REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO.6 OF 2020

BENARD AGANDA MUYUNGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence in Siaya Pm's Court SO Case No. 6 of 2019 on 22/1/2020 by Hon. M. Mwangi, RM)

JUDGMENT

Introduction

1. The Appellant **BENARD AGANDA MUYUNGI** was charged before the Principal Magistrate's Court at Siaya in Sexual Offense Case No. 6 of 2019 with the offence of defilement contrary to **Section 8(1) as read with Section 8(3)** of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that On the 22nd day of September 2018, at Sigona Uranga sub-location in Siaya district within Siaya county, he intentionally caused his penis to penetrate the vagina of (PAO) a child aged 15 years.

2. The appellant also faced the alternative charge of Committing an Indecent Act with the child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**.**

3. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.

4. The trial magistrate, Hon. M. Mwangi after hearing four prosecution witnesses and considering the appellant's mitigation, found the appellant guilty of the offence defilement as contemplated under section 8(1) as read together with section 8(3) of the Sexual Offences Act and convicted him under section 215 of the Criminal Procedure Code sentencing him to **20 years' imprisonment.**

5. Dissatisfied by the said conviction and sentence the appellant filed his petition of appeal based on the following grounds:

a) **That the trial court failed to observe that nothing linked him with the alleged offence.**

b) **That the trial court failed to observe that the sentence imposed was against the weight of the evidence adduced.**

c) **That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.**

d) **That the trial court failed to appreciate that the prosecution case was full of contradictions hence unsafe to base a conviction upon.**

e) **That the honourable court be pleased to serve him with a copy certified trial records to enable me erect more grounds.**

6. The appellant, through his advocates then on record Messrs Oduol Achar subsequently filed further grounds of appeal Challenging sentence alone as follows:

a) That, the Learned Trial Magistrate failed to appreciate the accused person's mitigation and hence arriving at a wrong conclusion on the same.

b) That, the sentence imposed on the Appellant is manifestly harsh and excessive in the circumstances.

Appellant's Submissions

7. The appellant submitted that that there was semblance of discrepancies in terms of dates the alleged offence occurred and as such it was not clear whether the offence was committed by the appellant and/or whether the genitalia organ of the appellant came into contact with those of the complainant. The appellant cited the complainant's failure to disclose to her (paternal grandmother) what allegedly befallen her likewise to her mother (PW3) respectively and thus questioned the complainant's conduct prior to the offence.

8. It was further submitted that the alleged offence occurred at night, so the chance(s) of true observation could not suffice due to the nature of the day and that mistaken identity could arise. Reliance on this position was placed on the case of **Simiyu v R.(no full citation given).**

9. The appellant further submitted that despite vehemently denying being at the scene of crime, the (paternal grandmother) was not availed to cast doubt given that she was in the said home and that she saw the girl and was thus a vital witness with valid information to ascertain the same, as she was part and parcel of the offence.

10. It was further submitted that the evidence of (PW1), Dr. Isaac did not strengthen the prosecution case as his services were based on the "pregnancy test" but not penetration and further that delay in ferrying the complainant to the hospital affected the doctor's findings given that the P3 form was dated 19.12.2018 barely 3 months down the line. As such the appellant submitted that there was/were "no obvious injuries" meted on both the outer and internal genitalia of the complainant such as minora and majora respectively, no freshly broken hymen noted, no laceration and bruises noted, no discharge or spermatozoa noted. The appellant further cited the alleged estimation of the complainant's age which could be higher or lower than the real age of the complainant's.

11. The appellant submitted that he was a first offender who was not aware of the dire consequences of the offence, a pauper and a layman as well and had since been rehabilitated and reformed and as such the sentence meted out upon him was wholly disproportionate to his criminal culpability.

12. It was his further submission that it was his right to enjoy the least severe of the prescribed punishment as enshrined in the requirements of Article 50(2) p of the Constitution and that he was the most favourite child of the law and every benefit went to him. He relied on the case of **Hamisi Bakari v R(1987).** He further urged the court to consider the period already spent in custody as part of his sentence as provided in Section 333(2) of the Criminal Procedure Code.

Analysis & Determination

13. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction 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 1978) E.A. 424."***

14. The prosecution evidence as laid out in the trial Court was as follows; **PW1 Isaac Imbwaga** a clinical officer from Siaya County Referral Hospital gave evidence that the complainant was brought to the facility with a history of having been defiled by a person well known to her in the period between 2017 and 2018 but the last incident she remembered happened on 22nd September 2018. It was his further evidence that the pregnancy test was conducted

15. He stated further that upon examination the girl had normal external genitalia, broken hymen scar, bruised *labia maniora* and vaginal discharge. It was his evidence that the complainant's HIV test was negative whereas the pregnancy test yielded a positive result. The ultra sound conducted on 21st December showed a single live intra uterine feotus at 19 weeks and 3 days. He further stated that they were issued with a birth certificate which showed that the complainant was born on 12th November 2003. In cross examination he stated that the complainant stated that the defilement took place on diverse dates between 2017 and 2018 but could recall the last day of the alleged defilement as 22nd September 2018.

16. The complainant P.A.O, testified as PW2 after the trial court conducted a voire dire examination and formed the opinion that she possessed sufficient intelligence and appreciated the nature and solemnity of an oath. It was the complainant's testimony that on 22nd September 2018 at about 7:00 p.m. the appellant herein called her when she was on her way to her grandmother's house. That her grandmother heard the appellant calling her and told her to go to the appellant.

17. She further stated that when she reached the house of the appellant which was about 60 metres away but within the same compound, the appellant took her to the bedroom of that house and proceeded to defile her after which he threatened to kill her if she ever told anyone what had happened. It was her further evidence that she later became sickly and missed her menses and her mother took her to a chemist where she was tested for pregnancy and the result was positive. It was then that she told her parents that it was Benard the appellant herein who had done that to her. She stated further that she gave birth to the baby on 13th May 2019. It was her evidence that she had known Benard the accused person herein as an uncle.

18. In cross examination she stated that on the 22nd the appellant had argued with his wife and the wife left. She stated further that on that day she was talking to the mother of the accused when the accused called her and the grandmother told her to first of all go where she was

being called. She further stated that the accused had sexual intercourse with her since 2017 and that her father had previously solved a case wherein the appellant/accused had defiled her but the appellant still continued to defile her.

19. PW3 CA, the complainant's mother stated that on 20th November 2019 her daughter told her that she was sick and had pain in the stomach. She then took her to the hospital where they were informed that she was pregnant. It was her evidence that upon asking the girl, the complainant revealed that Bernard the brother to her father had made her pregnant. She identified the said Bernard as the person before the court. In cross examination she denied the fact that her daughter had a boyfriend and stated that the reason she was transferred to her current school was because she had not paid fees as well as some PTA monies.

20. PW4 No. 106402 PC Christabell Simbiri the investigating officer gave evidence that on 18th December 2018 she received a complainant by the name **PA** who went in the company of her mother and father and reported that she had been defiled by her uncle. It was her further evidence that she escorted them to Siaya County Referral Hospital where the girl was found to be pregnant and a P3 form which she had issued was filled.

21. PW4 made an application seeking to have the accused together with the child born by the complainant herein subjected to DNA examination. The court allowed the application and the DNA was conducted. She stated that according to the findings, there was 99.99 % chance that the child is the biological child of the accused and produced the said DNA report dated 28th August 2019 as exhibit No. 5.

22. In cross examination she stated that she took the complainant for examination and when she interrogated her she told her that it was her uncle Bernard Aganda who made her pregnant. She further stated that there were only 2 government analysts in the region and that was the reason why she produced the report on behalf of the government analyst who was engaged in Busia.

23. At the close of the prosecution's case, the appellant was given an opportunity to defend himself and the provisions of Section 211 of the Criminal Procedure Code were explained to him, the appellant opted to give a sworn statement and indicated that he had 3 witnesses to call.

24. In his sworn statement the appellant stated that on the material date on which it is alleged that he defiled the complainant he was at home watching television as he and his wife had earlier come home from church. He further stated that he was shocked when he was arrested for having defiled the girl yet he had lived with the children since the year 2001. It was his evidence that he later found out that the girl had a boyfriend who worked in the village whom he looked for but could not trace as he had allegedly gone away.

25. In cross examination he stated that on 22nd September 2018 he was at home with his wife at around 7:00 p.m. He further stated that his wife was not one of his witnesses. He stated further that he and the father of Phad had an argument before as he had stolen at a place where his brother had assisted him to find work. The trial court noted that the accused person was hesitant when asked whether he saw the complainant on 22nd September 2018 but he later admitted to have seen her on that date. He also added that he had not argued with Prisca.

26. The appellant also applied to have the DNA examination repeated. The court allowed the application on condition that the appellant would meet the cost of the repeat DNA examination. Later the appellant stated that he did not have any money to conduct the DNA examination and would therefore not be conducting a repeat DNA examination.

27. DW2 GA the mother of the appellant gave evidence that on that day she and her son the appellant herein as well as the wife to his son had gone to church and returned home at around 7:00 pm and never left the house again. She stated further that she did not know how those things happened and added that the complainant had lied.

28. In cross examination, she stated that on 22nd September 2018 she did not see the complainant. She further added that the complainant's father was a brother to the appellant and that both were her sons. She denied having ever seen the 2 sons argue before. She further stated that the complainant had lied as she was not at the door when she was being defiled.

29. The appellant did not call any other witness and he closed his defence case.

Determination

30. The ingredients of an offence of defilement are: - identification or recognition, penetration and the age of the victim. The issue for determination in this case is whether the prosecution proved the ingredients of the offence of defilement beyond reasonable doubt.

31. Penetration of the female genitalia in defilement cases is one of the core elements. The penetration here is by way of a male organ (penis into the sexual Organ of the female. Section 2 of the sexual Offences Act defines penetration to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. According to the interpretation of Section 2 the slightest and brief arousal Penetration is sufficient to complete the crime. The law does not envisage absolute penetration into the genital nor the release of spermatozoa or semen of the male organ for the act of penetration to be said to be complete.

32. In this case, PW2 the complainant testified that on the material date, the appellant called her to his house and defiled her. It was her testimony that the appellant threatened to kill her if she ever revealed this information. PW1, the clinical officer further provided evidence of penetration when he testified that his examination of the complainant revealed that she had a broken hymen scar and a bruised *labia maniora* and further that the complainant tested positive when subjected to a pregnancy test. It is worth noting that when the complainant gave birth and a DNA test was carried out to authenticate the baby's paternity, the appellant was found to be the father.

33. During cross-examination of the complainant by the appellant there was no *iota* of material to render rebuttal to the testimony by the complainant in this ingredient. The complainant even made reference to past acts of sexual intercourse which had not reached the attention of PW3 but that her father had previously solved a defilement case against the appellant and still the appellant continued to defile her. The

appellant argued in his grounds of appeal that there was nothing that linked him to the charges brought against him however from the evidence adduced above I am convinced that the prosecution proved the aspect of penetration beyond reasonable doubt.

34. Regarding the age of the complainant the courts have on many occasions pointed out how desirable it is to for the prosecution to prove beyond reasonable doubt the age of the child victim. It is trite that the prosecution ought to prove the age of the child by either direct testimony of the parent, guardian, or victim herself, birth certificate, medical age assessment or by other expert means to finally establish the age. In the case of **Hilary Nyongesa v Republic High Court Appeal No. 123 of 2009** and in two courts adopting the dicta in the case of **Francis Onamu v. Uganda** the court held as follows:

> ***"In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim. In the case of any other evidence apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observance and common sense."***

35. In the instant case a photocopy of birth certificate No. 9324141 which showed the date of birth as 12th November 2003 was produced as exhibit No. 3 by PW1.The original thereof was not produced for the courts inspection. PW2, the complainant, stated that she was 15 years old. The alleged incident herein took place on 22nd September 2018 which means that the complainant was about 1 month and 3 weeks' shy from celebrating her 15th birthday. I am thus convinced that the complainant's age was proved beyond reasonable doubt to be 14 years.

36. Finally, as to the ingredient of identification, the charge of defilement is said to have occurred at the home of the appellant. That the victim had gone to see her grandmother on 22nd September 2018 at around 7:00 p.m. when the appellant/accused called her to his house where he defiled her. It was her evidence that there was solar light that had been switched on at the time and that the said light enabled her to see him. It was also her evidence that the accused had defiled her on several other occasions and that her father had intervened and tried to resolve the issue previously but the accused still continued to defile her. PW3 in her testimony stated that the complainant told her that it was her uncle Benard who had defiled her. The complainant knew the appellant all along as her uncle. PW4 also gave evidence that upon interrogating the complainant she reported that her uncle was responsible for defiling her and for the pregnancy she carried. Recognition is more reliable than identification as was held in the case of **George Kamau Muhia v Republic [2014] eKLR**. Accordingly, the appellant was positively identified.

37. The appellant further impugned the trial court's judgement on the grounds that the sentence was manifestly harsh and that in determining the sentence, the trial court ignored the appellant's mitigation. Trial Courts have a greater deal of discretion when it comes to punishment and meting out the appropriate sentence and other determinations. The law basically provides various range of sentences from which a Judge or Magistrates can opt to effect and apply in specific cases. The same law provides for a minimum mandatory sentences where the appellant case is stated to have been proved by the prosecution.

38. From the record the appellant faced a charge of defilement contrary to section 8(1) of the Act. The victim of the defilement was found to be aged 14 years old. The appropriate sentence on conviction is provided in Section 8(3) of the Act to be not less than 20 years' imprisonment. In his mitigation the appellant prayed for a lenient sentence as he was not used to a life in prison and that he wanted to be able to assist his family.

39. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **Ogalo s/o Owuora 1954 24 EACA 70.** It is well set out that:

> ***"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice"***

40. In the present appeal the horrors and trauma of a victim of defilement are such that they leave a permanent psycho-traumatic experience. Nonetheless, as the Court of Appeal has in the recent past abhorred mandatory minimum sentences and reversed them in line with the **Francis Muruatetu v R [2017]eKLR** principles, (**see Jared Injiri Koita v R [2019]eKLR**) I exercise discretion and set aside the 20 years imprisonment meted out of the appellant and substitute it with 15 years' imprisonment.

41. In the result I find no ground to interfere with the conviction of the appellant which I find to be sound. The appeal against conviction is dismissed. The appeal against sentence is allowed. Sentence to be calculated from date of arrest of the appellant on 12/1/2019.

Orders accordingly and his file is now closed.

Dated, Signed and Delivered t Siaya this 30th Day of November, 2020

R.E. ABURILI

JUDGE