REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

IN BUNGOMA

CRIMINAL APPEAL 153 OF 2019

FSC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the conviction and sentence in original criminal case number 61 of 2018

***on 23.9.2019 by HON WATTIMAH*]**

J U D G M E N T

The Appellant FSC was charged with the offence of defilement contrary to section 8(1) (4) of the sexual offences act No. 3 of 2006.

The particulars of the charge were that between on the 11th day of November 2018 as [particulars withheld] in Bungoma West sub County within Bungoma County, intentionally caused his penis to penetrate the vagina of S.A a child aged 11 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of that charge were that on the 11th day of November 2018 as [particulars withheld] in Bungoma West sub County within Bungoma county, intentionally inserted his penis to the vagina of SA a child aged 11 years.

The evidence before the trial court was that PW1 is SA is a student at [Particulars Withheld] primary. She testified that on 11/11/2018 at around 10.00pm accused came and opened the door while she was with her sister and brother sleeping. She testified that accused came to the bedroom and removed her skirt and biker and started doing bad manners using his thing he uses to urinate. She testified that there was D-light in the house and she could identify him well and had known the accused since she was born. She testified that she informed her mother and they reported to the village elders who reported to Sirisia police station and was taken to Sirisia Hospital.

Pw2 BC, testified that she is mother of the complainant who is 11 years old. She testified that she had gone on a journey on 11/11/2018 and came back on 12/11/2018 when the doctor informed her that she had been defiled. She recalled that she came home and complainant had taken to hospital by village elder called Beatrice Temnai. She testified complainant informed her F had defiled and that the accused is her nephew.

PW 3 CPL Chesarai Bruno the investigating officer who took over the file from Joshua Kiptala testified that on 11/11/2018 the case took in presence of a minor. He recalled that he received report from minor's mother that the minor on date of incident while the mother was away, the accused went and called her she opened the door. He testified that P3form was filed and it recorded that the minor had been defiled.

PW4 Philomen Yomba attached to Cheptais Hospital as Clinical Officer. He produced documents on behalf of Geoffrey Pepela. He produced P3 form, treatment notes and age assessment from documents of complainant. He testified that she came to the hospital 3 days earlier and the patient had some tenderness on the lower parts of the abdomen. He testified that she had foul smell from the vagina and lacerations on the walls of the vagina and hymen was missing a conclusion was that the child's private part had been penetrated.

In his defense the appellant gave unsworn testimony and stated that on the 13/11/2018 he was at the farm. He testified that Beatrice the village elder, who she had differed with came and told him they go to AP camp Nambila . He testified he was then taken to Sirisia Police station and brought to court for plea which charges he refute.

It is upon this evidence that the trial court convicted and sentenced the appellant to 20 years imprisonment. Having been dissatisfied with that decision the appellant preferred this appeal on grounds that:

The appellant is first offender and pleaded not guilty; that the trial court failed to note that the essential witnesses mentioned were not availed by prosecution; that the sentence was excessive in nature and that the appellant was not duly informed of his constitutional rights on the case.

The appellant also filed written submissions in court which he reiterated grounds of appeal. He briefly submitted that his constitutional right had been violated due to delay of the case. He submitted crucial witnesses were never summoned to testify. He submitted there existed bad blood between the village elder and him. The state counsel Ms. Akello opposed that appeal. Counsel submitted the appellant is not opposing the sentence but asking for reduction. He submitted that in sexual offence, the evidence of the victim alone is sufficient under section 124 of the Evidence Act. He submitted that the case took 10 months to be concluded and therefore there was no violation of constitutional right.

This being the first appellate court I'm tasked with the duty of reevaluating the entire evidence and coming up with my own independent findings bearing in mind I did not have the privilege of examining the witnesses I will thus give that allowance. See **Okeno vs R 1972 EA**

The issue this court will determine is whether the three ingredients forming the offence of defilement that is age, penetration and whether the penetration was by the appellant were proved beyond reasonable doubt as to find the appellant guilty.

The age of the complainant. The charge herein indicate that minor was 11 years. It was the evidence of pw1 during examination in chief stated that she was 11 years and pupil in standard 6, PW2 stated that PW1 was 11 years but did not produce birth certificate but she confirmed age assessment was done.

Pw3 testified that the minor was taken for age assessment and the report was produced as P Exhibit 5. PW4 testified that age assessment was done on 13/11/2018 and it found that minor was 11 years old.

The question that arise therefore is whether the evidence by prosecution was sufficient proof of age?" Rule 4 of the Sexual Offences Rules stipulates that:

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

Thereof an age assessment report was produced as exhibit 5 which indicate complainant was 11 years old. Therefore it is my finding that the age of minor was properly proved.

With regard to penetration it is important to note that penetration can be complete or partial.

Section 2 of the Sexual Offences Act defines penetration as:

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

This position was fortified in the case of ***Erick Onyango Ondeng v. Republic (2014) eKLR*** held as such on the aspect of penetration:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

In response to penetration it is important to note that the provision to **Section 124** of the **Evidence Act** that no corroboration is necessary in criminal cases involving a sexual offences. A court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth. In this case the complainant narrated how the ordeal unfolded. She stated as follow;

'….He removed my skirt and bike, he started doing bad manners, he raped me, he used his front part ……'

PW2, who was the mother stated that she was informed by PW1 that appellant had defiled her. PW4 on examination found that complainant had lacerated vaginal walls, foul smell from vagina and the missing hymen which corroborated the testimony of the complainant that a penis had penetrated her vagina.

There is therefore sufficient evidence on record to prove that the complainant's vagina was penetrated Appellants by penis of the evidence. I find and hold that penetration was proved.

The third issue is with regard as to whether the appellant was the alleged perpetrator. It is the evidence of the complainant that the appellant defiled her on 11/11/2018 at the complainant's home at around 10.00pm. The complainant stated that she knew accused as her brother and that she has known him since she was born and that she identified him at night since there was light from D light lamp that was in the house at that time.

The incidences and threshold on identification or recognition and the position stipulated in Law is now settled as can be observed from the principles in **Abdalla Bin Wendo v R [1953] 20 EACA 156, Roria v R [1967] EA 583, R v Turnbull [1976] 3 ALL ER 549.** The evidence required for this offence on visual recognition must fit the guiding principle in **Simiyu v R [2005] IKLR 192,** wherein the Court of Appeal stated:

> ***"In every case in which there is a question as to the identity of the accused, the fact of them having been a description given and terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or person who gave the description and purpose to identify the accused and then the person to whom the description was given."***

The duration that the appellant has been known by the complainant was sufficient opportunity to positively identify the appellant as the one who defiled her.

On question of whether the prosecution failed to call crucial witness as alleged by the appellant. It is important to note that Section **124** of the **Evidence Act** is clear. That no corroboration is necessary in criminal cases involving a sexual offence. In fact a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth. Therefore, I find that the complainant's evidence was sufficient to prove the offence.

On the question of fair trial, an integral component of a fair trial is that justice shall not be delay. From the record, I note accused was charged on the 15th November, 2018 and ended on 23.9.2019, a period of 10 months I find that the case was concluded within reasonable time.

For the above reasons, I am satisfied the prosecution discharged its duty to the required standards. The appellant guilt was proved beyond reasonable doubt and conviction was proper. The sentence of 20 years imprisonment imposed was proper as the complainant was aged 11 years old.

In the premises the appeal herein is without merit and is hereby dismissed.

Dated, signed, and delivered at Bungoma this 25th day of November, 2020

……

S N RIECHI

JUDGE