REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 7 OF 2020

STEPHEN OTIENO SEWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against judgment, conviction and sentence in Siaya PM's Court SO Case No. 61 of 2019

delivered by M. Mwangi, Resident Magistrate on 20/2/2020)

JUDGMENT

Introduction

1. The Appellant **Stephen Otieno Sewe** was charged before the Principal Magistrate's Court at Siaya in Sexual Offense Case No. 61 of 2019 with the offence of defilement contrary to section 8(1) and 8 (2) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on the 27th day of October 2019 at [particulars withheld] sub-location in Siaya sub-county within Siaya county he intentionally caused his penis to penetrate the vagina of CA a child aged 6 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a 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 unsworn statement of defence found the appellant guilty of the offence of defilement as contemplated under section 8 (1) as read together with section 8(2) of the Sexual Offences Act and convicted him under section 215 of the Criminal Procedure Code. After mitigation, the appellant was sentenced to serve life imprisonment.

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

a) **That the offence against the Appellant was not proved beyond reasonable doubt.**

b) **That there were gaps and inadequacies in the evidence which undermined the conviction.**

c) **That the child's mother's testimony was unreliable, untrue and could not be relied upon to support the conviction while the Childs Testimony was unreliable as her testimony clearly showed she had been coached.**

d) **That the trial and eventual conviction of the accused was an affront to the doctrine of presumption of the innocence of the accused.**

e) **That the medical evidence did not support the conviction and/or sentence.**

f) **That the trial court having asked for and obtained a pre-sentencing report did not use the report to exercise its legitimate discretionary jurisdiction in sentencing the Appellant but hamstrung itself by sticking to statutory provisions.**

g) **That the trial, conviction and subsequent sentence of the Appellant amounted to an affront on the Appellant's**

constitutionally guaranteed right to a fair hearing.

6. The appellant subsequently filed a supplementary grounds of appeal alleging as follows:

a) That the age of the complainant was not proved beyond any reasonable doubt.

b) That the trial court erred in law and fact by failing to analyse diligently the evidence of penetration as an ingredient of defilement.

c) That the trial court failed to observe the prosecution carried out a shoddy investigation.

d) That the trial court failed to observe that no forensic analysis (DNA) was conducted to prove the result of penetration.

e) That the trial court erred in law in breaching the right of the appellant to adduce and challenge evidence pursuant to article 50(2)(i)(k) of Constitution.

f) That the trial court erred in law and fact by not administering [sic]the contradictions and inconsistencies in this matter.

Appellant's Submissions

7. The appellant filed written submissions to canvass his appeal on 21/10/2020 whereas the Respondent filed written submissions on 23/10/2020 opposing the appeal. According to the appellant, the age of the complainant was not proved beyond reasonable doubt. It was his submission that the complainant's birth certificate was not brought in court prior to the alleged offence and as the birth certificate's date of issue contradicted the date of signing, this proved that the document was not genuine on how it was prepared. Reliance was placed on the case of **Arthur Mshila Manga v Republic Cr. Appeal No. 24 of 2014** where the appellant stated that it was held that "***Age of a child was not proved beyond any reasonable doubt as required on the authority of Kaingu Alias Kasomo v Republic Cr No. 504 of 2010 eKLR."***

8. The appellant further submitted that as per the medical examination done by PW2, nothing showed that there was penetration. It was his submission that the medical evidence adduced was not conclusive to lead the court to the positive ends of justice.

9. It was further submitted that the trial court erred in law in failing to observe that the case was riddled with poor investigations and medical examination where the police failed to investigate the matter properly thus ultimately rendering a fatal blow to their case. The appellant submitted that **Section 36(8) of Sexual Offence Act** provided that a DNA test was meritous in a Sexual offence and failure to adduce its report in court rendered a grave prejudice of justice.

10. It was his further submission that the trial court did not consider the contradictions and inconsistencies that emanated in the matter. The appellant cited PW2, the clinical officer who examined the minor and stated that PW1 wore a stripped top, a brown trouser and a white dirty stained pant whereas PW4, PC Zainabu, who received the minor explained in court that the minor wore a grey pullover and a kitenge dress which was evidence that both PW2 and PW4 never met the complainant as alleged and if they did they were hiding some light on this matter which was fatal to the prosecution's case.

11. The Respondent filed submissions supporting the judgment of the trial court on account that the appellant was no stranger to the appellant assailant, reiterating the testimony of the complainant in the trial court and submitted that the evidence of PW2 corroborated the testimony of the complainant victim on the fact of defilement after examining the victim.

12. According to the Respondent, PW3 the victim's mother confirmed that the victim was aged 6 years and the birth certificate was produced by PW4 as an exhibit. It was their submission that the appellant was caught ready handed defiling the minor of a very tender age and therefore he deserved no mercy as the crime is heinous and traumatizes the victim and family hence deterrent sentence was merited.. counsel urged the court to uphold the life imprisonment imposed on the appellant.

Analysis and Determination

13. This being a first appeal, the duty of the first Appellate court was succinctly stated in **Okeno v Republic (1972) EA 32** and restated in the case of **Kennedy Harold Ouma v Republic [2020] eKLR.** Briefly put, this court must reconsider the evidence before the trial court, evaluate it itself and draw its own conclusion though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. I shall therefore proceed to frame the issues for determination taking into account the evidence adduced in the trial court by the prosecution witnesses and the defence case as well as the submissions by the appellant in support of his appeal and the opposing submissions.

14. The issues for determination in this case are:

a) ***Whether the appellant's constitutional right to adduce and challenge evidence were infringed,***

b) ***Whether the prosecution proved its case beyond reasonable doubt,***

c) ***Whether the trial court failed to consider the contradictions and inconsistencies in the prosecution's case thus prejudicing the appellant and***

d) ***Whether the sentence meted out on the appellant was justified or whether it was manifestly harsh.***

15. The prosecution evidence as laid out in the trial Court was as follows: PW1 CA the complainant herein having been certified intelligent to give evidence in court but not appreciative of the nature or solemnty of an oath gave evidence as an unsworn witness. She testified that on 27th October 2019 she was at home playing with her friend K when the appellant whom she pointed to at in the dock and whom she refered to as Otibo called her and took her to a bed in his house where he did to her *"tabia mbaya."*

16. She further explained how the appellant removed her trousers and pant and proceeded to do tabia mbaya to her. She further stated that the appellant used his big *"dudu"* which he placed in her vagina and while at it she felt pain on her vagina which part of her body she pointed out to the court. She stated that she knew Otibo before and that he did bad manners to her and that he removed his dudu from his trouser and used it to do bad manners to her. She further stated thta while at it and after he told her that they rest a little while, Otibo was beated by someone a watchman using a cooking stick and that the said watchman called people to the scene and the people arrested Otibo and took him to the police acompanied by the complainant after which they were taken to hospital. In cross-examination she stated that she did not say everything and that her mother told her to come to court.in reexamination she stated that her mother only told her to go to court and tell the court what had happened to her.

17. PW2 Isaac Imbwaga the examining clinical officer from Siaya County Referal Hospital gave evidence that upon examination of the complainant, he found thta she had a normal external gentalia, partially broken hymen membrane, bruised vaginal walls and labia minora.It was his testimony that on high vaginal swab there were yeast cells but no spermatozoa seen. He produced the P3 form as Prosecution exhibit No.1, the lab request form dated 27th October 2019 as Prosecution exhibit No. 2, and the Post Rape Care Form bearing the same date as exhibit No. 3.

18. In cross examination he stated that there were signs of an attempt at penetration and discharge in the vagina. He further added that it would be hard to tell if they were sperms.

19. **PW3 EA** gave evidence that CA the complainant herein was her child. She stated further that she got a call from a person she did not know informing that her that a man who used to be their neighbour had raped her child. She stated that from that information she knew who it was as the appellant had been previously caught trying to rape a form 2 girl and an old woman. She stated further that she then went to the hospital and found her child being treated and that the child was later taken to a children's home in Gem.

20. In cross examination, PW3 stated that she saw the appellant at the hospital and at the police station when his mother was bringing him food.

21. **PW4 No. 99851 PC Zainabu** attached at Siaya Police Station testified that on 27th October 2019 a case of defilement was reported. She stated that the complainant was taken to Siaya County Referral Hospital. She stated that the appellant was caught at the scene before dressing up by members of the public. She stated that one of the members of the public was a relative to the accused and she therefore declined to record her statement.

22. PW4 stated further that the mother of the complainant supplied the minor's birth certificate which showed the date of birth as 22nd April 2013. It is noteworthy that the original thereof was presented to court for verification. A copy of the said birth certificate was produced as prosecution exhibit No. 4.

23. In cross examination, PW4 stated that the accused was brought to the police station by members of the public and further that one of the said members of the public had declined to record her statement as she was a relative to the accused person herein.

24. Placed on his defence, the appellant opted to give an unsworn statement. It was the appellant's case that there were witnesses who refused to come and as such he would leave the case to court to decide as he was suffering.

Determination

25. To secure a conviction on the offence of defilement, the ingredients of defilement as highlighted in the unreported case of **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013**, cited with approval in the reported case of **Kyalo Kioko v Republic [2016] eKLR** must be established. It was thus held:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

26. Therefore, did the prosecution prove all the ingredients of the offence of defilement against the appellant beyond reasonable doubt?

27. Penetration of the female genitalia in defilement cases is one of the core elements. The penetration here is by way on 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 element of 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.

28. In this case, PW1 testified that the appellant whom she pointed out in court and whom she refered to as Otibo called her and took her to a bed in his house where he took his big 'dudu' and did to her *"tabia mbaya" by puting it in her vagina.* This loosely translates to doing bad manners to her. PW1 further explained that the appellant removed her trousers and pant and proceeded to do tabia mbaya. She further stated that the appellant used his *"dudu"* on her vagina and while at it she felt pain on her vagina which she pointed out to the court. She stated that

she knew Otibo before he did bad manners to her and that he removed his dudu from his trouser and used it to do bad manners to her.

29. PW2 the examining clinical officer on his part also corroborated this evidence of PW1 and stated that upon examination of PW1, she had a normal external gentalia, partially broken hymen membrane, bruised vaginal walls and labia minora.On high vaginal swab there were yeast cells but no spermatozoa seen. He produced the P3 form as Prosecution exhibit No. 1,the lab request form dated 27th October 2019 as Prosecution exhibit No. 2, and the ost rape Care Report Form bearing the same date as exhibit No. 3.

30. In cross examination, he stated that there were signs of an attempt at penetration and discharge in the vagina. From this statement by the clinical officer it is important that I highlight the fact that under section 2 of the Sexual Offences Act, 2006 Penetration means the ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person.*** **(Emphasis supplied).**

31. The P3 form dated 28th October 2019 provided as follows:-

"Normal external genitalia, partially broken hymen membrane,bruised vaginal walls and labia maniora...foul smelling discharge on the vaginal introitus."

...From the history and physical examination i can ascertain that there are obvious features suggestive of vaginal penetration."

32. The Post Rape Care Form in respect of the complainant [CA] dated 27th October 2019 produced as Prosecution exhibit 3 also notes that there were obvious features suggesting partial vaginal penetration. As stated earlier even partial insertion of the genital organs amounts to penetration under section 2 of the Sexual Offences Act.

33. In the circumstances, I am pursuaded that the element of penetration was proved to the requisite standard of beyond reasonable doubt. Furthermore, albeit corroboration is no longer necessarry under the proviso to section 124 of the Evidence Act, the evidence of PW1 was sufficiently corroborated.

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** 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 PW3 the mother of the complainant stated that her daughter was 6 years old having been born on 22nd April 2013. She also stated that she supplied the investigating officer with a copy of the birth certificate of the minor. The investigating officer PC Zainabu corroborated this evidence when she stated that the mother of the minor had issued her with the original birth certificate which indicated the date of birth of the minor as 22nd April 2013. She presented the original thereof for the court's inspection and produced the photocopy of the birth certificate as Prosecution Exhibit No.4.

36. I find that the evidence tendered by the Prosecution witnesses on the ingredient of age was clear and cogent. The same remained uncontroverted. The allegations by the appellant that the complainant's age was not proved are thus unsubstantiated as there was no contrary evidence. In the circumstances, it is my finding that the ingredient of age was proved to the required standard that is beyond reasonable doubt.

37. Finally, on the ingredient of identification, the only identification evidence in support of the prosecution's case was that of the complainant a sole identifying witness. I am mindful to warn myself of the dangers of proceeding on the basis of the evidence of a sole identifying witness and i note that the same can in criminal cases ocassion a miscarriage of justice if not carefully tested. However, if properly tested the same can safely form the basis of a conviction.

38. PW1 stated that the incident took place at around 4:00 p.m when she had gone to play with her friends.She stated further that the appellant then called her and took her to a bed in his house. The appellant then went on to do tabia mbaya to her. PW1 stated that the watchman came and beat Otibo with a *mwiko* and called some motorbike people who came and arrested the appellant whom she refered to as Otibo and took him to the police station. She added that she knew Otibo before he did bad manners to her.

39. PW4 No. 99851 the Investigating officer herein corroborated this evidence as she stated that the appellant was brought to the police station naked after being caught by members of the public as he was caught at the scene before dressing up. She added that a member of the public declined to record her statement as she was a relative to the appellant.

40. That notwithstanding, the proviso to section 124 of the Evidence Act applies in this case as the complinant gave clear evidence on the event as they occured on the day the beastly act was commited against her. Having set out and analysed the identification evidence as herein above, it is my finding that the conditions under which the appellant was identified were good. It was around 4:00 p.m in the afternoon and the complainant knew the prior to the incident and even knew where he lived. There was no evidence that her vision had been hindered in any way. Moreover, the appellant was arrested at the scene by members of the public who frogmatched him to the police station while naked. 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 and safely identified as the perpetrator of the heinous act. the trial magistrate who had the benefit of seeing and hearing the victim minor testify believed that she was telling the truth on the identification and recognition of the victim's assailant. I have no

reason to differ with that finding of fact.

41. It is the appellant's further complaint that his constitutional right to adduce and challenge evidence was infringed. The record reveals that the appellant was granted the evidence the prosecution sought to rely on prior to the commencement of the trial and further that he had the opportunity, which he took, to cross-examine the prosecution witnesses. Further, I note that on being placed on his defence, the appellant stated that he had left the issue to court to make a decision. The appellant has not shown in what way the aforementioned rights were infringed and as such it is my finding that this ground is devoid of merit and so it must fail and it so fails.

42. The appellant further impugned the trial court's judgement on the ground that the sentence was manifestly harsh. He claims that despite the trial court ordering for the presentence report, she never relied on it to mete out sentence. 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 a range of sentences from which a Judge or Magistrate can opt to effect and apply in specific cases. The Sexual Offences Act provides for a minimum mandatory sentences where the prosecution's case is stated to have been proved by the prosecution beyond reasonable doubt. section 8(2) of the Sexual Offences Act provides for a mandatory minimum sentence. The section states: -

> ***"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

43. The complainant was proved to be aged 6 years old. I am a live to the jurisprudence emerging from the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic (2017) eKLR**. I am also alive to the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** in which the Court of Appeal imported the **Francis Karioko Muruatetu decision (supra) principles** to sexual offences. However, it is my finding that in the circumstances of this case the sentence imposed by the trial court was justifiable and fair. However, as the appellant was a first offender, and considering his mitigation and age- 21 years, applying the principle set out ion **Jared Koita Injiri v Republic[2019]e KLR,** I hereby set aside the mandatory life imprisonment imposed on the appellant and substitute it with fifty years imprisonment to be calculated from the date of arrest on 27th October, 2019.

44. Orders accordingly.

Dated, signed and delivered at Siaya this 16th Day of December, 2020

R.E. ABURILI

JUDGE