REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 45 OF 2016

(From Original Conviction and Sentence in Criminal Case No. 709 of 2013 by the Senior Principal Magistrate's Court at Mumias)

HASSAN SHISIA SHITEMI..…….....…...…….APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon SK Ng'etich, Senior Resident Magistrate, of defilement contrary to Section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to fifteen (15) years imprisonment.

2. The particulars of the charge that faced the appellant were that on the 28th day of August 2013 at [particulars withheld] Village, Mayoni Location, Matungu District of Kakamega County, he intentionally caused his penis to penetrate the vagina of JA, a child aged 16 years. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place as stated in the main count, he had intentionally caused his penis to come into contact with the vagina of the subject child.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called seven (7) witnesses.

JA, the complainant, testified as PW1. She gave sworn testimony. She identified the appellant as the person who defiled her throughout the night of 28th August 2013, and locked her up in the room where the assault happened. She was rescued from the room by O, who reported the matter to his mother T, PW5 who in turned called PW1's mother EA PW3. She was taken to hospital and she thereafter reported the matter at the Matungu AP Camp. She was subsequently taken to the Mumias Police Station. PW2, MAM, was the father of PW1. He rushed to the hospital where PW1 had been taken after he got report of the incident and found her there. He was informed by PW5 of what had transpired. He was led to the house of the appellant and he facilitated his arrest. EAO (PW3) was the mother of PW1, she was telephoned by PW5 and informed of what had happened to PW1. She informed PW2 and the two of them rushed to hospital to see her. She also was present at the house of the appellant when he was apprehended and blood stained clothes recovered. George Watila (PW4) was the clinical officer who attended to the PW1 and prepared the Police Form 3 which was put in evidence. He stated that she was brought to his clinic on 29 th August 2013, with a history of having been defiled on 28th August 2013 by a person known to her. Upon examining her, he found that her iliac region was tender, she was limping, and her labia minora and majora were tender and swollen. There was a slightly whitish fluid at her vaginal orifice. He noted that she experienced extreme pain upon insertion of a high vaginal stick. The urine test showed presence of spermatozoa, and he concluded that PW1 had been defiled. T WN testified as PW5. She stated that she was the one who rescued PW1 from the appellant's house. PW1 told her of her ordeal in the hands of the appellant. She saw blood stains on the bed, and noted blood on her private parts. She contacted the area assistant Chief and they both took PW1 to hospital. She also contacted her mother, PW3. She also reported the matter to the police, and later escorted the appellant to the police station, where he was arrested. PW6, Corporal Morrice Otieno, was the investigation officer. He stated that PW1 had reported the matter on 30th August 2013, in the company of PW2 and PW3. He noted that she had difficulty walking and had to be supported by PW2 and PW3. He commenced his investigations thereafter. The last witness was APC Bandar Ambaisi, who testified as PW7. He recieved the initial report on 29th August 2013. He was the one who arrested the appellant and took him to Mumias Police Station.

5. The appellant was put on his defence. He gave an unsworn statement and did not call witnesses. He said that on the 28 th August 2013 he received a telephone call from home, the caller telling him that he was required at Matungu hospital. He rode his motorcycle there, and upon arrival he was arrested by administration police officers who took him to their camp, before conveying him to Mumias Police Station. He said that it was at the police station that he got to know what his arrest was about.

6. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgement.

7. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds of appeal. He averred that the court convicted him on evidence that was not corroborated and which was fabricated malicious farfetched and lacked probative value, that there were- discrepancies with the dates when the alleged defilement happened, that the court did not consider that he was not medically examined to confirm whether or not he committed the offence, that there was the matter of Okumu who was denied by PW5 which meant that the evidence of the witnesses was not credible, and that the trial court had wrongly rejected his credible *alibi* defence.

8. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function 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 magistrates' findings can 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."*

9. The appeal was canvassed on 25th October, 2018. The appellant relied on written submissions that he placed before me, while Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. The appellant's written submissions dwelt mainly on the inconsistencies in the evidence. I shall consider all the issues raised in both the petition of appeal and in the submissions. Mr. Ng'etich submitted that the prosecution had proved all the elements of the offence of defilement to justify the conviction of the appellant, and the appeal therefore was not merited. Unhelpfully, none of the parties cited any case law or referred the court to any relevant statutory provisions.

10. The first issue raised in the petition is that the trial court relied on evidence that was not corroborated. The ordinary meaning of corroboration is evidence which confirms or supports a statement or theory, and corroborative evidence is one which that tends to support a proposition that is already supported by some initial evidence, and therefore confirming the evidence.

11. PW1 alleged that she had been defiled. PW5 was the person who immediately came into contact with her after the alleged assault. She noted blood on her private parts, and she was the one who arranged for her transfer to hospital. PW6 attended to her at the hospital and noted injuries in her genitalia, and concluded that there had been sexual contact. To that extent there was sufficient evidence that PW1 had been defiled. To that extent it cannot be said that her evidence was not sufficiently corroborated. The testimonies of her parents, PW2 and PW3, also confirms aspects of her story as to the sequence of events from the time of the alleged assault and up to the time she was taken to hospital and subsequently to the police. The second aspect to the first issue is that the evidence by the state was fabricated and farfetched. The appellant did not expound on this aspect of his appeal. He did not indicate the reasons he thought the evidence was fabricated, malicious and farfetched.

12. The second issue turns on alleged discrepancies with regard to the dates when the alleged defilement happened. The appellant's written submissions do not allude to that matter. I have perused through the record. According to the charge, the assault happened on the night of 28th August 2013. PW1, the complainant, testified that she met the appellant at 8.00 pm on 28th August 2013, and he took her to his house and it was there that the assault happened shortly thereafter and continued throughout the night till the morning of 29th August 2013. PW2, who was PW1's (father) testified about being informed of the assault on 25th August 2013 by his wife, PW3. On her part, PW3 said she was alerted of the occurrence at 1.00 pm on 28th August 2013. PW4, the clinical officer, attended to PW1 on 29th August 2013, and she had a history of having been assaulted on 28th August 2013. PW5 was the person who found PW1 in the appellant's house in the morning of 29th August 2013, and she was the one who took her to hospital before relaying the information to PW2 and PW3. PW6, the investigation officer, received the report of the assault on 30th August 2013, whose effect was that PW1 had been assaulted on 28th August 2013 by the appellant.

13. There are indeed discrepancies and inconsistencies with regard to the dates mentioned by PW2 and PW3, the parents of PW1. PW2 talked of having been informed of the occurrence on 25th August 2013, while PW3 talked of coming to know of it on 28th August 2013. The other witnesses talked of 28th August 2013. I find it curious that the parents of the complainant would confuse date relating to when their daughter was assaulted and how they came to get the information. Am particularly curious that none of them indicated whether they were aware that their daughter had not spent the night of 28th August 2013 at their house, and as at 11.00 am of the next day, 29th August 2013, when PW1 was allegedly rescued by PW5, they were still unaware that their primary school-going daughter had not returned home.

14. What I have stated in paragraph 13 here above should be looked at together with what I have mentioned in paragraph 11 here above. The appellant raised the issue of fabricated and farfetched evidence. The fact that the parents of the complainant could be the source of such inconsistencies, yet the police and medical evidence was procured from the reports they placed before those agencies, is telling. This should also be taken together with the evidence of PW1 and PW5. PW1 mentioned a O, saying that he was a son of PW5. She said it was PW5 who first found her in the house of appellant, and offered to call his mother to come and assist her. She came, and she identified her as PW5, T. She had met the said O before she met the appellant, that same evening of the alleged assault. Yet when PW5, T, testified, she made no mention of having been alerted by anyone, least of all O, of the presence of PW1 in the appellant's house. According to her she found PW1 there purely by accident, when she went there looking for the appellant, a *boda boda* operator so that he could transport her somewhere. When asked about O, she said that she knew of no such a person, even though PW1 had described him as PW5's son.

15. The other issue is that the court did not consider that the appellant was not medically examined to confirm whether or not he committed the offence. It is now well settled law that a person charged with a sexual offence need not be tested medically or forensically to ascertain any sexual connection between him and the complainant. The court cannot therefore be faulted for not taking that into account. The correct legal position is that the court convicts an accused person on basis of other evidence. It was held by the Court of Appeal in *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, that whereas section 36 of the Sexual Offences Act allowed the court to order samples to be taken from an accused person for forensic examination or deoxyboneleic acid (DNA) testing, but that provision was not mandatory, and the penetration or sexual intercourse could be proved by alternative evidence. It was

emphasized that medical or DNA evidence was not the only evidence by which commission of a sexual offence could be proved.

16. The offence that the appellant faced before the trial court was founded on section 8(1) of the Sexual Offences Act, and its key elements are 'penetration' and 'child.' The Act defines 'penetration' as partial or complete insertion of the genital organs of a person into the genital organs of another person; while 'child' has the meaning assigned thereto in the Children's Act. In *Dominic Kibet Mwareng vs. Republic* [2013] eKLR the court stated that -

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

17. In determining this appeal, I shall have to look out for evidence that establishes -

a) whether the age of the complainant was proved,

b) whether penetration was proved, and

c) whether the accused was positively identified by the minor as her assailant.

18. The age of the complainant has not been raised in the instant appeal. She testified on 6th August 2014, and said she was seventeen years old. That meant that she was sixteen on 28th August 2013. She produced a certificate of birth which put her date of birth at 16th January 1997. Her father, PW2, said she was sixteen at the time of the alleged offence. On whether or not the complainant had been penetrated by a sexual organ of another, again the issue did not arise in the appeal. She said the appellant put his penis inside her vagina. PW5 fallegedly found her in the appellant's house. She saw blood on the bed, and on PW1's private parts. PW4 examined her medically and confirmed penetration. PW1 positively identified the appellant, during her examination-in-chief and cross-examination as her assailant. It would appear that all the factors required to convict for defilement were present.

19. How am I to deal with the proof of all the elements of defilement in view of the inconsistencies mentioned earlier. The complainant appears, from the record, to have given evidence that was consistent, and which the appellant did not shake in cross-examination. PW4 and PW5 corroborated the same in material particulars. PW1 and PW5 were the critical witnesses. PW5, among the witnesses, was the only one who came into contact with the complainant after immediately her ordeal. Whatever inconsistencies in the evidence of the state do not appear to in anyway take away from the evidence that establishes defilement and the fact that the minor positively identified the appellant as her attacker, based on the fact that he was someone that she knew before the event. The appellant gave an unsworn statement, and nothing in it exonerated him nor displaced the evidence of PW1, PW4 and PW5.

20. In view of what I have stated above, I am satisfied that the conviction of the appellant was safe. I shall therefore dismiss the appeal before me, uphold the conviction and confirm the sentence. The appellant has a right of appeal to the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF APRIL, 2019

W MUSYOKA

JUDGE