REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 77 OF 2018

BETWEEN

MAURICE OWUOTH OWITI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence dated 13.07.18 by Hon. J.Mitey (RM) in Winam Criminal Case Number S.O 1142 OF 2015)

JUDGMENT

Background

1. The Appellant herein **MAURICE OWUOTH OWITI** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as ***the Act***) which was allegedly committed on 08th October, 2015 against **CAO** a girl aged 12 (Twelve) years.

2. In a judgment dated 13th July, 2018, the Appellant was convicted and sentenced to 20 years' imprisonment.

3. Aggrieved by this decision, the appellant lodged the instant appeal on 25th July, 2018. From the 4 grounds in the amended petition of appeal and written submissions both filed on 1st April, 2019, the appellant's raises the three main issues for determination.

1. ***Age of complainant***

2. ***Time when offence was committed***

3. ***Failure to conduct examination on the spermatozoa seen in complainant's genitalia***

4. At the hearing, Mr. Anyul for the Appellant submitted that the age of the complainant was not proved by medical evidence. He further submitted that the Appellant was framed by the complainant's mother after their love affair went sour. To demonstrate his assertion, he submitted the the complaint appears to have been reported before it occurred for the reason that the P3 form shows that complainant was treated at 08.30 pm, reported the matter to the police at 09.20 pm yet she returned home after the ordeal at about 11.00 pm. It was further submitted that failure by the prosecution to comply with the doctor's recommendation that the Appellant be subjected to examination to confirm if he had any nexus with the spermatozoa found in complainant's genitalia was fatal to the prosecution case. Counsel additionally faulted the trial magistrate for disregarding the Appellant's defence.

5. Mr. Muia, Learned Counsel for the State opposed the appeal on the ground that complainant's age was proved by her baptism card and evidence by her mother that she was 12 years old. It was also submitted that medical evidence proved that complainant had been defiled.

Analysis and Determination

6. In a more recent case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**, the Court of Appeal stated as follows on the duty of the first appellate court:

"It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision."

Prosecution case

7. **PW1, CAO** the complainant, stated that she was a girl aged 12 (Twelve) years and in class 5. She recalled that on the material date in the evening, the Appellant whom she knew by the names JAKANO and Morris called her from where she was playing with friends, took her by vehicle to a place called Mowlem where he took her into a bush and defiled her. It was her evidence that she returned home at about 11.00 pm, reported the matter to her mother.

8**. PW2 CA**, the complainant's mother stated she arrived home at about 7.00 pm. She stated that the complainant arrived home thereafter and informed her that Jakono had defiled her and she escorted her to hospital.

9. **PW4 PC GISAIRO MUCHAMA** re-arrested the Appellant from members of public on the material date at about 10.00 pm. **PW5 PHILLIP KILIMO** a clinical officer produced a P3 form filled by Dr. Omollo on 09,10.15 on the basis of a PRC Form which shows that complainant's hymen was intact but she had lesions on the labia majora; bloody discharge with foul smell and spermatozoa in her genitalia. He confirmed that the doctor recommended that the Appellant be subjected to medical examination. **PW6 CPL PATRICK INDOMBI** the investigating officer recorded witness statements and caused the Appellant to be charged.

10. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant denied the offence and stated he was framed by the complainant's mother after their love affair went sour. He however conceded that he knew the complainant. He called his mother as a witness but she did not know anything about the charges.

11. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and for the State.

12. The *penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant. The age of the victim is a matter of fact which can be proved by evidence other than birth certificate and age assessment report.* An accurate assessment of the age of the child is a material factor in charging, convicting and sentencing. Complainant testified that she was 12 years. The doctor that filled the P3 form assessed her age as 12 years. In the case of **Richard Wahome Chege v Republic [2014] eKLR**, the Court of Appeal held as follows:

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth" It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself".***

13. Although no documentary evidence was tendered to prove complainant's age, I am on the basis of the foregoing authority convinced that the trial court arrived at a correct conclusion when it found that the complainant's age had been proved to be 12 years.

14. There is no dispute that complainant was defiled. The P3 form filled a day after the alleged offence shows that complainant's hymen was intact but she had lesions on the labia majora; bloody discharge with foul smell and spermatozoa in her genitalia.

15. Concerning the identity of the Appellant as the person that defiled complainant, complainant told court that she was alone with the Appellant in a bush when he defiled her. The foregoing notwithstanding, ***Section 124 of the Evidence Act*** is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful.

16. The doctor that examined the complainant upon discovering spermatozoa in her genitalia recommended that the Appellant be subjected to medical examination. The defence faults the state for not subjecting the Appellant to medical examination as recommended by the doctor. The issue in question is whether failure by the prosecution to subject the Appellant to medical examination is fatal to its case.

17. ***Section 143*** of the ***Evidence Act*** provides that in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. Indeed, a fact can be proved by evidence of a single witness, provided the necessary precautions are taken to ensure that the evidence is watertight.

18. In **Bukenya & Others versus Uganda [1972] EA 549**, the predecessor of the Court of Appeal placed an obligation on the prosecution to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. A corresponding obligation was placed on the court to call witnesses whose evidence is essential for the just decision of the case. That power donated in the **Bukenya case** (supra) exists solely for purposes of calling witnesses as are sufficient and necessary to establish the charge to the required threshold. (See **Joseph Kiptum Keter v Republic [2007] eKLR**). Evidence in the form of spermatozoa was available which would have been subjected to examination to sufficiently establish the charge to the required threshold of prove beyond reasonable doubt. The prosecution however opted to abdicate the obligation placed on it to avail this evidence that was essential for the just decision of this case.

19. The Appellant denied defiling the complainant and failure by the prosecution to avail necessary available evidence is hereby construed to mean that such evidence would have been fatal to its case. In those circumstances, I have come to the conclusion that the evidence on record was not watertight to sustain the charge.

20. Having said that, I find that the defence cast a reasonable doubt on the prosecution case and the Appellant ought to have been given the benefit of doubt. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty. It is so ordered.

DELIVERED AND SIGNED AT KISUMU THIS 25TH DAY OF JULY 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Felix & Okodoi

Appellant - Present

For the Appellant -

For the State -