REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 14 OF 2019

MOHAMED SARAH NOOR...APPELANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against the entire judgment of Hon. A.K Mokoross (Senior Resident Magistrate Wajir) in Sexual Offence Case No. 03 of 2018 delivered on the 15th day of March, 2019)

JUDGEMENT

Introduction:

1. The appellant Mohamed Sarah Noor 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 being that on the 18th day of February, 2018 in Habaswein Sub-county within Wajir County, the appellant intentionally caused his penis to penetrate the vagina of FHM a child aged 15 years.

2. The appellant was tried, convicted of the offence of defilement of a child and sentenced to serve 20 years Imprisonment. This appeal therefore challenges the conviction and sentence imposed by the trial court. Being Dissatisfied with the trial court decision, the appellant filed the instant appeal on the following grounds: -

> **1) The learned trial magistrate erred both in fact and in law by convicting the appellant when the prosecution had not proved their case against the appellant beyond reasonable doubt**
>
> **2) The learned trial magistrate erred both in fact and in law by failing to resolve the apparent doubts in the prosecution case in favour of the appellant.**
>
> **3) The learned trial magistrate erred both in fact and in law when he rejected the solid defence by the appellant while relying on very weak reasons to convict the appellant.**
>
> **4) The learned trial magistrate erred both in fact and in law by failing to scrutinize and evaluate the Prosecution evidence thereby arriving at an erroneous decision.**
>
> **5) The learned trial magistrate erred both in fact and in law by failing to hold that burden of proof at all times rested with the prosecution and could not shift to the appellant.**
>
> **6) The learned trial magistrate failed to consider the prosecution evidence that exonerated the appellant person herein against the offence.**
>
> **7) The learned trial magistrate confused and misapplied the evidence in favour of acquittal of the appellant to convict him.**
>
> **8) The learned trial magistrate erred both in fact and in law in failing to find that the prosecution's evidence was contradictory in material facts.**
>
> **9) The learned trial magistrate erred both in fact and in law when she made a partial evaluation of the evidence and finding in favour of the prosecution instead of awarding the benefit of doubt to the defence.**
>
> **10) The learned trial magistrate erred both in fact and in law in failing to find that no tangible evidence was formed or presented to the court linking the appellant to the commission of the offence**

11) The learned trial magistrate erred both in fact and in law by failing to find that the failure to call crucial witnesses fatally weakened the prosecution case.

12) The learned trial magistrate relied on speculation, probabilities and possibilities to convict the appellant.

13) The learned trial magistrate erred both in fact and in law when he failed to find the prosecution did not prove the ingredients of the offence of defilement.

Submissions:

3. Both parties filed written submissions. The appellant submissions are dated 21/6/2019 and filed on 24/6/2019 whereas the Respondent submission are dated 24/6/2019 and filed on even date. The appeal came up for hearing on 24th June, 2019, where parties highlighted their submission.

Appellant's Case:

4. The appellant Counsel began his submissions by giving their perspective of what transpired based on the evidence tendered in court. He submitted that between14th -18th February, 2018 the complainant was released home from school to seek medical treatment, however she decided to run away to Wajir to her aunt, she did not have fare and hiked a lift and while at the said car saw half-drunk alcohol, she requested and drank the same and passed out till the following morning. Counsel went ahead and addressed the following grounds of appeal.

5. The first ground advanced by the appellant Counsel is that the prosecution evidence tendered is contradictory in material facts. Through their filed submissions they have noted several instances of witness testimonies contradictions, which they submit that the trial court failed to evaluate in favour of the appellant. They centered on the complainant's testimony which they submitted was laced with lots of contradictions, for instance she failed to explain on cross-examination the contradiction between the recorded testimony and the oral testimony. In addition, they submitted that there was inconsistency in the manner in which she met the appellant, her explanation that she was given water which affected her after 5 minutes and passed out as unconscious until the following the day when she work up to find the appellant standing next her is suspect as in between she alleged that she was given chips at night by the appellant.

6. In support of this ground, the appellant relies in the case of **Jon Cardon Wagner vs Republic & 2 others (2011) eKLR** and **Twehangane Alfred vs Uganda as** quoted in **Joseph Mwangi Kariuki vs Republic, Criminal Appeal No. 52 of 2015.**

7. The second issue addressed by the appellant is on penetration. He submitted that penetration was not denied, but there was no evidence that the appellant actually penetrated the complainant. They challenged the trial court finding that the doctors evidence collaborated the evidence of the complainant as the appellant and the complainant both had Urinary Tract Infection (UTI), arguing that the UTI cannot form a basis of such finding as the complainant in her testimony stated two other men who she doesn't know took her to a room and had sex with her.

8. In this regard they submitted that the complainant never gave a description of how the appellant penetrated her, she only stated that when she regained consciousness, she found the appellant standing next to her, and that she never said he was naked. It is his position that the appellant was only found culpable courtesy of the UTI, which they argue would have been there before the penetration.

9. Further, they submitted that it would not be humanly possible for the complainant to know who defiled her in her state of unconsciousness. In this rely in the case of **Michael Mumo Nzioka vs Republic(2019) eKLR.**

10. The third issue addressed by the appellant counsel is that the appellant defence of alibi, which they argue that the trial ought to have shifted the burden of proving the same to the prosecution; however it failed to do so as there was no investigation conducted over the same. It is their position pursuant to the alibi, it would have been the father of the appellant would have picked the complainant; this is supported by the complainant's mother testimony that he saw the said motor vehicle being driven by the appellant's father.

11. The fourth issue addressed by the appellant is on the 20-year sentence imposed. He submitted that the offence that faced the appellant is with reasonable doubt and urged the court to evaluate the proceedings and urged the court to act in the interest of justice arguing that the conviction was unsafe and urged to exercise its discretion and vary the sentence. In this he relies in the case of **AOO & 6 Others vs Attorney General & Another (2017) eKLR.**

12. The final issue addressed by the appellant is that the complainant evidence and revelation of the crime was not voluntary, and that she was beaten and strangled to disclose that she had been defiled. In addition, she even refused to be examined as per the evidence of the medical doctor. This they submitted is the reason for the contradictory evidence.

Respondent's Submissions:

13. The state through Counsel Mr. Mlati opposed the appeal, submitting that the ingredients of the offence were proved beyond reasonable doubt. These are the age, penetration and identification of the perpetrator. In terms of age, the complainant is 15 years as evidenced birth certificate tendered, penetration was not disputed and on identification he submitted that the complainant saw the appellant and the identified the motor vehicle used.

14. In respect to the UTI infection, he submitted that the same ought not to form the basis of the conviction of the appellant.

15. In regard to the appellant alibi, he submitted that the same did not displace the cogent evidence tendered by the prosecution, further

arguing that the same was not raised in the earliest opportunity to give the prosecution an opportunity to investigate the same.

16. In sum, he urged that court to dismiss the appeal and affirm the conviction, on sentence he left to the discretion of the court stating the court was not bound to any minimum sentence.

17. The duty of this court as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as was held in **Okeno vs Republic (1972) E.A. 32** where the court held: -

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."**

The Evidence:

18. The brief summary of the Prosecution case before the trial court was as follows. **PW1 (DB)** Complainant's mother testified that on 14th February, 2018 the complainant a student at Ogle girls secondary school was given permission to come home, and on 18th February, 2018 the complainant PW2 disappeared, she began a search spanning two days, she reported the matter to the police. On the third day PW2 resurfaced looking dazed and appeared mentally ill, and due to anger she slapped her twice while probing her on where she had been. She had blood stains on her clothes. She opened up saying that the only thing she remembers was boarding a tax; she took her to hospital where she was told by the medical doctor that she had been defiled. She subsequently reported to the police and took a P3 form.

19. She further testified that she was informed that PW2 had boarded a taxi owned by one Mohamed Sarah, the appellant father. She stated that she saw the said motor vehicle being driven by the appellant father in the period immediately after the disappearance of PW2. She stated that PW2 was 15 years and produced her birth certificate confirming the same.

20. **PW2 (FHM)** the Complainant testified that on 14th February, 2018 she was given permission to go home and on 18.02.2018 she purposed to visit her aunt in Wajir without the knowledge of her parents, and since she did not have money she hiked a lift from a tax driven by the appellant imprinted with the word 'wamba'. She stated that while seated at the appellant vehicle she felt thirsty and requested water from the appellant, who gave her half drank water, which she drank and immediately thereafter lost her consciousness. She regained her consciousness the following morning, feeling pain on her waist and her lower body with her pants and pantyhose removed. She recalled seeing the appellant having sex with her and when she regained consciousness the appellant was seated on her. She stated that the appellant locked the room and left, and she was picked in the afternoon by two other men who took her to another house where they took turns having sex with her the whole night, locked her in the house in the morning and at 4.pm picked her up and dropped her near Alhamdu, where she found her way home and on being beaten by his parents she revealed what had transpired, she was taken to hospital treated and filled the P3 form. She stated that she recognized the appellant and would not mistake him to someone else.

21. **PW3 (Dr. Aweis Ismael)** testified that she examined PW2 on 21.02.2018, where she noted bruises on the inner thighs of both the lower limbs and on examination of the genitalia he noted laceration on the vaginal wall and on the part of the cervix. The hymen was broken, but would not tell whether it was freshly broken, and there was a bloody discharge, which he ruled out menstruation. On conducting urinalysis, she found that PW2 had Urinary Tract Infection. He also examined the appellant and found that he also had the Urinary tract infection a communicable disease.

22. **PW4 (AA)** testified as the Principal of [particulars withheld] Girls Secondary School, confirmed that PW2 had permission to go home due to illness. She was released on 14.02.2018 and was to report back on 18.02.2018 as exams were to commence on 19.02.2018, recalled that he heard of PW2 defilement on the media and recorded a statement.

23. **PW5 (PC Henry Maina)** the Investigating Officer testified that PW2 accompanied by her parents reported gang rape on 21.02.2018 stating that she had hiked a lift from the appellant. They commenced investigations and arrested the appellant on 22.02.2018. He confirmed that on investigation they found that PW2 the complainant was 15 years old and produced the copy of the birth certificate. **PW6 (Sgt. Moses Mwangi)** testified that he was part of the team that arrested the appellant.

24. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to give sworn evidence and the bottom line of his defence was an alibi. He stated that between 18.02.2018 and 21.02.2018 he was operating his mother's shop and reported to the said shop at 6.00am and left at 8.00PM. He stated that his father owned the Taxi the subject of this case, however in the said period it was his father who was driving it and only drove it on 22. 02.2018 when he was arrested. **DW2 (Salah Abdi)** and **DW3 (Dahaba Salat)** are the appellant parents whose testimony is similar to that of the appellant.

25. Thereafter the trial court rendered its judgment finding the Appellant guilty of the offence of defilement and was convicted. He was sentenced to 20 years' imprisonment.

Issues and Analysis:

26. This Court in determining this appeal ought to satisfy itself that the ingredients of the offence of defilement were proved and as so required in law; beyond any reasonable doubt. The key ingredients of the offence of defilement include the proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. Therefore I will consider if each of them

were proved.

On the age of the complainant:

27. The complainant testified that she was 15 years old when she was defiled by the appellant. PW1 the complainant mother testified that the complainant was 15 years. The Investigating Officer PW5 produced the complainant birth certificate confirming the complainant age as 15 years. Equally the appellant never contested the age of the complainant and therefore the age of the complainant is that of a child aged 15 years.

On the issue of penetration:

28. The **Sexual Offences Act at Section 2** defines '**penetration**' as:

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

29. In **Mark Oiruri Mose vs R (2013) eKLR** the Court of Appeal stated thus:

> **"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 organ"**

30. Further, the same court differently constituted, in the case of **Erick Onyango Ondeng vs Republic (2014) eKLR** in this respect noted: -

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.** "

31. In this instant case penetration is not contested by the appellant, the contestation is on the identity of the person who committed the offence. The appellant in his submissions has denied the same. However, as a matter of fact penetration of the complainant is not disputed and therefore this limb of the offence was proved.

On whether the Appellant was the perpetrator:

32. The appellant has contested identification, he has challenged his identification as a perpetrator on various grounds, they include the alleged contradiction's, the failure to conduct the Identity Parade by the police, the involuntary revelation of the crime by the complainant and the failure of the complainant to describe the manner in which the appellant penetrated the complainant. Therefore I'm going to deal with each of the above grounds as raised by the appellant.

On alleged inconsistencies and Contradictions:

33. In **Jackson Mwanzia Musembi v Republic [2017] eKLR** quoting the case of Uganda Court of Appeal in T**wehangane Alfred v Uganda - Criminal Appeal No 139 of 2001, [2003] UGCA, 6,** a decision relied by the appellant, the court in respect to contradictions noted that not every c contradiction warrants rejection of evidence. It stated:

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

34. In regard to the alleged inconsistencies and contradiction, the trial court in this respect noted as follows at paragraph 89 of the judgment-

> **"I have gone through the inconsistencies, and it appears to me that most of it results from the evidence of the complainant when pitted against that of other witnesses and relates to matters peripheral to the real issue herein which is whether the complainant was defiled and, if so by who…as…I find and hold that the same are not material enough to displace the otherwise cogent evidence placing the accused person in the thick of the crime"**

35. I have equally looked at the several alleged instances of contradictions and inconsistencies alleged by the appellant and the authorities cited, and in my view there was no material contradiction warranting this court to doubt the key evidence tendered by the complainant PW2. As to the appellant penetrating the complainant, this in my view is settled by the Cross-examination evidence where PW2 categorically stated that when she regained consciousness she saw the appellant sitting on her, she felt some pain on her lower abdomen, her pant and pantyhose removed pointing to one direction, being that the appellant penetrated the complainant.

On evidence of a single witness:

36. The appellant argues that since the conviction was secured on the evidence of only one witness, the same is not safe and urged this court to give the benefit of doubt to the appellant. It is trite that the evidence of a single witness can be used to secure a conviction in sexual offences. In n **Kassim Ali vs Republic [2006] eKLR** it was held:

"… [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

37. This was also confirmed in **George Kioji vs R Nyeri Criminal Appeal No. 270 of 2012 (unreported) as cited S C N v Republic [2018] eKLR –**

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

38. Therefore, taking above into account, it is clear the complainant evidence and testimony on what transpired was consistent as captured by the lower court. She gave the whole genesis of what transpired beginning from the moment she hiked a lift from the appellant, her unconsciousness and the circumstances of what transpired when she gained her consciousness and all this puts the appellant at the center of the crime. Her evidence of recognition of the appellant stand unchallenged, and therefore in the circumstances the Identity parade was not necessary.

On the Appellant's alibi:

39. The Appellant witnesses DW2 and DW3 are his parents, apart from them he did not call any witness who saw him in their shop to come and confirm the same. Section 309 of the Criminal Procedure Code provides that Court ought to give the prosecution an opportunity to investigate a new issue that arises or raised by the accused during trial and before Judgment. In **Victor Mwendwa Mulinge vs Republic [2014] eKLR** the Court of Appeal quashed the conviction of the appellant where the prosecution did not call additional evidence as provided for in Section 309 of the Criminal Procedure Code.

40. Considering the appellant defence as raised and the circumstances therein, it is my view that the additional evidence if were to be called would still not displace the direct evidence tendered by the Prosecution confirming the appellant commission of the crime. I agree with the learned trial magistrate that the same was an afterthought.

41. As the Appellant did not provide any cogent contrary evidence to support his defence of alibi during the trial, this court therefore finds that the Learned Trial Magistrate acted correctly in convicting him. Hence, his Ground of Appeal equally fails and is hereby dismissed.

Sentence:

42. The appellant has urged this court to exercise its discretion and review the appellant sentence. The mandatory sentence for defilement of a child aged between 12 years and 15 years is 20 years' imprisonment under **section 8(3)** of the Act. In **BW vs Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, the Court of Appeal has considered the constitutionality of mandatory minimum sentences under the Act; *and* adopted what the Supreme Court decision held in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that the mandatory death sentence prescribed for the offence of murder by **section 204** of the ***Penal Code*** was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and 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**.**

43. From the above, it is settled that mandatory minimum sentence is unconstitutional and the court is bound to re-examine the sentence in view of the Legislature position that offences of defilement are serious offence and merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed.

44. In **Dismas Wafula Kilwake vs Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act as follow:

"[We] hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."

45. Further, **section 354** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya***)* provides for the powers of this court upon

hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under **subsection 3(b)**, *"in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence"*.

46. In this case the record attests that the court did not give the sentence because it was the minimum sentence in law. The court stated that it had considered the mitigation by the Appellant in arriving at the sentence. That being the case this Court, being an appellate Court, must act within the settled legal principles in appeals against sentence.

47. In the case of **Wanjema vs Republic (1971) EA 493** the court laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

48. Considering the nature of the offence and the manner it was undertaken by the Appellant and the Appellant's mitigations, the 20-year sentence in my view is excessive. A 15 years sentence would suffice as sufficient lesson to the appellant.

49. The appeal on sentence ought to succeed to that extent. Thus the court makes the following orders;

a. The appeal on conviction is dismissed and thus conviction upheld.

b. The sentence of 20 years is set aside and substituted with a sentence of 15 years to run from the date of conviction.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 26TH DAY OF SEPTEMBER, 2019.

C. KARIUKI

JUDGE