REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 01 OF 2019

CHARLES KASENA CHOGO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original conviction and sentence in Malindi Criminal Case No. 627 of 2013 as presided over by Hon. J. N. Wandia (RM) at Malindi Law Courts dated 2nd January 2019)

CORAM: Hon. Justice R. Nyakundi

Mr. Mouko Advocate for the appellant

Ms. Sombo for the State

JUDGMENT

This is an appeal by the appellant through legal counsel **Mr. Mouko** against conviction and sentence from the Judgment of the trial court presided over by **Hon. Wandia** determined on 2.1.2019.

The appellant was charged with the offence of defilement contrary to Section 8 (1) of the Sexual Offences Act and in the alternative for committing an indecent act with a child contrary to Section 11 (1) of the same Act.

In the trial court findings the appellant was found guilty, convicted of defiling the complainant contrary to Section 8 (1) (3) of the Act and accordingly sentenced to ten (10) years imprisonment.

Being aggrieved with the entire Judgment of the trial court, through his counsel **Mr. Mouko**, the appellant filed a Memorandum of Appeal dated 15.1.2019 constituting the following pertinent grounds:

1. That the Honourable Learned Magistrate erred in Law and facts by convicting the appellant on insufficient evidence.

2. That the Honourable Learned Magistrate erred in fact and in law in not finding that the prosecution's evidence which was littered with litany of contradictions outright lies and half-truths created a lot of doubts which should have been resolved in favour of the appellant.

3. That the Honourable Learned Magistrate erred in not considering the provisions of the evidence Act and the sexual offences Act, thus culminating in a wrong finding against the appellant.

4. That the Learned Magistrate erred in convicting the appellant on a defence charge thus prejudicing the appellant.

5. That the Honourable Learned Magistrate erred in not holding that the appellant had no burden of proof while the prosecution had failed to discharge the burden as is expected in law.

His main prayer is that the appeal court should quash the conviction and sentence as founded by the Learned trial Magistrate.

Brief evidence at the trial

The prosecution case was mainly based on the evidence of the five witnesses.

PW1 – The complainant testified that she was carnally known by the appellant on 30.8.2013 at the age of 16 years old. In order to proof her age, the complainant provided a birth certificate marked as MFI – 1 (a) and later admitted in evidence as exhibit 1 (a) by **PW4 Sgt Samwel Ngere** of Marereni Police Station.

Further, the complainant told the trial court that on the material day she was assigned duties of fetching water by her mother in the wee hours of the day. She informed the court that on or about 4.00 A.M. she received a telephone call from the appellant asking her to accompany him to a funeral function within the neighborhood.

Apparently, in her own evidence, she agreed to board the appellant motor cycle to attend the proposed funeral which is normally accompanied with a disco.

The complained narrated how they passed through the appellant house and agreed to engage in sexual intercourse. This was done prior to her undressing all her clothes followed with an act of penetration by the appellant.

She further told the court that when both of them were done with the sexual intercourse, the appellant dropped her next to the home, only to encounter with the father who demanded to know where she had been all along.

Following the incident **PW3,** took up the matter with PW2 the coordinator of women affairs within Magarini Location. PW3 testified that together with PW2 they picked the complainant from school to have her examined by the doctor in regard to the report on sexual assault by the appellant.

Consequently, PW2 and PW3 told the trial court that the complainant was medically examined at Malindi District Hospital by **PW5 – Ibrahim Abdullahi.** According to PW5, the examination revealed that the complainant had suffered a broken hymen but no injuries noted to the genitalia. PW5 stated that relying on the positive findings, the complainant was sexually defiled at the age of sixteen (16) years old. The P3 Form was provided as exhibit 3 in support of the prosecution case. It was also PW3 testimony that the complainant seemed to take left her bedroom on or about 3.00 A.M. and 6.30 A.M. She was yet to return back home.

In the testimony of **PW4**, the matter was reported to the police station in circumstances which indicated that the complainant had left the house through the window to unknown place. Thereafter, PW4 testified that investigations carried out showed that the appellant had defiled the complainant. The appellant was therefore apprehended, and charged with the offence. PW4 further informed the trial court that an inquiry carried out from the complainant established that she had engaged in sexual intercourse with the appellant.

The appellant on his part elected to give unsworn statement, wherein he raised an alibi defence and denied any knowledge of the complainant prior to the commission of the offence.

On appeal, the appellant counsel submitted that there was no proof of penetration for the trial court to have arrived at a verdict of guilty and conviction on the charge of defilement. Counsel submitted that the Learned trial Magistrate failed to subject the testimony of the complainant together with that of other witnesses to resolve the benefit of doubt in favour of the appellant.

According to the arguments and submissions the evidence as presented was full of contradictions that the element on penetration remained a mirage. Learned counsel drew the attention of this court to the case of **Goo v R {2016} eKLR,** where the court held that the evidence was riddled with inconsistences and contradictions which was fatal to the prosecution case.

Counsel further supported his arguments with the principles in the case of **Paul Kanja v R {2016} eKLR and John Mutua Munyoki v R {2017} eKLR** on insufficiency of evidence to proof defilement against the complainant.

It was also counsel's contention that the medical evidence by PW5 was inconclusive to be relied upon by the Learned trial Magistrate to convict the appellant. Counsel supported his argument with the dicta in the case of **David Ochieng Aketch v R {2015} eKLR.** The cases of **Williamson Njogu v R {2016} eKLR and Mwaniki v R {2001} EA 158** was cited on the submissions in respect to the framing of the particulars of the charge and its resultant defect which clearly prejudiced the appellant. The Learned counsel prayed that the appeal be allowed.

The respondent counsel **Ms. Sombo,** never filed a rejoinder submissions as at the time of preparing this decision despite granted leave of the court on 11.9.2019.

Analysis and determination

Having considered the memorandum of appeal, the trial court Judgment and submissions raised by the appellant, I am compelled as a first appellate court pursuant to the principles in **Selle v Associated Motor Boat Co. Ltd {1968} EA 123 and Okeno v R {1972} EA 32** to address the critical issues in this appeal.

> ***"The guidance in the above cases is that this court must reconsider the evidence, evaluate it, itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.***
>
> ***In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some part to take into account of particular circumstances or probabilities materially to estimate the evidence or if the impressions based on the demeanor of witness is inconsistent with the evidence in the case generally."***

The entire appeal turns out on two major grounds:

First, whether the prosecution proved its case beyond reasonable doubt in regard to the offence of defilement.

Second, whether the charge as framed was fatally defective. The question which must be answered is whether in convicting the appellant as required under Section 8 (1) (3) of the Sexual Offences Act, the prosecution proved the following ingredients:

> ***a) The act of penetration by the appellant against the female genitalia of the complainant.***
>
> ***b) That the victim was at the time aged below eighteen (18) years old.***
>
> ***c) That the appellant was positively identified by the complainant.***

during the trial each of this element must be satisfactorily proved beyond reasonable doubt.

As regards the act of penetration, under Section (2) of the Sexual Offences Act, its sufficient for the prosecution to tend evidence to proof partial or complete insertion of the male organ into the female genitalia of the complainant.

From the record, the basis of the conviction of the conviction of the appellant was simply the testimony of the complainant (PW1). The offence was apparently committed upon the appellant luring the complainant out of their house in the early hours of 30.8.2013 under the pretext that they were going to attend a funeral. (PW1), subsequently agreed to the request but according to her evidence they proceeded directly to the house of the appellant on board his motor cycle.

In the present case PW3 testified that when she went to check the complainant at about 3.00 A.M. in an adjacent room, she was not in her bed. She was therefore traced as a missing person until when she surfaced at 6.30 A.M. This is the time her father confronted her to explain where she had been and as a consequence PW3 took over the issue with the school and the police. The medical examination conducted by PW5 confirmed a ruptured hymen of the complainant. Apart from the evidence of the complainant, there was also the medical evidence prima facie that showed that she had experienced sexual penetration.

I note further that in defilement cases, it has been repeatedly stated, the act of penetration is complete upon proof of partial or complete insertion of the man genitalia with that of the female. When cross-examined by the appellant, she stated and attested to the various incident of the defilement and how she was dropped home by the appellant.

It is also instructive to observe that from the testimony of the complainant, a telephone call was placed by the appellant seeking her company to attend a funeral. It was at this juncture the appellant had subject her to the sexual ordeal in his house.

The court pointed out in the pursuant case of **Ives Mukude v The People SC 2, No11 of 2011** and **Saul Banda v The People SC2, Appeal No. 11 of 2017** the Supreme Court observed interalia this:

> ***"The Law on opportunity in defilement cases was aptly discussed in the illustrious case of Nsofu v The People where the Supreme Court stated as follows: "Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case.*** *In* ***Credland v Knowler Lord Goddard C. J.*** at Page 55 quoted with approval the following dictum of **Lord Dunedin** in **Dawsion v Mackinsee:** ***"Mere opportunity alone does not amount to corroboration, but ….. the opportunity may, be such a character as to bring in the element of suspicion. That is that the circumstances and locality of the opportunity, may be such as in themselves to amount to corroboration."***

In terms of Section 124 of the Evidence Act, the starting point is that:

> ***"in sexual offences no conviction can be entered against an offender unless the evidence is corroborated. It is also important to consider the proviso where in a criminal case involving a sexual offence, the court can convict the offender on the testimony of the complainant or victim on the reasons to be recorded that the alleged victim or complainant is telling the truth."***

Going back to the evidence PW1, testimony was that the defiler on this particular day happened to be none other than the appellant. At the same time, the evidence by the complainant fits very well with the provisions of Section 43 of the Sexual Offences Act on what constitutes intentional and unlawful act on the part of the appellant in committing the act of penetration. The conduct by the complainant throughout the trial points at the false pretense and fraudulent action by the appellant. In all these circumstances, the complainant left her room knowing that they were going to (*Disco Matanga*).

However, she ended up in the house of the appellant where the act of penetration took place consistent with the definition provided under Section 2 of the Sexual Offences Act.

In so far as the testimony of the complainant is concerned, I find no inconsistencies or contradictions that she did not have sex with the appellant on the 30.8.2013. Therefore, as stated in Section 124 of the Evidence Act, although corroboration is a requirement but in the same section, there should be no hesitation to convict an offender where there is prima facie evidence of a single witness proving the element of penetration.

The complainant in this case was consistent in stating that it was the appellant who asked her to get out of the house. Initially, to her it

appeared like an honest and genuine errand to a funeral function but it turned out to be an intentional and unlawful sexual act by the appellant. There was never a rebuttal of the allegations by the appellant to disapprove the evidence by the complainant.

The second question to be considered by this court is whether the appellant was properly identified or recognized as the perpetrator of the crime. It is trite that the prosecution case on identification or recognition must satisfy the guidelines set out in **Abdalla Bin Wendo v R {1953} 20 EACA 106, Roria v R {1967} EA 583 and Anjononi & Others v R {1976 – 1980 IKLR 1566.**

In the instant case it appears that the complainant knew the appellant very well before the invitation came in that she accompanies him to a funeral function. In so far as the complainant evidence is concerned, she left her room with full knowledge when she was supposed to meet.

There was nothing on record to suggest that the appellant was a stranger to the complainant. Throughout, this was a genuine case from an acquaintance which made it possible for the complainant to exit in confidence in accordance with the request. There is no evidence upon which the complainant's evidence on recognition can be faulted by being an error or mistaken. The prosecution case shows that the complainant also spent considerable amount of time with the appellant. It is not in doubt that the trial court properly relied on recognition evidence in this case to place the appellant at the scene.

The appellant in his defence raised an alibi defence. In the case of **Kiarie v R {1984} KLR** The Court of Appeal laid down the following principle this:

> ***"An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."***

It is settled Law that the prosecution bore the burden of proving the charge against the appellant at the trial court.

However, in relying on an alibi defence, nevertheless the entirety of the prosecution direct or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellant and the decision to raise an alibi defence at another stage of the proceedings should not escape scrutiny of the court.

In support of this right proposition, the court in **R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145** held as follows:

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."***

That is precisely what happened in this case. The plea of alibi certainly was never even part of the cross-examination issues raised at the trial by the appellant.

The record shows that the appellant in furtherance of his defence elected to give unsworn statement, certainly creating a bar for the prosecution to debunk the alibi through cross-examination. Though in Law, timeless of the disclosure, might not be in issue, under Article 50 of the Constitution on the right to a fair hearing the prosecution required adequate notice to investigate the allegation of the alibi defence.

Turning even to the short statement of defence his whereabouts at the time described by the complainant were never disclosed in his answer to the prosecution case on the basis of the above authorities. I am not persuaded, as the trial court did that the appellant alibi defence addressed significant aspect of the case against him of defiling the complainant.

As was stated in the persuasive case **R v Mahoney {1979} 50 CCC**

> ***"The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it."***

Further, in this appeal counsel argued that the charge as framed against the appellant was defective. The Law on framing of charges is provided for under Section 137 of the Criminal Procedure Code. It will also be noted that under Section 134 of the Criminal Procedure Code:

> ***"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 particulars as may be necessary for giving reasonable information to the nature of the offence charged."***

The material elements and the test to be applied is to be found in the case of **BND v R {2017} eKLR** where the court held that:

> ***"The principle of the Law governing charge sheets is that an accused should be charged with an offence known in Law. The offence charged should be discussed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand, it will also enable an accused person to prepare his defence."***

On consideration of this ground, the appellant dealt with semantics of language without pointing out which part of the charge sheet embarrassed or prejudiced his right to a fair trial.

It is clear that the main charge of defilement and alternative count were based upon the set of facts to put him on notice with regard to the specific allegations.

In my view if there was any defect pursuant to the provisions of Section 382 of the Criminal Procedure Code. The appellant has not demonstrated it occasioned a failure of justice. This ground of appeal also lacks merit.

Before, I put off its inconsistent to state that from the Judgment of the trial court the prosecution called a total of five (5) witnesses to prove the offence of defilement beyond reasonable doubt. The facts of the case were based on the ingredients of the offence taken together to be penetration, age of the victim and identification. The contents of the charge clearly specified penetration and the age of the complainant to be sixteen (16) years old at the time of the offence.

What the court of first instance did is verifiable that the three essential elements for a valid charge of defilement was made against the appellant.

I am satisfied on the evidence that conviction for defilement was correct and I accordingly dismiss the appeal. Likewise, on sentence the appellant failed to bring his appeal within the threshold in the case of **Ogolla S10 Owuor 1954 EACA 270**. For the foregoing principles, I regret I am unable to interfere with the order on sentence.

In these circumstances, the appellant remains properly convicted and sentenced by the trial court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23rd DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE