REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 10 OF 2018

OM .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the Senior Principal Magistrate Court

at Mariakani in Criminal Case No. 632 of 2015 in a Judgment dated 8.4.2016)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGEMENT

The appellant pleaded not guilty to a charge of defilement contrary to Section 8 (1) as read with 8(3) of the sexual offences Act, No. 3 of 2016. Nevertheless, after a full trial, he was convicted as charged and sentenced to 20 years imprisonment.

It was the state's contention that on 9th December 2015 at [particulars withheld] Village Chengoni Location in Kinango Sub-County in Kwale County within Coast region defiled GM a child aged 15 years. He was alternatively charge is that of committing an indecent act with child.

The grounds of appeal are as follows:

i. That he was a minor when he committed the offence.

ii. That the prosecution evidence was marred with irregularities.

iii. That the Learned Magistrate failed to decipher the charges were trumped up.

iv. That his defense was not considered.

The Appellant filed submissions in support of the above outlined grounds of appeal. On the 27th of May 2019, **Ms. Barbara Sombo,** the prosecution counsel for the state filed submission urging this court to dismiss the instant appeal on the grounds that the offence was proved beyond reasonable doubt.

I have considered the submissions tendered by both parties, and perused the record of trial court, I have also scrutinized the exhibits produced before the trial court in support of the prosecution case. I shall apply the submissions and the evidence adduced in my analysis and determination.

The appeal was argued by way of written submissions. Before I deal with the various grounds challenging the Judgment of the trial court, I find it prudent to recapitulate only briefly the evidence which was before the trial court.

In this case the complainant (PW 1), testified that on 9.12.2015 she went to spend a night at her uncle's place. Along the way she met the accused who is a stepbrother to her father. According to the complainant the accused got hold of her hands pulling her into the thicket, undressed her underpants and clothes to insert his penis to the genital organ.

The next prosecution witness **PW 2 – MM** testified that while at home one **L** reported that the complainant had been left behind with the appellant when PW 2 rushed to the scene, he found the appellant naked still dripping with semen from his penis. It was also at the same time PW 2 told the court, seeing the complainant with her skirt at half-most below the waist he therefore sought for the father to the complainant to assist in escorting the complainant to the hospital and the police to take further action.

PW 2 further testified that on arrival at Samburu Health Centre a medical examination carried out by **PW 3 Rashid Omar.** In PW 3 testimony he told the court on the examination conducted on 10.12.2015 at the Health Center he confirmed lacerations on the lm, her hymen was missing and some semen on the vaginal canal. The medical report admitted in evidence opined that the complainant was sexually penetrated.

PW 4 – PC Mwarome a member of the police force testified that while at the police station, he received a complaint on defilement of the complainant. On interrogation, he issued the P3 Form and investigation commenced which led to the arrest of the appellant.

The appellant gave a sworn statement and denied that he did not have sex with the complainant. His evidence further show that on that specific night, Gome and another man near to his house and spoke to him about the complainant. Thereafter, the father of the complainant came and proposed that he accompanies him to the hospital to escort the complainant. He agreed to accompany the father only to be placed in custody. As to his defence the offence was committed by another person.

Issues for determination

> ***(a) The issues for determination herein are whether the prosecution proved its case beyond reasonable doubt.***
>
> ***(b) Whether the prosecution evidence was marred with irregularities.***
>
> ***(c) whether the appellant's children rights under the constitution, particularly Article 53 and the Children Act, 2001 were violated.***

Analysis and Determination

The law is settled on the duty of the first appellate court as stated by the Court of Appeal in **Okeno vs Republic [1972]EA 32** that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic [1957] EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs R. [1957] EA570). 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 finding and conclusion; it must make its own 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 vs Sunday Post [1958] E. A. 424."***

Written Law

1. Whether the prosecution established the offence of defilement beyond reasonable doubt

Section 8(1) of the Sexual Offences Act No. 3 of 2006 provides as follows:

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment to a term not less than 20 years."***

This being the first appeal the court has to consider the entire evidence and make its own conclusions. (See the principles in **Okeno v R [1973] EA**.

It is the duty of the prosecution to discharge its burden of proof beyond reasonable doubt. It is for the prosecution to prove the guilt of the accused persons and this, burden except in a few exceptional circumstances never shifts from the prosecution to the accused. The standard of proof that is required to discharge this burden is what is commonly referred to as ***"Proof Beyond Reasonable Doubt."*** The court will therefore acquit an accused person if satisfied that the evidence given by either the prosecution or the defence creates a doubt as to his guilt in respect of the offence charged.

In this regard, the guiding principles in the dictum of **Lord Denning**, as he then was in **Miller v Minister of Pensions [1947] 2 ALL ER 372**

> ***"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 a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible but not in the least probable, 'then the case is proved beyond reasonable doubt, but nothing short of that will suffice."

This is the standard of proof the prosecution case will be tested whether in obtaining Judgment before the trial court it had satisfied the requirements of the law in respect to the charge against the appellant. What is at stake for the offence of defilement is prove of the following ingredients: penetration, age, positive identification of the appellant as the perpetrator of the crime.

As this court analyses whether these ingredients to be proved beyond reasonable doubt, this court shall consider each of the separately.

(a) Whether age was proved

The guidelines on prove of age of the victim of the offence in defilement cases has been stated in various cases to meet the threshold of beyond reasonable doubt. In the case of **Kaingu Elias Kasono –vs- Republic Criminal Appeal No. 54 of 2010** The Court of Appeal held that:

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim."

The principles also to be applied were discussed in the case of **Richard Wahome Chege –vs- Republic Criminal Appeal No. 61 of 2014** where the same court 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. PW 2 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 PW 2 but supportive evidence was given by PW 3 [the doctor] who examined the complainant, and the complainant herself."

The age of the complainant is not in dispute herein. She stated that she was 15 years of age. When the trial was heard. That means she was 14 years old when the offence was committed since the hearing of the matter was conducted a year after the commission of the offence. This age is supported with the Child Health Card produced in the trial court by **PW 4** the investigating officer. The minor was born in the year 2000. The bandwidth of 14 and 15 years in the instant appeal did not occasion any prejudice to the appellant in view of its application on sentencing upon conviction. Therefore, the age of the victim was conclusively proved to be 15 years at the time the offence was committed. Hence age was proved beyond reasonable doubt.

(b) What about the element on penetration

On this issue the points to be considered is whether the intentional and unlawful sexual act was within the scope of the provisions of the definition under Section 2 of the Sexual Offences Act which defines penetration to mean:

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

In answer to this issue, **PW 1** asserted that she was sexually abused by the Appellant. This claim is supported by the testimony of **PW 2** who testified that he caught the appellant naked at the scene of crime soon after the act. This fact is further supported by the P3 Form produced as exhibit by **PW 3, Rashid Omar**, a clinical officer. He stated that upon examining the complainant, she had some lacerations on lm (upper part), her hymen was missing and semen was noted in her vaginal canal. Laboratory test found she had spermatozoa on high vagina swab. Further that epithelial cells were also seen showing that there was friction force during penetration. The witness concluded that penetration was occasioned on the victim. I have no reason whatsoever to doubt this evidence hence I find that the fact of penetration was proved beyond reasonable doubt.

(c) Whether identification of the perpetrator was proved

In the case of **R vs Turnbull [1976] 3 ALL E. R. 549** the Court held:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

The facts tendered by the prosecution in support of this element can be briefly stated throughout the complainant evidence, the minor was candid that the appellant is the person who penetrated her genitals thereby committing the instant offence. She explained how the appellant grabbed her and forcibly took her into some bush where he proceeded to remove her clothes including the inner wears, to facilitate the act of carnal knowledge.

This particular fact is corroborated by the evidence of PW 2, who testified that he was informed that the complainant had been held back while on her way home by the appellant. Thereafter PW 2 took a torch, went towards the direction of the scene. He claimed to have heard some sound of someone struggling to breath in the bush. He ran to the spot and found the accused fully naked, with semen dripping from his

penis. He also stated that he found the complainant with her skirt pushed upwards above her waist.

PW 2 testified that he then confronted the appellant and also called the complainant's father who came with other people to witness the incident. The following morning the appellant was arrested. What this evidence depicts is that the appellant was caught red-handed at the scene of crime. He was a person well known to both PW 2 and the complainant by virtue of family relationship as uncle to the complainant. With such facts in view of the court there was strong and credible evidence on recognition of the appellant.

(2) Whether the appellant's children rights were violated

The appellant argues that at the time of omission of the offence, he was a minor. He claims to have been born in 1998. Further that the provisions of Section 189, 190 and 191 of the Children's Act No. 8 of 2001 ought to have taken into account by the trial Magistrate.

The appellant cited the principles in **Criminal Appeal No. 17 of 2015** to support his submissions.

I have perused the record of proceedings and noted that the appellant's age is not indicated anywhere. I have also noted that the appellant did not raise any issue to the court regarding his age throughout the trial proceedings. Neither did he raise the same in his defence.

If there were concerns as regards the appellant's age, the Learned trial Magistrate in his wisdom would have ordered for an age assessment report or the investigating officer to take steps to ascertain his age. I believe that the Learned Magistrate in his observation and demeanor of the appellant did not see the need to order for the age assessment report, to be conducted on the appellant.

I have carefully considered the appellant's contention. He has said he was born in 1998. But however, to my dismay, he has not brought forward any relevant evidence to support this claim. He is the one prosecuting the appeal and seeking to prove a fact. It is trite Law that on this issue the appellant has to discharge the burden by way of cogent evidence that he was born in 1998. It is only when the appellant has proved his claim of being a minor at the time he was prosecuted, that he may be able to sufficiently contend that his children rights under the Constitution and Children Act, 2001 were indeed violated. As it stands herein, I reject the appellant is contention for the want of adequate proof to support it beyond reasonable doubt.

On identification the appellant believes that the prosecution ought to have gone as far as to find out if the spermatozoa found in the minor's vaginal canal were his and in his view that would have ascertained whether he indeed defiled the minor.

Learned counsel for the state argued that PW 1 and PW 2 were people who knew the appellant so well and that the evidence on identification was by recognition. Learned counsel cited the case of **Douglas Ntoribi vs Republic [2014] eKLR** to support its contention.

(3) Whether the appellant's defence was not considered and whether there were irregularities in the prosecution evidence

In relation to inconsistencies which may be inferred from the testimony of witnesses who have been summoned by the state to prove existence of a fact the court in **Twehangane Alfred vs Uganda Crim. App No. 139 of 2001, [2003] UGGA, 6** held as follows:

> ***"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."***

I have perused the record of proceedings and my observation is that the prosecution case was very clear, straight forward and consistent to sustain conviction. The appellant claims that the prosecution case was marred with irregularities, a fact he has not brought any piece of evidence to prove. He has not been able to pinpoint the irregularities he alleges to exist. As regard his defense, my view is that as someone who was caught at the scene of crime just after committing the offence, denying having committed the offence is just a mere joke. There is overwhelming evidence to show that the chain of events is so tightly locked that am completely satisfied that the appellant offered no explanation both at the trial court and on appeal that gives rise for setting aside the conviction.

The upshot of this matter is that the appellant is case is not meritorious and is hereby dismissed. I uphold the conviction and I shall resentence the appellant in accordance with the principles in **Francis Muruatetu v R [2017] eKLR** and the Court of Appeal in **Christopher Ochieng v R [2019] eKLR.** In that respect I hereby invite the appellant to submit his mitigation for resentencing. I have considered the order on sentence and whether by its nature one can say the Learned trial Magistrate passed a punitive and excessive sentence. The jurisdiction of an appellate court to interfere with any sentence passed by a trial court is as stated in the case of **Ogolla s/o Owuor vs Republic [1954] EACA 270,** where the court held:

> ***"The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors." To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R –v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse –v – R (supra) while in the case of Shadrack Kipkoech Kogo –vs- R., Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal stated thus:-***
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> > ***Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. [1989 KLR 306]".***

Having taken into account the aggravating factors and mitigation offered by the appellant, I am of the view that there are no extenuating circumstances for this court to depart from the decision of the trial court on sentence.

It is so ordered.

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

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R. NYAKUNDI

JUDGE