REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 9 OF 2019

JULIUS WANJALA MUSOMBA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by Hon. M. Opanga, (SRM) in Kangundo Senior Principal Magistrate's Court in Criminal Case SOA No. 4 of 2018 and judgement delivered on 23.1.2019)

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. M. Opanga, Senior Resident Magistrate in Criminal Case SOA No. 4 of 2018 on 23.1.2018. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "On the divers dates between the months of September 2017 and December 2017 in Matungulu Sub-county within Machakos County intentionally caused his penis to penetrate the vagina of **CR** a child aged 10 years old. 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.

2. When the matter came up for trial, the appellant pleaded not guilty thereby warranting a trial. The prosecution presented four witnesses in support of their case. Pw1 was CR (name withheld). After conducting a voir dire, the court was satisfied that the victim could testify on oath. It was her testimony that in September, 2017 on a date she could not remember a man came and her mother told her to accompany him and who took her to an abandoned house and locked the door and lowered his trouser and his inner wear and slept on top of her and did bad manners to her. She reported the matter to Mama Grace. She told the court that this was not the first time that her mother used to instruct her to go with the man and that after the incident she was taken to Mama Lucy Kibaki Hospital where she was examined and treated.

3. Pw2 was Esther Njambi Macharia who testified that Pw1 was a neighbor and that she noted that Pw1 never used to go to school because of problems at home and she learnt that Pw1's mother used to offer her for prostitution and she used to sleep with the men at a nearby building hence Pw2 reported the matter. She told the court that the men used to give Pw1's mother money after they slept with Pw1. On cross examination, she told the court that Pw1 identified the appellant as one of the men who usually slept with her.

4. Pw3 was Rose Nyiendo Waweru who testified that she was a nurse at Mama Lucy Kibaki Hospital and that on 19.1.2018 she saw Pw1 who reported that her mother used to bring men to sexually assault her and examination revealed that her vagina was intact but her anal orifice was loose hence indicative of continuous anal penetration. She produced the PRC form and treatment notes in court. On cross examination, she testified that Pw1 was able to identify the men who sodomized her.

5. Pw4 was No. 68516 Pc John Obul who told the court that on 19.1.2018 a child was brought to the police station by neighbours who told him that on divers dates in September to December, 2017 men came to Pw1's house and gave her mother money and she in return gave out Pw1 to be sodomized by them and that Pw1 took the police to the house of the appellant and indicated that he was one of the men who sodomized her. He told the court that age assessment was done and that Pw1 was found to be 11 years as of 2017. The age assessment was produced in court. The court found that the appellant had a case to answer and he was put on his defence.

6. The appellant opted give a sworn statement and did not call witnesses. He told the court that he was a handsman at Kantafu and that the charges are fabricated. It was his testimony on cross examination that he lived at Kimani's house in Kantafu and he knew Pw1 and used to see her playing with other children on her way to school. He told court that he knew Pw1's mother and knew where they lived and that they kept moving houses.

7. The trial court found that the evidence tendered does not establish the particulars of the offence as charged and found that there was sufficient evidence that the complainant was aged 11 years when the offence was committed; that anal penetration was proven via the medical evidence; that the appellant knew Pw1 and his defence was without basis and therefore found the appellant guilty of defilement and sentenced him to life in accordance with Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.

8. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that the trial court went into error relying on a charge sheet that was defective and further that the prosecution's evidence was contradictory. The appellant submitted that the trial court went into error in failing to conduct a voir dire and in failing to indicate what language was used in conducting the trial. Further he submitted that there were contradictions in the evidence of how the sexual act was done. It was his submission that the prosecution failed to call crucial witnesses and therefore his appeal be allowed, the conviction quashed and he be set at liberty.

9. The state submitted that the charge was not defective; that the contradictions as to the age of the victim were clarified by the medical assessment report and are not material to affect the outcome of the case. Reliance was placed on the case of **Philip Nzaka Watu v R (2016) eKLR**. Counsel submitted that the appeal lacks merit and ought to be dismissed.

10. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

11. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into 2 grounds:

> ***1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;***
>
> ***2. That the trial magistrate erred in convicting the Appellant yet the charge sheet was defective;***

12. In cases of defilement the following are to be proven:

1. The age of the child.

2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and

3. That the perpetrator is the Appellant.

13. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years as she was aged 11 years as per the age assessment. It is also undisputed that there was penetration because the evidence on record points towards penetration and this was indicated on the PRC form and treatment notes that was uncontroverted by the appellant. There is however contention on the issue of identification of the appellant as the perpetrator. Pw1 told the court that in September, 2017 on a date she could not remember a man came and her mother told her to go with the man and he took her to an abandoned house and locked the door and lowered his trouser and his inner wear and slept on top of her and did bad manners to her and she reported the matter to Mama Grace. She told the court that this was not the first time that her mother told her to go with the man and that after the incident she was taken to Mama Lucy Kibaki hospital where she was examined and treated. From the evidence on record, the court is not able to say with certainty that the appellant was properly identified as the perpetrator.

14. I did not have the benefit of seeing the witnesses testify. However from the proceedings and the court record, the trial court seemed satisfied of the evidence against the appellant that was given by a single witness. The learned trial magistrate relied on Section 124 of the Evidence Act and the case of **Mohamed v R (2006) 2 KLR 138** in believing the evidence of the complainant and having considered the surrounding circumstances that earlier in the day the appellant was said to have been at his shop, I am unable to agree with her decision. It is on this basis that the law had set a high standard of proof in criminal cases.

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 Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); 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 trial court seemed to have relied on circumstantial evidence. However 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 appellant'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 **Shubadin Merali and another v. Uganda [1963] EA 647; Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

18. There is no evidence that the appellant was seen together with Pw1. What is there is the account of the victim and there is no other evidence on the part of the prosecution. The appellant's evidence in this case is that he knew Pw1 and his mother but there is nothing to draw

inference of guilt on the part of the appellant. He also denied commission of the offence.

19. I find that neither in the testimony of Pw1 nor that of Pw2 is there an element that conclusively proves that sexual intercourse or any other sexual act as defined by section 2 of the Sexual Offences Act occurred. The circumstances do not establish it as a fact that there was a meeting between the appellant and the victim. There would be corroborative evidence too is extremely weak. I appreciate the work of the well-wishers who brought this incident to court, however the evidence considered as a whole causes such doubt as would lead 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. It causes a real and substantial uncertainty with respect to the participation of the appellant with offence charged and a real possibility that though the unlawful sexual act did take place, the identity of the perpetrator was not properly identified in the evidence. Furthermore it transpired from the complainant's testimony that her mother used to hawk her to sleep with several men in the area and that the names or identities of those men were not disclosed. There was a possibility that the identity of the appellant from the other perpetrators might not have been properly established and hence the benefit of such doubt ought to be given to the appellant.

20. The appellant has raised the issue of a defective charge sheet. Section 134 of the Criminal Procedure Code provides as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

21. From the above analysis I find it unnecessary to belabor on the issue of the charge sheet.

22. From the evidence on record, I am not satisfied that the same is sufficient to sustain a conviction against the appellant who due to the evidence on record has not been placed at the scene of the crime on the material date and that the evidence of the complainant does not elucidate that the appellant was positively identified as the perpetrator. The conviction of the appellant was therefore not safe.

23. In the result, I find that the prosecution did not prove its case beyond all reasonable doubt. The appeal has merit and is allowed. The conviction is quashed and the sentence is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

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

D. K. Kemei

Judge