REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.37 OF 2019

PAUL KARIBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the Principal

Magistrate Hon. R. Yator delivered on 29th of April 2019 in Molo S.O No. 2 of 2017.)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section contrary to **Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006** with alternative count of **committing indecent act contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. Particulars to the main count are that on the 6th day of December 2016 at Molo Sub County within Nakuru County intentionally caused his penis to penetrate the vagina of **JM** a girl child aged 13 years. Particulars to alternative charge are that on 6th of December 2016 at Molo Sub County within Nakuru County he intentionally touched the vagina of **JM** a girl child aged 13 years with his penis.

2. The appellant denied the main charge and the alternative charges. The case proceeded for full trial and the prosecution called 5 witnesses in support of their case while the appellant opted to give sworn defence and did not call any witness. The appellant was convicted and sentenced to 20 years imprisonment.

3. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, filed this petition challenging the conviction and sentence on the following grounds: -

i. The learned trial magistrate erred in law by failing to appreciate that the case had all the ingredients of a frame up case based on the evidence adduced.

ii. The learned trial magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced could not corroborate the charges preferred against the appellant in that it was done way over the stipulated time of 72 hours.

iii. That the learned trial magistrate erred in law and fact by failing to consider that there was no explanation given by the prosecution case as to the delay between the time of the alleged commission of the offence and the time when the matter was reported.

iv. That the learned trial magistrate erred in law and fact by failing to warn herself on the dangers of relying on the evidence of a single witness.

v. That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution evidence was marred with contradictions and inconsistences.

vi. That the learned trial magistrate erred in law and in fact by overlooking and dismissing the appellant's defence without advancing any cogent reasons thereof yet the same was remarkably plausible, comprehensive, casted considerable doubts to the prosecution's case and was not rebutted by the prosecution.

vii. That the learned trial magistrate erred in law and in fact by summarily treating the prosecution case in isolation of the appellant's defence and by shifting the burden of proof from the prosecution to the appellant.

viii. *That the learned trial magistrate erred in law and in fact by failing to appreciate in totality that the prosecution case was to be proved beyond any reasonable doubt as required by the law*.

4. The state opposed this appeal through the state counsel. The appellant filed written submissions while the prosecution submitted orally.

APPELLANT'S CASE

5. The Appellant stated the testimony of the prosecution were all false and untrue as it was a frame up by the area chief who took his wife and they framed the appellant so that he could be imprisoned.

PROSECUTION'S CASE

6. The state counsel **Ms. Rita Roti**ch urged the Court to dismiss the appeal. On the issue of age, she submitted that the complainant she was 13 years old and her age was corroborated by PW2 who was PW1'S grandmother and production of birth certificate which confirmed her age as 13 years.

7. On identification PW1 stated she knew the appellant very well and knew where he resided. She identified the appellant by the name Karimba. The incident occurred at 10 am where the complainant was able to clearly see the appellant. She stated the appellant had defiled her on several other occasions and she knew him very well. PW2 stated the appellant was their neighbour and he was known as Baba Micheal and on the material day the appellant had been at her home. At the defence hearing the appellant admitted he used to go to the land of the complainant's family and that he knew the complainant very well.

8. On the issue of penetration, PW1 stated the appellant defiled her on several occasions. PW2 stated that the complainant started to urinate on the bed after the incident and was found to have urinary infection. PW4 who was the doctor noted broken hymen and whitish discharge. Upon undergoing a tests in the laboratory, presence of pus cells and infections were diagnosed. A P3 form was produced as exhibit 1 and treatment sheets as exhibit 3. The investigation officer stated the appellant was known by the name **Karimba** or **Baba Micheal**. During his arrest he was identified by the complainant.

ANALYSIS AND DETERMINATION

9. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic *[1972] EA 32*** where it was stated as follows: -

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function 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, [1958] EA 424.)"**

10. In view of the above, I have re-evaluated the evidence adduced before the trial court. I have also considered ground of appeal together with the submissions filed and identify the following as issues for determination

> **i. Whether the prosecution proved their case beyond reasonable doubt.**
>
> **ii. Whether the sentence was excessive and harsh.**

i. Whether the prosecution proved their case beyond reasonable doubt

11. There are 3 ingredients for the offence of defilement which have to be proved being age of the complainant, penetration; and identification of the perpetrator.

12. In respect to age, PW1 testified to be 13 years at the time of her testimony. The prosecution produced the complainant's immunization card as exhibit 2 which indicate she was born on 11th October 2003. The P3 form was also produced by the prosecution where the complainant's age is estimated as 13 years. Evidence to establish age of a child can either be a birth certificate, birth notification, age assessment report, clinic card or baptism card. In view of the fact that the immunisation card was availed to Court, there was no doubt on the complainant's age; the age was therefore sufficiently proved.

13. In **Machakos High Court Criminal Appeal No. 91 of 2011 Joseph Seet –vs- R**, the Court relied on the clinic health card of the child in a defilement case to uphold a conviction in a case where proof of age was an issue.

14. On prove of penetration **Section 2 of the Sexual Offences Act** defines penetration as **the partial or complete insertion of the genital organs of a person into the genital organ of another person.** In the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** the Court of Appeal held as follows: -

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."**

15. PW1 testified the appellant did bad manners to her in her grandmother's house. He removed her trouser and her panty and did bad manners to her on the sofa set. On another day the appellant did bad manners to PW1 inside the maize farm and gave her Kshs. 50/= to buy mandazi.

16. PW4 produced the P3 form which confirmed that the complainant's hymen was torn for a long time; further that she had whitish P.V discharge, her urine analysis showed moderate presence of pus cells and leucocytes. The doctor concluded that the complainant was defiled.

17. On the issue of relying on single evidence **Section 124 of the Evidence Act** provide that no corroboration is necessary in criminal cases involving a sexual offence. In fact, a Court can even convict on the sole evidence of the victim if the Court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth.

18. The testimony of PW1 and PW4, the medical doctor is sufficient enough to conclude the complainant was defiled. There was penetration by the appellant

19. **Section 214(2) of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya** states that: -

> **"Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."**

20. Further, **Section 382 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya** provides as follows: -

> **"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

21. In respect to identification of the perpetrator**,** PW1 testified that at around 10:00 am the appellant came to her grandmother's house and upon learning that PW2 was not around, he locked the complainant in the sitting room and did her bad manners on the sofa set. She said it was not the first time for the appellant to defile her. She knew the appellant very well and when she reported, she stated that she had been defiled by a person well known to her. In his defence the appellant confirmed that she was the complainant's neighbour and he was therefore well known to her.

22. The complainant did not report the case of defilement immediately because the appellant had threatened to cut her into pieces with a panga if she disclosed to anyone of the sexual encounter with the appellant.

23. On the ground that the trial magistrate failed to consider the appellant's defence and shifted the balance of proving the case beyond any reasonable doubt to the appellant, the lower court record show that the trial magistrate considered the appellant's defence and dismissed as it contained mere denials. The appellant in his defence started that the charges against him arise from a grudge that existed between him whom he had worked for but refused to pay him Kshs. 500/= and that she used used her grandchild to get at him by implicating him for defilement so that she could not pay the money. The ground that the appellants defence was not considered cannot therefore stand.

24. From the foregoing, there is no doubt that the prosecution proved their case beyond any reasonable doubt and the appellant's defence did not challenge evidence adduced by the prosecution.

(ii) Whether sentence was harsh and excessive

25. **Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006** under which the appellant was charged provide for a minimum sentence of 20 years.

26. In the case of **Muruatetu**, the Court declared mandatory nature of sentence unconstitutional for taking away the discretion of judicial officer. It renders mitigating factors in a case superfluous. It ties the judicious officer's hand from considering circumstance of each case to arrive at an appropriate sentence.

27. In view of **Muruatetu** case, I am inclined to consider the appellant's mitigation on record, I also consider the fact that the child defiled was 13 years' old. The appellant did not say much in mitigation. He only stated that he was sick but never expressed any remorse as noted by the trial magistrate. In view of the age of the child, I am however inclined to reduce the sentence to 15 years' imprisonment.

28. FINAL ORDERS

1. **Appeal on conviction is dismissed.**

2. **Appeal on sentence is allowed and sentence reduced to 15 years' imprisonment.**

3. Sentence to run from the date of sentence by the trial court.

Judgment dated, signed and delivered via zoom at Nakuru this 24th day of September, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person