REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 38 OF 2016

HAMISI KALUME KONGONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the conviction and sentence dated 17th December, 2015

by L. N. Juma, RM in Kilifi PM's Court Criminal Case No. 434 of 2013,

Republic v Hamisi Kalume Kongoni]

JUDGEMENT

1. The Appellant, Hamisi Kalume Kongoni was charged, tried, convicted and sentenced to 20 years imprisonment by the Principal Magistrate's Court at Kilifi for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006 (S.O.A.). It was alleged that on 2nd October, 2013 and on 8th October, 2013 within Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of AKC, a child aged 15 years.

2. The Appellant being aggrieved by both the conviction and sentence has lodged this appeal on amended grounds as follows:-

> **"1. That the learned trial magistrate erred in law and fact by not considering that the age of the complainant was not proved beyond reasonable doubt thus the conviction and sentence cannot stand in law.**
>
> **2. That the learned trial magistrate erred in law and fact by not seeing that my arrest has no link with the matter in question.**
>
> **3. That the learned trial magistrate erred in law and fact by not considering that the medical evidence adduced was contradictory hence unreliable to uphold both the conviction and sentence.**
>
> **4. That the learned trial magistrate failed in the rule of law by admitting the victim's testimony forgetting that PW1 was not a straight forward witness hence beg this Hon. Court to disregard her evidence.**
>
> **5. That the learned trial magistrate did not consider that the matter in question was not investigated hence breach of Section 109 of the Evidence Act.**
>
> **6. That the learned trial magistrate did not see that my defence was reasonable to award me the benefit of doubt."**

3. The appeal was argued through written submissions. The Appellant submitted that for a conviction to ensue in a case of defilement, the prosecution needs to prove penetration, the age of the victim and the identity of the offender.

4. The Appellant submitted that in his case the only evidence regarding the age of the complainant was given by the complainant who testified that she had been told by her mother that she was 15 years old. According to the Appellant, neither the mother nor father of the complainant were called to testify. There was therefore no corroboration of the evidence on the age of the complainant. The Appellant stressed that even the doctor did not produce any evidence in regard to the age of the complainant.

5. The Appellant relied on the decision in the case of **Hillary Nyongesa v Republic, Criminal Appeal No. 123 of 2009** in support of his submission that the age of the victim must be proved in sexual offences because the punishment is determined by the age of the victim. The

Appellant also cited my decision in **Abdalla Mohamed v Republic, Criminal Appeal No. 90 of 2012** in support of this point.

6. On the issue of the victim's age, the Respondent submitted that the complainant stated that she was 15 years old and this was supported by the P3 form in which the age of the complainant was indicated to be 15 years.

7. What was the evidence placed before the trial court on the age of the complainant? The complainant herself told the court that:

> **"I am fifteen years – my mother told me I am fifteen years old."**

8. The other information on the age of the complainant is found in the P3 form in which it is stated that the complainant is 15 years of age.

9. The evidence of the complainant also received support from the post rape care (PRC) form in which the complainant's date of birth is indicated as 1998 meaning she was about 15 years in 2013 when she was allegedly defiled.

10. When the complainant was being taken through *voir dire* examination prior to her testimony she indicated that she was in Standard 5 at (name withheld) Primary School. Whereas the fact that the complainant cannot be said to be a child simply because she was in Standard 5 two years after the incident, this evidence together with the evidence of the complainant, the P3 form and the PRC form all confirm that the complainant was indeed 15 years old at the time of the alleged offence.

11. Was there penetration? The complainant told the court that she slept at the Appellant's home overnight. She then went home and later went back to the home of the Appellant. It was while at the home of the Appellant that police officers went and arrested her. She was taken to the police station from where she was taken to the hospital for examination

12. The Appellant has questioned the sufficiency of the evidence adduced by the prosecution. He also questions the failure by the prosecution to avail the arresting and investigating officers as witnesses.

13. The trial magistrate considered the failure to call the arresting officer and the investigating officer and concluded that the same was not fatal to the prosecution case. She relied on the case of **Kiriungi v Republic [2009] KLR 638** in arriving at her decision. The trial magistrate also held that she had found the complainant to be a truthful witness and proceeded to convict the Appellant on the strength of the proviso to Section 124 of the Evidence Act.

14. When the Appellant was placed on his defence he opted to exercise his constitutional right to remain silent.

15. The trial magistrate was indeed correct in stating that the failure to call the investigating officer is not fatal to the prosecution case. In **Kiriungi v Republic [2009] KLR 638**, the Court of Appeal analyzed various decisions and concluded that **"the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to that prosecution unless the circumstances of each particular case so demonstrate."**

16. The question is whether it was necessary in the circumstances of this to call the arresting officer and or the investigating officer. This needs to be considered alongside the quality of the evidence that was adduced.

17. When the complainant was cross-examined she told the court that she had known the Appellant since June 2013. Upon further cross-examination she stated that she had known the Appellant for one month. Since the incident was committed in early October 2013 it means that she knew the Appellant in early September thus contradicting her claim that she had known him since June. Still pressed by the Appellant, she stated that she knew the Appellant four days prior to the incident. The complainant told the court that the Appellant told him his name on the night they met. The complainant testified that the Appellant's name was Hamisi Kaluti. However, the court record shows that the Appellant's name is Hamisi Kalume Kongoni.

18. Another contradiction that emerged during cross-examination was the complainant's claim that she followed the Appellant. She again changed her testimony and claimed that the Appellant carried her.

19. A perusal of the evidence adduced in support of the prosecution's case left many unanswered questions. No explanation was offered as to who reported the incident. No evidence was adduced as to how, where and when the Appellant was arrested. The complainant as already demonstrated gave contradictory evidence and the proviso to Section 124 of the Evidence Act was not applicable in this case.

20. The proviso to Section 124 of the Evidence Act can only be usefully be engaged where the victim of an alleged sexual offence is truthful. In this case an examination of the court record shows that the complainant was not a truthful person. There was therefore need to avail corroborative evidence. The evidence of the arresting officer could have assisted the court to establish the identity of the person who made the report. Even though the complainant talked of her father examining the documents related to the case at one time, no reason was given as to why he was not called as a witness.

21. In short, I find that the evidence adduced in support of the prosecution's case was too shaky to warrant the imprisonment of the Appellant for 20 years. The Appellant ought to have been given the benefit of doubt by the trial court.

22. The end result is that the Appellant's appeal has merit and it succeeds. His conviction is quashed and the sentence set aside. This means that he is forthwith set at liberty unless otherwise lawfully held.

Dated and Signed at Nairobi this 11th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 30th day of May, 2019

R. Nyakundi,

Judge of the High Court