REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 6 OF 2018

BETWEEN

BENSON NGANGA NYGARUIYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate at Loitoktok presided over by Hon. Okuche in a judgment dated 13th October, 2017)

JUDGMENT

The appellant Benson Nganga Ngaruiya has appealed against his conviction and sentence of 20 years for the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. Being aggrieved with both conviction and sentence through learned counsel Mr. Mbiyu Kamau a memorandum of appeal containing seven grounds challenging the judgment was filed before the High Court. In summary, the appellants major complaints on the trial Magistrate findings are in respect of the charge not proved beyond reasonable doubt, that the learned trial magistrate misdirected himself on various aspects of the evidence like identification, relying on inconsistent and contradictory evidence, taking into account extraneous matters not part of the evidence and failing to factor in mitigation during sentence and thereby arriving at a wrong decision.

Backgrounds:

On 6th April, 2017 the appellant was arraigned before the Senior Resident Magistrate Court at Loitoktok charged of two counts under the sexual offence Act No. 3 of 2006.

The first count was that of defilement of a girl contrary to Section 8(1) (2) of the Sexual Offences Act. The particulars of the offence alleged that on 26th March 2017 in Kajiado south District with Kajiado County the appellant intentionally caused his penis to penetrate the vagina of A.W.M. a child aged 15 years.

Count II – causing indecent Act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. On this it was alleged that the appellant on the material day as in count 1 intentionally touched the vagina of A.W.N. a child aged 15 years with his penis.

The appellant pleaded not guilty to both counts. The prosecution being conducted by Mr. Marete for the state centered their case on seven witnesses.

Brief summary of the Evidence at the trial Pw1 A.W.M. testified as to the events of 26th March, 2017 when she was called by the appellant to his shop. On arrival she was invited to go to the back room where the appellant demanded for sex. It was at that moment according to pw1 she removed her inner wear so did the appellant and both of them engaged in sexual intercourse. Pw1 further stated before the trial court that prior to the insertion of the appellant's penis to her genitalia, he put on a condom. In the evidence of pw1 when they were done she was released to go back home. Apart from the 26th March 2017 pw1 further testified that on 31st March 2017 she also passed through the appellant shop to collect her sweater which she had previously left in premises. It is at that moment her father J M found her at the shop.

This incident of 31st March, 2017 according to pw1 let to the matter being reported to the police who commenced investigations.

Pw2 further testified that he had received information that her daughter pw1 was having an affair with the appellant. In pw2 testimony he urged a police to conduct his own investigations to verify the information. That is how he tracked the complainant pw1 to the shop of the

appellant on 31st March 2017. Pw2 further told the trial court that he did involve the police who issued the p3 to pw1 to be examined at Loitoktok hospital. The complaint involving an affair between pw1 and the appellant came from the school as confirmed by the teacher S B pw3.

Pw4 Sgt Mohamed Abdullahi of Illasit police post testified that a report on the alleged sexual assault had been made by the parents and teacher of pw1 when he heard from them and the description of the suspect he went forward and effected an arrest against the appellant.

Pw5 Johnson Kulale who testified as the area Chief also confirmed to have received information from the head teacher of pw1 about the love affair. When the appellant got arrested by PW4 he therefore instructed that he be taken to the police station.

Pw7 Cpl Halima Osman who investigated the case testified on the nature of the evidence collected and recommendation made to charge the appellant. In her testimony a birth certificate of pw1 was received from pw2 indicating that she was 15 years old. PW6 further stated that the p3 form issued was duly filed by pw6 – Dr. Yusub Abdi Omari. The doctor's evidence was to the effect that on examination of pw1 she was found to have suffered grievous harm and probable type of weapon used was a human penis. The significant findings by pw6 were that labia majora and labia minora were not intact and the hymen was broken. In support of the medical diagnosis and treatment the p3 and post rape case forms were tendered in evidence as exhibit 1 and 2 respectively.

At the close of the prosecution case the appellant gave in sworn defence. He testified that he was called by the Chief of the location only to be told of the defilement of a minor. He denied committing the offence and stated it was a frame-up. The learned trial magistrate analyzed the evidence as placed before him by the state and the defence.

In his judgment he pronounced himself as follows: ***"I am satisfied that the prosecution has proved beyond reasonable doubt against the accused in the principal charge. I shall proceed to convict him accordingly pursuance to Section 215 of the Civil Procedure Code. I have considered the mitigation of the accused person. He is sentenced to serve twenty years imprisonment. 14 days ROA Explained***"

Submissions on appeal by the appellant:

Mr. Kamau argued the appeal on behalf of the appellant. In his submissions he pointed out various deficiencies in the proceedings rendering the trial unfair. Mr. Kamau contended that the language of interpretation and amendment of the charge requirements were flouted by the trial magistrate. Mr. Kamau contended that the record does not show consistence on the language used in some parts of the trial. He further argued and submitted that the state had sought leave to amend the charge twice and the said leave was granted but none of those occasions a fresh charge was read to the appellant. The appellant was not invited to plead afresh as provided for under Section 214 of the Criminal Procedure Code.

Mr. Kamau then submitted that there were discrepancies in the record which occasioned prejudice to the appellant. Mr. Kamau queried the learned trial magistrate for failing to inform the appellant of his right to legal representation under Article 50(2)(h) of the constitution. Mr. Kamau argued and submitted that the appellant was charged with a serious offence carrying a minimum sentence of twenty (20) years. Further he argued as indicated by Article 50 2(h) this was meritorious case for assignment of an advocate by the state as substantial injustice was likely to result. Mr. Kamau further contention was on the failure of the prosecution to call evidence on the pieces of condoms recovered from the appellant's house. That evidence according to Mr. Kamau was vital bearing in mind that pw1 had explicitly mentioned it in her testimony. Mr. Kamau also took issue with the medical evidence of pw6 who examined the complainant pw1 after one and half months from the day of the alleged incident. Mr. Kamau argued that there was nothing in the p3 or post rape care form connecting the appellant with the offence.

Mr. Kamau final submissions on the appeal was the aspect that the trial magistrate imported extraneous matters in his judgment to convict the appellant. Mr. Kamau submitted that contrary to the findings of the trial magistrate pw2 and pw3 did not corroborate pw1 on the sexual offence of defilement.

In support of the submissions he placed reliance on the following cases: ***John Michumbu v Republic Criminal appeal no. 184 of 2009, Edwin Nyandieka Omweri v Republic Criminal appeal no. 247 of 2011, Swalubu Simbani Simiyu and another v Republic Criminal appeal no. 243 f 2005***.

Mr. Kamau urged this court to allow the appeal on both conviction and sentence.

Submissions by the respondent counsel:

Mr. Akula, the Senior Prosecution Counsel on behalf of the state submitted that the prosecution case from the 7 witnesses was not controverted by the appellant at the trial. He further contended that the prosecution proved all the elements of the offence on defilement against the appellant.

Mr. Akula further submitted on the question of amendment which only dealt with topographical error and not the substance of the charge. He invited the court to apply Article 159(1) of the constitution on substantive justice. Mr. Akula argued that and contended that there was no language barrier that could be safely said to have disadvantaged the appellant. Mr Akula's contention was that there is an inevitable inference that the appellant took part in the proceedings because he was able to understand the language indicated as Swahili. On legal representation Mr. Akula was of the view that the work of a trial magistrate is not to advice accused persons and therefore he cannot be faulted on the issue of legal representation.

According to Mr. Akula whether such right has prejudiced the appellant has not been demonstrated on the facts and circumstances of this case. Mr. Akula contended that there was satisfactory evidence to prove the charge of defilement and place the appellant at the scene. He urged this court to dismiss the appeal.

Analysis and resolution

I have set out the evidence, arguments and submissions advanced by legal counsel for both the appellant and the respondent.

It is now my onerous duty to evaluate the evidence and the submissions and come up with my own findings and conclusions on the matter. The principles to guide this court are set out in the case of ***Shantillal Manelkal Ruwai v Republic 1957 EA570*** on the duty of an appellate court which provides *interalia* that:

> **"On first appeal from a conviction by a judge or magistrate setting without a jury the appellant is entitled to have the appellate courts own consideration and view of the evidence as where and its own decision therein. It has the duty to retain, the case and reconsider the materials before the Judge or magistrate with such other materials as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully highlighting and considering it……." Shall apply in this appeal**.

As I have outlined the 1st primary issue which ought to be answered is whether the prosecution proved its case beyond reasonable doubt to warrant this court to affirm the judgment of the trial court dated 13th October, 2017.

In line with the above the second issue whether the learned magistrate erred in law and fact for not reading afresh the amended charge to the appellant.

Thirdly, whether noncompliance with Article 50 2(1) and (h) of the constitution on legal representation rendered the trial unfair and detriment to the administration of criminal justice.

Finally, whether the language of interpretation under Article 50(m) of the constitution was infringed at the trial of the appellant.

It is settled that under Section 8(1) of the sexual Offences Act the prosecution has a duty to prove the following ingredients beyond reasonable doubt to sufficiently sustain a conviction against an accused person.

> **a. Proof of penetration of the male genital organ with that of a child aged below the age of 18 years**
>
> **b. Proof of the exact age of the victim of the offence.**
>
> **c. That the accused before court was the perpetrator who committed the offence**.

I will then analyze the above elements vis a vis the evidence and submissions on appeal stated in Ruwal case (supra).

a. Penetration:

Section 2 of the sexual offences Act defines "**penetration to mean – the partial or complete insertion of the genital of a person into the genital organs of another person**." Under this definition it is clear that the criminal act will involve exposure, of the offender's genital, contact with the female genital and subsequent penetration. So when the penis reaches the vulva or between the labia majora major of the female genital organ, penetration is said to have occurred.

Mr. Kamau learned counsel for the appellant submitted that the testimony of the complainant minor, pw1 was scantly to prove this element. He also took issue with the non-production the condoms as exhibit or a DNA profile from a government analysist. Learned counsel argued and submitted that the medical report cannot be relied upon because it was prepared after one and half months after the alleged Sexual Act.

It was the contention of learned counsel that there exists material in consistency and contradictious that puts the prosecution case in doubt which should be resolved in favour of the appellant. On this learned counsel for the respondent urged this court to find that no material contradictions exist on all the seven witnesses to warrant any doubt to be resolved in favour of the appellant.

It is trite that section 124 of the Evidence Act cap 80 of the Laws of Kenya provides the legal criteria on admission of the evidence in sexual offences. The first requirement is for the need for corroborating before a conviction can be entered while the proviso has an exclusion clause which provides as follows:"**That where in a criminal case involving a sexual offence the only evidence is that of the alleged victim and proceed to convict the accused person if, for reason to be released in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

What the proviso of Section 124 attests to is the fact that the victim testimony of sexual assault is the best evidence to establish the element of penetration, or indecent act. The specific details on how the victim was treated, injured, felt or affected by the sexual ordeal which is highly relevant can only be told by her in exclusion of anyone else.

In the present case pw1 gave evidence on her relationship with the appellant which had been existence for a while before the 31st March, 2017. She narrated to the trial court incidents of sexual intercourse with the appellant, including a promise to marry at the end her class eight studies. How the appellant invaded her body and this conduct resulting in penetration of her genital was laid bare before the trial court.

On the evidence of pw2 J.M.M the father to pw1 and pw3 Scholastica Bosire, the teacher both of them testified exhaustively on the information at their disposal about the sexual relationship between pw1 and the appellant.

In my view the evidence of pw1 leaving her sweater in the house of the appellant in a previous incident, her presence on 31st March, 2017 following a tip off to pw2 by the school administration, is additional circumstantial evidence under Section 8 of the Evidence Act. What the evidence establishes irresistibly is that the complainant pw1 talking to the appellant at the scene of the crime was in pursuit of the crime of sexual intercourse.

The medical Doctor **Omar Yakub Oabdi** who testified as pw6 gave evidence as to the positive findings on the genital of the complainant pw1. In particular to the labia Majora and minora membrane and the broken hymen. He also went further and identified the probable weapon of penetration as the human penis. The actus reus of the offence therefore was the actual penetration however slight into the genital of the complainant. It is true the p3 was prepared after one and half months from the day of the crime.

The issue as whether when the hymen of a victim of a sexual offence was broken or raptured sometimes raises pertinent questions and its relevance to the age of the offence of defilement. In the case of ***Mukasa Evaristo v Uganda Criminal Appeal No. 53 of 1999*****,** the court held as follows: **"Consequently, the question of when the hymen of a victim of defilement in a particular case was ruptured is not essential for arriving at a verdict. Each sexual act with a child below 18 years constitutes an independent offence and the fact that a child had, prior to the occurrence of event upon which an accused has been arraigned before court, lost her hymen would not offer a defence to the accused on a charge of defilement. What would be of essence is whether, on the evidence available, the prosecution has proved beyond reasonable doubt, that the accused before Court had had sexual intercourse with a child. The fact that a child's hymen is already ruptured does not mean that the victim cannot be subsequent to the rupture of the hymen."**

However, this does not lessen the probative value of the medical report admitted in evidence at the trial court. It is not uncommon for p3 reports to be prepared after the victim of the offence has undergone treatment for the alleged sexual offence. The defence has not challenged the evidence of the complainant that she was initially attended at Loitoktok hospital following the arrest of the accused on 31st March, 2017. For the sake of clarity the post care rape form exhibit 2 and the p3 all related to the complainant medical examination. On the other hand the non-submission of the condoms for a DNA profile did not amount to an omission which can render fatal the prosecution case.

The learned appellant counsel also raised the issue on some of the witnesses not called by the prosecution. He specifically cited the students who informed pw3 that pw1 was having an affair.

In answer to this submissions I find Section 143 of the Evidence Act to be relevant. It states: ***"No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact"***

The legal principle in the case of ***Keter v Republic 2007 EA 135*** is particularly appropriate to the circumstances here: The court held:- ***"That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses are sufficient to establish the charge beyond reasonable doubt."***

Going by Section 143 of the Evidence Act and the decision on **Keter** case I disagree with the appellant counsel that the failure to call the student occasioned a fatal deficiency in the prosecution case.

It also transpired and was stated on behalf of the appellant that the trial magistrate erred in law and fact by relying on contradictory evidence. In the case of **Dickson Elea Nzamba Shapwata & another v Republic, criminal appeal no. 92 f 2007, Joseph Maina Mwangi v. Republic, cr. Appeal no. 73 of 1993**. Both courts dealt with discrepancies in trials of defendants.

The legal principle is that an appellate court in considering any alleged discrepancies and contradictions should be guided by the fundamental question, whether such discrepancies, inconsistencies, or contradictions caused prejudice or miscarriage of justice to the appellant on both conviction and sentence.

I have reviewed the evidence by the prosecution witnesses, pw1 – pw7 and I find no material discrepancy on either of them to occasion prejudice or failure of justice on the part of the appellant. This ground therefore lacks merit.

It was also submitted that the trial magistrate took into account extraneous matters, particularly that pw2 and pw3 corroborated pw1 on the issue of sexual relationship.

The evidence by the complainant pw1 showed that the appellant was known to her for some time. She further confirmed existence of a sexual relationship which included a promise to marry. This information was not initially available to the parents until a revelation from the students. When pw3 received the report she apparently passed on to the father pw2 for further action. According to pw2 he commenced investigations to enable him take appropriate decision. When pw2 went to the shop of the appellant she found pw1 talking to the appellant. To him this was sufficient sign that there was something amiss going on between the two.

In those circumstances pw2 took the step of reporting the matter to the police for further investigations. It should be noted that this coupled with the fact that the complainant was a familiar face in the shop of the appellant the circumstances and opportunity were vital elements for the offence to take place.

I hold the view that this all goes to what is defined as circumstantial evidence to proof existence of a fact. The appeal also fails on this ground.

Proof of age of victim:

As regards the offence of defilement it involves victims below the age of 18 years. It is therefore important for the prosecution to establish beyond reasonable doubt the age of the victim. As illustrated in the case of ***Alfayo Gombe Okello v Republic Cr. Appeal No. 203 f 2009*** the

court stated as follows: ***"In its wisdom parliament chose to categorize the gravity of the offence on the basis of the age of the victim, and consequently the age of the victim to a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because, dire consequences flow from proof of the offence under section 8(1) ……."***

Further in ***John Otieno Obwor v Republic HCCR Appeal no. 34 f 2010*** – the court held inter-alia:

> **"Accordingly, it is important that the age of the victim be proved by credible evidence. In circumstances of the case, the charge sheet talks of the complainant being 14 years, other than that allegation, it is critical that the age of the complainant be determined by the prosecution to tender evidence like the birth certificate, the baptismal card, the medical assessment report by the dentist or dental technologist or by the parents of the children."**

This was a sexual offence under Section 8(1), (3) of the Act. The prosecution adduced evidence of the complainant pw1 and that of pw2 the father to proof age of the complainant. This was confirmed by the birth certificate admitted in evidence as exhibit 4. The evidence is sufficient to prove the element in the age of the child that as at the time the offence was committed she was 15 years old.

(c) The element of identification and placing the appellant at the scene:

In the case of ***Roria v Republic 1967 EA 583*** the court stated:

> **"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the of crime care. The evidence of a single witness respecting identification. Especially which is known that the conditions following a correct identification was difficult."**

Also in the case of ***Mwendwa v Republic Cr. Appeal No. 4 of 1989*** the court of appeal set out the guidelines which should be examined closely in circumstances in which a positive identification or recognition can be made by a trial court.

In the instant appeal the complainant knew the appellant prior to the 31st March, 2017. According to pw1 they were in relationship prior to this material day when pw2 confronted her at the shop. They had engaged in a sexual intercourse before pw2 decided to take police action and have the appellant arrested. On her own the complainant was comfortable with the relationship for being promised a reward of marriage at the end of it all.

The court is alive to the evidence of pw1 before the trial magistrate which explained substantially how the offence was committed on 26th March, 2017. This was not a case of mistaken identity there is no evidence from the appellant contradicting the events of 26th March, 2017 or any other day when such sexual assault took place with the complainant.

By no stretch of imagination could the complainant's allegations against the appellant be described as a fabrication. I am satisfied that recognition evidence placed the appellant squarely at the scene.

The other ground in this appeal was on the language of the judicial proceedings.

In article 50(2)(m) of the constitution 2010 as read with Section 198(1) of the CPC language of interpretation understood by the accused person is provided for as a requirement of the law. According to these provisions where the proceedings are conducted in a language the accused does not understand he shall be provided with an interpreter by the state free of charge.

Mr. Kamau for the appellant submitted that the language he gave his defence is not indicated by the trial court. The effect of that argued Mr Kamau was that the appellant was unable to clearly articulate his defence to the charge and evidence by the prosecution. What Mr. Kamau was submitting before this court touches on the right to a fair hearing, the independence and the impartial competence of the tribunal under Article 50 of the constitution.

According to the trial court record the appellant pleaded to the charge in Swahili language which was interpreted into English. The prosecution summoned seven witnesses. All of them except the complainant were cross-examined by the appellant save where he chose not to cross-examine the witness. I find no supportive material that it was because of the language barrier on the part of the appellant. When it comes for him to state his defence the constitution entitles him not to give incriminating evidence including to remain silent. The fact that the appellant gave brief unsworn statement of defence is not prima facie evidence that it is because he had a problem with the language of interpretation. It is clear from the record that he had indicated to the trial court during the time of plea that his preferred language was Swahili.

I do not find any record that he used a different language other than Swahili. It is not in dispute that he went through the evidence of the witnesses and chose the ones he needed to cross-examine. The number of questions in cross examination also depends on the issues raised in examination in chief. It is difficult for this court to conclusively state that one had a language barrier just from the answers given by the witnesses.

There is no legal requirement that in each of the sessions be either inter-parties hearings or mentions a trial court ought to indicate language of interpretation. What is expected of the court is to identity at the very earliest opportunity the language on accused person understand as of right. The problems of the right to language in Criminal Proceedings is the absence of proficiency mechanism by the trial Magistrate to sufficiently establish that the accused is well versed in the language to be used in the trial. More often than not courts entirely depend on the requisite or answer given by the accused during plea or at full hearing.

In view of these challenges it is not uncommon to see appeals grounded on the issue of language having been violated by the trial court.

I take judicial notice that substantially courts have no choice but to take a pragmatic approach in matters of language in Criminal trials. As an appellate court we are bound to go by the record of the proceedings. In particular I point out the brevity of the appellant statement is not an indicator that he did not understand or follow the gist of the charge or proceedings.

In these circumstances the submissions on language by itself can no longer stand in view of evaluation of the entire record. I find counsel attack of the proceedings on this ground as to language not meritorious to warrant this court to set aside the judgment of the lower court.

The other issue in this appeal touches on sentence. The charge preferred against the appellant attracts a mandatory minimum sentence of 20 years of imprisonment.

Consequently this sentence was not based on any wrong principle of law, nor was it manifestly harsh or excessive in the circumstances of this case. In the result there is no merit in the appeal and the same is hereby dismissed by affirming the judgment of the trial court.

Dated, delivered and signed this 21st day of June 2018.

……..

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Githuka for Mbiyu Kamau for the appellant

Appellant present

Mr. Meroka for the state

Cc. Mateli