REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 93 OF 2018

TOM MUSUMBA KWIYABI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Shanzu Criminal Case No. 99 of 2016 by Hon. A. Ndungu (RM) dated 1st December 2017)

Coram: Hon. R Nyakundi

Mr. Muthomi for Respondent

Appellant in Person

Judgment

The Appellant was charged with 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 were that on 14th November 2016 at [particulars withheld] area, in Kisauni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of RNW, a girl aged 12 years.

He was charged with an alternative count of committing an indecent act with a child contrary to section 11(1) if the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 14th November 2016 at Bamburi [particulars withheld] area in Kisauni Sub-County within Mombasa County unlawfully and intentionally caused his penis to touch the vagina of RNW a child aged 12 years.

At the end of the trial, the Appellant was convicted and sentenced to 20 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds:

> ***1) That the learned Magistrate having established that the complainant did not know the meaning of oath, he failed to observe the need of corroboration of their evidence.***
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> ***2) That the learned trial Magistrate erred in both law and fact by failing to find that the complainant was not a truthful witness.***
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> ***3) That the learned trial Magistrate erred in both law and fact by failing to observe the requisite need for cogent identification evidence.***
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> ***4) That the trial court failed to see that the scene of crime was not established by the prosecution.***
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> ***5) That the court acted in error by imposing a sentence that was manifestly excessive and harsh even if I were correctly convicted particularly given the circumstances of the case as disclosed by the prosecution evidence.***
>
> ***6) That the learned trial Magistrate also erred in law and in fact by failing to take cognizance of the numerous discrepancies in the prosecution evidence.***

Background

PW1 Dr. Daniel Rambei, was the medical officer from Coast General Hospital who testified on the medical evidence. He stated that the complainant, who he estimated her age 14years old, had abrasion on the posterior forchette and that the hymen was broken. He produced the P3 form (P. Exh1) and the Post Care Rape (PRC) form (P. Exh2) which was filled by Sadia Mwinyi on 15th November 2016.

PW2 RN, the complainant, after voire dire examination was found that she was of average intelligence and understood the difference knew the importance of telling the truth and therefore her evidence was received as unsworn. She stated that on the 14th November 2017 she was selling groundnuts at Mtamboni junction when the Appellant bought 6 cigarettes but he did not have change for Ksh.1000/-.That at 8:00 p.m she sought for money from the Appellant so she could go home so the Appellant suggested that they get change from a nearby shop. However, the Appellant directed the complainant to a bush covered her mouth and defiled her. She managed to push the Appellant off her, ran away and went home where she informed her father of what happened. That she went with her father to Bamburi Police Station and reported the matter. The next day she was taken to Coast General Hospital where she was examined. She stated that she did not know the Appellant before the incident except that he watered plan Mtamboni.

PW3 BO, was the complainant's father. He informed the court that the complainant was born in December 2005 but she was taken for age assessment on the 15th November 2016. He testified that on the 14th November 2016 the complainant was arrived home at 9:00PM, which was later than usual. That the complainant narrated what had happened to her. **PW3** suspected one Khalid who worked at the area but when the complainant saw her, she stated he was not the one. Thereafter, **PW3** took the complainant to Bamburi Police Station and reported the matter. The next day he took the complainant to Coast General Hospital where she was examined.

PW3 testified that they went to at Bamburi Cement at Bamburi Mtamboni junction and inquired from the security guards who watered the plants there. They were informed only two people did that and they were directed to where the Appellant was. That when the complainant saw the Appellant she immediately identified him.

PW4 PC Barnabas Kimeu No. 47669, was the investigating officer at Bamburi Police Station. He reiterated the evidence by **PW2** and **PW3**. He stated that **PW3** went to the Appellant to try and resolve the matter but when they failed they went to the police station where he arrested the Appellant.

At the close of the prosecution case, the Appellant was placed on his defence. He gave a sworn statement and told the court that when he went to work on Thursday he was informed that a man who resembled him had defiled a girl and he was advised to go to the police station. That when he presented himself to the police station was beaten and arrested and informed that they did not have time to look for any suspects.

Submissions

Appellant's written submissions

On appeal, the Appellant relied on his written submissions filed on the 22nd May 2020. The Appellant submitted that the complainant's testimony was full of contradictions and discrepancies, which the court failed to take into consideration when arriving in its decision as was held in **Moses Mudavadi Kadenge vs R (2017) eKLR.** He further submitted that due to the discrepancies and contradictions, the complainant was not a truthful witness and therefore the trial court erred in invoking section 124 of the Evidence Act and relying on the complainant's evidence without corroboration. The Appellant relied on the case of **Chila vs Republic (1967) EA 722.**

Secondly, it was the Appellant's submission that he was not properly identified by the complainant and faulted the police for failing to conduct an identification parade after he had presented himself at the police station to ensure there was no mistaken identity. He placed reliance on the case of **Simon Mwangi Muchiri & Gidraf Thuo Dola vs Republic CA CR. App No. 12&13 of 2013 Nyeri (UR).**

Lastly, the Appellant submitted that harsh and that the term shall be liable as used in the Sexual Offences Act did not imply that the penalty was mandatory but that it may be imposed at the discretion of the court. The Appellant prayed for a lenient sentence. He relied on **Kichanjele s/o Damungu vs Rep [1941] 8 EACA 64; Opiyo vs Uganda [1967] EA 752; John Kamala Chea vs Rep HCCR App No. 94 of 2015** and **Eliud Muchonde vs Rep HCCR App 93 of 2017.**

Respondent's submissions

The Respondent replied on its written submissions dated 22nd June 2020 and filed on the same day. In its submissions, the Respondent conceded the appeal on the grounds that there were contradictions on the identification of the Appellant and therefore he was not properly identified. Further, it was submitted that there was no corroboration of the complainant's evidence by the medical evidence. On sentence, it was the Respondent's submission that if the court found that the Appellant was properly convicted, the court should exercise its discretion and set aside the life sentence and substitute it with a sentence of 30 years pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & Ano vs Republic SC. Pet. No. 16 of 2015.**

Analysis and determination

Despite the Respondent conceding the appeal, it is trite that the court should examine the facts for itself in considering merit to the prosecution's concession. In **Odhiambo vs. Republic (2008) KLR 565** the Court held that: -

> ***"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."***

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the Appellant.

It cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic [2015] eKLR**.

The age of the victim in sexual Offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. It can also be proved by medical age assessment; direct evidence of parents or guardian or by observation by the court. In **Thomas Mwambu Wenyi v Republic [2017] eKLR** the Court of Appeal cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that: -

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence …."***

In the present case, **PW4**, the investigating officer told the court that the complainant did not know her age and sent her for age assessment. He produced the age assessment report (P. Exh3) which showed that the approximate age of the complainant was 12 years old. From this evidence, I find that the age of the complainant was properly established based on the principle established in **Thomas Mwambu Wenyi v Republic** (Supra).

On the element of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic [2013] eKLR** where the court stated that: -

> "**…**In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."

In this case, the victim **(PW2)** gave evidence how the Appellant led her towards a shop in the pretence that he was looking for monetary change for cigarettes that he had bought from her but grabbed her into a bush and defiled her. **PW1**, the medical officer from Coast General Hospital gave the medical evidence that showed that the complainant had abrasions on her posterior fourchette and that the hymen was broken.

However, I note that the P3 (P. Exh1) was filled on 27th March 2017, four months after the incident and one day before **PW1** testified. It is clear that **PW1** relied on the Post Rape Care form (P. Ex2) which was filled by Saida Mwinyi; however, the said Saida Mwinyi was never called to produce the PRC. Furthermore, **PW1** never stated that he had work with her and was therefore familiar with her handwriting and signature as required under section 72 of the Evidence Act and therefore the medical evidence has no probative value.

However, the evidence of penetration can be proved by the evidence of **PW1** alone as provided by section 124 of the Evidence Act which provides that: -

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

This position was succinctly held in by the Court of Appeal in **Williamson Sowa Mbwanga v Republic [2016] eKLR,** where it stated that:

> ***"The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in <u>GEORGE KIOJI V. REPUBLIC</u>, CR. APP. NO. 270 of 2012 (Nyeri):***
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> > *"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."*

On whether the trial Magistrate found the complainant truthful, he stated in his judgment that: -

> ***"In the present case, the complainant was clear and consistent in her testimony...Although the court finds that the child's evidence was corroborated in some material particular, the court warns itself of the danger of acting on the uncorroborated testimony of the complainant, a child of tender years. The court is satisfied that the complainant's testimony is truthful. She had no reason to lie against the accused."***

I have looked at the evidence tendered and I am in agreement that the complainant was consistent in her testimony that she was defiled and even in cross-examination she did not waiver on the fact that she was defiled. I find that penetration was proved.

On identification of the Appellant, the complainant and PW3 tendered evidence. The complainant stated that she had sold the cigarettes to the Appellant before the day of the incident and on the said day, however, she only learnt that the Appellant's name was Tom from PW3 after the incident occurred. PW3, on his part, testified that the complainant positively identified the Appellant when she saw him as set out in the evidence earlier in this Judgement.

I have carefully considered the evidence tender with regard to the identification of the Appellant and note that there are some discrepancies as to how the Appellant was identified.

Primarily, I note that the complainant never testified that she had gone with her father to identify the Appellant or that she had given a description of her assailant to her father or the police when she made her report, or that she could identify her assailant if she saw him again. On the contrary, it was her evidence that it was the father who told her the Appellant's name.

Secondly, **PW3** in his evidence stated that the security guards at Bamburi Cement informed him that there were only two people who watered the plants at the gate and that the security guards directed them to the Appellant. The other person was never identified or searched for and raises doubts as to whether this could be a case of mistaken identity.

Thirdly, the circumstances of the Appellant's arrested is not clear. **PW4** states that the Appellant was arrested after **PW3** and the Appellant went to the police station after they were unable to resolve an issue. This evidence was not corroborated by **PW3** which would have helped the court have a clear picture of the sequence of events from the moment the complainant purported to identify the Appellant. Moreover, the Appellant's defence that he presented himself to the police station voluntarily and alone without being accompanied by the Appellant's father casts a shadow of doubt on the evidence of **PW4** and raises the question whether the Appellant was truly identified by the complainant as held out by **PW3**.

This court has a duty to examine any discrepancies not dealt with by the trial court as was held in **Naftali Mwenda Mutua v Republic [2015] eKLR** where, the Court of Appeal held that: -

> ***"In Vincent Kasyla Kingo versus Republic Nairobi Criminal Appeal No. 98 of 2014 this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See Josiah Afuna Angulu versus Republic CRA. No. 277 of 2006(UR) where in, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellants commission of the offence charged and proceeded to substitute conviction for the disclosed offence."***

Guided by the foregoing precedent, I have evaluated the evidence on record and find that the discrepancies on identification go to the root of the matter as it determines whether it was the Appellant who committed the offence. I have been unable to reconcile the discrepancies as laid out here above and for these reason I find that the Appellant was not properly identified.

It is now trite that where the court has established the presence of contradictions, they are decided in favour of the accused. In **Richard Munene v Republic [2018] eKLR** the Court of Appeal stated that: -

> ***"Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused."***

Having reached a conclusion that the Appellant was not properly identified, I have no option but to resolve the issue in favour of the Appellant. In the final analysis, I find that the appeal is merited and thereby quash the conviction and set aside the sentence of the trial court is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Right to appeal 14 days.

Judgment delivered, dated and signed at Malindi this 18th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

The Appellant in person

Mr. Onyango for the State