REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 35 OF 2017

NOOR KORANE HASSAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Garissa Chief Magistrate's Court

Criminal Case No. 76 of 2016 delivered on 6th June, 2017by Hon. Cosmas Maundu (CM)

JUDGEMENT

Introduction:

1. The Appellant was convicted and sentenced to serve twenty (20) years imprisonment for the offence of defilement, contrary to section 8(1) as read with Section 8 (3) of the Sexual Offences Act. The particulars of the offence were that on 8th January, 2016 at [particulars withheld] in Garissa township within Garissa County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely the vagina of MA, a child aged 12 Years.

2. Additionally, the Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.

3. Appellant pleaded not guilty to the charge and after full trial was convicted on the first count of defilement and sentenced to 20 years imprisonment. Being aggrieved by the trial court judgment, he has appealed against the conviction and sentence. The Appellant's amended grounds of appeal as stated in his submissions are as follows:

1) That the evidence adduced by the prosecution's witnesses was not credible to warrant a safe conviction.

2) That there was no DNA test done to ascertain the truth of the complainant's allegations.

3) That the accused person's fundamental right s of a fair trial was infringed during hearing due to exercising judicial process against the rule of section 200 of the CPC by imposing the case to proceed without the free consent of the accused person.

4) That the mode of arrest of the said Abdirazak and the reporting was poorly instigated

5) That there was an existing vendetta between me and the Abdirazak who arrested and yet not brought to court.

6) That the Learned trial magistrate erred in Law and fact in finding me guilty as charged while the Prosecution failed to prove their case beyond reasonable doubt.

4. The appeal came up for hearing on 24th June, 2019, and the Appellant on his part relied wholly on his filed written submissions. The Prosecution counsel on the other hand made oral submissions.

5. The appellant in his filed submissions consolidated all his grounds of appeal and argued them together. The appellant submitted that the Prosecution evidence adduced by the witnesses were not credible due to inconsistencies and contradictions. On this he argues that the offence was allegedly committed at night and the evidence of the grandmother who alleged that she saw the accused after committing the offence

cannot be believable because it was dark and the grandmother was allegedly blind and deaf and therefore challenging the fact that she heard the commotion or saw the suspect.

6. Additionally, he submits that the complainant contradicted herself when she first stated that she was penetrated before the bed fell and while at first, she had alleged that the bed fell before the accused did anything. Further, he submits that the descriptions of the events by the complaint leading to the alleged rape make it impossible to have been done by the accused alone.

7. Further, the appellant submitted that the ruling by the trial Magistrate overruling his request for the matter to start *denovo* infringed his fundamental rights. He states that the role of ensuring availability of prosecution witness was with the prosecution and ought not to have formed the basis for the denial of his request to have the matter start *denovo*.

8. Furthermore, the appellant submitted that the no DNA was conducted to ascertain the truth of complainant's allegations. He submits that the there was no spermatozoa seen on the complainant and that in any event the hymen can be broken by various ways and thus it cannot be conclusive that the appellant penetrated the complainant.

9. Moreover, the appellant challenged his mode of arrest alleging that the same was not conducted in accordance with the law arguing that one Abdirazak who arrested acted out of vendetta.

10. In sum, the appellant submits that the prosecution did not discharge the burden of prove as stipulated by the law and seeks the court to allow the appeal.

11. Mr. Mlati, the prosecution counsel submitted that the Appellant faced defilement charge and that the age was proved, the penetration was also proved and the appellant was recognized by the complainant and witnesses as he was an uncle to the complainant.

12. And that during the ordeal the bed broke and the grandmother after hearing the commotion came to the complainant room where he saw the appellant leaving the room and talked to him. Additionally, he submitted that clinical officer confirmed there was penetration and the hymen was broken. In sum he argues that the evidence was cogent and strong.

13. 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 v 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:

14. The brief summary of the Prosecution case before the trial court was as follows. It called a total of 4 four witnesses. The complainant **PW1 (Mulki Abdi)** testified that she 12 years old and school going. She told court that on 8/1/2016 while asleep the appellant came to her room held her nose and mouth and with his hand removed her underpants and pulled up her long dress and laid on her penetrating her.

15. That due to his heavy weight the bed collapsed awakening her grandmother who immediately came and shown a torch at the appellant who was walking out of the hut naked and asked him who he was and the appellant told her he was Noor Korane.

16. She further stated that she identified the appellant from the solar light which was on and she recognized the appellant who was her uncle. Thereafter in the morning she was taken to hospital and matter was reported to the police culminating with accused being charged.

17. **PW2(Askira Ibrahim Adan)** testified that she is the complainant grandmother and she has been staying with her since she was small girl and on the material day the appellant visited at around 8pm where she served him with rice and tea and told him to go to his brother's house.

18. She stated that at midnight she heard commotions from the complainants hut and on checking with torch she saw the appellant naked and realized he had defiled her granddaughter. They went back to sleep after seeing the appellant leave the compound. The complainant's uncle visited and took action where they traced the appellant and had him charged for the offence.

19. **PW3 (Adan Ali Dika)** testified that he is a Clinical Officer at Garissa County Referral Hospital and he attended to the complainant. In his testimony he told court that the complainant had torn clothing's and trousers. On examination she had nail marks on the neck. She was 12 years of age. No visible injuries on other parts.

20. The degree of injury harm. She had vaginal laceration, no vaginal bleeding but the hymen broken. He did not do any test on the appellant. He formed the opinion that the appellant had been defiled and classified the injury as main.

21. **PW4 (Rahama Adan Ibrahim)** testified as the investigating officer and told that the appellant was arrested and brought to the station by the members of public including one AP officer

22. 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 that he was being fixed by the complainant uncle one Abdulzak. He called a total of 3 witnesses in support of case who gave sworn evidence.

23. **DW2 Darre Shiro** swore that the appellant did not commit the offence alleging that the charges facing the accused were false. **DW3 Sarah Daudi** also gave a sworn evidence that with her two examined the complainant and found out that nothing had happened and that at the time of the incident the appellant was away burning charcoal.

24. **DW4 Dek Ahmed** also gave a sworn evidence that the appellant charges are as a result of a grudge with the complainant Uncle.

25. Thereafter the trial court rendered its judgment on 6/06/2017 where the Appellant was found 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 12 years old when she was defiled by the appellant. PW3 who is the medic who assessed and attended to the complainant testified that the complainant was 12 years old. Additionally, the appellant has not contested this fact and therefore this court is satisfied that indeed the complainant was aged 12 years old at the time of the commission of the offence. In support of this the prosecution further produced an assessment report attesting to the age of the complainant being 12 years old.

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. The appellant has challenged the conviction alleging that the failure to take a DNA test on the complainant and the fact that there were spermatozoa traces on the complainant is fatal. Section 36 (1) of the Sexual Offences Act Stipulates:-

> **"36. (1) Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence."**

32. The above provision has been interpreted by the Court of Appeal in ***Robert Mutungi Mumbi vs Republic Cr. App. No. 52/2014*** **(Malindi)** and ***Williamson Sowa Mwanga vs Republic Cr. App. No. 109/2014*** **(Malindi)** as follows:-

> **"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."**

33. Therefore applying the above to the appellant case, it is apparent that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved. In this case the complainant was examined 10 days after the incidence and the medical report and testimony PW3 in my view affirms that indeed penetration occurred and am convinced that this limb of the offence was proved.

On whether the Appellant was the perpetrator

34. The appellant has contested identification, he alleges that the evidence of PW2 that he saw or heard the complainant on the night of the incident cannot be believed because she was both deaf and blind, and that since the incident happened at night the evidence of identification cannot be believable.

35. Further, he alleges that the evidence of PW1 description of the incidence makes it possible that the defilement would not have been done by one person.

36. The appellant did not dispute that he is related with the complainant as an uncle, and that on the material day he visited PW1 and PW2. He is a person known to the complainant and the evidence of PW2 that she was able to identify the appellant through a flashlight and that she saw him naked has not been displaced by the appellant. Additionally, the complainant stated that she slept while the lights were on and was able to identify the appellant.

37. The appellant alleges that PW2 is blind and deaf and therefore it is not possible that she neither heard the commotion nor saw the appellant on the material night. However, this was dispelled by the evidence of PW1 and PW2 who refuted the claims as PW2 attended court and gave evidence collaborating PW1. The trial court would have noted that fact.

38. From the foregone it is not in doubt in my view that there were no circumstances that may have led to any doubtful recognition of the Appellant by the complainant and as

such the identification of the Appellant by way of recognition as the aggressor was not in error.

39. Therefore I find and hold that the prosecution proved that it was the Appellant who sexually defiled the complainant. The third limb of the offence of defilement is also answered in the affirmative.

40. On **sentence**, the Appellant was sentenced to 20 years' imprisonment sentence under **Section 8(3)** of the **Sexual Offences Act**. The record is clear 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.

41. The Court in the case of ***Wanjema vs Republic (1971) EA 493*** 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.

42. 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.

43. Considering the nature of the offence and the relationship between the complainant and the Appellant and the Appellant's mitigations there is no apparent error on imposed sentence of 20 years' imprisonment. The appeal on sentence has no merit and is for dismissal.

Conclusion:

The court finds that the appeal lacks merit and makes the following orders;

i) The appeal is dismissed, conviction upheld and sentence confirmed.

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

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C. KARIUKI

JUDGE