REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.63 OF 2017

MOHAMMED IDD KIOKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of* Hon M. Chesang *(Resident Magistrate) in Kangundo Senior Principal Magistrate's Court Criminal Case No. 11 of 2016 (S.O) delivered on 15th November, 2016)

JUDGEMENT

1. The appeal herein arises from the conviction and sentence by Hon M. Chesang – Resident Magistrate in **Kangundo Senior Principal Magistrate's Court Criminal Case No.11 of 2016 (S.O)** wherein the Appellant was convicted and sentenced to serve life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of Sexual Offences Act No. 3 of 2006.

2. The Appellant being aggrieved by the said conviction and sentence filed the present appeal in which he has raised the following grounds of appeal namely:

(i) The Respondent's case not proved beyond any reasonable doubt

(ii) The Respondent failed to call crucial witnesses.

(iii) The Appellant's defence was not considered by the trial court.

(iv) The sentence imposed is manifestly excessive and punitive.

3. This being a first appeal, this court is under a duty to re-evaluate the evidence tendered before the trial court and come to an independent conclusion but to bear in mind the fact that it did not have the benefit of seeing or hearing the witness testify. (see **OKENO =VS= REPUBLIC [1972] EA 32.**

4. The record of the trial court reveals that the Appellant had been charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual offences Act No.3 of 2006 with the particulars being that on the 27th day of June 2016 around 1600 hours in Matungulu District within Machakos County intentionally caused his penis to penetrate the vagina of C.R a child aged 11 years. The Appellant also faced on alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual offences Act No. 3 of 2006 with the particulars being that on the 27th day of June, 2016 at around 1600 hours in Matungulu District touched the vagina of C.R a child aged 11 years with his penis.

5. **C.R. (PW.1)** was the complainant aged 11 years old. She stated that she was in the company of her school mates heading home from school when the Appellant who was herding some cows nearby called them. He led the complainant into a nearly incomplete building and directed her companion to be on the lookout for passerby while inside he removed the complainant's biker and underpant and defiled her. He later gave her Kshs.20 with which to buy whatever she wanted and warned her of dire consequences should she reveal to anybody on what had transpired. The complainant stated her friend later alerted her siblings who in turn informed her mother who organized for her to be taken to hospital for medical checkup.

F K (PW.2) stated that the Appellant did bad manners to the complainant. She stated that they were from school heading home when the Appellant called them and that the Appellant led the complainant into an incomplete building while he directed her to keep a lookout for persons passing by. Later the complainant came out and joined her outside and they headed home although the complainant walked with some difficulty.

J A (PW.3) stated that the complainant was his sister and they were walking home from school when the Appellant called the complainant to

join him at an incomplete building and after a while the complainant emerged while walking with difficulty having been given some money by the Appellant. He further stated that the Appellant had been in the habit of sneaking the complainant to his house within the area.

V I (PW.4) was the mother of the complainant and who testified that she received information from her son that the complainant had been engaging in sex with the Appellant who lived nearby. She decided to take the complainant to hospital where it was discovered that she had lost her virginity. She interrogated the complainant and learnt from her that the appellant had defiled her and had threatened to kill her if she told anybody about it.

L N M (PW.5) stated that he instructed his teacher colleagues to interview the complainant and her classmates over the incident and it turned out that the complainant had been having sex with the Appellant for money while her classmates kept watch for passersby and they would later share the money together. He directed the complainant's mother to take her to hospital for medical checkup.

Thomas Kioko Mutua (PW.6) was the area chief of Komarock location and stated that upon being alerted by the Complainants' school teacher of the incident he proceeded to the school and interrogated the complainant who confirmed that she had sex with the Appellant twice and learnt the Appellant was a herdsman in the area. She positively pointed out the Appellant as her assailant and who was promptly arrested and escorted to the police station.

APC Emmanuel Cheptumo (PW.7) based at Komarock AP Post arrested the accused and escorted him to KBC police station.

Irene Nyangwachi (PW.8) a Clinical Officer stationed at Mama Lucy Hospital stated that the complainant was brought to the hospital on 2/7/2016 and examined her genitalia and noted the hymen was inflamed (red) but intact. She confirmed that it was possible for hymen to remain intact if there was only rubbing without penetration. She established that the complainant had been defiled as there was redness on the sexual organ although the defilement was not severe. John Mutua (PW.9) a clinical officer attached at Kangundo District Hospital stated that the complainant was examined on 1/7/2016 and her genitalia revealed that the hymen was red but not broken. He confirmed that the redness of the hymen was an indication of some contact as ideally it is not supposed to be red. He stated that it depends on the force used. He confirmed that the complainant had been defiled.

PC. Charles Oduor (PW.10) was investigating officer. He stated that he interrogated the complainant and who implicated the Appellant as her assailant who used to give her some money every time they had sex.

The trial court subsequent established that the Appellant had a case to answer and placed him on his defence. He tendered a sworn testimony and stated that he was arrested on 1/7/2016 and beaten on allegation of sleeping around with children. He complained as to why the complainant was examined at both Kangundo Hospital and Mama Lucy Hospital yet he himself was not examined. He denied knowledge of the complainant and her school mates. He denied committing the charges.

Parties herein filed written submissions.

Appellant's submissions

6. It was submitted by the Appellant that the offence of defilement had not been proved as the act of penetration was not properly established since the complainant's hymen was found by the doctors to be intact. It was also submitted that the witnesses heavily contradicted themselves in their testimonies and reliance was placed in the case of **NJOROGE RITHO & ANOTHER =VS= REPUBLIC – CR. APPEAL NO. 99 OF 1986** where the court held that contradictory and inconsistent evidence is unreliable and cannot be used to convict. It was also submitted by the Appellant that the prosecution failed to call all the relevant and crucial witnesses whose evidence could have favoured the Appellant. It was finally submitted by the Appellant that his defence was not considered by the trial court.

Respondent's submissions

7. Mr. Machogu, learned counsel for the Respondent submitted that the issue of penetration was properly established since by dint of Section 2 of the Sexual Offences Act No. 3 of 2006 the same could either be complete or partial insertion of the genital organ of a person into the genital organ of another person. He submitted that the evidence of the complainant and the doctors proved the issue of penetration. It was also submitted that if there were any contradictions in the testimonies of the witnesses, the same are curable under Section 382 of the criminal procedure code and the case of **JOSEPH MAINA MWANGI =VS= REPUBLIC – CR. APPEAL NO. 73 OF 1993** was relied upon.

It was also submitted that by dint of Section 143 of the Evidence Act the Prosecution is not obligated to call a particular number of witnesses in the absence of any provision

of law to the contrary to prove any fact.

As regards the Appellants defence, it was submitted that the said defence was duly considered by the trial court and found not able to shake that of the prosecution.

Learned counsel for the prosecution sought for the dismissal of the appeal and the conviction and sentence be upheld.

Issues and determination

8. I have considered the evidence presented before the trial court as well as the submissions of the Appellant and the Respondent. I find the following issues necessary for determination.

(i) Whether the essential ingredients of the offence of defilement had been established by the Respondent,

(ii) Whether there was contradiction of witnesses in their testimonies,

(iii) Whether the Prosecution failed to call crucial witnesses;

(iv) Whether the Appellant's defence case was considered by the trial court,

(v) Whether the Respondent's case had been proved beyond the required standard of proof.

9. As regards the first issue, it is noted that the Respondent in order to secure a conviction for the offence of defilement under Section 8(1) (2) of the Sexual Offences Act No.3 of 2006 must establish that the Appellant had committed an act which causes penetration with the complainant who is a child. Penetration has been defined under Section 2 of the Act to mean the partial or complete insertion of the genital organ of a person into the genital organ of another person. As an alternative charge had also been preferred against the Appellant under Section 11(1) of the Act, the Prosecution was to prove that there was an unlawful intentional act which causes any part of the Appellant to come into contact with the genital organ, breasts or buttocks of the complainant but which does not include an act that causes penetration as defined by Section 2(1) of the Sexual Offences Act 2006.

The prosecution was also under obligation to prove the age as disclosed in the particulars of the charge to support the eventual sentence imposed against the appellant. The prosecution was also to establish that the Appellant was the assailant.

On the question whether there was penetration, it was the evidence of the complainant that Appellant removed her bicker and underpant and inserted his penis into her vagina and had sex with her. The evidence on the aspect of penetration was further corroborated by the clinical officers who testified as PW.8 and PW.9 and who produced the post rape care form and P.3 form as exhibits. According to the two doctors, the complainant's hymen was reddish which was an indication that there was some contact or rubbing since the hymen ideally is not supposed to be red in nature. The Appellant has strongly urged this court to find that there was no penetration since the hymen despite being reddish was intact and not ruptured. As the two doctors have stated in their testimonies that there was defilement owing to the redness of the hymen, I must find that indeed there had been a partial penetration of the complainant's sexual organ since even a partial insertion of the male organ into the female organ is sufficient to constitute penetration as defined under Section 2 of the Sexual Offences Act No. 3 of the 2006.

On the question of the age of the complainant, it is noted from the particulars of the charge sheet that the complainant's age is indicated as 11 years. The complainant's mother (PW.4) stated that her daughter was yet to attain the age of 12 years. The complainant was also examined on 3/10/2016 at Kangundo District Hospital and her age was found to be between 9 -10 years. The P.3 form indicated her age as 10 years. Even though the exact age of the complainant was not given, I find no prejudice was suffered by the Appellant since the offence for which he has been charged is under Section 8(1) (2) of the Sexual offences Act which places the maximum age of the minor for the purpose of the Act at 12 years old so as to attract a sentence of life imprisonment upon conviction. Hence any discrepancy in the age of the complainant minor herein did not prejudice the Appellant in anyway since the age is within the bracket contemplated by the Section for which he has been charged. In any event any material contradiction as complained by the Appellant is curable under Section 382 of the Criminal Procedure Code.

On the question regarding the identity of the assailant the evidence of the Complainant and her school mate, F K (PW.2) and the complainant's young brother J A (PW.3) left no doubt that the Appellant herein was the complainant's assailant. The three witnesses gave consistent testimonies and were unshaken even on cross-examination. The evidence of PW.2 was that the Appellant directed her to keep a lookout on any passerby as he went about engaging in sex with the complainant.

10. As regards the second issue, it is noted that the Appellant has maintained that some of the witnesses contradicted themselves in their testimonies. I have perused the entire evidence of the ten (10) witnesses and found that the discrepancies are not that major and do not prejudice the appellant since they are curable under Section 382 of the Criminal procedure Code. It is common knowledge that in any trial it is almost impossible to expect all the witnesses to give evidence word for word like the rest since each witness perceives issues differently. Hence it would be hard to obtain homogeneity in the testimonies and therefore the provisions of Section 382 of the Criminal Procedure code comes in handy to take care of such discrepancies as long as the contradictions, discrepancies and inconsistencies do not cause any prejudice to the Appellant. The evidence of the complainant was substantially corroborated by the rest of the witnesses.

11. As regards the third issue, the Appellant has claimed that the Prosecution did not call some crucial witnesses who could have given evidence exonerating him from the offence. Ideally the prosecution is obligated to call all witnesses even if it may turn out that some of the evidence would exonerate an offender or is adverse to the Prosecution's case. In the case of **BUKENYA =V= UGANDA [1972] EA 549** the court held as follows:-

"The law as it presently stands, is that the Prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even though some of the witnesses evidence may be adverse to the prosecution's case. However the prosecution is not bound to call a plurality of witnesses to establish a fact where however the evidence adduced barely establishes the prosecution case and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had the witness been called his evidence would have been adverse to the prosecution's case."

It is noted that the Appellant has claimed that the complainant's teachers who had earlier interviewed her were not called to testify in the case. However, the two teachers did not witness the incident and their evidence therefore would not have assisted either the appellant or the Respondent in any way. Besides the Appellant during his defence hearing could as well have sought to have them summoned if he felt that any of the witnesses left out had material evidence. All in all the prosecution under Section 143 of the Evidence Act is not under any obligation to call a particular number of witnesses in the absence of any provisions of law to the contrary to prove any fact. I find the ten

prosecution's witnesses called by the Prosecution were quite sufficient to prove the relevant facts in support of its case.

12. As regards the fourth issue it is noted that the Appellant in his defence evidence had vehemently denied knowing the complainant and her school mates. The trial court considered the entire evidence and believed the evidence of the complainant and her witnesses. As the complainant and her school mates had in their testimonies placed the Appellant at the scene of the crime, his defence claim that he did not know them did not exonerate him from the offence levelled against him.

13. As regards the last issue it is quite clear from the totality of the evidence adduced by the prosecution that it had proved its case against the appellant beyond any reasonable doubt. The evidence of the complainant was corroborated by the rest of the witnesses. The Appellant's defence evidence did not shake that of the prosecution which was overwhelming against him. The conviction arrived at by the trial court was quite sound and the sentence imposed was within the law as provided for under Section 8(1)(2) of the Sexual offences Act.

14. In the result I have come to the conclusion that the Appellant's Appeal lacks merit. The same is ordered dismissed. The conviction and sentence of the trial court is upheld.

Orders accordingly.

Dated and delivered at Machakos this 24th day of July, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Mohammed Idd Kioko – the Appellant

Machogu for the Respondent

Josephine/ Munyao - Court Assistant