REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 9 OF 2018

(From original conviction and sentence in Sexual Offence No. 530 of 2013 of the Chief Magistrate's Court at Kerugoya)

JMM..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant JMM to be referred as the appellant was convicted of the offence of Defilement Contrary to Section 8 (1) (2) of the Sexual Offences Act by the Senior Resident Magistrate Kerugoya in Criminal Case No. 530/2013 and sentenced to serve twenty (20) years imprisonment.

2. The appellant was dissatisfied with both the conviction and sentence and filed this appeal which raised the eight grounds.

3. However, the appellant filed supplementary grounds of appeal and raised the grounds that the trial magistrate erred by relying on the evidence of the complainant which was insufficient, unsatisfactory and unsafe to support a conviction. That key witnesses were not called. That the trial magistrate relied on contradictory evidence which failed to prove the prosecution case beyond any reasonable doubts.

It is further contended that the trial magistrate erred by relying on the testimony of a single witness to convict.

That the trial magistrate erred in failing to find that there was a grudge between the accused family and the complainant family.

4. He prays that the appeal be allowed, conviction be quashed, the sentence be set aside and he be set at liberty.

5. For the state it is submitted that they discharged the burden of proving the ingredients of the charge namely: -

a) Identity of the perpetrator.

b) Penetration

c) Age of the complainant.

6. I have considered the grounds of appeal and the submissions. This is the 1st appellate court and I therefore have a duty to evaluate the evidence and make an independent finding but leave room for the fact I never had a chance to see the witnesses when they testified and assess their demeanor then leave room for that. This is in line with the holding in ***Okeno -v- Republic 1972 E.A 32.***

7. I have considered the evidence tendered before the trial magistrate. I will first deal with the grounds raised by the appellant. The brief facts of the case are that the complainant was aged 13 years on 27.1.11 when the offence was committed. She was born on 16.8.98 as per the birth certificate which was produced in court at exhibit 4.

On 27.1.11 the complainant HWN was on her way home after visiting her sister's home when she met the appellant who she knew very well as he was her brother-in-law. The appellant led the complainant to a church compound then led her into a vacant house which was not locked. The appellant then defiled the complainant and ordered her to dress up.

8. The appellant left the scene and one Kariuki went to her aid. The complainant was escorted home and she informed her mother. She was escorted to Kangaita Dispensary where she was examined then referred to Kerugoya Hospital.

9. A P.3 form was filled by Hezron Macharia Maina a clinical officer who examined the complainant. He found that the complainant was walking with her legs apart. She had bruises in her vagina and the area was swollen and red. The hymen was broken. There were blood stains on the injuries. He filled a P3 form which he produced as exhibit 3.

10. The clinical officer also examined the appellant who was alleged to have defiled the complainant. He found the entry point of the penis was wet with a whitish discharge. The appellant was then charged.

11. I will proceed to consider the grounds of appeal.

That the evidence of the complainant was insufficient unsatisfactory and unsafe to support the conviction.

The trial magistrate considered the evidence of the complainant and stated as follows at page 34

> ***"The accuracy of the purported examination has not been compromised since the victim knew the accused as her brother-in-law. I therefore find that the direct evidence of the victim did prove the true identity of the accused person".***

12. The appellant was well known to the victim. The trial magistrate reached an inevitable conclusion that the appellant was identified as the perpetrator. The evidence of the complainant that she was defiled was corroborated by the medical evidence tendered by the clinical officer PW3. This being a sexual offence, the trial magistrate could rely on the evidence of the complainant to convict.

> ***Section 124 of the Evidence Act*** provides: -
>
> ***Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted***
>
> ***on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

13. The trial magistrate gave reasons in her judgement for admitting the evidence of the complainant. The trial magistrate cannot be faulted for admitting the evidence.

14. The issue of the circumstances proving a positive identification did not arise. In any case the appellant was arrested the same day and was escorted to hospital where he was examined by the clinical officer PW3. The appellant informed the PW3 that he had defiled a girl and alleged that the girl had consented.

The appellant did not dispute the evidence which PW3 maintained in cross-examination that the appellant penetrated the patient. I find that the ground is without merits. The law allows the trial magistrate to rely on the testimony of a single identifying witness if she is satisfied that she is telling the truth. The trial magistrate saw the demeanor of the complainant and found that she was not only reliable but her testimony was corroborated.

In Charles O. Maitanyi - R – (1986) KLR 198. The Court of Appeal held that:

> ***"Although it is trite law that a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of single witness respecting identification"***

However, in sexual offences where ***Section 124 of the Evidence Act*** applies the court can rely on the evidence. Having considered the evidence of the complainant who said she knew the appellant before there was no possibility of mistake.

Second ground: - Key witnesses were not called. It is trite law that no particulars number of witnesses is required to proof a fact. ***Section 143 of the Evidence Act*** provides:-

> ***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.***

Failure to call witnesses will only be fatal to the prosecution case if the witnesses called are barely enough. It may also be fatal where failure to call a particular witness or witnesses will lead to an inference that if that witnesses (es) was called it would have prejudiced the prosecution case. That is why prosecution has a duty to call all the witnesses whether they support their case or not and leave it to the court to decide the case on the evidence. The Court of Appeal while ***In AGM -V- R (2014) eKLR*** while considering a similar contention by the appellant that the judge erred in failing to observe that the prosecution failed to summon vital witnesses stated:

> ***"We have considered this ground of appeal and we reiterate that the prosecution is not duty bound to call any given number of witnesses.***
>
> ***Section 143 of the Evidence Act (Cap 80 Laws of Kenya) provides that no particular number of witnesses shall in the absence of***

any provisions of law to the contrary be required for proof of any fact. ***In Julius Kalewa Mutunga -v- Republic Criminal Appeal No. 31*** of ***(2005) UR.*** this court held that:

> ***"As a general principle whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with exercise of that discretion unless, for example it is shown that the prosecution was influenced by some oblique motive".***

The evidence tendered by the prosecution was sufficient. There was no requirement for corroboration of the complainant's evidence. The witnesses who the appellant said were not called could not have added any value to the prosecution case as there is no dispute that the appellant was arrested. It is only the complainant who could give evidence of defilement in this case. I find that this ground is without merits.

The trial magistrate was right in holding that

> ***"The direct evidence adduced by the prosecution did prove the particulars as stated in the Principal Count".***

15. The 3rd Ground: **Conflicting evidence by the prosecution witnesses**

The contention by the appellant is that the treatment notes at page 36 and P.3 from at page 41 were different. I am not able to decipher any contradictions on the two documents.

My views that even where there are contradictions, the court will disregard minor contradictions which do not cast doubt on the evidence presented before it. The ground is a sham.

16. 4th ground: **Court relied on medical evidence when the ingredients were not proved.** Contrary to the assertion by the appellant the medical evidence proved penetration. The doctor stated at page 22

> ***"On the entry of the vagina; she had bruises both on the left and right side. The area was swollen and red in colour. The hymen had been broken. I saw blood stains on the injuries though there was no discharge.***
>
> "***In conclusion, the nature of offence was defilement. The age of the patient I examined was 13 years".***

17. The appellant submits that the doctor's observation was not consistent with penetration because it would be most unlikely that a minor of that age would be in fair general condition after being defiled by an adult (sic). He also submits that the doctor did not indicate whether the hymen was freshly broken or not.

18. The ***Sexual Offences Act*** defines penetration as follows under section 2 of the Act.

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

Whether penetration perforates the hymen or not does not determine penetration. Even partial insertion which leaves injuries on genital organ of the victim completes the act of penetration. From the observations made by the doctor, there is no doubt that there was penetration.

Failure to indicate whether the hymen was broken before or freshly is not fatal.

The fact that the doctor found injuries and blood, when he observed that the hymen was broken, it must have been related to the present complaint which he was treating. In any case there was evidence of the complainant which point to complete insertion of the appellant's genital organ in her genital organ. This is what the complainant stated;

> ***"He removed his penis and entered the same into my vagina. He raped me. The act was continuous".***

This leaves no doubt that there was complete insertion of his genital organ into the genital organ of the complainant. The injuries observed by the doctor were consistent with defilement. The evidence is cogent and overwhelming. The prosecution proved the ingredients of defilement beyond any reasonable doubts.

19. Finally, the appellant submits that the trial magistrate did not consider his brief defence testimony. The appellant acknowledges that his was a brief testimony.

It was a statutory statement as it was not given on oath. All the appellant stated is that he never committed the offence.

20. The defence was considered by the trial magistrate page 34 the trial magistrate has stated that the defence is misplaced. This defence was a mere denial. There was nothing more for the trial magistrate to consider faced with a brief sentence of defence against overwhelming evidence to support the charge.

The ground is without merits.

21. In conclusion:

As righty submitted by the respondent the three ingredients of the offence of defilement which are,

1. Identity of the perpetrator,

2. Penetration,

3. Age of the complainant were proved beyond any reasonable doubts, were proved with cogent evidence.

Having evaluated the evidence my finding is that this appeal is without merits.

22. The appellant has not challenged the sentence. He was sentenced to serve 20 years imprisonment.

This was the minimum sentence the court could impose.

I have considered that the appellant was charged under ***Section 8 (1) (2) of the Sexual Offence Act*** which provides:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***A person who commits an offence of defilement aged eleven years or less shall upon conviction be sentenced to imprisonment for life".***

There was a problem here as the particulars of the charges stated that the complainant was aged 13 years.

The evidence tendered proved that the complainant was aged 13 years, that means that the charge should have been under ***Section 8 (3) of the Sexual Offences Act*** which provides:

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years".***

23. The question is whether the appellant suffered any prejudice.

The appellant has not raised the issue as a ground of appeal.

Secondly the sentence imposed by the trial magistrate is the bare minimum provided under ***Section 8(3) of the Act.***

My view is that the applicant was not prejudiced and this is a defect which can be used under ***Section 382 of the Criminal Procedure Code Cap 75 Laws of Kenya.*** The Section provides:

> ***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.***

The conviction should therefore be under ***Section 8 (1) (3) of the Sexual Offences Act*** which is the proper section in the facts of this case.

This court has jurisdiction to deal with both law and facts being a 1st appellate court.

24. I find no reason to interfere with the sentence.

25. The appeal lacks merits and is dismissed.

Dated at Kerugoya this 31st day of October, 2019

L.W. GITARI

JUDGE