REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 53 OF 2018

JOSHUA KINAMA MUTHAMA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. E. Muiru (SRM) in Kilungu Senior Resident Magistrate's Court Criminal Case No. 2 of 2018)

JUDGEMENT

Introduction:

1. The appellant was charged with the offence of **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 the 3rd day of January 2018 within Makueni County, the appellant intentionally caused his penis to penetrate the vagina of FMM a child aged 14 years.

2. There was an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and at the same place, the appellant intentionally touched the vagina of FMM a child aged 14 years.

3. The learned trial magistrate convicted him on the main charge and sentenced him to 20 years imprisonment.

The Appeal:

4. Aggrieved by that decision, the appellant filed a homemade memorandum of appeal and raised the following 8 grounds;

a) That the learned trial magistrate erred in law and fact for not taking note that the voire dire conducted was invalid.

b) That the learned trial magistrate erred in law and fact when he failed to note that the prosecution witnesses were incredible and that the case had grave contradictions.

c) That the learned trial magistrate erred in law and fact by failing to note that the recovered exhibits differed.

d) That the learned trial magistrate erred in law and fact when he failed to note that the particulars in the charge sheet were defective.

e) That the learned trial magistrate erred in law and fact when he failed to note that the appellant was not taken for medical examination

f) That the learned trial magistrate erred in law and fact by hurrying up the prosecution case.

g) That the learned trial magistrate erred in law and fact in declining to attach any weight to the defence and shifting the burden of proof to the appellant.

h) That the learned trial magistrate erred in law and fact by failing to note that the medical examination tendered created doubts.

5. Directions were given that the appeal be canvassed by way of written submissions. The appellant filed his submissions which I have considered and the learned prosecution Counsel elected to rely on the evidence on record in opposing the appeal.

Duty of Court:

6. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

7. In analyzing and re-evaluating the evidence, I will combine grounds (b) (e) and (h) and deal with the others individually.

Voire dire:

8. The appellant is complaining about the fact that *voire dire* was conducted because according to him, the complainant was not a child of tender years. The purpose of *voire dire* is to ascertain that a witness is intelligent enough to take oath. It is meant to guarantee an accused person a fair trial. The Children Act defines a child of tender years as one who is below 10 years however, there have been varying decisions from the superior Courts on who a child of tender years is for purposes of criminal trials.

9. In ***Patrick Kathurima –vs- Republic, [2015] eKLR***; the Court of Appeal held that:

> ***"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years (emphasis mine) remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes''.***

10. The above decision notwithstanding, it is my view that there was really nothing wrong in conducting the voire and being certain that the witness possessed the requisite intelligence to take oath. It would have been a different story if the complaint was that *voire dire* was not conducted. This ground fails for lack of merit.

The exhibits:

11. The appellant submits that the clothes worn by the complainant during commission of the offence differed with the ones produced by the investigating officer (PW6).

12. **PW1** testified that on the material day, she was wearing a trouser material black, a white sweater written Lagos larga, a yellow T-shirt and a yellow underpant. **PW6** stated as follows; *"I was given complainant's inner wear and her sweater and saw the sweater was torn showing there was a struggle. I did not note any tear on the pant. I retained said clothes to use as exhibits….the grey and red jacket produced as exhibit 7 and yellow pant produced as exhibit 8."*

13. Evidently, the investigating officer talked about a grey and red jacket which was a departure from what the complainant had talked about however; there is a witness and exhibit list on record which was signed by the Court assistant, J. Mwendwa. It shows that exhibit 7 was a torn sweater and exhibit 8 was yellow underpant. Court assistants are mandated with the collection and marking of exhibits. If indeed, a grey and red jacket was produced, I do not see how it would have escaped his record. It is therefore my considered view that the point of reference should be the list of exhibits prepared by the assistant. This ground therefore fails.

Whether the charge sheet was defective:

14. The appellant submits that the charge sheet was defective because the word 'unlawfully' was omitted in the particulars of the offence. Further, he submits that the charge sheet indicated the victim's age as 14 years yet PW5 stated that she was 15 years.

15. Firstly, the birth certificate produced as exhibit 1 shows that the complainant was born on 04/07/2003 which means that at the time of the offence on 03/01/2018, she was 14 years and 5 months. In my view, failure to indicate the exact age in the charge sheet or indicating that she was 15 years does not change the fact that she was a minor and that did not in any way prejudice the appellant.

16. Similarly, omitting the word 'unlawfully' did not affect the sufficiency of the charge as the record shows that the appellant participated in the proceedings in a manner indicating that he understood the charge he was facing.

17. Section **382** of the Criminal Procedure Code states that;

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding."***

18. Accordingly, it is my considered view that the errors and omissions highlighted by the appellant did not in any way occasion a failure of justice. This ground fails.

Was the prosecution's case hurried?

19. The appellant complains that the case was conducted too fast and that he was not given enough time to prepare his defence. The record shows that plea was taken on 05/01/2018 and the matter was fixed for hearing on 30/01/2018. On that day, the prosecutor had 4 witnesses but the case did not proceed because the appellant had not been supplied with witness statements. The case came up again for hearing on 13/02/2018 and the prosecutor had 4 witnesses. The appellant indicated that he was ready to proceed.

20. The 4 witnesses gave their evidence after which the prosecutor prayed for adjournment in order to call the doctors and investigating officer. On 20/02/2018, the case did not proceed because the witness was indisposed. The appellant requested for a free bond which was declined on account of the gravity of the charge. On 26/02/2018, the prosecutor had the remaining 3 witnesses and the appellant said that he was ready.

21. From the foregoing, I fail to see the basis of the appellant's complaint. Evidently, the case was at one point adjourned, despite the presence of witnesses, because the appellant had not been supplied with statements. This was clearly in recognition of his constitutional right to have adequate time and materials to prepare for his defence. Further, there is not a single time that the appellant requested for adjournment and the same denied. On the contrary, the record shows that he was ready to proceed. Be that as it may, one of the main objectives of the Judiciary is expeditious disposal of cases and if anything, the learned trial magistrate should be commended for determining the matter within the shortest time possible. This ground is clearly frivolous and should fail.

Whether the burden of proof was shifted to the appellant:

22. From the judgment, it evident that the learned trial magistrate considered the defence but disbelieved it because according to her, the prosecution's evidence was overwhelming. It is totally in order to disbelieve an accused person's defence and that does not mean that the burden of proof has been shifted. This ground fails.

Whether the case was proved beyond reasonable doubt:

23. The appellant submits that the prosecution's evidence was contradictory, that failure to take him for medical examination was erroneous and that the medical evidence created doubts.

24. **PW1** narrated that she had gone to the appellant's shop to buy mandazi when he pulled her, took her to his house and defiled her. Her sweater got torn in the process. She tried to scream but he blocked her mouth with his hand. After the act, she went home but did not find her mother. He mother (PW2) arrived after 10 minutes and she told her what had happened. PW2 took her to the bedroom and checked. They waited for their father and when he arrived, they all went to the police station.

25. **PW2** testified that when she arrived home on the material day, she found PW1 crying. PW1 told her that she had been defiled by the appellant whereupon she checked her private parts and saw a whitish male discharge. The pant had blood and discharge. They waited for their father who took PW1 to the station and later to the hospital. She remained behind with the small child.

26. **PW3**, the complainant's father said that when he arrived home on the material day, he found PW1 crying and was informed that she had been defiled by the appellant. They all went to the police station. He then took PW1 to the hospital.

27. **PW4** was Dr. Nicholas from Wote Hospital. He produced an OP card, a lab request form, a prescription note and a Post Rape Care form. He said that the broken hymen illustrated that there was penetration and that the complainant's clothes showed there was a struggle.

28. **PW5** was Eric Kasiamani, a clinical officer from Kilungu District Hospital. He testified that he saw PW1's inner clothes which had blood stains and her sweater was torn. On physical examination, PW1 had pain on her lower back and legs. She was experiencing pain in her labia majora and minora and the hymen was freshly perforated.

29. **PW6** was the investigating officer who produced the birth certificate and clothes.

30. The totality of the evidence on record is that the prosecution witnesses were credible and the evidence was corroborative. The contradictions alluded to by the appellant were minor in my view, like when PW2 said that she did not accompany PW1 and PW3 to the police station.

31. Further, the fact that the appellant was not examined did not in my view shake the overwhelming prosecution evidence. The appellant agreed that PW1 went to his shop at the material time. He was therefore at the scene of crime. Contrary to the appellant's submissions, the medical evidence was strong and compelling.

32. PW1 had a freshly perforated hymen, her sweater was torn, her underpants had blood and she was experiencing pain in her genitalia. In a nut shell, the prosecution proved its case beyond reasonable doubt.

Conclusion:

i. The appeal has no merit and is hereby dismissed.

ii. The conviction is affirmed and sentence confirmed.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE