REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 79 OF 2018

ONESMUS SAFARI NGAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Hon. Wewa in Criminal

Case No. 204 of 2016 at Malindi on both conviction and sentence)

CORAM: Hon. Justice R. Nyakundi

Ms. Ruttoh for the Appellant

Ms. Sombo for the State

JUDGMENT

On 9.11.2018 the appellant was tried and convicted for the offence of defilement contrary to Section 8 (1) (4) of the Sexual Offences Act and on 28.11.2018 he was sentenced to ten (10) years imprisonment. He was aggrieved by both conviction and sentence and did file an appeal to this court on the following grounds:

1. The Learned Magistrate erred in convicting the appellant on the alternative count of indecent act contrary to Section 11 (1) of the Sexual Offences Act no. 3 of 2006.

2. The Learned Magistrate erred in Law and facts in convicting the appellant on evidence that did not meet the standards required in Law to uphold a conviction for the offence.

3. The Learned Magistrate erred in Law and facts by meting upon the appellant an excessive sentence in the circumstances.

4. The Learned Magistrate erred in Law in convicting the appellant of the offence of indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Notwithstanding that the evidence before the trial court, when properly analyzed and evaluated, did not support the conviction.

The prosecution case against the appellant was based on the testimonies of eight witnesses. To start of the narrative was the testimony of the complainant **GS** who told the court that on the material day in company with other pupils like **PW4 – AK,** and the appellant had gone to Watamu in order to participate in tycondo competition. At that venue the complainant testified that because of the distance they had to book rooms to spend the night. The appellant apparently was the one responsible in sorting the accommodation for the rest of the pupils including the complainant. The complainant confirmed to the court that she was shown a room which was in the middle with that of the appellant.

Further, according to the complainant, the same room was to be shared with another pupil by the name **(R).** The complainant testified that in the middle of the night, she realized her colleague was not sleeping next to her but instead it was the appellant. Thereafter in a little while the appellant demanded to have sex with her though she resisted but the appellant overpowered her, by removing the innerwear followed by insertion of his penis to her vagina.

The appellant on accomplishing his task of having carnal knowledge, left for his room. The complainant further testified that she was left distressed in her room until the following day to participate in the tycondo games but due to the painful and trauma suffered she did not join the them to play.

The complainant gave evidence that the event continued for two days. Thereafter she went to her home. Further on 9.1.2015 in another

incident the complainant, appellant and other pupils travelled to Nairobi to participate in the same games with other schools.

On their arrival from Mombasa, the complainant told the trial court that they passed through the house of the appellant and once more he had sexual intercourse and before the actual act the complainant described the conduct of the appellant which involved removal of her clothes, innerwear and biker, for easier access to penetrate her vagina.

In the meantime, after the act, the appellant gave her a tablet to swallow without explaining for what ailment.

The complainant on arriving home, realized that she was bleeding heavily which continued for the next nine (9) days. As a result of the bleeding, she became unconscious only to find herself in the hospital. She alleged that the appellant continued to encourage her that if she plays, the periods would come back. That for some unknown to reason that did not happen when she came back from the Nairobi trip, the appellant took her to a woman resident of Mombasa who administered a black concoction in a glass, though bitter, nevertheless she managed to drink it. She was visited by her auntie **PW 6 – CM** Even as of that day the complainant had not disclosed about the sexual act incidents she had with the appellant. It only happened one day when she decided to inform **S (PW2)**, a fellow teacher in the same school with the appellant.

PW2 – who testified as a teacher at [particulars withheld] School confirmed that the complainant explained that she had serious challenges with the studies because of the disturbances from the appellant. The complainant broke the news to PW2 that the appellant has been involved on several occasions with sexual relationship. In the face of this information, PW2 told the court that he disclosed it to the headteacher who in turn took it up with the school manager. Upon careful examination of the complaint, it's apparent from PW2 evidence that police at Mtwapa got involved so as to investigate the allegation.

It's after the investigations, the appellant was arrested and charged with defiling the complainant. **PW4 AK** a minor aged 16 years old testified that he is a pupil in the same school with the complainant where the appellant is a teacher and tycondo coach. It is the evidence of PW4 that in November 2014, they did travel to Watamu for a tycondo games. At the close of the day's activities, the appellant went with the complainant and other girls to show them the rooms to spend a night.

PW4 - further testified that while at home, he received information that he was required by the police to record a statement about investigations involving the complainant.

PW5 AA - a committee member at [particulars withheld]Primary School testified that on 8.2.2016 they had a meeting where the issue of sexual abuse of the complainant was discussed. According to PW2 the complainant did narrate the ordeal with the appellant. From this report PW5 told the court that they decided to escalate the matter to the police.

The other witness called in to assist by the headteacher of the school alluded by the complainant was **PW6 – CM** Through an inquiry conducted upon the complainant PW6 stated it emerged that the appellant had sexually abused her and it was necessary that a report be made to Mtwapa Police Station.

The evidence of **PW7 Dr. Sheila Mukari** is significant as she gave evidence on behalf of **Dr. Hashim** who filled the P3 Form admitted as exhibit 3. He tendered the report which showed the hymen was missing and the complainant had conceived as a result of the act sexual penetration.

PW8 – PC Mariam Mohamed, in her testimony addressed the role she played as the investigating officer following the report in the office on defilement of the complainant. PW8 interviewed the relevant witnesses based on the history of the complainant. On considering various matters PW8 issued the P3 to the complainant which was filled by **Dr. Hashim.** PW8 further established that the complainant had suffered serious bleeding due to the 'medicine' dispensed by the appellant to assist in aborting the pregnancy. From the report in the P3 Form, exhibit 3 discharge summary- exhibit 5, there was evidence of defilement. It's this evidence and the complainant identification of the appellant she effected an arrest and preferred a charge on the two counts of defilement and in the alternative indecent act that convicted the appellant.

The appellant after the close of the prosecution case was placed on his defence. The appellant gave a narration that he is involved in tycondo games activities that is how he came to travel to Watamu with the complainant and other pupils. On his part, the complainant and others were accommodated during the period of the tournament. He also admitted that he was also booked at the same premises with the girls. He denied the allegations on defilement stated to have happened on that night as false.

Analysis and determination

This appeal before me is a first appeal governed by the clear principles in **Okeno v R {1972} CA 32 – 36.** I have already set out the background evidence leading to the impugned Judgment of the trial court.

Before delving into the merits of the appeal, the requirements of the standard of proof in cases of this nature remains as set out in Section 107 (1) of the Evidence Act and the principles in **Woolmington v DPP {1935} AC** and **Miller v Minister for Persons {1947} 3 ALL ER:**

As for the prosecution who are the burden bearers, the case is determined beyond reasonable doubt. The key ingredients upon which the standard of proof would be test against involves the following:

(1). That the appellant sexually penetrated the genitalia of the complainant.

(2). That it was proved by evidence the complainant was aged below 18 years.

(3). That positively, the appellant was identified as the one who convicted the sex act.

Therefore, in these itemized ingredients during the trial, the appellant was preserved innocent until the contrary is proved beyond reasonable doubt by the prosecution. He assumes no burden at all to supplement in any form to the discharge of the burden of proof on behalf of the prosecution.

To begin with is to re-examine, the trial court evidence to establish whether the act of sexual intercourse between the appellant and the complainant actually occurred as defined in terms of the Sexual Offences Act.

It is stipulated under Section 8 (1) as read with Section 8 (4) of the Sexual Offences that on 20.11.2015, the appellant did have carnal knowledge of **GST,** a girl aged 15 years old at the trial of the act.

What the law provides under Section (2) of the Act is for the appellant to have either partial or full penetrated of the genitalia of the complainant with his penis.

In the case of **Charles Karani v R Criminal Appeal No. 72 of 2013,** the court stated inter alia that:

"In the critical ingredient forming the offence of defilement are age of the complainant, proof of penetration and the positive identification of the assailant."

When it comes to the ingredient of penetration, the requirements of the Act sets out distinctively that once the prosecution proves intentional and unlawful act of partial or complete insertion of the male genitalia with that of the female genitals, the act is proved beyond reasonable doubt.

The distinction is significant for the trial courts to draw a line between indecent acts or attempted defilement offences. This restatement of the Law on penetration as deprived under Section 2 of the Sexual Offences Act was reaffirmed by the court in the authorities of **Mark Oiruri Mose v R {2013} eKLR, Erick Onyango Ondengu v R {2014} eKLR** with these principles in mind the question to be answered is whether the prosecution proved penetration as the key ingredient of the offence.

As already reappraised, the act of sexual intercourse and involvement of the appellant was cogently given by the complainant. The evidence by the complainant specifically referred to the incidents of 20.11.2015 at Watamu when she was part of the tycondo team from her school and the appellant being their coach accompanied them to the competition set to be held in Watamu. The complainant's testimony indicated that after the games, the appellant who organized the room she was to spend the night with her schoolmate **(R)** snick into the room and had carnal knowledge. The complainant also outlined the events at the house of the appellant.

Further the medical evidence by **PW7** found injuries to the hymen and the fact of pregnancy to confirm that complainant was sexually penetrated. On the other hand, the complainant pointed out to the trial court steps taken by the appellant to compel her take some medication which was meant to interfere with the intra uterine membranes to trigger an abortion. This fact was also confirmed by the medical evidence from PW7.

Secondly, circumstantial evidence from **PW4** ascertain that in the evening of 20.11.2015 after the day's activities, the appellant was the last person who left with the complainant to go and show her where to spend the night. It's this same night the complainant alluded to as to the time the appellant defined her in the same room he had procured for them to spend the night with another girl. It seems that there was a conspiracy between the complainant's school mate **(R)** and the appellant because her supposed roommate never made it to the room. In support of the sufficiency of the prosecution evidence to proof penetration, I place reliance at the following cases. In the case of **AML v R {2012} EKLR.** The court stated interlia as follows:

> ***"The fact of rape is not proved by way of the report of DNA evidence but by way the complainant testimony or other independence evidence to that effect commenting on the same issue."***

The court in **Kassim Ali v R CR Appeal No. 84 of 2005** at Mombasa stated that:

> ***"The absence of medical examination to support the fact of rape is not a decisive as the fact of rape can be proved by the oral evidence of a victim of rape or circumstantial evidence."***

I may also add, that in the instant appeal giving by the provisions of Section 124 of the Evidence Act and the record, the act of sexual intercourse against the appellant was corroborated in the form of PW4 testimony and the medical reports admitted in evidence by PW7 testimony without any objection.

In the persuasive Judgment by the Superior Court in **Zambia in Katebe v People 19775 ZR 13** the court stated as follows:

"Where there can be no motive for a prosecution deliberately and dishonestly to make a false allegation against an accused, and the case is in practice no difference from any others in which the conviction depends on the reliability of her evidence as to the identity of the culprit, this is a special and compelling ground which would justify a conviction on un corroborated testimony."

On consideration of the evidence relying on this authority, the appellant was games instructor of the complainant. She had a teacher-pupil relationship. They had built trust and confidence together during this presumed role-model arrangement in which pupils look up to their

teachers for instructions and guidance. It is therefore not in dispute that the complainant would have had no hesitation or fear for the appellant to arrange the accommodation facility in the night of 20.11.2015. The appellant must therefore controvert the complainant evidence that on the material night he did not proceed to the same room to have carnal knowledge of the complainant. It is against this background that these facts by the prosecution in so far as the charge is concerned proved sexual intercourse. Thus the penetration and emission of semen into the genitals of the complainant resulted in the pregnancy notwithstanding that it is not a decisive factor for the offence of defilement.

Now I come to the second ingredient of the charge, age of the complainant subject matter of this appeal. In the case of **Francis Omuroni v Uganda Criminal Appeal No. 2 of 2000** the court held:

> ***"The age of the victim or may also be proved by birth certificate, the victim & parents and guardians and by observation and common sense."***

The complainants in the case at the trial submitted her own birth certificate to proof that she was 15 years old at the time the appellant committed the offence. In the circumstances, there is no dispute that she was aged below 18 years old and by carnal knowledge falls with the provisions of Section 8 (1) and Section (4) of the Act.

As stated in the Judgment of the trial court the appellant conviction on identification was based on the testimony of the complainant; even though her evidence was that of a single witness. There is no question that law on identification or recognition on such matters as are portrayed in this appeal is well settled. The courts have on several occasions left no chance to declare in no uncertain terms the guidelines and principles to support or disqualify for that matter identification evidence.

In the case of **Wamunga v R {1989} KLR, R v Turnbull & Others 3 ALL ER 549:**

> ***"Deals with the conditions that a court has to consider with faced with the issue of identification and its correlation in placing the assailant at the scene.***
>
> ***First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, which the defence alleges is mistakes, the judge should warn, the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need of such warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should decree the jury to examine closely the circumstances in which the identification by each witnesses came to be made. How long did the witness have with the accused under observations? At what distance? In what light? Was the observation impeded in anyway, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If any mainly, had he any special reason for remembering the accused. How long elapsed between the original observations and the subsequent identification to the police was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance it would seem from the testimony of the complainant and the Judgment of the lower court. This was a case of recognition."*** In the case of **Anjononi v R 1976 -80 IKLR** the Court of Appeal held:

> ***"A case of recognition not identification of the assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the perianal knowledge of the assailant in some form or another."***

In the instant appeal throughout the evidence of the complainant she describes the appellant as her coach in tycondo at [particulars withheld] Primary School. The appellant was therefore well known to the complainant prior to this incident at Watamu. The evidence by the complainant clearly carries out that in the evening it was the appellant who was in charge of accommodation facilities. This evidence is corroborated by a fellow pupil (PW4) who also participated in the games at Watamu. The familiarity of the appellant with the complainant is therefore not in doubt when it came to the night incident appellant know the room and surrounding very well. The circumstances are that he made it look that the complainant would spend the night with her fellow student by the name (R) but unknown to the complainant a conspiracy was already in place for the appellant to sleep with her in that same room. Indeed, from the testimony of the complainant, she never came to know of what happened to (R) and had she vacated the room for the appellant the basis of the complainant recognition was further strengthened with the aid of electricity light in the room which apparently was structured on by the appellant. At this time when the appellant was next to the complainant in the bed she was sleeping in there was nothing to impair her visual identification of the appellant. She was to observe him both physically and including voice recognition as he pushed the complainant for sex favours. The distance for intimate relationship to occur is normally negligible.

This same appellant continued with the amorous behavior even after 20.11.2015 acknowledging that all was well with the complainant until PW2 hacked the incident making it a public case. The trial court considered any such defence offered by the appellant with regard to recognition evidence.

The appellant reiterated that despite making arrangements for one the team members of his school there is nothing he did on the allegation of having sex with the complainant. He denied that he slept in the same room with the complainant. He relied on the period after Watamu to demonstrate that the arrest came to him as a surprise for an offence he never committed at all.

On the alibi defence of the appellant, I bear in mind the nexus of the complainant's evidence and circumstantial evidence from PW2 who saw them leave together after the day's activities on 20.11.2015. The inculpatory factors available on record are incomparable with the innocence of the appellant and incapable of explanation (including alibi defence) upon any reasonable hypothesis than that of guilt of the appellant (see **Musili Tulo v R 2014 eKLR)**

Alibi defence means elsewhere it presupposes that on 20.11.2015 the appellant had no possibility of committing defilement with the complainant because he was in another place and not the room alleged by the complainant in considering whether or not an alibi defence satisfies the criteria in law, the Supreme Court of Nigeria in the case of **Mohammed v State {2015} LPELR 24397SC** stated that:

> ***"the defence of alibi means that at the time the crime was committed accused person was not at the scene of the crime, and so it is impossible for him to be guilty of the crime. The onus of establishing alibi is on the accused person since it's a matter within his perinal knowledge. The defence of alibi would succeed if the earliest opportunity after his arrest, he gives to the police sufficient particulars of where he was at the time the crime was committed and police investigations of his alibi turns out to be true. The defence of alibi would crumble like a pack of cards where there is a stranger evidence against it."***

Although the accused has a right to raise any defence in law to a criminal charge, the success or failure of such defence is dependent on the burden of proof vested with the prosecution to proof the offence. See the cases of **(Woolmington v DPPAC 462 and Miller v Minister of Pensions {1947} 2 ALL ER 372).**

In the instant case, I am persuaded that the complainant evidence and that of PW4 placed the appellant at the scene of the crime. There are no discrepancies or inconsistences in the persuasive case which creates a doubt that the complainant may have been sexually assaulted by someone else beside the appellant.

So far as this appeal is concerned, I am satisfied that the evidence as a whole and the trial court making its finding appropriately determined that the case against the appellant was proved beyond reasonable doubt.

In my considered opinion as an appellate court exercising such jurisdiction there is no evidence of the Learned Magistrate having misdirected herself on the evidence or application of the relevant principles to the case to warrant interference of the Judgment. I find that the appellant was rightly convicted based on overwhelming evidence admitted by the trial court.

On sentence, defilement is a serious offence against the right to privacy and human dignity of vulnerable members of the society. In a proper case the courts in this country should do all within their power to keep sex predators off society, where there is substantial proof of intentional and unlawful act of defilement without any justification to that extent, the sentence also is affirmed for its neither punitive nor excessive.

Accordingly, the appeal has no merit and I order it dismissed.

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

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R. NYAKUNDI

JUDGE