REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 70 OF 2018

BARAKA KAHINDI……..…. APPELLANT

VERSUS

REPUBLIC…….……..……. RESPONDENT

(Appeal from a judgement of the Senior Principal Magistrate Court at Kilifi Hon. R. K. Ondieki dated 24/8/2018)

CORAM: Justice R. Nyakundi

Ms. Sombo for the State

Appellant present in person

JUDGEMENT

Baraka Kahindi hereinafter referred as the appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act of 2006. He was sentenced to serve 15 years' imprisonment.

The brief facts which constituted the crime were that on diverse dates between 14th April 2017 and 16th April 2017 at [particulars withheld] Village within Kilifi County he intentionally and unlawfully caused his penis to penetrate the vagina of **DKK** a child aged 16 years.

The appellant was also indicted with the offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The appellant has now appealed to this court being dissatisfied with the entire judgment of the trial court and has put forward the following grounds: -

> ***1)That the learned trial magistrate erred in law and fact in convicting him with uncorroborated testimony of the complainant.***
>
> ***2)That the learned magistrate erred in law and fact in convicting the appellant without proper finding that several key and crucial witnesses were not called to testify at the trial.***
>
> ***3)That the learned trial magistrate erred in law and fact in convicting the appellant without proper finding that the appellant was not examined to find out if he suffered from any sexual transmitted disease.***
>
> ***4)That the learned magistrate erred in law and fact in convicting the appellant without proper finding that the evidence of the doctor did not support in any way or implicate him with the offence and therefore does not amount to corroboration; put shortly, the appellants challenge to the judgement is that the prosecution failed to adduce sufficient evidence against him to prove the offence beyond reasonable doubt.***

The appellant argued his case on appeal by way of written submissions. Towards this end, the appellant submitted that from the testimony of the three witnesses there was no evidence in support of the acts of penetration against the complainant. In reference to the testimony of PW1 and that of PW3 there were material contradictions and inconsistences as to the time or date when the incident took place.

Hence, the circumstances as explained by the complainant did not irresistibly point to his guilt as the prosecution relied on hearsay evidence to prove its case against the appellant.

Secondly, it was argued by the appellant that the prosecution failed to call the father and area locational Chief who are mentioned by **PW3** that they were the ones who arrested and escorted him to the police station. Regarding the failure by the prosecution to call crucial evidence appellant relied on the legal position in the case of **Bukenya & Others v Uganda [1972] EA 549**. The appellant further submitted and urged

this court to re-evaluate the medical evidence tendered by PW2. His contention was on the fact that whereas the complainant testified that she was inflicted with sexually transmitted disease of gonorrhea, that examination was never extended to him to establish a correlation on this fact of infection. He urged this court to be guided by the decision in the case of **Faud Dumila Mohamed v Republic CR. Appeal No. 210 of 2003.**

According to the appellant, in spite of the glaring substantial inconsistencies between the complainant testimony and the findings of the medical doctor, the learned trial magistrate proceeded to convict the appellant in absence of corroboration.

On this submission he placed relevance in the case of **Kazungu Mramba Mweni v Republic CR. Appeal No. 220 of 2007**. As far as age of the complainant was concerned, appellant submitted that the prosecution had no credible evidence to prove the ingredient beyond reasonable doubt. The appellant argued and submitted that during PW1 testimony she stated to be aged 14 years whilst the medical assessment indicates her to be 16 years old. The fact that the prosecution presented two different versions means that the age of the complainant remained unknown. For this reason, the appellant contended that there was variance on the particulars of the charge and the evidence adduced to that effect. He referred to the law as correctly stated in the cases of **Mtawali Bomuu v Republic HCCA No. 178 of 2009 at Mombasa, Kagundi Muthuli v Republic HCCA No. 527 of 2010, Alfayo Okello v Republic 2010 eKLR.**

In respect to the ingredient on proof of age in every sexual offence under the Act for the very purpose that the criteria on sentence depends on the age of the victim or complainant. The appellant, based on the above, submissions, urged this court to quash both conviction and sentence as they were founded on wrong principles of law and facts.

The prosecution, counsel Ms. Sombo, urged this court to rely on the evidence of the trial court to find that both conviction and sentence were arrived at on overwhelming and watertight evidence from the witnesses who testified against the appellant.

Analysis

This being a first appeal the task of the court was discussed way back in 1957 by the Eastern Court of Appeal in the cases of **Pandya v Republic 1957 EA 336** and **Shantilal M. Ruwala V Republic 1957 EA** where at the concurrent decisions the court held as follows:

> ***"On the first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellant court's own consideration and views of the evidence as a whole and its own decision therein. It has the duty to rehear the case and reconsider the materials before the judge or magistrate with such other materials as it may have decided to admit. The appellate court must then make up its mind not to disregard the judgment appealed from but carefully weighing and considering it when the question arises which witness is to be believed rather than another and that question how turns on a manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses but there may be other circumstances quite apart from the manner and demeanor which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen……"***

The duty and the power of an appellate court as defined in Pandya and Ruwala authorities remains in force today. The words to re-evaluate and rehear the case in order to come up with its own conclusions was meant to have a resulting emphasis being upon scrutiny and evaluation of the totality of the evidence. Consequently, the plea on appeal rests with the issue on the burden of proof set for the prosecution whether it was discharged to secure a conviction against the appellant beyond reasonable doubt.

In the determination of the issues in this appeal the defined parameters under these cases would guide the court to distill whether the essential elements of the offence were proved to the required standard of proof before a conviction was entered by the learned trial magistrate. In other words, the appellate court has to weigh all such challenges raised by appellant against the judgement of the trial court in a manner that independent conclusions can be drawn to either in support of the decision or there exist grounds for its interference.

On the basis of the arguments made by the appellant and respondent, I will proceed to review the evidence presented to the court and issues before me.

It is thus clear from the memorandum of appeal that the central issue to determine this appeal is whether the prosecution discharged the burden of proof on the ingredients of the offence beyond reasonable doubt.

The duty for the prosecution as the burden bearer in criminal cases is provided for under Section 107 (1) of the Evidence Act which provides:

"(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

The persuasive English authority in the case of **Miller v Minister of Pensions 1947 2 ALL ER 372-274** also addressing the doctrine of proof beyond reasonable doubt in the decision which has been applied in Kenyan courts provides as follows: -

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be described with the sentence of course it is no doubt nothing short of that will***

suffice."

The inquiry by the trial court with regard to the charge against the accused is whether there is prima facie evidence to prove each element of the offence as charged. Upon failure to discharge the burden the accused must be set free as of right.

Guided by the aforesaid legal requirements I will now proceed to consider what elements the prosecution set to prove before the trial court. The crucial elements for a charge of defilement remain to be as follows:

(a)Penetration of the male genitalia with that of a female genitalia

(b)That the complainant was aged below 18 years.

(c)That it was the offender alone or with another who committed or had carnal knowledge with the complainant.

The provisions of Section 2 of the sexual offences act defines **penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another.**

On appeal, the appellant took issue with the offence having been stated to be committed on diverse days. He added that being separate incidents there is no clarity from PW1 with regard to both incidents. The appellant was also aggrieved that after the alleged defilement on 4/4/2017, PW1 did not complain to her sister MS, and no reasons were given for that lapse of information. He also complained of the doctor who examined the complainant whose evidence went to find that the complainant suffered from gonorrhea, sexually transmitted disease. However, there was no corresponding medical examination on the part of the appellant to ascertain whether he had committed the sexual act which could have led him to be in effected of the disease.

In objection to this ground the prosecution relied on the testimony of the complainant which was to the effect that on 4/42017 she visited her sister by the name M. In the course of her stay she also went out and kept vigil at a funeral where the appellant intimated his love to her. It was also the complainant's testimony that the love offer from the appellant on that same night was accepted and they proceeded to his house at Waheni area.

Further, the complainant testified that on arrival at the home they had intimate sexual intercourse until the following morning at 6.00 a.m. That morning she left for her home but did return until evening at 8.00 p.m. to continue having sexual intercourse with the appellant. Apparently, from the record (PW1) indicates that her engagement with the appellant at his home lasted about two weeks before the elders got wind of it and did smoke her out of the home. She told the court that upon inquiry it was decided by the elders to have a report made to the police.

As this was a case of defilement PW1 gave evidence that she was first to be referred to Kilifi County Hospital for a medical examination. According to **PW2, Dr. Noor**, on examination of the complainant it was established that she had a broken hymen and a urine infection. The P3 form dated 21/4/2017 was produced as exhibit 1 confirming the findings made by the medical doctor.

PW3 CPL Philiph Dzombo attached to Bamba police station who investigated the matter testified that from the evidence recorded from PW1 and PW2, he formed the opinion that an offence of defilement had been committed.

Further, PW3 told the court that he escorted the complainant for an age assessment as depicted in exhibit 3.

At the close of the prosecution case, the appellant was placed on his defence. From the record he elected to remain silent and left the matter for the courts decision. It is also convenient to mention a legal point of importance in cases of this nature, in terms of Section 124 of the Evidence Act.

It is obvious that the broad principle of corroboration evidence relating to proof of criminal cases be weighed against the testimony of a single witness. However, the provision to section 124 gives discretion to the trial court to convict on evidence of a single witness against an accused person provided there is justification. That the evidence tested in every material fact way credible and in the mind of the judge/magistrate believed to be true in every aspect of the case to prove facts in issue. Even more relevant is the judge's or magistrate's summing up the evidence of a single witness on this point to which he or she has referred to form an opinion that the witness is to be believed as truthful and credible witness. That part of the provision to Section 124 of the Evidence Act is meant to safeguard against the dangers of relying on such evidence which could not in itself be cogent prima facie evidence to implicate an accused person for the offence charged.

The section as drafted presents no much difficulty over the years as seen from the case in **Mohamed v Republic 2006 2KLR** where the court held:

"It is now settled that courts shall no longer be bound by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful"

That means to my understanding that corroboration or independent evidence is no longer a mandatory requirement in sexual offences so long as the proviso to Section 124 of the Act is properly applied by the trial court to proof the offence beyond reasonable doubt.

In so far as the appellant case was concerned, the only direct evidence against him was that of the complainant. The learned trial Magistrate ought to have applied the cautionary proviso under Section 124 of the Evidence Act that in his judgement in convicting the appellant he

found the complainant to be a truthful and honest witness supported with reasons for that believe.

A reading of the trial record on the alleged offence leaves this court with a reasonable doubt why he acted on it without corroboration. The failure by the Learned Magistrate not to warn himself on the application of the provision of section 124 of the Evidence Act to me renders the decision reached unsatisfactory and breach of the above provisions. While I understand that a fact can be proved by a single witness in a case, in the same way it does not lessen the duty of addressing such other independent evidence to discharge the burden of proof beyond reasonable doubt. What corroboration in criminal proceedings does it excludes any possibility of the evidence being tainted or connived to the complainant's advantage regardless whether the accused committed the offence or not?

This appeal raised two issues from the testimony of the complainant. The complainant according to her evidence was requested by the appellant if she could agree to spend a night in his house on the 4/11/2017. During that conversation the complainant voluntarily agreed to go to the appellant house purposely to engage in sexual act. There is admissible evidence that she left in the early morning but again on her own volition went back to the evening to continue with the carnal knowledge. It was also recorded and observed from PW1 evidence that she stayed in the appellant's home for about two weeks before an arrest was effected by the father and village elders. In the case of **Republic v Henry and Manning 1969 53 Criminal Appeal 150**, the English case did address the instant appeal corroboration in sexual offences is considered to be necessary, even though a court can convict without corroboration. The court held as follows:-

> ***"In cases of alleged sexual offences it is nearly dangerous to convict on the evidence of the woman or girl alone. This is dangerous because her main experience has shown that in these cases girls and women do sometimes tell an entirely false story which is very easy to fabricate but entirely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all."***

I do hold the proposition given the events of the complainant testimony it required corroboration by some other evidence to identity the applicant and place him at the scene of the defilement. Though the medical report seems to indicate rapture of the hymen but no evidence to prove the time and age when it was broken. The P3 dated 21/4/2017 was non-responsive on any discharge, tears or vaginal injuries to the genitalia of the complainant. In a nutshell, the evidence on sexually transmitted disease of gonorrhea referred to by the appellant and the complainant is missing from the medical report.

On perusal of the record it is evident that at the onset of the trial the investigating officer failed to exercise due diligence which rendered doubt as to whether the prosecution case discharged burden of proof beyond reasonable doubt. This therefore gave rise to suspicion as to whether the appellant had carnal knowledge with the complainant.

I also take issue with the nature of the evidence left out by the prosecution. In my view, the explanation offered by the complainant that she went to visit M and that in the course of her stay one Sifa came and took her to the appellant's house is of a category which demanded their compellability as witnesses to testify as to the coexisting circumstances which recognize the appellant as the perpetrator of the offence.

It is also on record that the village elders who went to rescue the complainant from the appellant's house and thereafter reported the matter to the police station were never called as witnesses.

This omission was never explained in the sworn evidence of the investigating officer. Despite the fact that the appellant opted to remain silent and not to offer any defence did not take away the duty of the prosecution to proof of the charge beyond reasonable doubt. Therefore, the substance of the grounds of this appeal hinges on the edge that the evidence against the appellant may be fabricated and or unreliable.

I bear in mind the test laid down by the Supreme Court of Zambian **Peter Haamenda v The people 1977 Z. R 82** which principles I find relevant to this appeal. The court held as follows:

> ***"Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the investigating agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of hat dereliction of duty, the accused is seriously prejudiced because evidence which might have been favorable to him has not been adduced, he dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty."***

The proper course in this kind of appeal was to adduce evidence of M, Sifa, the father and the village elders. This is one case where the failure to call the witnesses weakened the prosecution burden of proof of beyond reasonable doubt. The issue of calling key and crucial witnesses was appropriately dealt with in **Bukenya v Uganda 1972 EA 549** where the court held:

> ***"The prosecution must make available all the evidence necessary to establish the truth, even if such evidence may be inconsistent with their case. The court too has the right to call witnesses whose evidence appears essential to the just determination of the case and lastly where the evidence called is barely adequate the court may infer that the uncalled evidence would have been adverse to the prosecution case."***

In this case, the failure to call the crucial witnesses and the learned trial magistrate error in dealing with the single witness testimony worked an injustice to the appellant. I must also point out that in this appeal where an appellant was charged with the offence of defilement of a minor proof of age beyond reasonable doubt is as key as penetration itself.

The statutory sentence of imprisonment under the provision of the Sexual Offences Act is age is specific. Its noteworthy that courts have emphasized the importance in every accused person charged and convicted with the offence of defilement age ought to be proved beyond reasonable doubt. Subsequently, to the holding in the case of **Alfayo Gombe Okello v Republic [2010] eKLR** as it stands age of the child may be proved by her testimony with cogent evidence, guardian, parent medical record, birth certificate and any other relevant

documentation.

In the instant case, the trial court convicted the appellant in the evidence of medical assessment report by **Dr. Mwachae** dated 21/4/2017. From the record the investigating officer produced the age assessment as an exhibit before court. As stated in the evidence PW3 who testified as a police officer was not the maker of the age assessment report. The provisions of the law applicable in admission of such evidence remains to be section 77 of the Evidence Act. In soliciting the evidence to have it produced by a different witness other than the maker a proper basis must be laid by the prosecution why the maker cannot be called to testify as to the content of the document or report. Failure to call the maker and in absence of consent from the appellant for this crucial piece of evidence especially in this case where there was conflicting facts as to the age of the complainant did prejudice the appellant.

The lower court record reflects the complainant testifying that she was aged 14 years old at the time of the trial. On the other hand, the P3 form duly signed by a medical doctor produced as exhibit 1 documents the age of the complainant to be 14 years old. The charge sheet is grounded on the age of 16 years. The onus is on the prosecution to amend the charge sheet under Section 214 of the Criminal Procedure Code. See the case of **Hadson Ali Mwachingo v Republic 2016 eKLR**.

On careful perusal of the judgement, the documentary evidence relied upon to proof age was in contradiction of Section 77(3) of the Evidence Act as no basis was laid in for admitting it without calling the maker. He investigating officer cannot be paid to be a substitute of the medical doctor who carried out the age assessment. It is also against right to a fair trial why the age assessment was admitted in absence of the appellant being notified and consenting to its production without calling the maker.

It was desirable in dealing with this issue the Learned Magistrate brings to the attention of the appellant the provisions of Section 77 of the Evidence Act.

The prosecution in relying on the evidence by the medical officer ought to have established from the parent/guardian of the complainant any essential facts as to history on her date of birth. The age factor in sexual offences of a minor deals with a most important aspect of the charge against the appellant.

Under our law I consider age assessment to be a scientific process and when undertaken the expert can only do so based on various factors, and knowledge. The process on age assessment as it currently premised in most cases runs in contravention of Section 48 of the Evidence Act.

In my evaluation of the medical assessment report admitted by the trial court lacks the following fundamental foundational information: X-rays, history of the parent/guardian of the complainant, physical examination, radiology and dental observation by the expert etc.

The upshot is that in my judgement the Learned Magistrate was wrong in establishing proof on element of age in the presence of such major inconsistencies and contradictions.

Accordingly, after re- evaluating the evidence in this case I am satisfied that there is strong suspicion that the appellant took part in carnal knowledge of the complainant.

The case falls short of the required prove of beyond reasonable doubt on all the three elements of the offence of defilement contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act.

The appeal on conviction and sentence is therefore set aside and the appellant be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF SEPTEMBER, 2019.

R. NYAKUNDI

JUDGE