REPUBLIC OF KENYA

IN THE HIGH COURT

AT KIAMBU

CRIMINAL APPEAL NO. 28 OF 2018

GABRIEL GATONYE GAKUNGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Hon. PM C.A Otieno-Omondi in Thika Cr. Case No.5031 of 2012 delivered on the 24th April 2018 PM)

JUDGMENT

1. The appeal is against the conviction of the appellant in the trial court where he was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2016, as read with Section 8 (3) of the Act.

2. The appellant was alleged to have defiled the complainant, PW 15 year old girl on the 28th November 2012 within Muranga County. He was convicted and sentenced to serve twenty (20) years imprisonment in line with Section 8(3) of the Sexual Offences Act.

3. Being the first appellate court my duty is to re-examine the entire evidence adduced before the trial court to satisfy myself that the said evidence supports the findings but warning myself that I never saw or heard the witnesses testify – **Republic –vs- George Anyango Anyang** and **Denis Oduol Ongojo (2016) e KLR**.

It is not the duty of the appellate court to look for evidence that may support the trial courts findings. The court will however weigh the entire evidence and draw its own conclusion – **Pandya -vs- R (1957) EA 336.**

4. The appellant preferred three grounds of appeal, that the conviction was based on contradictory, inconsistent and uncorroborated evidence, including the medical evidence.

5. The complaint was 15 years old as certified by a Birth Certificate (PExt 2). The appellant was an employee of the complainant's mother (**PW2**) in her hotel at the material times. The evidence on record is that the complainant was found by her mother with a another person (PW3) in the appellant's house about 30 meters from the hotel, after the mother found her missing from their house and suspected she could have been in the appellant's house.

6. In her evidence the complainant (**PW1**) a form 2 student stated that she knew the appellant well as he was working in her mother's hotel.

That on the material day at about 8.00 p.m. she went to watch T.V. in the hotel when the appellant requested her to go to his house to collect a bangle she had given him earlier. It was her testimony that she went and while at the appellant's house door requested for the bangle but the appellant pulled her inside the house and forced her to have sex with him.

7. It was her testimony that the appellant removed her pants but she should not remember him removing his clothes. However when her mother (**PW2**) came and knocked the door twice they failed to open and hid behind the door and on the 3rd time they opened.

It was her evidence that she did not scream because the appellant had closed her mouth.

8. PW2 MM and mother to the complainant testified that at 8.00 pm she did not find her daughter in their house and decided to check her up in the appellant's house where she found her together with the appellant. She then reported to the police station and on the following day took her to hospital for examination.

9. PW4 Simon clinical officer upon examining the complainant made findings that the girl's hymen was perforated, had mucus like discharge from the vaginal walls, as a result of infection or trauma and had a foul smell. He also found pus cells which indicated infection caused by intercourse. She was given drugs. He filled a P3 form and a post care rape form and also a treatment card (PExt 1 (a), (b) and (c) respectively.

10. PW5 the investigating officer collaborated PW1 and PW2 evidence.

In his unsworn evidence in defence the appellant testified that he never went to work on the material day as he was unwell, and about 6.00p.m. the complainant went to his house and soon thereafter her mother knocked and entered the house, started screaming and together with another man started beating him. He denied defiling the complainant.

Upon the above evidence the trial magistrate convicted the appellant for the offence of defilement.

12. I have re-evaluated the entire evidence.

There are contradictions in the prosecution witnesses evidence mainly on the time the complainant alleges to have gone to the appellants house, PW1 stating it was about 8.00p.m.while the appellant says it was 6.00p.m. It is evident that between the period 6.00p.m. and 9.30p.m the complainant was in the appellant's house, whether she took herself into the house or was force to enter into the house by the appellant is not clear.

13. None of the prosecution witnesses testified to have found the complainant and the appellant engaging in sexual intercourse though both were in the house.

In **sexual offences**, uncorroborated evidence is sufficient to convict an offender if the victim's evidence is found to be truthful and credible.

The **proviso to Section 124 of the Evidence Act** empowers a court to convict on such uncollaborated evidence if it is truthful and credible, and upon warning itself of dangers of such evidence – See **Chila -vs- Republic (1967) EA 722.**

14. There is no doubt that the complainant and the appellant were well known to each other before the alleged defilement. They seemed to have had a good relationship. The appellant's defence is that although the complainant was found in her house having gone there to collect her bangle he did not defile her.

15. The medical examination one day after the event was that the complainant's hymen was perforated, had a discharge, pus cells and infection. In the doctor's opinion, the infection was as a result of sexual intercourse.

The Children's Act No. 8 of 2001 describes and gives a meaning to **penetration** as the partial or complete insertion of the genital organs of a person in the genital organs of another person.

16. The ingredients of defilement are that the prosecution ought to prove to sustain a conviction are:

a. The age of the child

b. proof of penetration

c. positive identification of the assailant.

I have stated earlier that the age of the complainant was proved so is the identification of the assailant – **Hilary Nyogesa -vs- Republic.**

17. It is also evident that the complainant took herself to the appellant's house in the evening between 6.00p.m. and 9.30 p.m. When the mother knocked onto the door around 9.30 p.m. the complainant hid herself behind the door. No evidence of her having screamed was tendered.

18. The medical evidence was clear that sexual intercourse and penetration had taken place, but not clear when such took place. It is doubtful then whether the sexual intercourse was by the appellant or not. I state so because I do not think that an infection would have manifested itself hours after the act if at all it took place. Further the appellant was not tested for any venereal disease or infection that he would have passed to and infected the complainant with.

19. The medical evidence in my view confirms sexual activity by the complainant leading to the infection.

It does not state with conclusively that the appellant is the one who perforated the complainant's vagina nor that he was the one who had infected her with a venereal infection.

The trial magistrate took the clinical officers evidence as credible and truthful without adequate analysis.

20. The salient questions as to whether the infection was by the sexual assault one day prior to the examination and if so whether it was the appellant who infected the complainant by the sexual assault, more so that the appellant denied having had sexual intercourse with the complainant. In that regard I am guided by the holding in **Peter Mwangi Muthanya –vs- Republic HCA No.154 of 2005 – Nakuru**

(Kimaru J) when in very similar circumstances the court found that the prosecution did not prove its case to the required standard.

21. Upon re-examination of the evidence before the trial court the question that emerges is whether the prosecution proved its case beyond reasonable doubt.

This court is not satisfied that the prosecution discharged its burden of proof to its satisfaction.

The evidence tendered is purely circumstantial as no witness testified to have seen the appellant commit the offence.

22. In order to justify inference of guilty upon circumstantial evidence the facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis.

23. The burden of proving such facts is on the prosecution and always remains with the prosecution.

It is never the duty of the accused to prove his innocence as doing so would amount to shifting the evidential burden of proof to the accused.

Further before a conviction on circumstantial evidence the court must be sure that there are no other co-existing circumstances that would weaken or destroy the inference of the guilt of the accused – **Republic –vs- Kikering Arap Koske & Another (1949) 16 EACA 135.**

See also **Abanga** *alias* **Onyango -vs- Republic Cr. Appeal No. 32 of 1990** (unreported).

24. Cummulatively I find that the circumstances upon which the appellant was found guilty do not form a chain so complete that it can only be inferred that the offence was committed by him and no one else.

Consequently I find the appeal to be merited and it is allowed.

The trial magistrate's conviction is quashed and the sentence set aside.

The appellant is set free unless otherwise lawfully held.

Dated and signed at Nakuru this 27th Day of March of 2019.

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J.N. MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th Day of April of 2019.

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C. MEOLI

JUDGE