REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 118 OF 2017

ELVIS WAFULA WASIKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by G. N. Sitati, RM, in Mumias PMC Criminal Case No. 538 of 2015 dated 4/5/2016)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve life imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:-

> 1. The learned trial magistrate erred in law and fact by failing to consider that PW2 was forced and coerced to give incriminating and false evidence against the appellant by her mother (PW1).
>
> 2. The learned trial magistrate erred in law and fact by relying on prosecution's evidence that was marred with contradictions and inconsistent hence unreliable witnesses.
>
> 3. The case against the appellant was not investigated hence the appellant was convicted on mere allegations.
>
> 4. The trial court erred in law and facts by not considering that very vital evidence was not availed in court hence the case was not proved beyond reasonable doubt.

2. The state opposed the appeal.

3. The particulars of the charge against the appellant were that on the 12th July, 2015 at around 11.00 hours in Mumias Sub-County within Kakamega County he intentionally caused his penis to penetrate the vagina of ACSM (herein referred to as the complainant/minor), a child aged 8 years.

Case for Prosecution –

4. The case for the prosecution was that the complainant, who was PW2 in the case, is a daughter to VM PW1 and NM PW3. That in 2015 she was aged 8 years. The appellant was employed as a shamba boy by the parents to complainant. He had worked for them for about 6 months.

5. That on the material day the complainant and her two younger siblings had attended church in the morning and returned home at 10 a.m. On getting back home her mother went to church and left the complainant and her siblings under the care of the appellant. The complainant's father had left for church earlier. As the parents were away the appellant defiled the complainant in the kitchen. Her mother returned home at 1 p.m. but she did not reveal what had happened. Her mother however noticed that the girl was very dull and was not playing with other children. Her father returned home at 6 p.m. He observed that the girl was limping. He asked the appellant who told her that the girl had fallen down.

6. That on the following day the parents noted that the girl was in pain. Her mother interrogated her. She then revealed that the appellant had defiled her on the previous day. Her father PW3 took the appellant to Shianda Police Station. He was locked up.

7. On the following day the complainant's parents took her to Makunga Dispensary. She was attended to by a clinical officer PW4 who found her with bruises between the labia minora and majora. The hymen was present but was tender and reddish brown and painful to touch. A laboratory examination revealed puss cells. The clinical officer completed a Post Rape Care form for the girl.

8. PC Mwangi PW6 of Shianda Police Station investigated the case. He issued a P3 form to the girl. It was completed by a clinical officer PW5 at Kakamega Provincial General Hospital. The appellant was also taken to hospital and was examined. He was charged with the offence. He denied the charge. During the hearing the girl's mother PW1 produced the girl's birth certificate as exhibit, PExh.1. It indicated that she was born on 9th January, 2009. The clinical officer who attended to the girl PW4 produced the girl's Post Rape Care form, the treatment notes and laboratory instructions as exhibits, PEx.2, 3 and 4 respectively. He also produced the appellant's treatment notes and laboratory instructions as exhibits, PEx.5 (a) and (b) respectively. The clinical officer who completed the P3 form produced it as exhibit, PEx.6.

Defence Case –

9. When placed to his defence the appellant stated in an unsworn statement that he was employed as a shamba boy. That at 8 p.m. his employer told him that he had defiled their child. He denied it.

Submissions –

10. The appellant made written submissions. He submitted that the complainant was coerced by her parents to implicate him with the offence. That the complainant's mother admitted to have threatened the girl while the girl said that her father had beaten her to reveal what had happened to her. The appellant questioned why the girl did not willingly report the incident to her parents. He submitted that the evidence of the girl should be discarded.

11. The appellant submitted that there was no medical evidence to support the charge. That no DNA test was carried out to establish whether the appellant was connected with the offence. That though laboratory examination on both the complainant and the appellant revealed presence of puss cells in their urine it was not established the cause of the infection as this could have been as a result of poor hygiene.

12. He further submitted that the siblings of the complainant were not called to give evidence in the case. That the case was not proved beyond all reasonable doubt. He urged the court to acquit him.

13. The prosecution counsel did not make any submissions in the appeal.

Analysis and Determination –

14. This is a first appeal. The duty of a first appellate court is to analyze the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify - See **Okeno –Vs- Republic (1972) EA, 32.**

15. The trial magistrate in the case against the appellant found that the age of the complainant was proved by the production of the birth certificate that indicated that the girl was born on 6/1/2007 which put her age at 8 years at the time of defilement. That penetration on the girl was corroborated by medical evidence from the clinical officers PW4 and PW5. That the appellant was a person well known to the complainant and she identified him as the person who had defiled her. The magistrate found that the appellant had defiled the complainant.

16. The birth certificate produced in the case showed that the girl was at the time of the incident aged 8 years. The age of the complainant was thereby proved.

17. There is no requirement in law that a charge of defilement can only be proved by way of medical evidence to support it. Defilement can be proved by oral evidence and circumstantial evidence. **In AML –Vs- Republic (2012) eKLR** the Court of Appeal held that:-

> ***"The fact of rape or defilement is not proved by a DNA test but by way of evidence ."***

This position was restated by the same court in **Kassim Ali Vs Republic, Mombasa Criminal Appeal No. 84 of 2005** where it held that:

> ***"(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"***.

18. Section 36 of the Sexual Offences Act gives powers to a court trying an accused person over a sexual offence to order for samples to be taken from the person for testing including a DNA test for purpose of ascertaining whether or not the accused person committed the offence. It has however to be noted that the Section is not couched in mandatory terms. In **Hadson Ali Mwachongo Vs Republic (2016) eKLR** while citing **Robert Mutungi Murumbi Vs Republic, Cr. App No.524 of 2014 (Malindi)** expressed itself thus on the section:

> ***"Section 36(1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."***

19. Section 36 can only be resulted to when there is reason to do so. In this case there were no samples from the complainant e.g. blood stains or spermatozoa that needed to be compared with samples taken from the appellant. There was thereby no need to issue an order for DNA test.

20. The appellant alleged that the prosecution's evidence was marred with contradictions and inconsistencies. He did not pin-point any such contradictions and or inconsistencies.

21. The appellant further urgued that the case against him was not properly investigated and that the siblings to the complainant were not called to testify in the case.

22. Section 143 of the Evidence Act provides that there is no particular number of witnesses required for the proof of any fact unless a particular law provides otherwise. Further to this the proviso to Section 124 of the Evidence Act allows a court trying an accused person over a sexual offence to convict on the evidence of a child victim of the offence if the court is satisfied that the child was telling the truth. The complainant did not state whether her siblings witnessed the assault which took place in the kitchen while the other two siblings were in the sitting room. The complainant was the first born to her parents. The ages of the other two siblings was not stated. The fact that the complainant's siblings did not testify was not fatal to the prosecution case.

23. The medical evidence adduced in the case indicated that the hymen was intact but that the victim had bruises between the labia minora and labia majora. The question before the trial court was whether there was penetration when the hymen was intact. The trial court cited the definition of penetration in Section 2 of the Sexual Offences Act that penetration means:-

> ***The partial or complete insertion of the genital organ of a person into the genital organs of another person.***

24. The trial court further cited the case of **Mark Oiruri Mose –Vs- Republic (2013) eKLR** where the Court of Appeal held that:-

> ***"Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organs."***

The trial court accordingly held that there was supervisial penetration due to the injuries on the minor's genitalia which corroborated the minor's evidence on penetration.

25. I entirely agree with the findings of the learned trial magistrate that there was partial penetration of the complainant by the appellant. It is apparent that the minor was in pain on the evening of 12/7/19 and on 13/7/19 when her parents observed the discomfort that she was in that prompted them to inquire from her what was wrong. The clinical officer who examined the minor at Makunga Health Centre PW4 found her with bruises on the labia minora and majora. The minor had told her mother on the second day that the appellant had defiled her.

26. There was no doubt that the complainant had been defiled. The findings of the clinical officer PW4 of bruises on the genitalia corroborated the evidence of the minor that she had been defiled. The minor's parents had observed that the minor was in pain that prompted them to inquire from her as to what was wrong. All this evidence supported the evidence of the complainant that she had been defiled.

27. The learned trial magistrate considered the credibility of the minor and believed that the appellant is the person who had defiled her. The trial magistrate saw no reason why the minor would have framed up the appellant.

28. It is the trial court that saw the minor and weighed her credibility. This court does not see any reason to fault the magistrate's findings on the credibility of the minor. If anything, the court record portrays the minor to have been a very candid witness. It is clear that the appellant had been left by the parents of the children to take care of them when the parents were away in church. The appellant ended up defiling the minor. There was no truth that the minor mentioned the appellant because of the threats and beatings from her parents. The beatings were only meant to prompt the girl to tell what had happened to her which she revealed. There was no evidence that there was any other adult person at the home of the minor when the minor was defiled. The denial by the appellant did not stand in face of the overwhelming evidence that was adduced against him.

29. The upshot is that the charge against the appellant was proved beyond all reasonable doubt. The appeal on conviction has no merit and is thereby dismissed.

30. Section 8 (2) of the Sexual Offences Act No. 3 of 2006 provides that:-

> ***"A person who commits an offence of defilement with a child eleven years or less shall upon conviction be sentenced to imprisonment for life."***

31. In **Denis Kinyua Njeru –Vs- Republic (2017) eKLR** the Court of Appeal expressed the view that the sentences provided under section 8 of the Sexual Offences are "*straight jacket*" penalties that left no room for the exercise of discretion by a sentencing court. However, recently in **Evans Wanjala Wanyonyi –Vs- Republic [2019] eKLR**, the court held that:-

> ***"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under***

Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:

In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.

25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."

32. The meaning of the latter holding by the Court of Appeal is that the sentence provided by Section 8 (2) of the Sexual Offences Act is a discretionary maximum sentence. A sentencing court therefore has the discretion to impose a lesser sentence. The trial court in the petitioner's case imposed the maximum sentence of life imprisonment. The Court of Appeal had not delivered its decision in the latter case when the appellant was convicted. The appellant is entitled to a review of his sentence on the basis of the Court of Appeal decision in **Evans Wanjala Wanyonyi –Vs- Republic** (Supra).

33. Upon considering that the appellant was first offender and that he is a young man I do not think that the sentence of life imprisonment is warranted. The same is therefore set aside.

34. The appellant defiled a child aged 8 years. I should think that a prison term of 20 years is sufficient period for the offence committed. I sentence the appellant to a prison term of 20 years commencing from the date of sentence by the lower court.

Delivered, dated and signed in open court at Kakamega this 30th day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for state

Appellant - present

Court Assistant - George

14 days right of appeal.