REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 22 OF 2018

DANIEL MAINA WAMBUGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate at Loitoktok Hon. Okuche delivered on 3rd November, 2017)

JUDGMENT

The appellant Daniel Wambugu was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. In the alternative an indecent act with a child contrary to Section 11(1) of the same Act.

He was convicted after a full trial and sentenced to life imprisonment. He appealed against both conviction and sentence based on the following grounds.

1. That the learned trial Magistrate erred in both law and facts by holding that the prosecution had proved their case against me the appellant whereas evidence on record does not support such a finding.

2. That the learned trial Magistrate erred in both law and facts by failing to observe that the allegations of defilement of the victim minor was a force revelation made out of threat of beatings by her uncle given that even her own grandmother was not told about the allegation yet was the first person of contact soon after the alleged commission of the offence charged.

3. That the learned trial Magistrate erred in both law and facts and misdirected himself by failing to make an adverse inference in favour to me the appellant due to the prosecution's failure to subject me the appellant to medical examination so as to afford or obtain a possible link with the sexually transmitted disease found on the complainant by PW2 upon lab test.

4. That my conviction based on the evidence on record was manifestly unsafe.

Before delving into the merits of the appeal it would be prudent to set out the brief summary of the case at the trial court.

Prosecution case:

The prosecution case comprised of five witnesses who gave the following narrative. PW1 herein referred as V N K was the complainant. In her evidence on 25th June, 2017 the appellant at about 6.00p.m called her to the house where he induced her with Ngumu, Kario and Supa Dip. From this encounter PW1 stated that the appellant had invited her to his house which is located behind a shop he operates. The journey back on the scheduled time did not take time because they are neighbours with the appellant.

At the house of the appellant PW1 testified that she was undressed all her clothes after the appellant closed the door. In the same breathe the appellant removed his trouser and pant placed her on the bed and had sexual intercourse. When he was through according to PW1 she was left to go home.

This incident was later reported to PW4 S N W who testified as an uncle to PW1. In the testimony of PW4 in company of PW3 V N W the grandmother they interrogated PW1 about the source of buns she was eating. PW 3 and PW4 told the trial court that PW1 opened up and testified the appellant revealing that she had also been defiled in the course of transaction. It was at that stage PW3 and PW4 followed the appellant into his house to lodge and complain with a view to effect arrest. On arrival at the shop of the appellant PW3 and PW4 deposed that other members of the public came to know of the complaint about PW1. As things got enraged and descended on the appellant police officer got word and arrived at the scene. The police officer PC Dorcas Chirchir apprehended the appellant in response to mass public, she

saw while on patrol. She took the appellant to Kimana Police Station and investigations commenced on the alleged defilement.

The medical evidence provided by PW2 Antony Gitonga a clinical officer who attended the complainant ascertained that the hymen was broken. The clinical officer further stated that the complainant sustained injuries to the occipital region. The condition was that the complainant suffered grievous harm accompanied with defilement. The age assessment of the complainant was stated to be 9 years as per exhibit 5 dated 12th July, 2017.

The defence case:

Mr. Wambugu, the appellant gave a sworn statement of defence in answer to the charge. He denied any reference linking him with defilement of the complainant. The appellant explanation was that police just went to his shop and effecter an arrest for the offence he has no knowledge about. This is the background in which the appeal would be determined. The task of the first appellate court from a conviction of the subordinate court on both conviction and sentence and the approach together with guiding principles are well spelt out in the case of ***Pandya v Republic 1957 EA 336-337.*** It is settled and that appeals by the first appellate court are in a way a form of fresh rehearing and re-evaluation of the evidence from the trial court from the grounds filed by the appellant out the primary issue is whether in considering the charge and evidence the prosecution established the case against the appellant beyond reasonable doubt to support the conviction, Secondly whether the sentence as meted out was excessive and permissive as arrived at by the learned trial Magistrate.

Discussion and determination

The law and evidence it is trite that the prosecution under Section 107(1) of the Evidence Act bears the burden of proof on every element in a criminal charge beyond reasonable doubt. This was well buttressed in the well stated principles in the cases of ***Woolington v DPP 1935 AC 462 and Miller v. Minister of Pensions 2 ALL 372-273*** where the two courts held that that standard of proof is not proof to the hilt nor is it proof beyond or iota of doubt.

The appellant in this appeal was charge with the offence of defilement contrary to Section 8(1) of the Sexual offences Act which provides: **"A person who commits an act which causes penetration with a child is guilty of the offence termed defilement and depending on the age of the victim i.e, if under eleven years shall upon conviction be sentenced to imprisonment for life."**

Going by this definition for the state to sustain a conviction against an offender the following elements must proved beyond reasonable doubt.

i. Penetration of the male offender into the genitalia of the female victim.

ii. The age of the child must be established in view of Section 8(1), (2),(3) and (4) of the Sexual Offences Act.

iii. Evidence that the accused was positively identified as the perpetrator.

When dealing with sexual offences involving under the age of maturity the court is entitled to apply Section 124 of the Evidence Act on corroboration. However in absence of corroboration the proviso of Section 124 provides as follows:

> "**provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons be reached in the proceedings the court is satisfied that the alleged victim is telling the truth"**

It is therefore necessary to re-evaluate and subject the evidence to afresh scrutiny to be satisfied that the prosecution proved its case in the court below beyond reasonable doubt.

Penetration:

Penetration of the female genitalia in defilement cases is one of the core elements. The penetration here is by way on male organ (penis into the sexual Organ of the female. Section 2 of the sexual Offences Act defines penetration to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. According to the interpretation of Section 2 the slightest and brief arousal Penetration is sufficient to complete the crime. The law does not envisage absolute penetration into the genital nor the release of spima tosoa or sereen of the male organ for the act of penetration to be said to be complete.

It was on this part of the definition the charge against the appellant was formed and evidence adduced by the prosecution to proof as provided for under Section 107 (1) of the Evidence Act. On this first point I see a lot of emphasis on the inadequacies of the presence or absence of medical evidence as requirement to proof penetration. Sometimes trial courts have to lean towards medical evidence laid before court by the prosecution to conclusively decide that penetration was visible.

It is prima facie that may be the case but my conceded view is that sexual intercourse can be proved without expert medical evidence. What the court requires is proof of facts that the offence was committed even without medical evidence. There is equally in my judgment adequate provisions in the law of evidence under the proviso of Section 124 of cap 80 to rely on to convict the accused on non-corroboration evidence on sexual offences. In this case the sexual ordeal was laid bare by the complainant V W K she describes on how she was undressed out her clothes by the appellant and inappropriately penetrated her. According to her she was not able to scream because her mouth was covered by the appellant with a piece of cloth. When the appellant was done she was released from the house. It is this the information got the attention of PW2 and PW3 on the critical issue how penetration occurred. The complainant deposed that the appellant penis was inserted into her vagina.

During cross-examination by the appellant there was no *iota* of material to render rebuttal to the testimony by the complainant in this ingredient. The complainant even made reference to past acts of sexual intercourse which had not reached the attention of PW2 and PW3 or the law enforcement agencies.

The appellant took issue with the medical evidence as being unreliable and inconsistent. He further argued and submitted that he was not examined by the medical doctor. I have already alluded to the legal position under Section 124 of the Evidence Act that the failure or refusal by the investigating officer or the police to examine the appellant was not by itself fatal to the prosecution case.

In enacting the provision of Section 124 of the Act parliament in its wisdom was to reform the law for courts not to lean in favour of the accused and order for an acquittal on the grounds that there is no corroboration. The medical evidence on the complainant or that of the appellant is therefore not significant.

From the appraisal of the trial courts record in my view the prosecution managed to place sufficient corroboration from the undisputed medical evidence by PW2 who said the complainant was defiled. The evidence of a broken hymen though not peculiar to sexual intercourse and the conclusion reached by PW2 is compelling evidence against the accused in absence of any other material to the contrary. That together with the testimony of the complainant that she has been having sexual intercourse with the appellant renders credibility that the ruptured hymen must have been occasioned during any of the sexual assault incidence.

I therefore find no persuasive evidence on the part of the appellant to warrant this court interfere with the findings on this ingredient on penetration.

Proof of the age of the victim being under 18 years:

The courts have on many occasions pointed out how desirable it is to for the prosecution to prove beyond reasonable doubt the age of the child victim. It is trite that the prosecution ought to prove the age of the child by either direct testimony of the parent, guardian, or victim herself, birth certificate, medical age assessment or by other expert means to finally establish the age. In the case of ***Hilary Nyongesa V Republic High Court Appeal No. 123 of 2009*** and in two courts adopting the dicta in the case of ***Francis Onamu v. Uganda*** the court held as follows:

> **"In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim.** ***In the case 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 observance and common sense****"*

In the trial court there were credible findings from PW1, PW3 and PW4 as to the age of the complainant. The investigating officer PW5 also subjected the complainant to a medical age assessment exhibit 5. The conclusion by the learned trial Magistrate on this issue was inconformity with the above decisions on proof of age in defilement cases. There is no merit also on this ground.

Identification of the appellant as the perpetrator:

The charge of defilement is said to have occurred at the home of the appellant. According to PW1, she went to the house of the appellant in broad daylight. The appellant is no stranger to the locality where they live. The evidence of PW3 before the lower court was not contradicted and it can therefore be said to be satisfactory beyond doubt.

In my view the complainant came out clearly on the essential features, surrounding, bed, place where the defilement used to take place. It is also deposed by the complainant the type of inducement and gifts he used to give to have her into the sexual intercourse.

Whatever this court looks at the victim from the right position in ***Roria v Republic 1967 EA 583*** **the c**ircumstances were tenable to enable the complainant to identify the appellant. According to her this incident of 25th June, 2017 was just among the others she had carnal knowledge with the appellant. The evidence by the complainant placing the appellant at the scene is water light. I find the submissions by the appellant not able to impact the reliability or credibility of the witnesses for the prosecution.

For these reasons stated elsewhere in this judgment I disallow the appeal on conviction.

Sentence:

Trial Courts have a greater deal of discretion when it comes to punishment and meting out the appropriate sentence and other determinations. The law basically provides various range of sentences from which a Judge or Magistrates can opt to effect and apply in specific cases. The same law provides for a minimum mandatory sentences where the appellant case is stated to have been proved by the prosecution.

From the record the accused faced a charge of defilement contrary to section 8(1) of the Act. The victim of the defilement was found to be aged 9 years old. The appropriate sentence on conviction is provided in Section 8(2) of the Act to be mandatory life imprisonment. The learned trial Magistrate therefore considered and paid due regard to the minimum legislated sentence for the offence of defilement.

The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of ***Ogalo s/o Owuora 1954 24 EACA 70.*** It is well set out that: ***"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice"***

In the present appeal the horrors and trauma of a victim of defilement are such that they leave a permanent psycho-traumatic experience. I am alive to the fact that when parliament legislated for minimum sentence in sexual offences it was meant to deal with societal problem of sex predators of young girls. However even with long minimum custodial sentences the problem seems not to abate nor such incidents reduced to zero rated within our country.

I think time has come to revisit the issue for the people of Kenya to find durable solutions to this scourge against victims of sexual offences. As for now the prescription in the statute on minimum sentence stays. In the result I find no ground to interfere with the order on life imprisonment against the appellant.

Accordingly the entire appeal is disallowed. The trial court judgment dated 3rd November, 2017 is hereby affirmed on both conviction and sentence.

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

R. NYAKUNDI

JUDGE

In the presence of:

The appellant present

Mr. Meroka for DPP