REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NUMBER 32 OF 2019

JOHN NJIRU NJUE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein was charged with two counts of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the first count were that; on the 23rd June, 2015 at [Particulars withheld] Sub-Location, Nembure Division within Embu County, Intentionally and unlawfully, caused his genital Organ penis, to penetrate the genital organ vagina of VK a girl aged 7 years.

He also faced an alternative charge of Committing an Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that; on the 23rd June, 2015 at [Particulars withhed] Sub-Location Nembure Division, within Embu County, intentionally touched the vagina of VK a girl aged 7 years with his penis.

The particulars of the 2nd charge were that; on the 23rd June, 2015 at [Particulars withheld] sub-Location, Nembure Division within Embu County, intentionally and unlawfully caused his genital organ penis to penetrate the genital organ vagina of CW a girl aged 5 years.

He also faced an alternative charge, the particulars being that; on the 23rd June, 2015 at [Particulars withheld] Sub-Location, Nembure Division within Embu County, intentionally touched the vagina of CW a girl aged 5 years with his penis.

He was convicted on the two (2) main counts of defilement and sentenced to serve 20 years imprisonment on both counts.

Being dissatisfied with both the conviction and the sentence, he has appealed to this court vide his Petition of Appeal dated the 29th November, 2019 wherein he has listed twenty (20) grounds of Appeal.

The prosecution called seven (7) witnesses. On being put on his defence, the prosecution testified on oath and called two (2) witnesses in support of his defence case.

The complainant in count 1 (VK) testified as PW1 and stated that on the 23rd June, 2015, she was with her aunt MW and her sister CW (the second complainant) who testified as (PW2) when the Appellant told them to accompany him so that he could give them maize. The Appellant had two handkerchiefs and a rope, he got hold of her hands, tied her sister (PW2) laid her down on a sack, removed her clothes and did “tabia mbaya” to her and after he had finished with her he did the same to her sister (PW2).

He told them not to tell anyone. In the evening, she told her mother that she was feeling pain and she was taken to hospital where she was examined and treated.

Her sister CK testified as PW2. Her evidence was similar to that of PW1 on what transpired on the material day.

PW3 the mother to the two (2) complainants stated that on the 23rd June, 2016, MW (her sister) took her two children (PW1 and PW2) to stay with her children as she was going to do casual work. In the evening the children were taken back and when she was bathing them, they refused to be bathed and on asking them, PW1 told her that someone had done “tabia mabaya” to them.

She told MW what she had heard. The following day MW picked the two children and went with them and when they went back home MW told her that the children had identified the person who defiled them.

She took the children to Githimu Dispensary and later reported the matter to Itabua Police Station. She later took them to Embu Level 5 hospital where they were examined and found to have been defiled. She later came to learn that the Appellant is the one who had defiled them after he had been arrested.

MW who is the aunt to the complainants testified as PW4. It was her testimony that on the 23rd June, 2015 she went and took PW1 and PW2 to the farm where she was working and where they spent the whole day. In the evening, she took them back to their mother (PW3) but at around 9.00pm, PW3 called her and told her that the children had been sexually assaulted.

The following day she picked the children from PW3's house and took them to the farm and they showed her the person who had sexually assaulted them.

Doctor Phyllis Muhonja gave evidence as PW5. She filled the P3 forms on the 24th June, 2015 using the PRC forms.

She stated that when she saw the complainants the clothes were stained and there were no tears. She produced the P3 forms as exhibits.

The Arresting Officer Joseph Chepkwony who gave evidence as PW6 stated that he was at the Githimu Police Post when the complainants' father called him and informed him that he had seen the Appellant. He and PC Ngere and in the company of the complainants' father arrested the Appellant and escorted him to Itabua Police Station. He was identified to them by the complainants' father.

Risper Beryl Achieng Atieno testified as PW7. She was the Investigating Officer. She recorded the statements of the complainants and issued them with P3 forms which were duly filled by the doctor. He preferred charges against the Appellant.

As earlier noted, the Appellant gave a sworn statement in his defence and called two (2) witnesses. He stated that on 23rd June, 2015 he left Githimu and went to see Patrick Ngithi (DW2) where he worked until evening. It was his evidence that there were 17 people working in the farm on the material day and had been given the work of harvesting beans. The farm had maize and beans and the maize was three (3) meters tall. He further stated that the land is flat and there are no bushes and one can see from one corner to another.

He stated that it was not possible to do such a thing as there were many people in the farm. He denied having committed the offence of defilement. He was arrested on 29th June 2015 and he was not informed why he was arrested and he was taken to court the following day. He stated that the charges were fabricated.

Patrick Ngithi M'meru (DW2) stated that on 23rd June, 2015 he went to his Githimu farm to harvest beans. The appellant and other seventeen (17) people were engaged as casual labourers on the said date where they worked from 8.00am to 6.00pm under his supervision.

He testified that his farm had maize which were about 3 meters tall and beans and the spacing was about four (4) feet and one can see through the farm. That no one complained about defilement of their children. He stated that if any incident occurred in his farm, he could have known. According to him, the Appellant was framed in this case.

Ireri Mwaniki (DW3) stated that he was in Ngithi's farm harvesting beans. They were 17 people in the farm and they worked from 8.00am to 5.00pm. It was his evidence that the land is flat and one could see every corner of the farm. He was with the Appellant and he never left him. He stated that they could have known if any child was defiled in the farm. According to him the Appellant was framed in the case.

The appeal was canvassed by way of oral submissions which this court has duly considered. From the grounds of appeal and the submissions, the following issues arise for determination;

1. Whether the learned Magistrate erred in law and fact by convicting the appellant on charges that were not supported by medical evidence in light of the fact that no PRC was produced.

2. Whether the Learned Magistrate erred in law and fact in allowing the medical examination report to be produced by a person other than the author.

3. Whether the learned Magistrate erred in both law and fact in convicting and sentencing the appellant relying on the evidence of PW1 which was unsworn and which evidence the defence was not afforded a chance to cross examine.

4. Whether the learned Magistrate erred in Law and in fact in failing to consider the written or oral submissions by counsel for the Appellant.

5. Whether the learned Magistrate erred in law and in fact in failing to consider the evidence of the defence.

6. Whether the learned Magistrate erred in law and in fact by failing to take into consideration that the totality of the evidence adduced by the prosecution did not meet the threshold of proof beyond all reasonable doubt.

7. Whether the learned Magistrate erred in law and in fact by sentencing the Appellant to serve 20 years imprisonment which sentence was harsh, extreme and excessive in the circumstances of the case.

In his submissions, counsel for the Appellant submitted that since in cross examination PW2 admitted having been coached by her mother, the trial court should have cautioned itself of that fact.

He also stated that the Appellant was not afforded an opportunity to cross examine PW1 and that the post rape care form was not produced in evidence yet it is the initial document that the doctors use to fill the P3 form.

Counsel also submitted that there are discrepancies in the dates on when the P3 form was filled and when the investigations started. He also took issue with the fact that no identification parade was conducted to identify the Appellant.

It was also his submissions that the birth certificates for the complainants were produced by a person who is not the maker of those documents; that the Appellant was in custody for a period longer than what is provided for in law and that there was inconsistencies in the evidence that was adduced by the prosecution witnesses.

On her part, counsel for the Respondent opposed the appeal and submitted that the trial court conducted itself judiciously and lawfully. She stated that the sentence was lawful and legal as stipulated under the Sexual Offences Act. According to her the prosecution's case was cogent, credible and the witnesses had no motivation to lie.

Counsel urged the court to consider the circumstances of this case where two sisters aged 5 and 7 years were defiled by the Appellant and that from the incident, the minors are scarred for life from the action of the Appellant. She urged the court to consider the sentence in line with the sentencing policy 2016 and specifically the community protection and uphold the sentence.

In his response, counsel for the Appellant submitted that the P3 form did not specify the exact area of the vagina where the complainants were injured and therefore the same is a nullity. He urged the court to consider the defence tendered by the Appellant and his witnesses, which he submitted was not considered by the trial court.

The court has re-evaluated the evidence on record and has considered the submissions by both counsel for the Appellant and the Respondents.

The Appellant was charged and convicted on the two main counts of defilement contrary to Sections 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. In Criminal cases it is trite law that the burden of proof lies on the prosecution throughout the proceedings. ***Viscount Sankey L.K.*** in the case of ***H. L € WoolWington vs. DPP 1935 A.C 462 PP 481*** in what has been described as a subtle and mastery fashion stated the law on legal burden of proof in criminal matter that;

> ***"Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of the England and no attempt to whittle it down can be entertained."***

The supreme court of Canada in the case of R***. vs. Lifchus (1997) 3 SCR 320*** suggested the following explanation; -

> ***"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such a time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…… the term beyond a reasonable doubt has been used for a very long time and is part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances, you must give the benefit of the doubt to the accused and acquit him because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."***

On what amounts to reasonable, ***Lord Denning in Miller vs. Ministry of Pensions (1947) 2AII 372*** stated;

> ***"That degree is well settled. It need not reach certainity, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as so leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

In the Sexual Offences Act, defilement is defined as:-

> ***"a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

To prove the offence of defilement, the prosecution has to prove beyond any reasonable doubt the following

a) the complainant must be a child.

b) Proof of penetration

c) Positive identification of the assailant.

The complainants in counts I and II were said to be aged 7 and 5 years respectively. In the case of ***John Gorden Wagener vs. R. I (Criminal Appeal No. 404 of 2009***) the court held that:

> ***"In defilement cases, the age of the complainant is proved either by medical evidence or through other evidence since the sexual offences act has different categories of ages."***

Also in the case of ***Musyoki vs. R (Criminal Appeal No. 172 of 2012*** in which it was held ***"Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. On that basis, the high court found that the complainant's age was properly ascertained through the evidence of PW3, the mother of the complainant and her grandmother."***

There is no doubt that in Sexual Offences, the age of the complainant is a critical component. In the case of ***Elias Kasom vs R. (Malindi Criminal Appeal No. 504/2020)*** the court of Appeal stated;

> ***"Age of the victim in a sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that credible evidence for the sentence to be imposed will depend on the case of the complainant."***

In the case herein, the ages of the complainants were stated by their mother as 7 and 5 respectively. The Investigating Officer who testified as PW7 produced their birth certificates and the same were marked as exhibits 3 and 4. Though the defence counsel raised an objection on the production of the same, the learned Magistrate overruled the same on the basis that a birth certificate is a public document which finding, this court agrees with. As can be seen in the case of ***Musyoki vs. R. (supra)*** the birth certificate is not the only way via which age can be proven. The age can be proved through the mother. In this case the mother to the complainants testified and gave their ages as 7 and 5 years respectively. The court also notes that the objection was premised on the maker and not the contents of the birth certificates. In my considered view, the learned Magistrate did not err in allowing the birth certificate to be produced by the Investigating Officer.

The other essential ingredient is the penetration. The same is defined in Section 2 of the Sexual Offences Act as follows;

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

On this issue, counsel for the appellant submitted that the same was not proved as the PRC forms were not produced yet they are the initial documents that the doctors use in filling the P3 form and hence, the P3 form is not a complete document.

In her evidence, PW5 stated that she filled the P3 form using the PRC forms though the said forms were not produced as exhibits. It was her evidence that she examined the two complainants. On examining VK. she found that there were lacerations and bruises on the right side of the inner thigh, the vagina was swollen up to the cervix and the hymen was perforated. There was foul smelling vaginal discharge. She also examined CW and found that the hymen was lacerated and labia majora and minora were intact. She also had a foul smelling vaginal discharge. On re-examination, she stated that the P3 forms contains injuries sustained by the complainants. The injuries were from the PRC forms and upon examining the two complainants, she confirmed vaginal and hymen perforation.

In this regard, it is the position in law that medical evidence is not the only evidence that can prove defilement. The same can also be proven by oral or circumstantial evidence. See the case of ***AML vs. Republic (2002) eKLR*** where the court of Appeal held;

> ***"The fact of rape or defilement is not proved by DNA test but by way of evidence."***

Also in the case of ***Kassim Ali vs. Republic, Wisa COA Cr. appeal no. 84 of 2005*** where the court held;

> ***"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."***

That notwithstanding, in the circumstances of this case, PW5 was categorical that she filled the P3 form using the PRC forms and she examined the complainants to confirm the injuries, which she did. In view of her evidence, failure to produce the PRC forms cannot vitiate the proceedings herein. PW5 in her evidence stated that the complainants were defiled and therefore, penetration was proven.

On the identification of the Appellant, it is important to note that the appellant was not known to the complainants before this incident. The court in the case of ***Ali Mlako Mweru vs. Republic (2011) eKLR*** had this to say about identification;

> ***"The identification of the Appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Jr. Oguk, that in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken. So may a number of them; see Ruria vs. R. (1967) E A 583. There is nevertheless some measures of reassurance when the case rests on recognition as stated in the case of Anjononi & Another vs.***

Republic (1980) KLR 59 thus;

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favorable."***
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> ***This was, however, a case of recognition, not identification of the assailant's. Recognition of an assailant is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Gitera vs. Republic (unreported)***
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> ***in the case of R. Vs. Turnbull (1976) 3AII ER 549*** the court held.
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> ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

In the case herein, the Appellant submitted that there was no identification parade conducted to identify him.

As earlier stated, the complainants did not know the appellant before the incident. In their evidence, the complainants did not tell the court how long the incident took. PW4 stated that, the following day she went for the complainants from her sister's house to the farm and they showed her the person who had sexually assaulted them.

There is nothing on record to indicate how the complainants were able to identify the appellant as the assailant yet he was not a person known to them before the date of the incident. No description of any nature was given to PW4 or the police when the case was first reported by the complainants. In my view, the most reliable way of ascertaining the efficacy of the alleged identification was by way of an identification parade. Of course, it is not mandatory that there must be an identification parade in each and every case but if the conviction or acquittal of the accused was largely dependant on identification failure to conduct an identification parade had a negative impact on the prosecution's case. In this case I am of the view that the identification was not completely free from error. My view above is further supported by the court in the case of ***Maitanyi GV. Republic (1986) KLR 198*** where the court stated;

> ***"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police." In this case no inquiry of any sort was made. ……. if a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained."***

In the case of ***Cleophas Otieno Wamunga vs. R. (Court of Appeal Criminal Appeal No. 20 of 1989*** the court held;

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.***
>
> ***Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution for convicting the defendant in reliance on the correctness of the identification."***

The importance of conducting identification parades where the accused person is not known to the complainant have been well captured by the courts which have been quick to place reliance on it. See ***John Kamau Wamatu & Another vs. R. (2010) eKLR and Ajode v. R. (2004) eKLR.***

The court of Appeal in ***James Tinega Omwega v. R. (criminal Appeal 59 of 2011 (2014) eKLR*** expressed itself as follows;

> ***"----------This is because the purpose of an identification parade is to test the correctness of the identification of an accused person by a witness who did not know him prior to the incident. Therefore, the identification parade conducted by PC Joseph was to test the correctness of the identification of the appellant based on the description she had given of the attacker in her initial report. The law is settled that in general identification of a suspect who was a stranger at the time the offence was committed which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect in a dock identification which in some cases is regarded as worthless."***

The other issue raised by the Appellant was that he was held in custody for a longer period that what the law provides. In his submissions counsel for the Appellant submitted that, the appellant was in custody from 29th June, 2015 to 1st July 2015 which is a period of four (4) days. The court was able to confirm the same from the record. Counsel for the respondent did not submit on this aspect. The courts on several occasions have had a chance to consider this issue. In the case of ***Patrick Daniel Lesadala vs. Republic (2019) eKLR,*** the court of appeal held that;

> ***"……. moreover, the appellant's relief with regard to this violation is no longer an acquittal. Courts have since held that where***

there is such a violation, an accused's remedy lies in compensation by way of damages against the state. For instance, in Julius Kamau Mbugua v. R. (2010) eKLR the court of Appeal observed that a violation of the constitutional provision stipulating the time within which an accused must be produced in court does not give rise to an automatic acquittal since such an accused person could be adequately compensated by way of monetary damages."

I wholly agree with that finding and I have nothing more to add in that regard.

Lastly, the Appellant faulted the learned Magistrate for relying on the evidence of PW1 which was unsworn and which evidence the defence was not afforded a chance to cross examine. Indeed, the record shows that PW1 was not cross-examined. It is trite law that an accused person is entitled to a fair trial pursuant to article 50 of the constitution. In this regard, an accused person has a right to adduce and challenge evidence in a trial. One way of challenging evidence is by way of cross examination of the witnesses. This right is absolute and cannot be limited.

In the case of ***HOW VS. Republic (2014) eKLR*** the Court of Appeal dealt with the question of cross examination of prosecution witnesses by an accused person and noted.;

"The first such matters and which is the main one is on point of procedure in law, we feel fundamentally prejudiced the entire case and the Appellant. This is that the complaint J.J. who was a minor was taken through voire dire examination and this was proper in law for whatever evidence was given on age, she was not above twelve (12) years in age. The learned trial magistrate found as a result of voire dire examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross examine this witness and no reasons were recorded as to why that procedure was not done----------"

In the case of ***Nicholas Mutula Wambua v. Republic (criminal Appeal no. 373 of 2006*** the court held;

"Accordingly, all prosecution witnesses are liable to be cross examined in order to test the credibility and the veracity of the witnesses. The trial courts should always observe that requirement of the law in all criminal trials to obviate on otherwise stable case from being lost on that omission."

In this regard, I find that the failure by the trial Court to afford the appellant an opportunity to cross examine PW1 vitiated the proceedings and it is a breach of his fundamental right to a fair hearing.

The Appellant also took issue with the fact that PW2 clearly stated that she was coached by her mother on what to say in court. In re-examination, the prosecution never sought to clarify that assertion by PW2. In my view, this seriously compromised the prosecution's case with regard to the weight to be attached to her evidence. The situation was made worse by the fact that there was no cross examination of PW1 to ascertain the veracity of her evidence.

Having evaluated all the evidence on record afresh, I have come to the conclusion that the conviction was unsafe. The prosecution failed to prove positive identification of the appellant. It failed to prove case against the appellant beyond reasonable doubt as required by law.

For the aforegoing reasons, I find that this appeal has merit. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant is set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated, Delivered and signed at EMBU this 23rd day of October, 2020.

.....

L. NJUGUNA

In the presence of

.....for the Appellant

.....for the Respondent