REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 76 OF 2019

SAMBASTIAN SILA KAKOVU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*From original conviction and sentence in Criminal Case(S O) Number 40 of 2018 in the Senior Principal Magistrate's Court at Kangundo delivered by Hon E. Agade (SRM) on 14.8.2019*)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

SAMBASTIAN SILA KAKOVU .....ACCUSED

JUDGEMENT

1. The Appellant herein, **SAMBASTIAN SILA KAKOVU**, was tried and convicted by Hon E. Agade, Senior Resident Magistrate at Kangundo for 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 convicted of the offence under section 8(1) as read with 8(3) and sentenced to serve 15 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 this Petition of Appeal and raised the following grounds of appeal as amended and summarized as follows: -

a. ***That the prosecution case was not proven beyond reasonable doubt***

b. ***That the trial magistrate erred by convicting him on inconsistent and contradictory evidence.***

4. The case for the prosecution in the trial court was as follows: **Pw1** was **RM**; after the conduct of a *voir dire*, the court was satisfied that she was seized with low intelligence but however she was aware of her environment and the purpose of her attendance in court; it was directed that she be sworn in and testify in Kamba. She testified that she was a class 3 pupil and that she knew the appellant as one who used to work at her cousin's farm. She told the court that there was a day during the school holiday that her aunt G sent her to the farm to pick tomatoes and it was then that she saw the appellant come from behind and push her and she fell on her back; that the appellant unzipped his trouser, removed her panty and used his thing for urinating by putting it into her thing for urinating. She told the court that R came and saw what happened and she run and told Aunt G; that the appellant was on top of her when R and Aunt G came and saw them and it was then that the appellant run away. She stated that uncle W and Uncle M went in search for the appellant who was tied with a rope. She added that she was taken to Mama Lucy Hospital and that she did not remember the date she was born. On cross examination she told the court that the appellant found her in the farm plucking tomatoes.

5. **Pw2** was **GKM** who testified that sometimes in September she was alerted by a scream that she discovered was from J M who informed her that she had seen Sila lying on top of Pw1 and raping her. She told the court that she went to the farm and indeed saw what she had been

told was true; she let out a scream that made the appellant run away. She testified that she alerted Uncle W and M who went out in search of the appellant who was apprehended at 8 pm. It was her testimony that Pw1 was taken to Mama Lucy hospital while the appellant was taken to Malaa Police station.

6. **Pw3** was **JMM** who testified that on a day she could not remember in August or September, Pw1 had been sent to get tomatoes from the farm when she heard Pw1 screaming. She told the court that she went to the farm and found the appellant lying on top of Pw1 and that he had lowered his trouser a few inches down. She told the court that she rushed to inform Pw2 with whom she returned to the scene; that the appellant ran away but was however was tracked down and taken to Malaa Police station whereas Pw1 was taken to Mama Lucy Hospital.

7. **Pw4, AMN** told the court that he was informed on 23.8.2018 that Pw1 had been raped by the appellant who emerged at 8 pm and sought forgiveness for what he had done as he claimed that the devil had entered him. He testified that he went to Mama Lucy Hospital where he was given a medical summary sheet dated 24.8.2018 (MFI 2) and a post rape care form dated 24.8.2018 (MFI 3)

8. **Pw5** was **Esther Mawea**, a nurse at Mama Lucy Kibaki Hospital who testified that she attended to Pw1 on 24.8.2018. The witness testified that the victim did not know her age but however upon age assessment, her age was given as 15 years. She testified that Pw1 had a history of defilement. According the witness, the examination revealed a red vagina that was caused by friction and explained that the same was as a result of an insertion of a penis. She told the court that the vaginal swab indicated the presence of spermatozoa, which meant that there was sexual activity in the vagina. Her conclusion was that sexual violence occurred. She tendered the medical summary sheet dated 24.8.2018, the PRC form as exhibits and the age assessment report dated 17.10.2018 was marked for identification.

9. **Pw6** was **Pc Charles Oduor** who told the court that on 23.8.2018 he saw the appellant being frogmarched into the station where he was. He stated that Pw1 reported that while she was in the farm getting tomatoes, the appellant who was a farm worker of one of her uncles pounced on her and defiled her; that she was taken to Mama Lucy Hospital and that investigations revealed that as per an age assessment Pw1 was about 14 to 15 years. He testified that he interrogated the appellant who claimed to have been at Koma Market the whole day drinking. The age assessment report was tendered in court as an exhibit. He told the court that the medical report indicated that Pw1 had been defiled.

10. The court found that the appellant had a case to answer and he was put on his defence. He opted to give unsworn evidence and call no witnesses after section 211 was explained to him. He testified that he worked at Koma in the farm till 1200 hours, then he went to Kalingile where he stayed till 1830 hours after which he went to Dust Bar in Mitamboni where he stayed till 2000 hours. He told the court that when he arrived at Uncle Mutingi's home, he was tied with a rope then taken to Malaa Police Station and later arraigned in court. He was convicted not under the section that he was charged but under section 8(1) as read with section 8(3) of the Sexual Offences Act. After considering mitigation, appellant was sentenced to 15 years' imprisonment.

11. The appeal was canvassed vide written submissions. The Appellant's undated written submissions were filed and are on the court record while the State's undated written submissions were filed on 6.7.2020.

12. The appellant submitted that penetration was not proven; that the medical examination conducted showed that Pw1 had a normal hymen; that there was no DNA conducted on the spermatozoa that was found on Pw1. Reliance was placed on the case of **Amos Kinyua Kugi v R (2015) eKLR**. It was pointed out that there was inconsistency in the evidence as to the colour of Pw1's panties hence the inconsistency be resolved in favour of the appellant. The appellant sought that the appeal be allowed, the conviction quashed, the sentence set aside and he be set free.

13. Learned counsel Mr Mwongera for the Respondent opposed the appeal and framed two issues for determination. Firstly, whether the conviction was proper and secondly whether the sentence was proper.

14. On the first issue, counsel submitted that penetration was proven vide the medical evidence in the P3 form; age was established vide the age assessment form (Pexh 4). On the 2nd issue it was submitted that the offence attracted a sentence of 20 years and the trial court erred in passing a 15 year sentence; court was urged to enhance the sentence to 20 years.

15. 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".***

16. Having looked at the Appellant's and State's written submissions, the appeal and amended grounds of appeal, I find that the following issues necessary for determination namely:

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

b. **Whether there were material contradictions in the evidence of the prosecution that could not be cured by section 382 of the Criminal Procedure Code Act.**

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

17. On the issue of proof of the prosecution case, I shall combine the same with the aspect of contradictions. The Appellant submitted that because there was contradiction in the colour of Pw1's panty, the prosecution case was riddled with contradictions. A perusal of the list of

exhibits in the trial court showed an age assessment report as evidence of age; a P3 form and PRC form as evidence of penetration.

18. With regard to evidence of penetration, there is the evidence of Pw1, as corroborated by Pw2 and Pw3 who found the appellant in flagrant delicto and that the medical evidence from Pw5 wrapped up the issue on penetration. The said medical evidence was based on a P3 form and PRC form that Pw4 tendered and the same was identified by Pw5. Pw5 testified that the complainant had a red vagina, and the same resonate with the circumstances that the complainant gave as well as how she was found by Pw2 and Pw3. When I look at the evidence in totality, I do confirm that there was penetration and it was caused by a male organ and that the appellant had an opportunity to meet Pw1 and therefore defile her. It transpired from the evidence of the complainant that it was during the day when she was sent to the farm to fetch tomatoes and clearly recognized the appellant who had been a farmhand for her uncle. Further, Pw2 and Pw3 found the appellant red handed in the act. The appellant was thus placed squarely at the scene of crime.

19. The appellant raised a defence of alibi. His evidence is of no value to set up the said defence as the direct evidence as well as circumstances as set up by the prosecution evidence speak to the fact that the unlawful sexual act took place between the appellant and Pw1. The appellant was actually got red handed in flagrant delicto with the complainant on the material date and which obliterates his alleged alibi.

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 satisfactory to convince this court that the appellant is the perpetrator of the offence. His defence of alibi (if any) has not cast doubt on his involvement. I find no inconsistency in the prosecution evidence in so far as it speaks to the elements of the offence; the relegation of the prosecution case to inconsistency in the colour of Pw1's panty is of no use to the appellant as there is consistent, cogent evidence that established that Pw1 was aged 15 years; that there was penetration in terms of section 2 of the Sexual Offences Act and the identity of the appellant was not in doubt.

21. The appellant had pointed out belatedly in his submissions that there was no DNA test carried out on the semen that was found in the HVS conducted on Pw1. The appellant rightly cited the case of **Amos Kinyua Kugi v R (2015) eKLR** where Justice Ngenye Macharia spoke to the non-mandatory requirement for DNA test unless the circumstances dictate. It is patently clear that a DNA test is unnecessary for reasons stated in paragraph 20 above. There was no need to conduct a DNA test as the identity of the appellant as the perpetrator was not in question as he was actually caught red handed in flagrant delicto with the complainant in broad daylight. The defence alibi did not dislodge or shake the prosecution's case.

24. The prosecution has raised the issue of severity of the sentence meted on the appellant. The unaltered principles of the law upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **Ogolla & s/o Owuor v Republic [1954] EACA 270** where the court stated:

> ***"The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES Vs. REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."***

25. Similarly, section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

> ***"Subject to the provisions hereinbefore 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."***

26. I agree with the submission by counsel for the state and also note the irregularity occasioned by the trial court in passing the conviction and sentence contrary to the provision of section 8(3) of the Sexual Offences Act yet the appellant was charged under section 8 (2) of the Sexual Offences Act. Section 214 of the Criminal Procedure Code allows the court to amend the charge sheet before judgement stage. However, the record does not speak to the invocation of such power by the trial court. However, the appellant suffered no prejudice about being sentenced under section 8(3) of the Sexual Offences Act as the complainant's age fell within that bracket and further the provisions of section 382 of the Criminal Procedure Code cured the resultant defect. In any case the appellant knew all along about the charges he faced and to which he mounted his defence and the defect has come out at the stage of sentencing.

27. In respect of the sentence, I make a finding that the evidence speaks about the fact that Pw1 was aged 15 years, therefore there was an error in the section with which the appellant was charged and in the sentence meted on the appellant as the court had no power to pass a sentence other than that provided for in the law since section 8(3) of the Sexual Offences Act provides for a minimum sentence of 20 years. Consequently, the appellant shall be sentenced to 20 years in accordance with section 8(1) as read with section 8(3) of the Sexual Offences Act in invocation of the revisionary powers of the appellate court under 364(a) of the Criminal Procedure Code as read with section 382 of the same Act. The sentence imposed will commence from the date of arrest as the appellant remained in custody throughout the trial.

28. In the result it is my finding that the appellant's appeal on conviction lacks merit. Similarly the sentence imposed by the trial is hereby set aside and substituted with a sentence of twenty years (20) years imprisonment from the date of arrest namely 24.8.2018.

It is so ordered.

Dated and delivered at Machakos this 17th day of September, 2020.

D. K. Kemei

Judge