REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 24 OF 2017

(From original conviction and sentence in Criminal Case No. 939 of 2016 of the Senior Principal Magistrate's Court at Baricho).

ALBERT GITARI GIKUNJU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Albert Gitari Gikunju was charged before the Senior Principal Magistrate's Court at Baricho with the offence of Defilement Contrary to ***Section 8(1) as read with Section 8(3) of Sexual Offences Act***. It was alleged that the appellant defiled M.W. a child aged twelve (12) years on 4/7/2016 [Particulars Withheld] Village Mwea West Sub-County.

The appellant denied the charge but after a full trial he was found guilty, was convicted and sentenced to serve 20 years imprisonment. He was dissatisfied with the conviction and sentence and filed this appeal based on the following grounds:-

1. The learned trial Magistrate erred in law and facts by not establishing the age of the complaint to the required standards.

2. The trial Magistrate erred in law and facts by failing to consider that evidence adduced was incredible.

3. The trial Magistrate erred in law and facts by not considering investigation done was shoddy.

4. The trial Magistrate erred in law and facts by not considering that vital witnesses were not produced in court.

5. That the trial Magistrate erred in law and facts by not considering that penetration was not proved to the required standards.

6. That the trial Magistrate erred in both law and facts by not considering that the case was full of contradictions and inconsistencies.

7. That the trial Magistrate erred by not giving the appellant enough time to prepare his defense hence not giving him a fair hearing.

8. That the trial Magistrate erred in law and facts by not considering the appellant defense.

9. That the trial Magistrate erred in both law and facts by not considering that the medical officer never gave his qualifications or experience as required by law.

He prays that the appeal be allowed, conviction be quashed, sentence be set aside and he be set at liberty.

The State opposed the appeal through Mr. G. Obiri, Assistant Director of Public Prosecutions who submitted that the appeal lacks merits and it should be dismissed.

This is a first appeal and this court has a duty to evaluate the evidence tendered before the trial court, analyse it and come up with its own independent finding while bearing in mind I did not have an opportunity to see the witnesses and leave room for that. This is in line with the holding in the case of ***Okeno –v- R (1972) E.A 32*** where it was stated:

> ***"The 1st appellate Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."***

The brief facts are that the complainant M. W. who was a child aged 12 years was on the way home from school with her sister S W on 4/7/2016 when she met the appellant who she knew as Gitari. The appellant asked them why they were not visiting. The appellant held the complainant M. W on the hand and neck then led her to to maize plantation where he defiled her. The appellant then released her and she went home where she met Kariuki and informed him what happened. The matter was reported at Kiangai Police Post. The complainant was referred to Sagana Police Station. She was examined at Sagana hospital and was admitted for one day. A P3 form was filled exhibit P-2- and her age was assessed and a report filled showing she was twelve years old, exhibit 3. The complainant knew the appellant before and the offence was committed in broad daylight. The appellant was then arrested and charged.

The complainant testified that she knew the appellant before and maintained that he is the one who defiled her. The complainant was the only witness to the fact of defilement. She was led in a maize plantation where she was defiled. It is not expected that such an offence would be committed in the open so as to get eye witnesses and that is why there is a proviso to ***Section 124 of the Evidence Act*** which allows the trial Magistrate to accept the evidence if for reasons to be recorded he has reasons to believe the witness. It is provided:-

> ***124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***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 to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

The trial Magistrate in the Judgment delivered on 27/3/17 stated:

> ***"I have considered the evidence by the prosecution and wish to state as follows. The accused was identified as somebody known to the complainant. The incident was said to have occurred during the day and hence the complainant had opportunity to see and know the person who had defiled her. She immediately identified who had defiled her to his brother. She repeated the same to the police. The accused his (sic) defence of alibi is an afterthought. The same was not raised with the complainant when she testified and even with the investigating officer. If indeed that was the case this ought to have been raised well in advance or a basis for the same being laid. In nutshell (sic) I do find that it's the accused that has been connected to the offence and therefore the one who defiled the complainant."*** Page 22 line 11 – 21.

What the trial Magistrate is stating is that he had reasons to believe the complainant. The evidence by the complainant was cogent and no doubts were cast. I am of the view that the trial Magistrate arrived at the inevitable conclusion on the guilt of the appellant based on the evidence tendered before him. I find that the conviction was safe and proper. My finding is that the prosecution tendered sufficient evidence which proved the charge of defilement against the appellant. The evidence of the complainant was corroborated by the medical evidence adduced by PW-3- Naftali Macharia Mwangi. He stated that the complainant was examined and treated on an allegation that she was defiled by someone known to her. He testified that the nature of offence was defilement. He testified that the hymen was broken. Urine analysis revealed presence of pus cells, epithelial and spermatozoa. The broken hymen in a girl of twelve years who alleged that she was defiled is conclusive evidence that there was penetration. This is further confirmed by the presence of spermatozoa. The accused was identified as the perpetrator of the crime through recognition as there is undisputed evidence that he was well known to the complainant. The ingredients of the offence of defilement were proved beyond any reasonable doubts, that is the victim of the crime, penetration and the perpetrator.

I now turn to the grounds. The appellant faults the conviction on the ground that the trial Magistrate erred in law and facts by not establishing the age of the complainant to the required standards. The age of the victim in a charge of defilement is a fact that must be proved with tangible and credible evidence as the charge and the ultimate sentence are based on the age of the victim. Age of the victim is a key ingredient of the charge which must be proved to the required standard in criminal charges, that is to say, beyond any reasonable doubts. ***Section 8(1) as read with Section 8(3) of the Sexual Offences Act*** provides:-

> ***8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years.***

The charge sheet states that the complainant was aged twelve (12) years.

The complainant M. W. who testified on 19/9/16 testified that she was aged twelve (12) years and was a pupil in class two. She stated that she did not know when she was born. She testified that she was taken for age assessment. PW-2- S N G who is the complainant's elder brother testified that she was born in 2005. PW-3- Naftali Mwangi Macharia a Clinical Officer at Kerugoya County Hospital testified that the age of the complainant at the complainant at the time of examination on 4/7/2016 was about twelve years. He produced age assessment report as ***Exhibit -3-.*** It states that the complainant was between the age of 12 and 14 years. The evidence is sufficient and proves the age of the complainant as 12 years at the time the offence was committed. The above provision states:-

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years ……."*** **The age of the complainant falls within this age bracket.**

The defence did not make any submissions on this ground. My finding is that the prosecution proved the age of the complainant as twelve years at the time the offence was committed. This ground must fail.

The appellant faults the court for failing to consider that evidence adduced was incredible. As I have pointed out, the trial Magistrate gave

reasons for relying on the evidence adduced to convict the appellant. The evidence of the complainant was credible as the fact of defilement was corroborated by medical evidence which witnessed broken hymen and presence of spermatozoa. There was prove that the appellant was implicated through recognition in favourable circumstances as the offence was committed in broad daylight. The ground is without merits.

It is also submitted that the investigations were shoddy. I find that the prosecution conducted thorough investigations as they did have the complaint examined by a Clinical Officer who confirmed there was defilement. Her age was assessed and the appellant was arrested and charged. The ground must fail.

The appellant submits that vital witnesses were not called. The law on this aspect is clear. No particular number of witnesses is required to prove a charge. ***Section 143 of the Evidence Act Provides:***

> ***143. 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 Court of Appeal in the case of ***Bukenya & Others –v- Uganda East Africa.***

The former Court of Appeal held that the prosecution has a duty to call all witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had a duty to call any person whose evidence appears essential to the just decision of the case, ---------- while fully in agreement with the above statement it should be remembered that the context in which it was made is that of a case in which the evidence called is barely enough. In the present case the proviso ***to Section 124 of the***

Evidence Act and the medical evidence must be borne in mind as well. ***Section 143 of the Evidence Act Cap 80*** which provides that in the absence of any requirement by provision of law no particular number of witnesses shall be required for the proof of any fact.

The provisio to ***Section124 of the Evidence Act*** allows Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is truthful.

This is a Sexual Offence. The complainant was the only eye witness. The trial Magistrate had the opportunity to see the demeanour of the complainant. He concluded that her evidence was reliable and he gave his reasons which I have quoted above.

I am of the view that the prosecution called witnesses who were sufficient to prove the charge. The two witnesses who were not called did not witness the defilement. The conviction was

dependent on whether the trial Magistrate believed the complainant which he did in this case. Furthermore medical evidence corroborated the evidence of the complainant that there was penetration. The evidence of the two witnesses who were not called was of no probative value. This ground is without merits.

The appellant states that the trial Magistrate erred by failing to find that penetration was not proved to the required standard. There is evidence by the complainant as to how the appellant defiled her for about two minutes. That perse is evidence of defilement and penetration. It was confirmed by the Clinical Officer who filled the P.3 form. The trial Magistrate at Page 21 of the record from line 10-17 stated:

> ***"PW-1- stated that the perpetrator took her to the farm and penetrated he vagina. The Investigating Officer produced the age assessment report to show that the victim was a minor. The C.O (Clinical Officer) found in his examination that there spermatozoa in the urine analysis. This is only possible where sexual activity has taken place. The defence on the other hand has on the other hand has not challenged the fact of being penetrated on 4/7/2016. The issue of age has not equally been challenged by the defence. In the circumstances I do find that the complainant was defiled."***

The trial Magistrate considered the evidence and found, which in my view was inevitable, that there was penetration.

The appellant submits that the complainant stated that she felt pain but upon examination, by the Clinical Officer the labia majora and minora was intact as well as the cervix. There were no lacerations or tears. Urine analysis revealed presence of pus cells epithelial cells and spermatozoa. Degree of injury assessed as grievous harm and yet it was not an assault case. That he did not give his opinion as to whether there was defilement. He submits that there was no expert opinion.

In his testimony in court the Clinical Officer stated that the nature of offence was defilement. Based on the evidence the trial Magistrate formed the opinion that there was penetration. This finding was based on cogent evidence. The victim was examined on

the same date, that is 4/7/16 and the P3 form was filled on 9/7/16. This is clear from the evidence of the Clinical Officer and the P3 form. The treatment notes show that she was treated in hospital on 4/7/16 and tests which were done revealed the presence of spermatozoa. There was no contradiction. At time of filing and signing P.3 form it was five days after the incident. The court was referred to the case of ***Timothy Opunya Banjamin –v- Republic, Cr. Appeal No. 6/2003*** a decision of the High Court, Onyancha J. where it was stated:

Furthermore, the crucial link between the appellant and the defilement of the complainant was the sexually transmitted disease found in the complainant. Had the prosecution wanted to get the link, all it could have done was to medically examine the appellant for the signs of the disease. If he would be found with the disease, it would inescapably be established that he gave the disease to the complainant or got it from her during the alleged sexual intercourse. On the other hand if he was not found with it, it would safely be concluded that he was not the one who defiled the complainant. More so because the absence of the hymen in her vagina also suggested that she had had sexual intercourse before examination date.

This is a persuasive decision. I have stated above the key ingredients of the charge of defilement under ***The Sexual Offences Act.*** The case cited, the offence was under ***Section 145 of the Penal Code.*** The D. N. A would have been necessary if the identity of the perpetrator was in dispute. The appellant in the case had offered to pay compensation. In this case the identity of the perpetrator was not in doubt. I am not persuaded by the decision. There was no dispute that the broken hymen was not as result of the defilement, that is penetration. Furthermore the presence of spermatozoa proves it all, that the broken hymen was as a result of penetration by a male sexual genital organ, that is penis which ejaculated spermatozoa which was found in the urine of the complainant. This ground is without merits and must fail.

Finally it is submitted that the trial Magistrate failed to consider that there were contradictions and inconsistencies in the evidence. Minor contradictions are excusable. There is no discrepancy on the scene. The complainant said the appellant took her to his maize farm and defiled her. PW-5- said in his evidence in Chief that the complainant reported that she was defiled in the maize farm. In cross-examination he said she reported it was in his house. He then investigated and found that it was in the maize plantation. The evidence is clear that the offence took place in the maize farm. The complainant was firm on this. The minor contradiction by PW-5- even after he said the offence was reported to have been committed in the farm does not change the finding by the trial Magistrate. The Court of Appeal in the case of ***Daniel Njoroge Mbugua –v- R(2014) eKLR*** stated:

> ***"From the record we find that the evidence of PWI & 2 was consistent and corroborative. Any discrepancies or inconsistencies in evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record."***

The appellant seem to have abandoned grounds 7, 8 & 9 as no submissions were made. The record shows that the appellant was charged on 11/7/2016 and the trial started on 19/9/2016. The appellant gave his defence on 15/11/2016. This was a period of four months and gave the appellant adequate time to prepare his defence. The trial Magistrate considered the defence and stated that the defence was an afterthought as it was not raised when the Investigating Officer and complainant testified.

Though an accused person is not required to prove his defence of alibi when it is raised too late in the trial it denies the prosecution an opportunity to make enquiries and to sufficiently reply to it. It was not tested, as it was not put to the witnesses when they testified. It is a surprise defence which the trial Magistrate rightly found to be an afterthought.

The Clinical Officer testified and his qualifications were not challenged. It is presumed that he was qualified to examine the complainant and to fill the P3 form. The grounds must fail.

In Conclusion:

Having considered the evidence tendered, I come to the conclusion that the conviction of the appellant was safe and was based on well corroborated and cogent evidence. The appeal is therefore without merits and so I dismiss it.

Dated at Kerugoya this 27th Day of September 2018.

L. W. GITARI

JUDGE