REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 114 OF 2017

MKM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. P. O. Ooko (PM) in Mavoko Senior Principal Magistrates' Court Criminal Case No. 19 of 2015 on 22nd September, 2016)

JUDGEMENT

1. The appellant was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006 and sentenced to life imprisonment. Aggrieved by the same, he lodged this appeal on grounds that:

a) He was convicted on contradictory evidence.

b) He was convicted on a defective charge sheet.

c) The trial magistrate failed to comply with section 211 of the Criminal Procedure Code.

d) The case was not proved beyond reasonable doubt.

e) The trial court failed to consider his defence.

2. Brief facts of the case is that AMK on the material day after dinner retired on a coach where she sleeps while her brother slept on a bed. The two left their father, the appellant on another seat in a different room. The appellant later went to where she was sleeping, removed the blanket she had covered herself with, removed her pant and defiled her. She screamed but nobody came to her rescue. The appellant ordered her to be quiet and threatened to show her something bad if she continued screaming. Afterwards he used a handkerchief to wipe her and instructed her to take a bath the next day. She told the appellant that she would tell her mother who was away in hospital what had happened and the appellant warned her not to tell her. The next day she did her chores then took a bath. She stated that she felt pain especially when passing urine. She proceeded to her paternal grandmother's place. There, she informed her grandmother who informed her mother about the ordeal. The appellant was questioned but he denied the allegations. AMK later went to her maternal grandmother whom she informed about what had transpired. Her grandmother inspected her private parts and confirmed that she had been defiled. She was thereafter taken to Nairobi Women Hospital, Kitengela where she was admitted for three days.

3. EM (PW2) who is AMK's mother was away on the material day. Upon her return, she was informed by A M K that she had been defiled by the appellant. She checked her private parts and confirmed that she had been defiled. She then took her to Athi River Health Centre where she was examined and the same confirmed then referred to Nairobi Women Hospital, Kitengela where she was admitted for 4 days. She stated that AMK was aged 11 years and produced her birth certificate in that regard as P. Exhibit 1.

4. Patrick Itumbi Simon (PW3) a clinical officer at Nairobi Women Hospital, Kitengela examined AMK on 29th August, 2015. He found AMK's genitalia to have bruises and bloody discharge. Her labia majora was swollen and red. Her hymen was broken but there was no vagina tear. Her vaginal wall was tender and he formed an opinion that she had been defiled. He produced a post rape care form as P. Exhibit 2 and P3 form as P. Exhibit 3 and test forms as P. Exhibit 4. On cross examination, he stated that AMK was examined 2 days after the incident.

5. Police Constable Sophia Mumbuni (PW4) received a report from PW2 that AMK had been defiled by the appellant who is her step father. She referred her to Nairobi Women Hospital, Kitengela where she was admitted for two days. She interrogated AMK who indicated that she was defiled by the appellant when PW2 was

away. That she identified him using light which the appellant switched off during the act. That she recognized the appellant's voice when she asked him why he was defiling her and the appellant told her that she was just dreaming. That the appellant told her to take a bath the following day. She visited the scene and found out that the house was a single room partitioned by a curtain and that there was a sofa set and a bed.

6. The appellant was put on his defence. He stated that PW2 on 27th August, 2015 indicated to him that she was going to Machakos to collect a letter. He went to work and returned at 7.00 pm and found the two children relaxing. He later left town for work and went back home at 7.00 am when he found the children screaming on the coach and he went straight to bed. He was woken up by A M K in the morning to take tea. He went to work and when he returned at about 5.00 pm he was informed that the children had gone to their paternal grandparent's home. He then went there and found PW2 who accused him of defiling AMK. That PW2 sent relatives to him in custody for money so that she could drop the charges.

7. It is the appellant's submission that the charge is incurably defective. That section 20 (1) of the Sexual Offences Act provides for incest and section 8 (1) for one who is not a relative. That the charge sheet is incurably defective for giving a charge which is irrelevant to the facts. That penetration was not proved beyond reasonable doubt. That AMK's evidence was that the appellant went to where she was sleeping, removed the blanket and her pant and defiled her and that once he was through he used a handkerchief to wipe her and she proceeded to sleep. That comparing the said evidence with that of PW3 with regard to his findings, the same does not corroborate A M K's evidence. That AMK never said that she bled. He cited **Joseph Wekesa Fuchaka v. Republic [2018] eKLR**. That AMK's evidence is contradicted by that of PW2, PW3 and PW4 in regard to the date of the alleged offence.

8. The respondent submitted that proving the offence of defilement the prosecution must prove age of the complainant, penetration and identity of the assailant. That PW2 testified that AMK was born on 3rd March, 2004 and that incident occurred on 28th August, 2015 therefore she was aged 11 years at the material time. That the same was proved by the birth certificate she produced. That according to AMK, on a date she said she could not recall while at home, the appellant defiled her and during the ordeal warned her not to scream or tell anybody. That the same was corroborated by PW3 who examined her and found bruises in her genitalia and bloody discharge and that her labia majora was swollen and hymen broken. That the presence of broken hymen an inference is made of penetration as per the meaning of section 2 of the Sexual Offences Act. It was submitted that the conditions prevailing was favourable for positive identification and the question of wrong identification does not arise. In this regard, the respondent relied on **Anjononi & others v. R [1981] eKLR**. It was submitted that the discrepancies were inconsequential to the conviction and sentence. In this regard the respondent relied on **Philip Nzau Watu v. R [2016] eKLR**. That the appellant's defence was a fabrication and that the prosecution proved the case beyond reasonable doubt. On defective charge sheet, it was submitted in view of section 134 of the Criminal Procedure Code and **Sigilani v. Republic [2004] 2 KLR, 480** that the appellant was charged, tried, convicted and sentenced for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. That the evidence adduced implicated him as the father to AMK and this does not render the charge defective though the law provides for the offence of incest. That from the onset, the appellant knew that the charge facing him was one of defilement and its particulars were clearly spelt out. That he participated in the trial in a manner suggesting that he understood the charge he was facing therefore there was no miscarriage of justice or prejudice to the appellant.

9. This court sitting as a first appellant court is under duty to re-consider the evidence tendered before the trial court afresh and arrive at its own independent conclusion bearing in mind however that it had no opportunity to see the witness[es] demeanor. I have considered the appeal and the rival submissions. The issues for determination are as follows:

a) Whether or not the appellant was convicted on a defective charge sheet.

b) Whether or not the appellant was convicted on contradictory evidence and if answered in the affirmative, the effect thereof.

c) Whether or not the case was proved beyond reasonable doubt and whether or not the appellant's defence was considered by the trial court.

10. It is the appellant's contention that the charge sheet gave facts irrelevant to the case since the evidence adduced pointed to incest. It is an undisputed fact that the appellant is AMK's step-father and as correctly submitted by the appellant the proper charge would have been incest.

11. In view of the provisions of section 179 of the Criminal Procedure Code, an accused person can be convicted with an offence which he or she was not originally charged with. The said section provides as follows:

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

12. The conviction on the substituted charge is in effect of the said section based on the fact that the particulars of the main charge have not been proved and the evidence points to a minor offence. The essence thereof is that an accused person benefits from being convicted of a lesser offence and consequently lesser sentence. The appellant was charged with defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006 rather than incest. The latter section provides that an accused shall upon conviction be sentenced to imprisonment for life and section 20 (1) of the Sexual Offences Act which is the proviso for incest provides that an accused if found guilty shall be liable to imprisonment for life where the complainant is below the age of 18 years. Bearing in mind the fact that section

179 of the Criminal Procedure Act presupposes that substitution should lead to a lesser sentence, the said section was not available in view of the circumstances of this case since both charges resulted to imprisonment for life or rather substitution would have not resulted to a lesser charge bearing in mind the age of the complainant in this case. The trial court was thereby right in not substituting the charge. Additionally, I find that the charge sheet disclosed an offence known in law which the appellant understood and participated in the trial and was not prejudiced. I am guided in this issue by **Yosefu v. Uganda [1969] E.A. 236** and **Sigilani v. Republic [2004] 2 KLR 480** where assessment of fatality or otherwise of a charge sheet was discussed. In the end, I find that there was no defect in the charge sheet and that ground fails.

13. With regard to the contradictions pointed to by the appellant, I find that the same was not material since inconsistencies are common in criminal cases due to lapse of memory. In this regard, I am guided by the Court of Appeal's holding in **Philip Nzaka Watu v. Republic [2016] eKLR** where it was stated:

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.***
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> ***In Dickson Elia Nsamba Shapwata & Another V. The Republic, CR. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:***
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> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***
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> ***The main contradiction that the appellant complains about relates to the time when the offence was committed. The prosecution witnesses were clear that they were not testifying to the exact time. They were approximating, to the best of their abilities as common rural folk. The witnesses mentioned various times, ranging from 6.30 pm, 7.00 pm, 7.30 pm and 8 pm. The only exception was the evidence of PW1 where the time is recorded as 6.30 a.m. granted the consistency of the estimates of the other witnesses, we cannot rule out the possibility that the reference to 6.30 a.m. was in fact a typographical error in the record. The trial court was satisfied that the offence was committed between 6.30 pm and 7.00 pm and we have no basis for concluding that there was material contradiction in the prosecution evidence to warrant interference with the conclusion of the trial court. In any case, the time when the offence was committed is a question of fact, which the two courts below determined."***

and in Uganda Court of Appeal in **Twehangane Alfred v. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** quoted with approval by the Court of Appeal of Kenya in **Erick Onyango Ondeng' v. Republic [2014] eKLR**. The Uganda Court of Appeal held:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

In view thereof, that ground fails.

14. To secure a conviction for the offence of defilement under section 8 (1) of the Sexual Offences Act, the prosecution must establish that the appellant committed an act which causes penetration with a child. Penetration under section 2 of the Act means, the partial or complete insertion of the genital organs of a person into the genital organs of another person. AMK in her evidence testified that she was on the material day defiled by the appellant who is her father. It emerged that the two conversed during and after the ordeal. In view of the same, the circumstances were favourable for positive identification by recognition. On penetration, AMK's evidence was corroborated by that of PW2 and PW3. PW3 specifically highlighted the injuries sustained by AMK and that her hymen was broken. The appellant contended that AMK did not indicate in her testimony that she bled and therefore her hymen could not have been found to have been broken. He relied in the case of **Fuchaka** (supra). I find that the said case is distinguishable for the reason that the complainant in that case was said to have been stable and had no discomfort after the alleged ordeal unlike in this case where AMK was found to have sustained some injuries. I further disagree with the court's finding in that case that there being no blood, the hymen was not broken therefore penetration was not proved for the reason that under Section 2 of the Sexual Offences Act, penetration can either be the partial or complete insertion of the genital organs of a person into the genital organs of another person and bleeding does not necessarily occur when hymen is broken. AMK's age was established to be 11 years at the material time by the birth certificate produced. I therefore find that defilement under section 8 (1) of the Sexual Offences Act was proved. The appellant's evidence on the other hand was mere denial which was not cogent at all. The same did not cast doubt to the prosecution case in whatever manner.

15. In the end, I find no merit in this appeal and it is hereby dismissed.

Orders accordingly.

Dated and Delivered at Machakos this 29th day of November, 2018.

D.K. KEMEI

JUDGE