REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL CASE NO 40 OF 2018

JACKSON GARI MWASAHA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and sentence made by the Senior Principal Magistrate's Court at Kilifi (Hon. R. K. Ondieki) on 7th June, 2017 in Kilifi, Criminal Case No. 39 of 2016, Republic versus Jackson Gari Mwasha).

JUDGMENT

1. The Appellant, Jackson Gari Mwasaha, was charged before the Chief Magistrate's Court at Kilifi with defilement contrary to section 8(1)as read with Section 8(4) of the Sexual Offences Act, 2006 (S.O.A.). The particulars of the charge were that:

> **"On diverse dates between April 2015 and December in Kilifi County [The Appellant] intentionally and unlawfully caused his penis to penetrate the vagina of MM a child aged 16 years"**

2. The Appellant faced an alternative charge of indecent act contrary to section 11(1) of the S.O.A. the particulars being that:-

> **"On diverse dates between April and December 2015 in Kilifi County touched the genital organ namely vagina of MM a child aged 16 years with your genital organ namely penis".**

3. The Appellant denied the charges and at the conclusion of the trial he was found guilty of the main count and sentenced to 10 years imprisonment. The Appellant appeals against both conviction and sentence on the following grounds:-

> **"1. That learned trial magistrate erred in law and fact by convicting and sentencing me to 20 years imprisonment without considering that the charge of defilement was not proved beyond reasonable doubt as required by the law.**
>
> **2. That learned trial magistrate erred in law and fact by finding my conviction and sentence without noticing that the DNA was not conducted to ascertain the actual defiler.**
>
> **3. That learned trial court magistrate erred in law and fact in arriving to his conclusion without considering that the source of my arrest was not established to have had any connection with this offence in question.**
>
> **4. That learned trial Court magistrate erred in law and fact by not considering my reasonable defence statement which was also backed up by the defence witnesses**."

4. The Respondent opposed the appeal. This being a first appeal, my duty is as was delineated by the Court of appeal in **Eliud Waweru Wambui v Republic [2019] eKLR** as follows:

> **"A first appeal always proceeds by way of re-hearing based on the evidence on record and an appellant is therefore entitled to expect that the first appellate court will go beyond a mere rehashing of what is on record or a repetition of the findings of the trial court.**
>
> **It is required to and must be seen to have, consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the limitation to its task being a remembrance that it is without the advantage, enjoyed by the trial court, of seeing and observing the witnesses as they testified, for which it must make due allowance."**

5. The complainant testified as PW1 and told the Court that she was 16 years old and in form 2. Her evidence was that she knew the Appellant since they lived in the same village. She had known him for one year. She also stated that he was her boyfriend and she started having sex with him in April, 2015. In December, 2015 she discovered that she was pregnant and upon informing the Appellant of this development he took her to a place in Mtwapa where the pregnancy was terminated.

6. It was the complainant's testimony that prior to the abortion her pregnancy was visible and her uncle informed a certain woman of the same. The woman in turn informed the complainant's mother. Her mother informed her teacher by the name F. of the pregnancy and she was taken to a private hospital in Kilifi where it was discovered she was going through a miscarriage. She was referred to Kilifi District Hospital where she was treated. From there they went and reported the matter at Kilifi Police Station. The Appellant was later arrested after her uncle identified him to the police.

7. PW2 FC told the Court that MM was one of the children they sponsored in their school. In January, 2016 some of the villagers in Tezo called them and informed them that MM was pregnant. PW2 proceeded to MM's school and picked her and took her to a clinic in Kilifi. Upon examination MM was found to be undergoing a miscarriage. PW2 went and reported the matter at Kilifi Police Station and they were issued with a P3 form and advised to go to Kilifi District Hospital. Upon examination it was found that MM was undergoing an abortion. PW2 questioned MM who disclosed that the Appellant was responsible for the pregnancy. The police went and arrested the Appellant.

8. PW3 Dr. Daisy Juma attempted to produce the P3 form but was stepped down after the Appellant objected to her testimony.

9. PW4 Corporal Philip Dzombo testified that he received the report of the defilement from MM on 17th January, 2016. She told him that she had been defiled on diverse dates between April 2015 and December 2015. He later arrested the Appellant after MM identified him.

10. In the course of the trial the trial magistrate L. N. Wasige, SRM was transferred and the matter was taken over by R.K. Ondieki, SPM. Upon compliance with Section 200 of the Criminal Procedure Code, the Appellant opted to have the case proceed from where it was left by the first magistrate. Before the new magistrate, Dr. Zeinabu Zahan testified as PW2 and produced a P3 form filed for M. M. by Dr Busra. She stated that the complainant had vaginal bleeding and the hymen was absent. She also indicated that a test for pregnancy was positive.

11. Corporal Philip Dzombo once again testified as PW3 and repeated the testimony he had given before the first magistrate.

12. Nelly Dumbu a senior nurse at Kilifi County Hospital told the court that she examined MM. on 11th December, 2016. She found that she was 10 weeks pregnant. Blood was oozing from her vagina. MM told her she had been advised to take some drugs to abort but it was not successful. The witness' testimony was that the pregnancy test was positive. She filled a post-rape care form (PRC) which she produced as an exhibit. The PRC is dated 11th January, 2016 and it is likely that the witness erred in saying that she examined MM in December, 2016.

13. In his defence, the Appellant who testified as DW1 told the court that he was a boda boda operator. Sometimes in January, 2016 the mother of the complainant engaged him to drop the complainant at Mtwapa. He was arrested later in the same month and charged. He stated that there was no bad blood between him and the family of the complainant.

14. In support of the appeal, counsel for the Appellant submitted that there was no evidence adduced to corroborate the complainant's testimony that she had sex with the Appellant. Further, that no evidence was adduced to show that the complainant was 16 years at the time of the alleged offence and that the Appellant knew that she was 16 years.

15. Counsel for the Appellant submitted that failure by the prosecution to avail the personnel at the Mtwapa clinic, the mother of the complainant and the uncle of the complainant as witnesses was fatal to the prosecution case. Reliance was placed on the decisions in **Said Awadhi Mubarak v Republic [2014] eKLR** and **William Cheruiyot Kandie v Republic [1997] eKLR** for the proposition that failure by the prosecution to call crucial witnesses weakens the prosecution case and the benefit of doubt should go to the accused person.

16. Counsel for the Appellant also faulted the prosecution for failing to conduct DNA on the foetus that was allegedly aborted.

17. The Appellant's counsel also faulted the trial court for failing to consider the Appellant's defence considering that the Appellant had denied having any sexual liaison with the complainant.

18. Turning to the issue of corroboration, counsel for the Appellant asserted that the trial Court's finding that the medical evidence corroborated the evidence of the complainant on the bleeding from the vagina was erroneous since the issue was not whether the complainant was bleeding or not. According to counsel for the Appellant, the issues before the trial court were whether the complainant was below 18 years of age and whether the Appellant had sex with her.

19. The Respondent in opposition to the appeal submitted that the evidence adduced established that the Appellant had sex with the complainant who was a child at that time. Further, that DNA test is not mandatory and was not necessary in the circumstances of the case. Counsel for the Respondent relied on the decision in the case of **Fappyton Mutuku Ngui v Republic [2014] eKLR** in support of her submissions that a DNA test was not necessary. She urged this court to find that the prosecution had proved its case beyond reasonable doubt and dismiss the appeal.

20. In my view, the question to be answered is whether the evidence adduced at the trial was sufficient to warrant a conviction. Counsel for the Appellant submitted that the prosecution failed to adduce evidence to corroborate that of the complainant. On the face of it, this submission is contrary to the proviso to Section 124 of the Evidence Act, Cap. 80 - Section 124 states that:-

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of

the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

21. There is now a tendency by investigating officers to want to nail accused persons using the evidence of the victim only. This is not what the proviso to Section 124 of the Evidence Act was meant to achieve. The proviso to 124 can only come to the aid of the prosecution where the **"only evidence is that of the alleged victim of the offence."** Where there is other evidence, the prosecution is under a duty to avail that evidence to the trial court. Even where the only evidence is that of the victim, the court must satisfy itself that the victim is telling the truth and the reasons for believing that the victim is telling the truth should be **"recorded in the proceedings".**

22. In the instant case, there were other witnesses who should have testified but were never called to testify. No reason was given as to why the witnesses were not called to testify. Here, I am referring to the mother and uncle of the complainant. Indeed, the evidence of the unnamed uncle of the complainant was crucial as he is the one who allegedly alerted the complainant's teacher about the pregnancy. The investigating officer ought to have visited the place at Mtwapa where the complainant was allegedly taken to carry out an abortion. He did not do so and neither did he offer any explanation why he did not go to Mtwapa.

23. There were also unreconciled contradictions on record. The complainant talked of a successful abortion in December, 2015 which left her bleeding for one week. The teacher, the investigating officer and the medical personnel talked of the complainant being examined on 11th January, 2016 and found to be bleeding. Indeed PW2 stated that the complainant was examined and found to be undergoing an abortion.

24. Considering the contradictions in the testimony of the prosecution witnesses and the fact that crucial witnesses were not called to testify, it was not safe for the trial court to arrive at the conclusion that the Appellant committed the offence with which he was charged. He ought to have been given the benefit of doubt. For the stated reasons I find this appeal has merit and I allow it. The conviction is quashed and the sentence set aside. The Appellant is therefore set free forthwith unless otherwise lawfully held.

Dated and signed at Nairobi this 5th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Signed and Delivered at Malindi this 29th day of May 2019

R. Nyakundi,

Judge of the High Court