REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 95 OF 2018

BONIFACE NGAO NDUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence of the Senior Principal Magistrates Court at Kangundo delivered on 20.2.2018 by the Senior Principal Magistrate E. Agade in Kangundo SPMCC Criminal Case SO.20 of 2017*)

JUDGEMENT

1. This is an appeal from the conviction and sentence of **Hon. E. Agade RM, in Criminal Case SOA No. 20 of 2017 delivered on 20.2.2018**. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty to both charges.

2. The appeal was lodged on 16th July 2018. The appellant's case is three-fold. Firstly that the conviction was based on insufficient evidence secondly that the trial was unfair and irregularly conducted. Thirdly that the conviction of the appellant was based on contradictions.

3. The appellant submitted that it was not established that the appellant was identified as the perpetrator

4. The state opposed the submissions filed on 24.5.2019. Learned counsel addressed three points; that is whether the prosecution proved their case beyond reasonable doubt, inconsistencies and whether the appellant's defence was considered. On the issue of proof of the prosecution case, learned counsel submitted that the appellant was a neighbor hence was properly identified as the perpetrator and that the nickname Robot belonged to him. On the issue of inconsistencies, counsel submitted that the same are minor and curable under Section 382 of the Criminal Procedure Code**.** On the issue of consideration of the defence, counsel agreed with the findings of the trial court that the defense of the appellant could not exonerate him from the offence. In the end, counsel submitted that the court dismiss the appeal and uphold conviction and sentence of the trial court.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. A voir dire was conducted on the victim but however she was stood down because she was distressed on several occasions and could not testify. However the court was satisfied that she did not understand the nature of an oath hence would not testify on oath. **PW1** was DNM who told the court that the victim is her child. It was her testimony that on 12.6.2017 she received information that Boniface raped the victim. She went home and noticed that the victim was in pain and she had a watery discharge from her private parts. She told the court that the victim is aged 6 years and 8 months as evidenced by the Health card indicative that the child was born on 17.2.2011. On examination by court, she testified that the victim informed her that the person who raped her was called Robot and that is the name that the appellant is known by in the village and he threatened to kill the victim. On cross examination, she testified that the victim told her that she was able to identify the appellant as the one who passed by the school and raped her.

6. **PW2** was MNA who testified that on 12.6.2017 the victim came late to school and she had dried tears. She noted that the child was aloof and not playing and when pressed to talk, she told her that Robot, a person known as Boniface Ngao Ndunda threw her down in a bush and removed his penis and inserted it into her vagina and threatened to kill her if she spoke. She also told the court that the victim indicated to her that the appellant usually waited for her as she came to school and defiled her hence this was not the first occasion. She told the court that she inspected the victim and noted that she had stained clothes.

7. **PW3** was KM (name withheld) who was placed in a concealed witness box. She told the court that on her way to school she met Robot also known as Ngao Ndunda who took her to a bush and removed her clothes and laid on top of her and touched her on her private parts and he removed his panties. She told the court that the school is not far from her home.

8. **Pw 4** was Maureen Kanene Musili, clinical officer at Kangundo Level 4 hospital. She testified that on 19.6.2017 she attended to Pw1 who came with a history of defilement on 12.6.2017. She observed that the hymen was torn and the tears were fresh and the labia was reddish

hence she opined that the minor had been defiled. She had the P3 form dated 13.6.2017 that was filled on 19.6.2017 and she produced the same together with the treatment notes. The appellant did not cross examine Pw4.

9. **Pw5** was Sgt Sarah Situma who told the court that on 12.6.2017 she received a report from the parents of Pw3 that the minor had been defiled. On interrogation, she received the details that the minor arrived late at school and her teacher interrogated her and she informed her teacher that Robot intercepted her on her way to school and threatened to kill her if she screamed then he removed her panty and unzipped his pants and lied on top of her and raped her and when he was done, he told her to go to school. It was her testimony that when the said Robot was brought to the police station, Pw3 identified him as the one who raped her and Pw5 learnt that Robot was a nickname of the appellant in the village.

10. The court was satisfied that a prima facie case was established against the appellant who was placed on his defence. Section 211 Criminal Procedure Code was explained to the appellant and he opted to give unsworn evidence. He denied commission of the offence and that he was framed and he sought forgiveness from the court. The court found that the age of Pw3 was proven vide the health card; that penetration was proven vide medical evidence and the account of Pw3; that the appellant was properly identified and that his nickname was Robot and found that the prosecution proved its case against the appellant and he was convicted of defilement and sentenced to life imprisonment.

11. Having looked at the Appellant's and State's written submissions, the grounds of appeal and the evidence on the court record the following are the issues for determination:-

a. **Whether or not the prosecution had proved its case beyond reasonable doubt.**

b. **What orders the court may issue.**

12. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case; that the prosecution evidence was riddled with inconsistency. The prosecution opposed the appeal and submitted that the prosecution proved its case. A perusal of the list of exhibits in the trial court showed a birth notification in the names of **KM** as the victim born on 17.2.2011, a P3 form as evidence of penetration in the names of **KM**. There is no eye witness account of the incident save for the account of Pw3 who gave unsworn evidence but duly cross-examined by the appellant.

13. The appellant has neither disputed nor admitted that he was at the scene on the material day. However he is reportedly a neighbor of the victim and her family and hence the identity of the victim has been proven. There is evidence of a victim aged below 18 years. The appellant denied commission of the offence and he has imputed that he was framed. The trial court relied on the P3 form to prove that there was penetration. The form was filled in about five days after the incident. However there are treatment notes that are dated 13.6.2017 indicative that the complainant had a torn hymen.

14. It is trite law that in cases of defilement the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a) That the victim was below 18 years of age.

b) That a sexual act was performed on the victim.

c) That it is the accused who performed the sexual act on the victim.

15. This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see **Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918**).

16. Beyond reasonable doubt is proof that leaves the court firmly convinced the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

17. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See ***Ssekitoleko v Uganda [1967] EA 531***). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence of defilement which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

18. The evidence as narrated by Pw1, 2 and 5 is largely hearsay. The direct evidence is the account of Pw3 as corroborated by Pw4 who examined her and tendered in court the P3 form and the treatment notes that the appellant has not objected to or controverted. In this regard I find that there is cogent evidence pointing irresistibly to the appellant as the defiler. There is no doubt as to the identity and age of the victim.

19. Section 143 of the Evidence Act provides that: "**Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.**"(emphasis added). A conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. From the evidence on record, I am satisfied that the victim was telling the truth, because the state of the victim as reported by Pw2 indicated that she was distressed, aloof and came late to school. However the court is not able to solely rely on her evidence alone hence the need for corroborative evidence. The trial court did not satisfy itself of the danger of a conviction based on evidence of a single witness who gave unsworn testimony and the need for corroboration as well as did not satisfy itself that the single witness was telling the truth. The Proviso to Section 124 of the Evidence Act is that "***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***."

20. Be that as it may, there is circumstantial evidence that is available. In a case placing reliance on circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

21. The circumstantial evidence that is available is that the appellant is the neighbour of the victim; he is named Robot; and he has given no explanation for his movements on the material day as this was used to pin him down by the prosecution. The complainant's testimony left no doubt that the appellant was her assailant as she immediately gave out his nickname as Robot who resides within the area as soon as she reached school and that her teacher took action upon confirming that the victim had been defiled. The corroborative evidence on record left no doubt in the prosecution's evidence against the appellant. The appellant's evidence did not shake that of the prosecution which is overwhelming. The appellant merely claimed that he had been framed. There was no evidence of any grudges between him and the complainant's family as he confirmed himself that the complainant's father was his friend for a long time. There was therefore no likelihood that the complainant's parents would use their daughter as a victim of a sexual offence so as to get at the appellant.

22. For a finding of fact to be made based on the available evidence, this court must be satisfied that there are no other co-existing circumstances which would weaken or destroy the inference. I find that the testimony of Pw3 as corroborated by that of P.W.1, Pw2 and Pw4 conclusively proves that sexual intercourse as defined by section 2 of The Sexual Offences Act occurred between the appellant and Pw1. The circumstances are suggestive that there was a meeting between the appellant and Pw3 that gave an opportunity for sexual contact and penetration between the sexual organs of the appellant and the victim. I am aware that the absence of a hymen cannot in itself prove penile penetration but having considered the the same has left no doubt in the minds of a reasonable and prudent person with respect to the elements of penetration and the involvement of the appellant in the offence charged and a real possibility that the unlawful sexual act did indeed take place and that the perpetrator was the appellant.

23. In the instant case, I am satisfied that there is direct as well as cogent circumstantial evidence pointing irresistibly to or showing that it is the appellant that caused the victim the absent hymen and I am unable to agree that there was inconsistency in the evidence of the prosecution. It was safe to convict on the basis of the evidence as presented in the instant case. I am not able to see how the trial was unfairly conducted because the appellant pleaded not guilty to the offences, he attended trial, was given an opportunity to cross examine all the witnesses and he was put on his defence. His attack on the manner that the trial was conducted lacks merit and is dismissed.

24. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, if find that the evidence on record is satisfactory to convince this court that the offence was committed by the appellant.

25. On the issue of the orders that the court may grant, because this court agrees with the conviction of the Appellant by the trial court. On sentence I note that the appellant was sentenced to life imprisonment as the age of the victim was below 11 years as provided for under section 8(2) of the Sexual Offences Act. However following the decision of the Supreme Court in the case of Francis Karioko Muruatetu & Another V. R (2017) eKLR several petitions have been lodged by persons serving sentences of death or life imprisonment seeking resentencing by the courts. The court of appeal in several cases of this nature has reduced life sentences to periods ranging between 20 years to 30 years. Even though the offence committed against the complainant was serious as it traumatized her, I find that a sentence of twenty five (25) years would be reasonable in the circumstances.

26. In the result the appeal partly succeeds. The conviction is upheld while the sentence of life imprisonment is set aside and substituted with a sentence of twenty five (25) years from the date of arrest namely 13.6 2017.

Orders accordingly.

Dated and delivered at Machakos this 26th day of November, 2019.

D. K. Kemei

Judge