REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NUMBER 11 OF 2019

KIGORO MACHORO..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGEMENT

The Appellant herein was convicted of the offence of Defilement Contrary to Section 8(1)(2) of the Sexual Offences Act no. 3 of 2006 and sentenced to life imprisonment. He was aggrieved by the conviction and the sentence and filed this Appeal. The Appeal is based on the grounds set out in the amended petition of Appeal filed on the 16th day of December 2019. The grounds raised by the Appellant are that;

1. The learned Magistrate erred in law and in fact in convicting the Appellant on the basis of contradicting, insufficient, incredible and unreliable evidence;

2. The learned Magistrate erred in not finding that the prosecution did not prove it's case beyond reasonable doubt;

3. The trial court failed to comply with the provisions of Section 31 of the Sexual Offences Act;

4. The trial Magistrate erred in not finding that the prosecution's evidence was insufficient, unreliable and incredible and could not sustain a conviction;

5. The learned Magistrate erred in not finding that there was no medical evidence and/or proper and/or credible medical evidence and/or reports to prove a case of defilement.

6. The trial Magistrate erred by not setting out the reasons in his judgment.

7. The learned Magistrate erred in not finding that the Appellant's defence was credible, consistent and that it rebutted the prosecution's evidence.

The particulars of the offence were that; on the 28th June, 2014 at [particulars withheld] area in Mbeere District within Embu County, intentionally and unlawfully caused penetration of the genital organ of NWN a child aged 11 years.

The Appellant also faced an alternative charge of Sexual Assault Contrary to Section 5(1) as read with Section 5(2) of the Sexual Offences Act no. 3 of 2006, the particulars being that; on the 29th June, 2014 at [particulars withheld] area of Mbeere District within Embu County; unlawfully manipulated part of his body namely penis or part of the body of another person namely NWN so as to cause penetration of the genial organ by that said penis.

In support of the charge, the prosecution called six (6) witnesses. On the part of the defence, the Appellant gave a sworn statement and called two witnesses.

It was the evidence of the complainant that, on the 28th June, 2014, she was going home from school in the company of PW3. They passed through her grandfather's home to ask for passion fruits. As they left her grandfather's home headed to their homes, the Appellant called her and asked her whether her mother had finished using a "chadarua" that she had borrowed from him. As she was leaving, the Appellant held her both hands and he had in his possession a knife. He took her to his house, threw her below the bed and locked the door. He removed his trouser and inserted his penis into her vagina.

She stated that as she tried to shout for help, the Appellant threatened her with a knife and after he had defiled her he locked her inside the house. She stayed in the house for a while and thereafter the police went and opened the door for her.

It was her further evidence that while inside the house, she heard people talking outside the Appellant's compound. She was taken to the AP camp at Ganduri in the company of PW3 and Samuel Mureri by the police officers who went to rescue her. Her mother and three teachers also accompanied her to the AP camp. They later recorded a statement at Kiritiri Police Station. The following day she was taken to Kiritiri Health Centre where she was treated and a P3 form was issued to her at Siakago District Hospital.

PW2 was on 28th June, 2014 heading to the shops when he found PW3 who is his younger brother seated down at the appellant's gate. PW2 told him that they were with the complainant but the Appellant had held her with both hands and had led her to his bedroom. He told his sister (PW4) and teacher Faith. In their company they went to the Appellant's home and tried to open the door but it was closed from inside.

The Appellant came out holding a knife and upon checking, PW2 saw the complainant under the Appellants bed. They called police officers who came to the scene and arrested the Appellant.

PW3 was on his way home from school on the 28th June, 2014 when he saw the Appellant pulling the complainant towards the entrance to his house. He reported what he had seen to his brother (PW2). In the company of PW2, PW4 and teacher Dorothy they went to the home of the Appellant where they found the house locked from inside. The Appellant later opened the door and the complainant who was inside the house came out. Police officers were called and the appellant was arrested.

PW4 was at the material time a teacher at [Particulars Withheld] Child's Development Centre. On the 28th June, 2014 she was going home in the company of Veronica, a colleague, when she was called by PW2 who told her the complainant had been pulled to the Appellant's house. They proceeded to the Appellant's house and called out PW1's name but she did not respond. Later the Appellant came out of the house and on asking him, he said he had not seen PW1. They called police officer who came and ordered the Appellant to open the house and on doing so, the complainant was inside the house under the bed. The Appellant was arrested and taken to Ganduri Police Station.

John Mwangi the Clinical Officer at Mbeere District Hospital testified as PW5. He examined PW1 on the 28th June, 2014. He filled the P3 form and in doing so, he relied on the PRC and the treatment notes from Kiritiri Health Centre.

PW6, who was the Investigating Officer produced the original birth certificate of the complainant.

DW1 the Appellant herein, denied having defiled the complainant. He stated that he was at his home on the material day at about 4-5 pm when children went to his home and the complainant was among them. The children went looking for money in his house while he was seated outside the house taking a pawpaw using a panga and a knife. He then closed the house but did not know there was somebody in the house. He was then arrested but he does not know why he was arrested.

DW2 who is the daughter of the Appellant was at home on 28th June, 2014. She was at the shamba outside the Appellant's house. She was gathering maize for cooking when she heard many people talking and upon going there, she found the complainant standing at the Appellant's door and there were some police officers. She learnt that the complainant was alleged to have been defiled by the Appellant. On seeking to know the truth from PW1, she said that the allegations were not true. The Appellant was arrested and taken to Kiritiri Police Station.

DW3 the son of the Appellant stated that he was within Embu Town on the material day when he was called by Gibson Wachira informing him that there were police officers at the Appellant's home. He later went to the police station where he found his father.

In his submissions, counsel for the appellant submitted that the prosecution never proved its case beyond reasonable doubt to warrant a conviction. That, the evidence of the prosecution witnesses was contradictory, insufficient, incredible and unreliable and the same cannot sustain a conviction.

He also submitted that the medical evidence tendered by the prosecution was insufficient and unreliable and the same did not support the allegations of defilement in that, there was no spermatozoa in PW1's vagina and that the PRC was only marked for identification but it was not produced in evidence as an exhibit.

He further submitted that the appellant's defence was credible, consistent and that it rebutted the prosecution's evidence thus proving that the Appellant was not guilty of the offence of defilement. This, he argued, was because as clearly demonstrated, the appellant could not fit under the bed due to his advanced age which is over 90 years and the fact that the bed was only about a foot from the ground; yet it was claimed that the incident took place under the bed. He contended that he was not examined by a medical doctor to ascertain the said offence and/or if his genitalia was still functional considering his advanced age or if his genitalia had any contact with that of PW1.

On the part of the Respondent, it was submitted that the prosecution proved its case beyond reasonable doubt and that the appeal lacks merits. Counsel submitted that the Appellant was identified and the complainant despite the circumstances and the threat by the Appellant, she was able to concisely explain the ordeal to the trial court.

She further submitted that PW4 who was present during the arrest also identified the Appellant and she is the one who called the police officers who came and rescued PW1 who was under the Appellant's bed. Counsel submitted that the evidence of PW5 the Clinical Officer proved that there was actual vaginal penetration and that the hymen was perforated.

This being a first Appeal, the duty of the court is to analyze and re-evaluate the evidence adduced at the trial court and draw its own conclusion while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify. See the case of **Okeno vs.**

Republic (1972) EA 32 and Kiilu & Another vs. R (2005) 1KLR 174.

I have considered the evidence on record, the grounds of appeal and the submissions of the parties. The Appellant was charged with the offence of defilement Contrary to Section 8(1) of the Sexual Offences Act.

He also faced on alternative count but the court found him guilty of the main charge.

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 complainant in this case was said to be aged 11 years at the material time when the offence was committed. In the case of **John Gordon Wagner V. R. (Criminal Appeal 104 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 PW2, her grandmother.**

In cases under Sexual Offences Act, the age of the victim is a critical component. In the case of **Kaingu Elias Kasomo vs. R (Malindi CRA. 504/2010)** the Court of Appeal stated;

> "**Age of the victim of the 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 the same is proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.**"

In the case herein, the birth certificate of the complainant was produced as exhibit (4) by the Investigating Officer PC Edward Waswa. The same shows that she was born on the 28th March, 2003. The production of the same was not challenged. Going by the same, the complainant was aged slightly over 11 years when the offence is said to have been committed on the 28th June, 2014. She had not yet attained the age of 12 years and therefore the Appellant was charged under the correct Section of the Sexual Offences Act.

The 2nd element is proof of penetration . Penetration 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 organs of another person".**

In this regard, counsel for the appellant submitted that the medical evidence tendered by the prosecution was insufficient and unreliable as the same did not support the allegations of defilement. He contended that it was important to establish whether there were spermatozoa in PW1's vagina as proof that there was defilement which failure was fatal to the prosecution's case.

Counsel also took issue with the fact that PRC form was not produced as an exhibit though it was marked for identification. He submitted that the information contained in the PRC form differs with that contained in Section C of the P3 form.

The court has perused the evidence on record which is relevant to this issue of penetration. The complainant in her evidence stated that the Appellant inserted his penis into her vagina and when she tried to shout for help he threatened her with a knife. It was her evidence that it was painful. This evidence was corroborated by that of the Clinical Officer who testified as PW5. He examined her on the 28th June, 2014. On examination, the hymen was perforated and labia was over reddened. There were no tears and no vaginal discharge. Some other investigations were done and bacteria were seen upon high vaginal swab. His conclusion was that there was actual vaginal penetration and though he could not remember the exact date that he examined the complainant, he was clear in his evidence that he must have examined her before he filled the P3 form. The court has perused the P3 form, which was produced as exhibit 2. It shows that the hymen was perforated, there was hyper reddened labia minora but there was no perineal tear. It also shows that there was actual vaginal penetration.

In view of the evidence adduced by PW1 and PW5, I find that the prosecution was able to prove penetration. In any event, medical evidence is not the only conclusive evidence in cases of rape or defilement. There are many Judicial Authorities on this subject which hold that medical evidence is not the only evidence that can prove defilement. The same can be proved by oral and circumstantial evidence. In ***AML Vs. Republic (2012) eKLR*** the Court of Appeal 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."**

On identification, the evidence of PW1, PW2 and PW3 is very critical. The evidence available to the court is that the Appellant was a person well known to the complainant (PW1). The incident happened in broad day light. In view of the fact that the Appellant was known to the complainant, the issue here is that of recognition of the assailant which is more satisfactory than that of identification of a stranger. On the issue of identification, the court in the case of ***Mlako Mwero vs. Republic (2011) eKLR*** expressed itself as follows:

> **"The identification of the Appellant in this case lay not only on the visual features observed by Mesalin but also on his recognition by that witness. We agree with Mr. 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……… This was, however, a case of recognition, not identification, of the assailants; 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.**

In the case of ***R. Vs. Turnbull (1976) 3E11 E. R 549*** the court held that;

> **"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, with the evidence of PW1, PW2 and PW3 coupled by the fact that the Appellant was arrested at his home and the fact that the complainant was in his house, there was overwhelming evidence of identification.

On the ground that the learned Magistrate erred in convicting the Appellant on the basis of contradicting evidence. The court has perused the record of the proceedings vis-à-vis the submissions by counsel for the appellant in regard to the contradictions in the evidence adduced by the prosecution witnesses.

Though there are some contradictions, they are not material contradictions as to affect the main substance of the prosecution's case. How to treat contradictions in a case was stated by the court of Appeal in the case of **Jackson Mwanzia Musembi vs. Republic (2017) e KLR** where the court cited with approval the Ugandan case of **Twahangane Alfred vs. Uganda (Cr. Appeal no. 139 of 2002 (2003) UGCA, 6** in which the court held;

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".**

The same position was held by the ***Court of Appeal at Nairobi, in Criminal Appeal No. 91 of 2017 JKM VS R***. wherein they adopted the positions in law as stated in the case of ***Joseph Maina Mwangi vs. R. (Criminal Appeal No. 73 of 1993*** that,

> **"in any trial there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.**

Also in the case of ***Kimei vs. R. (2002) 1KAR 757,*** where it was stated that;

> **"It is not every conflict or contradiction in evidence, even of a minor nature that vitiates a trial to lead to such eventuality, the contradictions involved must be of such a nature as to create doubt in the mind of the court regarding the guilt of the accused.**

In ***Njuki & 4 others vs. Republic (2012) 1KLR 771,*** it was stated that;

> **"Where discrepancies in the evidence do not affect an otherwise proven case against the accused person, a court is entitled to overlook those discrepancies."**

Lastly, in **Josiah Afuna Angulu vs. R. Criminal Appeal No. 227 of 2006 (CR) and Charles Kiplangat Ng'eno vs. R. (Criminal Appeal 77 of 2009 (CR)** it was stated that;

> **"Where contradictions and inconsistencies are alleged to exist in the prosecution case, the duty of the court is to reconcile these and determine whether they vitiate the prosecution's case or otherwise".**

In the case herein, the contradictions and the inconsistencies the Appellant has complained of, relate to the evidence of PW1 on where the alleged incident took place, whether it was under the bed or at the end of the bed, whether the bed was 2 feet or 1 ½ feet and how long the incident took. In my considered view, these were just minor contradictions that did not affect the otherwise proven case against the appellant.

With regard to the evidence of PW6 and the contradictions of his evidence as submitted by counsel for the appellant; I wish to state as follows;

1. The statements by the two police officers namely PC Mbaluka and PC David Otieno were never produced as exhibits in the case before the trial court.

2. On being re-examined, PW6 stated that PC David Otieno is the one who referred the complainant for treatment and he was the one who preferred the charges against the appellant

3. The complainant was referred for medical attention which led to the filling of the P3 and the medical documents tendered in court.

These medical documents coupled with the evidence on record are sufficient proof that the Appellant committed the offence of defilement.

The other ground of appeal is that the learned Magistrate erred in failing to comply with Section 31 of Sexual Offences Act. The section deals with the subject of vulnerable witnesses, when the trial court can declare a witness a vulnerable witness and how to appoint an intermediary. The record shows that the trial court conducted voire dire and it was satisfied that the complainant though a minor aged 12 years understood the nature of oath and consequently the court took her sworn evidence. In the circumstances, it was not necessary to declare the complainant a vulnerable witness and therefore it was not necessary to invoke the provisions of Section 31 of the Sexual Offences Act.

On the submission that the Appellant's defence was credible and consistent, upon re-evaluating and analyzing the evidence on record, I find that the evidence by the prosecution witnesses was cogent to sustain a conviction and this court has no reason to fault the finding arrived at by the learned Magistrate on conviction.

On the sentence, the court in the case of **Christopher Ochieng vs. R. (2018) eKLR Kisumu Criminal Appeal No. 2011** and in **Jared Koita Njiiri Republic Kisumu Criminal Appeal No. 93 of 2014** considered the legality of minimum mandatory sentences under the Sexual Offences Act.

This court notes that the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic Sc Petition no. 16 of 2015** held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprived courts of their legitimate jurisdiction to exercise discretion not to impose death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the above supreme court decision the court of appeal in the case of **Christopher Ochieng vs. Republic stated;**

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1) of the Sexual Offences Act, and if the reasoning in the supreme court case was applied to this provision, it too should be considered unconstitutional on the same basis…. Needless to say, pursuant to the supreme court's decision in Francis Karioko Muruatetu (supra) we would set aside the sentence of life imprisonment imposed and substitute it therefore with a sentence of 20 years imprisonment"**

Guided by the above cases, I am convinced and satisfied that the mandatory sentence of life imprisonment meted out to the Appellant by the learned Magistrate cannot stand. I am inclined to interfere. I hereby set aside the sentence and substitute the same with one of imprisonment for a term of 20 years.

It is so ordered.

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

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L. NJUGUNA

JUDGE

In the presence of:

....for the Appellant

....................................for the Respondent