies to the effect that PW4 had been defiled by a person known to her. They told her that the suspect was planning to flee and he was arrested at night. She identified the said suspect as the appellant. PW5 sent PW4 to CPGH in the company of the 2 ladies where PRC and P3 forms were filled. An age assessment was done and it gave the approximate age of PW4 as 12 years.

26. The lower court proceedings indicate that Dr. Rehema Omar (PW6) produced the PRC and P3 forms for PW4. She indicated that the PRC form was filled on 13th March, 2017. It showed that PW4 had a whitish discharge and her hymen was broken. She was found to be HIV positive. PW6 indicated that PW4's P3 form was filled by Dr. Dombei on 27th March, 2017. His findings were similar to those reflected on the PRC form. PW6 also produced PW4's age assessment report which indicated that she was 12 years old as at 27th March, 2017.

27. The appellant gave a sworn defence and stated that on the day it was alleged that he committed the offence, he was at Kanamai with his friend until very late and he left for work very early in the morning. He indicated that he worked for a week and a neighbour of his called him and told him that it was being rumoured that he had defiled his landlord's daughter. He stated that after work he and his driver went to the said neighbour who had called him and asked him about the rumours but instead of responding, he went out of the plot. The appellant stated that he asked another neighbor the reason why since 5th (sic) he had not been asked anything. That as they were talking, his landlord went where they were and asked him what the matter was all about. The appellant indicated that before the landlord could respond, he was arrested by 2 police officers.

ANALYSIS AND DETERMINATION

28. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced and reach its own independent decision when bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact.

29. The issues for determination are:-

i. If the evidence adduced by the Doctor was unreliable;

ii. If failure to call some witnesses was fatal to the case for the prosecution;

iii. If the prosecution proved its case beyond reasonable doubt;

and

iv. If the sentence can be regarded as being harsh or excessive.

If the evidence adduced by the Doctor was unreliable.

30. The appellant thought that the medical evidence was unreliable as PW6 was not the author of the PRC and P3 forms. He submitted that PW6 did not disclose whether she had worked with Dr. Dombei who filled the P3 form or whether she was conversant with his handwriting and signature. The appellant was correct in so stating. PW6 did not lay a foundation as to whether she had worked with Doctor Dombei or if she was conversant with his signature or handwriting. The lower court proceedings however do not reveal that the appellant objected to the production of the PRC and the P3 forms by PW6.

31. When given an opportunity by the court to cross- examine PW6, he had no questions to ask. That being the case, it was upon the appellant to demonstrate how he was prejudiced by the production of the P3 and PRC forms by PW6. Section 77 of the Evidence Act provides as follows:-

> **"(1) In criminal proceedings any documents purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence**
>
> **(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**
>
> **(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."**

32. The appellant did not apply for Dr. Dombi to be summoned in court to testify and the Trial Court did not think it was necessary to summon the maker of the documents in issue. Had it deemed it necessary it would have summoned him. It is this court's finding that the medical documents were properly produced before the Trial Court. On the failure to conduct DNA analysis on the appellant, this court notes that it is not a mandatory requirement.

If failure to call some witnesses was fatal to the case for the prosecution.

33. The appellant's claim on the above issue is that some women known as Z, N and M were not called as witnesses by the prosecution. The evidence on record was that PW2 on finding the appellant and PW4 in bed, informed one Z what he had seen. Z in turn told M who was another neighbor, M name [withheld] who testified as PW3. In her evidence she indicated that a woman called N who was PW2's mother is the one who told her. After that, PW3 and another woman known as M reported the incident to Bamburi Police Station.

34. It is worth noting that M, N and Z were not eye witnesses to the incident complained of. Z was informed by PW2 what he had seen. Z informed PW3 of what PW2 had told her. PW3 requested Magdalene to accompany her to Bamburi Police Station to report the matter. The most crucial witness among the said women was PW3 as she was the one who took the initiative to report the incident to the police. In **Keter v Republic** [2007] eKLR, the court held as follows:-

> **"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the change beyond reasonable doubt."**

35. In this case no adverse inference can be drawn by the failure of the prosecution to avail the 3 women mentioned by the appellant. They would have added no much value to the prosecution's case.

If the prosecution proved its case beyond reasonable doubt.

36. The age of PW4 was established through her father's evidence and the age assessment report produced by PW6. She was 12 years old when she was examined on 27th March, 2017.

37. PW4 and the appellant were found lying side by side while half naked, on the appellant's bed. The appellant's pair of trousers had been pulled down to his knees. PW4's dress had been pulled up exposing her nudity. PW2 found them in the said compromising position when he went looking for PW4 at 8:00p.m., as she was not at home. PW2 saw PW4's shoes outside the appellant's house. He knocked at the door but there was no response. He pushed the door open and found the two on the appellant's bed.

38. On being medically examined on 13th March, 2017 PW4's hymen was found to be broken and she had a whitish discharge. The medical findings of that day were a replica of what was contained on the PRC form. It was evident that she had been defiled although she was not examined for a few days after the incident as according to PW3, Doctors at CPGH were on strike.

39. The identity of the perpetrator was well known to PW4 to be the appellant. PW2 also identified the appellant as the person he found PW4 in bed with. He was well known to them as their neighbour. The appellant was a tenant of PW1, who was PW4's father. Apart from PW2 finding PW4 and the appellant in a compromising position in bed, PW4 testified that she was defiled.

40. In her evidence she indicated that the appellant put his thing for urinating in her thing for urinating and she felt pain. It was apparent that penetration was complete from the medical evidence adduced.

41. The appellant took issue that when conducting *voir dire* examination, the Hon. Magistrate stated that PW4 did not impress him as one who understood the duty of being truthful.

42. The appellant therefore failed to understand how the Trial Court then thereafter went ahead to regard her as a truthful witness under the provisions of Section 124 of the Evidence Act. When conducting *voir dire* examination, the Trial Court also stated that the said witness did not appear to be in full control of her faculties.

43. This court's finding is that the first impression the Hon. Court got was that it was not appropriate for PW4 to be sworn as she seemed not to understand the duty of being truthful. It must be noted that the said observation was made before the witness had testified. She thereafter adduced evidence and the Trial Court found her to be truthful. The said court is the one which had the advantage of observing the demeanour of prosecution witnesses and the appellant and it drew its own conclusions. This court has no reason at all to doubt the finding of the Trial Court that PW4 was a truthful witness.

44. The appellant stated that PW4 said she did not like him and took issue with said fact. This court notes that the context in which PW4 uttered the said words was in the backdrop of the appellant having defiled her as she felt pain in the process. My understanding of PW4's statement about her feelings towards the appellant was not that she generally disliked him for no good reason. The reason was apparent. Her failure to scream when she was being defiled cannot be used against her. She gave a very brief account of the incident.

45. Although the appellant claimed that the prosecution case was marred by massive contradictions and discrepancies, he failed to elucidate on the same. His complaint on the same was therefore just a general statement. He also failed to clarify why he thought PW1, PW2, PW3 and PW4 were witnesses of doubtful integrity. This court's finding is that the evidence against the appellant was overwhelming. His alibi defence failed to cast a shadow of doubt on the case by the prosecution. Although he claimed to be at his friend's house, he failed to call his friend to support his alibi defence. I uphold the conviction against the appellant.

If the sentence is harsh and excessive.

46. The appellant was sentenced to 20 years imprisonment. The provisions of Section 8(3) of the Sexual Offences Act provide for a minimum sentence of 20 years imprisonment. Inasmuch as the term *"is liable to"* means that a court can mete out a sentence of less than 20 years, I see no justification for interfering with the sentence imposed on the appellant. The Trial Court exercised its discretion in sentencing the appellant to 20 years imprisonment. I uphold the said sentence.

47. In line with the provisions of Section 333(2) of the Criminal Procedure Code, the appellant's sentence shall be effective from the 13th March, 2017 when he was first arraigned in court, as he was in prison remand throughout his trial before the lower court. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **25th** day of **September, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi for the DPP

Mr. Musundi - Court Assistant.