REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 72 OF 2018

(From original conviction and sentence in Criminal Case No. S.O 19 OF 2018 of the Principal Magistrate's Court at Wang'uru - D. N. SURE – RM).

WILSON MUTHII WACHIRA..... APPELLANT

– VS –

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with the offense of defilement of an Eight year old girl Contrary to **Section to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, No. 3 of 2006,** and an Alternative offence of **Indecent Act contrary to Section 11(1) of the Act**. On 30/11/2018, the trial court convicted him on the main charge and sentenced him to ten(10) years imprisonment.

2. This appeal is against both the conviction and sentence on the grounds stated in the petition of appeal dated 14/12/2018 upon summarized grounds that:-

The Trial Magistrate erred in both law and fact in failing;

(i) To carry out a proper voire dire inquiry before taking the complainant's evidence.

(ii) To fully comply with proviso to Section 124 of the Evidence Act.

(iii) That the conviction was against the weight of the evidence adduced.

(iv) To consider the defence evidence and

(v) By shifting the burden of proof to the appellant.

And further that **the sentence meted to the appellant was harsh and excessive in the circumstances**.

3. The duty of the first appellate court is to subject the entire evidence adduced before the trial court to an exhaustive re-examination and analysis, so as to arrive at own findings and conclusion – **Okeno –v- Republic (1972) E.A 32, and Pandya –v- Republic (1957) E.A 336.**

It is only upon the above that the court can, decide whether the Magistrate's findings should be supported, making allowance that the trial court had the advantage of hearing and seeing the witnesses testify.

4. Voire dire Examination:

The complainant was an Eight (8) year old girl. The age was confirmed by a Child Health Card that stated her date of birth as 24/1/2010 (Exhibit No. 5). It is trite that age of a child for purposes of sexual offences may be proved by a Birth Certificate, Baptismal Card, School records or any other similar document including an age assessment by a Clinical Officer – Court of Appeal in **Richard Wahome Chege –v- Republic (2014) eKLR, Kaingu Elias Kasono Criminal Appeal No. 54 of 2010 and Kevin Ariami Musoga –v- Republic (2020)eKLR.**

The matter of the complainant's age is not indispute.

5. I have considered the complainants evidence as captured at Page 9 of the proceedings. Two pages of a voire dire examination of the

complainant by the trial Magistrate is stated. All the questions by the court and answers by the complainant are stated. The trial Magistrate, in conclusion stated to have considered the demeanour of the witness, her age, and stated that she may not understand an oath therefore ordered her to give unsworn statement and allowed the accused to cross examine her.

6. Upon conclusion of her evidence, the accused, now appellant cross examined her. The appellant faults the trial court in what he says is his failure to carry out proper voire dire inquiry. The complainant did not take an oath as the trial Magistrate was not satisfied that she understood the. I have considered the question/answer dialogue between the trial Magistrate and the complainant, and the evidence she adduced. The Magistrate indeed formed the necessary opinion, as stated in the case **John Muiruri –v- Republic (1983) KLR 445,** and cited in **Ben Maina Mwangi –v- Republic (2006) eKLR**, when it was held collaborative evidence was necessary on her evidence upon which to base a conviction. See also court of Appeal holding in **Maripet Loon Komok –v- Republic(2016) eKLR.**

7. I am therefore satisfied that the trial Magistrate complied fully with the requirements of taking a voire dire examination before allowing the complainant to testify. The appellant's ground of appeal on that ground is therefore without merit. **Proviso to Section 124 of Evidence Act** clearly states that corroboration in Sexual Offences Act is not mandatory – **J. W. A –v- Republic(2014)eKLR**, the court held that:-

> ***"It is now settled that the courts shall no longer be hamstrong by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

8. In the instant case, I find elaborate corroborative evidence to the complainant's evidence, and therefore the **Proviso** is not applicable. The trial Magistrate relied on the totality of the evidence, by the prosecution witnesses to base the conviction.

9. Having perused and considered the complainants evidence, in the typed proceedings as compared with the handwritten proceedings that there was a minor typographical error the correct version is that the trial Magistrate, I quote;

> ***"I have considered the demeanor of the witness, her age, she may not understand an oath, to give unsworn statement. I will allow accused to cross examine,***
>
> ***PW-1- - Minor states as follows in Kiswahili ----------***
>
> ***My names are ----------"***

9(a) From the above, it is evident from the handwritten proceedings that the minor complainant did not take an oath, was not sworn but she gave unsworn statement. It is therefore not true, as submitted by the appellant that the complainant gave a sworn statement. That settles the matter as to whether or not the minor gave sworn statement or unsworn.

10. Conviction against contradictory and uncorroborated/inconsistent evidence and therefore against the weight of evidence.

The appellant submits that the charge sheet states that the offence took place on the 1/7/2018 whereas the P3 form states 1/3/2018, and further evidence of PW-2- and PW-3- who testified that the defilement was continuous over the weekends without giving specific dates. I agree the charge sheet shows date of the offence as the 1/7/2018. PWI (Complainant) testified that she was defiled by the appellant on 1/7/2018 at 7.00 Pm, and that it was the first time.

11. **PW-2-** a teacher at St. [particulars withheld] Primary School to whom the complainant reported the incident two days after the incident testified that initially the child (complainant) disclosed defilement on Saturdays, Sundays and Fridays but despite a trap, it had not materialized. **PW-3-** also a teacher at the same school and the complainant's class teacher testified that on 2/7/2018, her pupils reported bad smell from the complainant, and that it was not the first time, and upon interrogating her, she disclosed that the appellant used to defile her on Fridays, Saturdays and Sunday; upon which she made a report to the Head teacher.

12. It is the above evidence that the appellant submits is contradictory, basically on the matter of the date the offence was committed. The complainant disclosed to her teachers that the appellant not only defiled her on the 1/7/2018, but on prior dates, on Fridays, Saturdays and Sundays. Other than stating that there was a contradiction, the appellant did not tender any proof of such contradiction. It is indeed the complainant who proceeded to expound that she had been defiled before the date stated in the charge sheet by the appellant. The appellant did not challenge that evidence in cross-examination by the complainant.

13. This evidence, in my considered view was ably corroborated by Medical evidence by PW-6-, a Clinical Officer who produced the P3 Form (P exhibit 2) and Laboratory test results – P Exhibit 3a-d, upon examination of the complainant on the 3/7/2018, three days after the incident. The results showed normal external genitalia, no injuries on labia majora minora, no bruises on vaginal wall, hymen not intact, had old perforation, whitish discharge noted (from the Laboratory test). The Clinical officer could not tell when the hymen was perforated but stated that the patient had claimed defilement on different occasions. Medical evidence of defilement is very essential to prove the offence of defilement. Penetration is one of the elements to prove the offence of defilement – **Section 8(1) of the Sexual Offences Act.** Penetration under Section -2- is defined as the;

> ***"partial or complete insertion of the genital organs of a person into the genital organs of another person."***

14. The fact of defilement or rape can be proved not only by medical evidence but also by oral evidence by the victim or by circumstantial evidence held by the Court of **Appeal in A.M.L –vs- Republic (2012)eKLR**. See also **Kassim Ali –v- Republic, Mombasa Criminal Appeal No. 84 of 2005** where the court held that;

> ***"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."***

15. The appellant submits that there was no proof of defilement as the medical evidence showed no connection between the old hymen perforation and the present case, citing the case **Ben Maina Mwangi –v- Republic (2006) eKLR** where the court held that;

> ***"----- it is unacceptable that the doctor saw the hymen missing and presence of laceration on the anus but failed to give age of these injuries. That appears to have been deliberate and in my view the learned trial Magistrate should have not let the Doctor go free ------- the Doctor's findings did not connect the date of the alleged defilement of the complainant with the age of the injuries noted. It was worthless evidence for the purposes of this case."***

16. Whereas in the **Ben Maina Mwangi Case(supra)** the Doctors evidence was rubbished by the court, and that case not provided to the Court for analysis of its circumstances, the medical evidence in the present case is well supported by circumstantial evidence as well as the oral evidence by both the complainant and the prosecution witnesses, PW-2- and PW-3-.

I agree that there can be no prove of defilement when penetration is not proved. A broken hymen is prove of penetration. **Section -2- of the Act** (cited above) is clear as what is defined as penetration.

17. I find the appellants submission that there was no penetration of the complainant's genitalia and therefore no defilement misplaced as the medical evidence was clear on the findings. It is noted that the defilement took place previously on several occasions (PW, PW2 and PW3) and that explains the old torn and perforated hymen of the complainants genitalia. It is trite that minor contradictions by witnesses that do not go to the merits of valid, finding ought not invalidate valid findings by a court – **Republic –vs- J.G.M(2020)eKLR, and Joshua Mula Nzalu & another –v- Republic (2019)eKLR.**

18. By the above, I come to the unenviable conclusion that I find no contradictions and inconsistences sufficient enough to invalidate the trial court's findings based on the evidence adduced before her.

That ground of appeal is dismissed.

19. Defence Evidence

The appellant's evidence is basically a denial of commission of the offence. He did not answer to the charge as stated. He testified to be a stranger to the allegations. He however raised an alibi stating that at the material day and time he was watching video movies up to 7.00 Pm. He called no witness to establish his alibi.

20. It is trite that an alibi raises a specific defence. An accused person who puts forward such defence as an answer to a charge does not in law thereby assume any burden of proving that answer. It is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable –**Kiarie –v- Republic (1984) eKLR**. It is the duty of the prosecution to disapprove the alibi and proving the appellant's guilt. However, for an accused to benefit from the defence of alibi, it is necessary that he brings it forth early enough in the trial so that it can be weighed against the prosecution evidence, and for the court to determine if the accused's guilt is established beyond reasonable doubt by the Investigating Authorities, thereby to present any suggestion that the defence may have been an afterthought – as held by the Court of Appeal in **Victor Mwendwa Mulinge –v- Republic.**

21. In any event, the defilement is stated to have taken place at about 7.00 Pm on the 1/7/2018. That time coincides with the time the complainant testified to have been defiled. I find this to be an afterthought. On the failure of the prosecution to call witnesses alleged to have seen or being present when offence is alleged to have been committed.

It is now trite that;

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, it is shown that the prosecution was influenced by some oblique motive."***

22. In **Julius Katewa Mutunga –v- Republic, Criminal Appeal No. 32 of 2005** see also **Benjamin Mbugua Gitau –v- Republic(2011),** the court held that;

> ***"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – Section 143 of the Evidence Act ----".***

However, the prosecution is obligated to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

23. SHIFTING THE BURDEN OF PROOF TO THE DEFENCE?

Considering the Judgment of the trial court and the reasons for the same, I find contrary to the appellant's submissions, that the trial court did not shift the burden of proof to the defence. **Article 50 (2)(a) of the Constitution** guarantees every accused person a right to fair trial, including to be presumed innocent until the contrary is proved. This is a right that is not limited. I have not found anyway in which the trial

magistrate during the hearing of the case, where or when that right may have been violated. None has been pointed out by the appellant. At Page 64 of the record of appeal, the reasons for the Judgment are stated.

24. In totality, I find no reasons to persuade me to interference with the trial Magistrate's finding of guilt of the appellant. The conviction is upheld.

25. Harsh and excessive Sentence?

The sentence, upon conviction of the offence under **Section 8(1) of the Sexual Offences Act** is provided under **Section 8(2)** thereof as life imprisonment. The trial Magistrate meted a sentence of ten years imprisonment on the 30/11/2018 to the appellant. I agree with the appellant that the prosecution cannot apply for enhancement of a sentence in submissions in an appeal. A Proper Notice ought to be filed, or by filing a Cross-Appeal upon an appeal being filed for reduction of sentence, or by a written warning that it would be urging for enhancement. None of the above was done by the prosecution. This request is without legal basis. It is rejected.

26. Despite the appellant stating in his petition of appeal that the sentence of ten years was manifestly harsh and excessive in the circumstance, no submission was had, to justify the assertion and urge for reduction. As stated above, and taking the circumstances thereto, and upon consideration of the Muruatetu case (see below), where the Supreme court untied the court's hands in respect to minimum sentences and giving courts discretion in sentencing, I feel and hold that given the circumstances of this case, the sentence handed to the appellant is consummerate to the offence committed and in line with recent judicial pronouncements, post **Muruatetu decision of 2017** – see **Court of appeal decision in Dismas Wafula Kilwake –v- Republic 2019**, where the court sitting at Kisumu reiterated that the reasoning in the Supreme Court decision in **Francis Karioko Muruatetu (supra)** should apply to Sexual Offences, and proceeded to reduce the appellant's sentence of 20 years, to ten years imprisonment. I uphold the sentence.

27. In conclusion, I find no merit in the appeal. It is dismissed.

Orders accordingly.

Dated, signed and delivered at Kerugoya this 29th day of October 2020.

J. N. MULWA

JUDGE

In the presence of:-

· **Ngige for Appellant**

· **The Appellant**

· **F. S. Ashimosi, - Assistant Director Public Prosecutions**