REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 77 OF 2017

EVANS SHITO LIBESE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. E. Kigen (RM) in Eldoret Chief Magistrates' Court Sexual Offences Case No. 205 of 2016 on 14th July, 2017)

JUDGEMENT

1. The appellant was convicted for 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. Aggrieved by the same he lodged this appeal on grounds that can be summarized as; that defilement was not proved to the required standards, that the trial court failed to inform the appellant of his right to representation, that section 36 of the Sexual Offences Act was not complied with and that his defence was not considered.

2. This is a first appeal and this court is under duty to re-evaluate the evidence afresh with a view to arriving at its independent conclusion bearing in mind that it did not have the benefit of seeing the witness(es) demeanor. I have given due consideration to this appeal and find that the following issues fall for determination:

i. Whether or not the offence was proved beyond reasonable doubt.

ii. Whether or not the trial court informed the appellant of his right to representation.

iii. Whether or not section 36 of the Sexual Offences Act was complied with.

iv. Whether or not the appellant's defence was considered.

3. FC recounted that she was on 31st August, 2016 playing with T when the appellant who sells basins at Kipkarren called her and told her he was going to give her KShs. 30/-. He thereafter took her to the river and defiled her. She had a dress and short on which the appellant removed. He then removed his trouser and inserted his penis into F.C.'S vagina. FC felt a lot of pain and he thereafter told her to go home. She found her mother and narrated to her what transpired. She stated that the appellant told her that he would slaughter her if she told her parents what happened and that his name was Charles. Her mother took her to Referral Hospital for treatment and to the police to report. JN (PW2) stated that she had gone to seek permission from her employer on 31st August, 2016 as F.C. was unwell. On arriving back at around 12.00 pm she found her crying and told her that someone had defiled her. She examined her and she screamed and collapsed. She rushed her to hospital. That she was bleeding from her private parts. When she interrogated her, she told her that it was the appellant who defiled her and she showed her his house. She said that the appellant told her that he would kill her and members of the public intervened and the appellant jumped over the fence. PW2 made a report to Yamumbi Police Station on 2nd September, 2016. Eunice Talit (PW3) produced a p3 form filled by Dr. Yatich in respect of PW1. She stated that she was found to have broken hymen. Dry blood wounds and discharge stained blood and an inference made that she was defiled. Corporal Anthony Kiilu (PW4) received PW1 and PW2 on 2nd September, 2016 with a report of PW1 having been defiled by the appellant. He issued a p3 form and PW1 was taken to hospital. He stated that PW1 was aged 7 years and he produced a clinic card as P. Exhibit 4 and blood stained inner pant as P. Exhibit 2 & 3.

4. The appellant was put on his defence. He stated that he has a grudge with PW2 who is his neighbour. That she once went where he sells his wares and spit on them and another time insulted him that he was a thief. He stated that PW2 made his wife leave him. He denied that he committed the offence.

5. This court has given due consideration to the appeal herein factoring in its duty as a first appellate court to re-consider and re-evaluate the evidence afresh to arrive at its independent conclusion. The ingredients forming the offence of defilement are age of complainant, proof of penetration and positive identification of the assailant. Applying the test, FC's clinic card was produced by PW4. The same ascertained that

she was aged 7 years and it follows therefore that she was a child of tender years. See: **Patrick Kathurima v. Republic [2015] eKLR** where it was held that:

> ***"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of Cap 15. We are aware that section 2 of the Children Act defines a child of tender years to be one under age of ten years. the definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts if the two statutes."***

6. It emerged that FC's hymen was broken and she had blood wounds and discharge stained blood. This evidence corroborated her evidence that she was penetrated. She described the appellant to PW.2 while reporting to her. She specifically indicated that she was defiled by the appellant who sells basins at Kipkarren. In the circumstances, I find that the prosecution proved the charge of defilement since the aspect of age, penetration and positive identification of appellant were clearly established.

7. The appellant was not informed of the right to legal representation. Article 50 (2) (g) and (h) of the Constitution stipulates as follows:

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
>
> ***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;…"***

In **David Njoroge Macharia v. Republic [2011] eKLR** The Court of Appeal pronounced itself as follows in regard to Article (2) (h):

> ***"Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

8. The Court of Appeal held the opinion that the State ought to provide legal representation to accused faced with a capital offence. That the same can also be availed through a case by case basis i.e. where there exists complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. It is my considered view the case at hand bears no complex issues and is not of public interest. I note also that the appellant understood the charge and the case in particular and was able to conduct his case. I find that he was not prejudiced by lack of representation thereby his right to legal representation was not infringed by the trial court's failure to inform him of the same. That ground therefore fails.

9. Section 36 of the Sexual Offences Act provides:

> ***"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing including a DNA test, in order to ascertain whether or not the accused person committed the offence."*** [Emphasis mine]

10. This section is not in mandatory terms. Under the circumstances of this case, I do not find that the appellant was in any way prejudiced by the trial court's failure to order for a DNA test. That ground fails.

11. Weighing the prosecution evidence *vis a vis* that of the Appellant's, it is clear and I find that the prosecution case was not shaken by that of the Appellant. In the circumstances, I am not inclined to interfere with the trial magistrate's findings. Accordingly, I uphold and affirm the conviction and sentence by the trial court. The Appeal is dismissed.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 22nd day of November, 2018.

STEPHEN GITHINJI

JUDGE