REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATA SIAYA

CRIMINAL APPEAL NO. 13 OF 2018

GORDON OMONDI MANYANGE..... APPELLANT

VERSUS

REPUBLIC……..……..PROSECUTION

(Being an appeal from the sentence and conviction of Bondo P.M.CRC No. 1272 of 2016 dated 4.12.2017 before Hon. M. Obiero - PM)

JUDGMENT

1. The appellant herein **GORDON OMONDI MANYANGE** was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. P**articulars are that on the night of 27th and 28th December 2016 at [particulars withheld] Estate, Bondo location, Bondo Sub-County within Siaya County unlawfully intentionally caused his penis to penetrate the vagina of VAO [full name withheld] a child aged 12 years.

2. The appellant was further charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars are that on the night of 27th and 28th December 2016 at [particulars witheld] Estate in Bondo Sub-County within Siaya County, willfully and intentionally touched the vagina of VAO a child aged 12 years.

3. The Appellant denied the charge and the prosecution called five witnesses who testified in support of their case.

4. After the full trial, the appellant was found guilty of the main charge of defilement. He was convicted and sentenced to serve the mandatory minimum sentence of twenty years imprisonment. Being aggrieved by the conviction and sentence, the appellant filed this appeal setting out the following grounds of appeal:

> *1. **THAT**: the learned trial magistrate erred in facts and in law by not observing that the medical examination was only done on one party in regard to the criminal case for factual evidence in the circumstances of the case.*
>
> *2. **THAT**: the learned trial magistrate also erred in facts and in law by failing to observe that there existed a grudge between the appellant and the complainant's family.*
>
> *3. **THAT**: the learned trial magistrate erred in facts and in law failing to consider the evidence as a whole and especially for the defence.*
>
> *4. The right of **habeas corpus**.*

5. This being a first appeal, this court is expected to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See **Okeno v Republic [1972] E.A. 32.**

6. Revisiting the evidence before the trial court, The testimony of PW1 VA on oath after voire dire examination was that on 27th day of December, 2016 at about 8.00 p.m. the appellant called her and told her that he wanted to send her to the shop. She explained that she accepted to be sent and the appellant held her hand and they walked together. On the way, the appellant put her on the ground and that he removed her pant and put the penis into her vagina. She explained that she did not scream because the appellant threatened to kill her. After that, she went back to their house. The following day, she explained to her sister what had happened and her elder sister QA informed her father. Together they went to the appellant's home and her father asked him what happened. Later, she was taken in the hospital where she was treated and taken to the Police station where she was issued with a P3 form which was filled by the doctor after she was examined and that she wrote a statement with the police. She identified the appellant in court.

7. In cross examination she reiterated her testimony in chief and stated that blood came out of her during the incident and that she did not

scream for help because the appellant threatened to kill her. She denied being told by her father to say what she was saying in court.

8. **PW2 QA** testified on oath that she was a salonist and the elder sister to PW1. She stated that on the 27th day of December 2016, she was in the house together with her other siblings. In the process, the complainant went away without informing her where she was going. She stated that she went in bed before the complainant returned. On the following day at about 6.00 am, she asked the complainant where she had gone and the complainant explained to her that she had gone to Colleta's home and Baba Adoyo took her to the bush and defiled her. When their father returned, PW2 informed him and he went to the home of Baba Adoyo and they proceeded to the police station. PW2 did not know Baba Adoyo.

9. **PW3 POO** working as a security guard testified that the complainant was his daughter. He stated that on 27th day of December 2016 at 6.00 p.m., he went to his place of work and he left the children at home. When he returned the following day in the morning he found the complainant crying. He stated that when he asked the complainant what had happened the complainant told him that Gordon that is the appellant took her to the bush and defiled her. After that, he went to the village elder and made a report. Later, he escorted the complainant to the police station where he reported the incident. He subsequently took the complainant to the hospital where she was examined and the P3 form filled. He stated that the complainant was aged 12 years old. That she was born on 10/8/2004. He identified her Birth Certificate in court. He stated that he knew Gordon the appellant by appearance as a neighbour. In cross examination he stated that the complainant took him to the bush where the appellant had alleged defiled her.

10. **PW4 David Okoth a Clinical Officer** based at Bondo District hospital testified on oath and stated that 'the complainant aged about 12 years was seen at the hospital –Bondo on 28/12/2016 as outpatient No. 32094 on allegations that she was defiled by on 27/12/2016 from 7pm to midnight. That he examined complainant and found that the external vaginal wall was inflamed but no laceration. There was discharge but no obvious bleeding. Her hymen had been broken. Laboratory tests showed no presence of spermatozoa. He concluded that there was penetrating sexual intercourse and he produced the P3 form as an exhibit No.1.

11. In cross examination he stated that the complainant was accompanied by her father.

12. **PW5 PC OMUDHO OKWARO** testified on oath that he investigated the case. He stated that on the 28th day of December 2016, he was at the police station when he received the complainant and the appellant. He stated that it was alleged that the appellant had defiled the complainant. He rearrested him. Later, he issued the complainant with a P3 form which was subsequently filled at BONDO District Hospital. He stated that during the investigations, he found that the appellant was the complainant's neighbor. He obtained a certificate of Birth in respect of the complainant and he produced the same as exhibit 2. In cross examination, he denied being bribed by the complainant's father.

13. At the close of the prosecution's case, the appellant adduced unsworn evidence. He denied the offence. He stated that prior to his arrest, the complainant's father had warned him of serious consequences.

SUBMISSIONS

14. In support of this appeal, the appellant filed written submissions which he adopted as canvassing the appeal, denying the offence and maintaining his innocence. He submitted under two headings:

15. **Age of the complainant:** the appellant submitted that since the birth certificate showed that the complainant was born on 10/8/2004, she was aged 11 years and 4 months and not 12 years as the offence allegedly occurred on 27/8/2016. That the birth certificate was issued to fix him as it was made on 18/1/2018, weeks after his arrest. He relied on **Francis Omuroni v Uganda CA No. 2 of 2000** where it was held that in defilement cases age of the complainant was crucial and that only the doctor could determine the age of the complainant in the absence of any other evidence. He submitted that the birth certificate should not have been relied upon. He claimed that a birth notification or baptismal card should have been produced in evidence.

16. **On contradictions**: the appellant submitted that the evidence of PW1,2,3and 5 was untrustworthy because it was not clear why the complainant left her home and when she returned home and told her elder sister about the incident. That at 8pm there were people still walking around hence they should have been called to testify on what they saw. That PW1 claimed she did not know the appellant yet it was alleged that he was a neighbor to the complainant. That it is not clear if the complainant went to the home of appellant or whether he went for her and that it is not clear whether the incident took place the same day or the following day.

17. That PW1 claimed spermatozoa was found on her but the P3 form showed absence of the same. Further, that PW3 said the child was taken to hospital but PW1 said she was taken to hospital by her father. That it is not clear what time the complainant was defiled and that medical evidence showed that her genitalia was normal without lacerations. That a 12 year old who had had no prior sexual intercourse could not have failed to have fresh tear of the hymen and discharge of blood and that no clothes were exhibited and that neither was DNA test done or high vaginal swab done to connect the appellant with the alleged offence. That there was no evidence of penetration. That he had a boundary dispute and work related issues with the complainant's father.

18. **On the part of the prosecution,** Mr. Okachi submitted that the victim and the appellant were neighbors hence they were no strangers to each other. He relied on the testimony by the prosecution witnesses on record as adduced adding that PW2 and PW4 corroborated the evidence of PW1 and that the issue of a grudge was a cover up.

19. **On sentence,** it was submitted that it was lawful hence it should be upheld. Counsel urge this court to dismiss the appeal herein.

20. In a rejoinder, the appellant submitted that had there been defilement, spermatozoa or blood stains would have been found on the complainant. He insisted that there was no injury to her vagina.

DETERMINATION

21. I have carefully considered the evidence on record, the grounds of appeal and submissions for and against the appeal. In my humble view, the main issue for determination is whether the prosecution proved their case against the appellant beyond reasonable doubt that it was the appellant who defiled the complainant. There are other the ancillary rhetoric questions posed by the appellant in his submissions which I will consider as I determine this main issue.

22. On whether the prosecution proved its case against the appellant beyond reasonable doubt, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The subsection (1) creates the offence of defilement of children whereas subsection (2) thereof is the penal provision where the child proven to have been defiled was aged between 12 years and 15 years old, which punishment is twenty years imprisonment.

23. There are three main elements of defilement namely: proof of age of the complainant, penetration and positive identification of the perpetrator. On proof of age of the complainant, the charge sheet states that the complainant was aged 12 years. PW1 during voire dire examination stated that she was aged 12 years. The P3 form dated **28/12/2016** states that the complainant patient was aged 12 years. The evidence of PW3 POO was that PW1 was aged 12 years and that she was born on **10/8/2004** as per the birth certificate identified and later produced by PW5 the investigating Officer PC Omudho Okworo. The birth certificate is dated 18/**01/2017** which means it was issued after the date of the alleged offence.

24. The appellant did not challenge the testimony of any of the prosecution witnesses who testified on the age of the complainant. However, he raised it in this appeal claiming that the birth certificate was issued long after the alleged commission of the offence and secondly, that going by the birth certificate, the complainant was aged 11 years and not 12 years.

25. Starting with the latter submission that the complainant must have been aged 11 years and not 12 years, and going by the birth certificate No. [particulars withheld] produced in evidence as an exhibit, the complainant was aged 12 years and 17 days if she was born on **10/8/2004.** On the other hand, the claim that the prosecution did not prove the age of the complainant or that the birth certificate was not genuine because it was issued after the alleged incident in my view has no merit. The charge sheet which was signed on 30/12/2016 shows that the complainant was aged 12 years. Similarly, the P3 form dated 28/12//2016 gives the same age. The birth certificate was issued later but the view of this court is that age can be proved in many other ways and not just by way of a birth certificate. PW2 the complainant's biological father clearly stated that the complainant was aged 12 years and this is what informed the police to arrest and charge the appellant even before obtaining the birth certificate. There is nothing to show that the age of the complaint was fabricated in order to fix the appellant. The alleged bad blood was in my view a fabricated theory put forth by the appellant as there was no material evidence that the complainant or her father could have given false evidence against the appellant. s**ee Chrispine Waweru v Republic [2015]e KLR -Phaustina Mghanga v Republic , Mangunyu v R, Alphayo Gombe Okelo v R [2010]e KLR.**

26. **In Faustine Mghanga v Republic (Supra) Nzioka J stated, and a**

I agree that:

> ***"I do appreciate the importance of age assessment in such cases. But honestly, who can know the age of a child better than the mother of a child and or the child (if of age?). I personally take judicial notice of the fact that most people in rural areas (and even urban areas) would not purpose to have a birth certificate unless required for a specific purpose…"***

27. In **Mangunyu vs Republic, [supra]** Hon. Justice W. Ouko, (as he then was) quoting reference from **I.E. Collingwood's Criminal Law of East and Central Africa (London: Sweet and Maxwell) 1967 Ed of page 123** observed:

> ***"Age may be proved by a birth certificate, or particularly in the case of Africans, by the evidence of a person present at birth."***

28. In **Alfayo Gombe Okello vs Republic [2010] eKLR and JWA Vs Republic [2014] eKLR** the Court of Appeal stated that the age of a child as stated in the P3 Form and produced in court can be used to ascertain the age of the child.

29. In In **Joseph Kieti Seet v R [2014]** the court held that "It is trite Law that the age of a victim can be determined by medical evidence and other cogent evidence. In **Francis Omuroni vs Uganda, CR. A 2/200** it was held:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense. …."***

30. Accordingly, iam persuaded that the age of the complainant in the instant case was proved to be 12 years old hence within section 8(3) of the Sexual Offences Act.

31. On proof of penetration of the complainant, PW1 stated how on 27/12/2016 at 8pm she was in her home at [particulars withheld] when the appellant took her with him claiming he was going to send her to the shop and on the way he held her hand, told her not to scream, threatened to kill her, put her on the ground by force and removed her pant, lay on top of her and put his penis into her vagina. She felt pain but. He later abandoned her at the scene. She went to her home and informed her elder sister of what had happened to her and the following day they informed her father who had been away on duty as a guard.

32. PW2 testified that on 27/12/2016 PW1 went out but did not say where she was going so she slept and the following morning she asked PW1 where she had gone and PW1 revealed to her what the appellant had done to her. PW4 the clinical Officer who examined PW1 confirmed that she had had penetrative sexual intercourse hence penetration was achieved as the external genitalia was inflamed and the hymen was not intact. There was discharge but no obvious bleeding.

33. Albeit the appellant claims that there was no spermatozoa to prove defilement, there is no legal requirement under section 2 of the Sexual Offences Act that for penetration to be achieved there must be spermatozoa. In addition, on allegation that DNA test was no done on the appellant to determine if he was the person who defiled the minor, there is no mandatory requirement that DNA test must be done on the appellant to establish that he was responsible for the offence. The provisions of section 36 of the Sexual Offences Act are in permissive and not mandatory terms.

34. Section **36 (1) of the Sexual Offences Act** Stipulates:-

> ***"36. (1). Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence."***

35. The above provision was considered by the Court of Appeal in the cases, among them- Robert **Mutungi Mumbi v R Cr. App. No. 52/2014 (Malindi)** and **Williamson Sowa Mwanga v R Cr. App. No. 109/2014** (Malindi). In the former case of **Mutungi Mumbi v R**, the Court of Appeal stated:

> ***"Section 36 (1) of the Act empowers the Court to direct a Person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."***

36. In the latter case of **Williamson Sowa Mwanga v R** the Court of Appeal stated as follows on the issue of paternity and defilement:

> ***" …. It is patently clear to us that whilst paternity of PM's child may prove that the father of the father of the child had defiled PM. that is not the only evidence by which defilement of PM. can be proved. The fact, as happens in many cases that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the Appellant would at mot determine whether he was father of PM's child, which is a different question from whether the Appellant had defiled PM. As the court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured. (See Twehangare Alfred v Uganda CR. APP No. 139 of 2001." It is partly for this reason that Section 36(1) of the sexual offence Act is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence to order that samples be taken from him for forensic, scientific or DNA testing."***

37. Accordingly, I find and hold that failure to undertake a DNA test on the appellant was not fatal to the prosecution's case. Further, the allegation that the complainant did not bleed hence she must have engaged in previous sexual intercourse does not exonerate the appellant from culpability as section 33 of the Act excludes such evidence of previous sexual activity.

38. On alleged contradictions in the prosecution's case, I have exami9ned the evidence adduced by the prosecution witnesses PW1, PW3 AND PW2 and I find no material contradiction that would vitiate the conviction of the appellant. I find and hold that the prosecution proved penetration of the complainant beyond reasonable doubt.

39. **On identification of the perpetrator,** it is not in dispute that the appellant and the complainant are neighbours. It is also not in dispute that the complainant knew the appellant prior to the date of the incident. The complainant testified that the appellant went to her home and asked her to accompany him so that he could send her to the shop and that it was while they were on the way that he pulled her and defiled her after threatening to kill her if she screamed. Therefore, as established above, although the appellant claimed that there was no DNA tests conducted to determine if he was the person who defiled the complainant, the trial magistrate who heard and saw the complainant testify believed that she was telling the truth. Albeit the appellant claimed that he was framed by the complainant's father because they have a boundary dispute, and that the complainant's father had threatened him, there was no evidence suggestive of that dispute or that the complainant's father had any reason whatsoever to frame up the appellant with such a heinous offence.

40. The trial court stated:

> ***"I have carefully considered the evidence of PW1 against the evidence of the accused person, I wish to point out that I had the opportunity of observing the demeanour of the PW1 during her testimony. I did not note anything that could suggest that she was not saying the truth. As such, I am of finding that the defence by the accused person that the complainant's father had threatened him has no basis."***

41. I have no reason to differ from the findings of the trial magistrate who had the opportunity to hear and see the complainant as she testified and tested her demeanor.

42. ***For the above reasons, I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt and that***

the appellant's defence was a sham. I find this appeal against conviction devoid of merit. I dismiss it.

43. **On sentence**, section 8(3) of the Sexual Offences Act is the penalty section where an accused person is convicted for the offence of defiling a child aged between 12 and 15 years. The trial magistrate convicted the appellant and sentenced him to serve minimum mandatory prison term of 20 years.

44. This was after considering the address by the prosecution that the appellant was a first offender and the appellant's mitigation wherein he prayed for leniency, that he was a first offender and that he has children who depend on him. In his sentencing remarks of 1.2.2018 the trial magistrate stated that the sentence provided for in section 8(3) of the Sexual Offences Act was mandatory and not discretionary hence he had no discretion.

45. That was so then but the situation has since changed with the Court of Appeal applying the principles enunciated in the **Francis Karioko Muruatetu & others v Republic SC Petition No. 15&16 of 2015** where the apex court held that the mandatories of death sentence was unconstitutional as it deprives the trial court of the judicial discretion to mete out appropriate sentences having regard to the circumstances of each case. In addition, the Supreme Court held that the mandatoriness of sentence deprived the accused person of the right to mitigate. This decision has been followed by the Court of Appeal in several decisions including Jared **Koita Injiri v Republic CA (KSM) CRA NO. 93 of 2014.**

46. For the above reasons, albeit the sentence meted out was lawful, but it was not mandatory. However, there can never be any justification for a sane man defiling a child aged 12 years if he has his own children whom he is expected to protect from harm. Sexual offences leave lasting trauma on the victims. The offence is heinous and therefore deterrent sentence is called for to protect the children of such sex pests, it is important that the appellant be kept away from the society for some time for him to be rehabilitated and to reform. For that reason, ***I exercise discretion, having regard to the mitigations given by the appellant in the trial court and resentence the appellant to serve 15 years imprisonment. As the appellant had jumped bail while on trial, the sentence to run from the date of conviction and sentence in the lower court.***

Dated, Signed and Delivered at Siaya this 17th Day of December, 2019

R.E.ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for the Respondent/State

CA: Brenda and Modestar