REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 19 OF 2018

BETWEEN

J M K.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence of life dated 24/1/2018 in Nyeri CMC CR. Case (S.O.) No. 11 of 2016 by Hon. R. Kefa)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. In Count I, the appellant herein, J M K was charged with **defilement contrary to section 8 (1) (3) of the Sexual Offences Act, No. 3 of 2006**, the particulars thereof being that on diverse dates between 25th December and 31st December, 2015 at an unknown time at Mbiriri sub-location within Nyeri County unlawfully and intentionally caused his penis to penetrate the vagina of E.W. a child aged 13 years.

2. The appellant faced an alternative count of committing an **indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, No. 3 of 2006**, the particulars thereof being that on diverse dates between 25th December and 31st December, 2015 at unknown time at Mbiriri sub-location within Nyeri County, he unlawfully and intentionally touched the vagina of E.W., a child aged 13 years with his penis.

3. In Count II, the appellant was also charged with defilement contrary to section 8 (1) [as read with section 8] (2) of the Sexual Offences Act No. 3 of 2006. The particulars are that on diverse dates between 25th December and 31st December, 2015 at [an] unknown time at [particulars withheld] sub-location within Nyeri County, he unlawfully and intentionally caused his penis to penetrate the vagina of N. W., a child aged 10 years. He also faced an alternative charge in respect of Count II, where the particulars are that on diverse dates between 25th December and 31st December, 2015 at [an] unknown time at Mbiriri sub-location within Nyeri County he unlawfully and intentionally touched the vagina of N.W., a child aged 10 years with his penis.

4. The appellant denied both the main and alternative counts when he took plea on 19th February, 2016. The prosecution called 5 witnesses to testify against the appellant.

5. At the close of prosecution case, the trial court ruled that the appellant had a case to answer on the two main counts and put him on his defence. He gave a brief unsworn statement in which he denied committing the offences. He did not call any witnesses.

Judgment of the Trial Court

6. Upon careful analysis of all the evidence on record, the Learned Trial Court was satisfied that the prosecution case against the appellant on the two main counts had been proved to the required standard. The appellant was accordingly found guilty as charged, convicted and sentenced to 20 years' imprisonment on Count I and life imprisonment on Count II. The trial court ordered that the two sentences would run concurrently.

The Appeal

7. Being aggrieved by both conviction and sentence the appellant filed this appeal on 6th July, 2018 and raised the following grounds of appeal:-

> ***1. THAT the Trial Magistrate erred in both law and fact while basing my conviction on reliance with section 124 of the Evidence Act and failed to consider the contradictions and inconstencies as the record reveals.***
>
> ***2. THAT the Trial Magistrate erred in both law and fact while convicting I the appellant relying with the advanced evidence of the grandmother of the complainant which was been left in doubt and to how the victim was been defiled.***
>
> ***3. THAT the Trial Magistrate lost direction in medical evidence which had no indication penetration took place while in absence of the age of injuries into the complainant's genital organs further no spermatozoa was been noted a foregoing with the evidence.***
>
> ***4. THAT The Trial Magistrate further lost direction while believing that the prosecution side proved their case and rejected my defence which was not displaced by the prosecution side as per section 212 of the CPC Cap 75 Laws of Kenya.***

8. In summary, the appellant's appeal is premised on grounds that the prosecution's case was not proved beyond reasonable doubt and secondly that the Learned Trial Court rejected the appellant's defence without assigning any reasons for the rejection. For the above reasons, the appellant prays that his appeal be allowed in totality.

9. This is the first appellate court in this matter and that being the case, the court is under a duty to subject the whole of the evidence adduced during the trial to a fresh and exhaustive evaluation and analysis with a view to reaching its own independent conclusions. The only fact to bear in mind is that this court has no opportunity of seeing and hearing the witnesses including the appellant who testified during the trial. In this regard, the case of **Kiilu & another –vs- Republic (2005) IKLR 174** is relevant. In the case the Court of Appeal was clear in its mind that:-

> ***"An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

The Prosecution Case

10. In summary the prosecution case flows from the following witnesses E.W.N. who is complainant in Count I testified as PW1 (PW1) while N.W., the complainant in Count II testified as PW2 (PW2), EW, grandmother to both PW1 and PW2 testified as PW3 (E). No. 80851, Inspector Hilda Namu previously of Kiganjo police station testified as PW4 (Inspector Hilda Namu) while Dr. Beatrice Maina of Nyeri Referral Hospital testified as PW5 (Dr. Maina).

11. From the above witnesses the prosecution case is that on 25th December, 2015, PW1 and PW2 were at home with other siblings E, and J.W. The four children two girls and two boys were living with the appellant herein who is their father. The appellant had separated with the children's' mother. On the 25th December, PW1 prepared supper as usual and after they had eaten the children went to bed. In the night the appellant threatened to kill her brother before taking her to his bed and removing her clothes. He then inserted his penis into her vagina. The appellant did the same thing to PW2 that same night.

12. After one week, PW1 got the courage to inform the village elder about that incident. The village/clan elder in turn informed the grandmother E. PW1 further testified that until she had informed the village elder and E, the appellant defiled PW1 and PW2 on a daily basis.

13. Upon receipt of the report, E took both PW1 and PW2 to Murang'a hospital where the two girls were examined before being issued with P3 forms which were produced in evidence.

14. E confirmed that after receiving the reports of the defilements of PW1 and PW2 from the clan elders, she picked the children and took them to hospital for treatment. E also testified that the appellant had threatened both PW1 and PW2 with dire consequences if they dared say anything to anyone about what had befallen them.

15. Dr. Maina examined both PW1 and PW2, filled the P3 forms and produced the same as Pexhibits 1 (a) and 1 (b) respectively. She also produced the Post Rape Care forms as Pexhibit 2 (a) and 2 (b). On general examination, Dr. Maina confirmed that PW1 was 13 years old while PW2 was 10 years old. Their respective hymens were found broken and further according to the PRC forms PW1 and PW2 had not engaged in previous sexual intercourse.

16. Inspector Hilda Namu testified that she investigated the case on 6th February, 2016 after being informed that the appellant had defiled PW1 and PW2 who are his step-daughters. She also took the children for age assessment. The two reports on age assessment were produced as Pexhibits 3 (a) and 3 (b) respectively. She stated further that the village elder assisted the police in arresting the appellant. Inspector Hilda confirmed that she did not find any used condoms under the bed in the appellants house.

The Defence Case

17. The appellant gave unsworn evidence. He stated that he was arrested during the month of February, 2016 on allegations that he had defiled PW1 and PW2. The officers who arrested him demanded a bribe of kshs 3,000/= if he wanted his freedom, but when he could not produce the money he was taken to court. He maintained that he was innocent and added that the police officer who arrested him had an affair with his wife and had even rented a house for her before he finally took off with her. The appellant did not call any witnesses.

submissions

18. The appellant filed written submissions. Apart from the attack on the medical evidence which he alleged was given by a person other than the one who carried out the medical examination on PW1 and PW2 the rest of the submissions dwelt on alleged contraventions of the appellants rights and fundamental freedoms. The appellant also submitted that the village elder who gave the information to E should have been called to testify, and in the opinion of the appellant, the prosecution did not call the village elder for fear that he would have given adverse evidence that was adverse to the prosecution case. The appellant submitted that this case was a frame-up by the mother to PW1 and PW2.

19. Prosecution counsel Miss Jebet opposed the appeal on grounds that all the three ingredients for the offence of defilement for both PW1 and PW2 were proved. Regarding production of the P3 forms by Dr. Maina, counsel submitted that the documents were properly produced in accordance with Section 77 of the Evidence Act, since the doctor who had filled the forms was shown to be on other official duties. Counsel urged the court to dismiss the appeal.

Issues for Determination

20. In this case, the prosecution need to prove the following:-

i. Age of the complainants.

ii. That there was penetration for each of the complainants and,

iii. That it was the appellant and not anybody else who caused the penetration.

Analysis and Determination

21. The first issue for determination is whether the respective ages of the complainants was proved. The age of the victim is critical in sexual offences because it is the age that determines the extent of the sentence. The evidence regarding the complainant's age was given by the complainants themselves as being 13 and 10 years respectively. The two complainants were also taken for age assessment and in Dr. Maina's evidence the age of E.W. was estimated to be 13 years while that of N.W. was estimated to be 10 years. I am satisfied that the prosecution proved the age of both E.W. and N.W. through oral and documentary evidence.

22. The second issue for determination is whether the prosecution proved penetration in respect of the two main counts. E.W. narrated how starting from 25th December, 2015, the appellant took the two girls onto his bed, removed their clothes and inserted his penis in their vaginas in turns. In addition to this evidence by E.W., N.W. also testified and confirmed that the appellant inserted his penis into her vagina after he had done the same to E.W. The medical evidence adduced by Dr. Maina, also shows that the hymen of PW1 as well as PW2 was broken.

23. I have analyzed the whole of the evidence, including the manner in which the medical documents were produced and I am satisfied that the procedure followed by the trial court was in order. Section 33 of the Evidence Act provides that **"Statements, written or oral, or electronically recorded of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible……..."** The Learned Trial Magistrate applied the above cited provision as read with section 77 of the Evidence Act in admitting the P3 forms, PRC forms and the age assessment reports. The trial court was satisfied that Dr. Maina who was conversant with both the handwriting and signature of the medical officer who filled the various forms, and who was at the time engaged in other official duties, could safely produce the medical documents.

24. It is not lost to this court that there is always some urgency when the court is dealing with sexual offences cases involving children, so that the sooner they are concluded the better for the victims who must thereafter be assisted to deal with the unpleasant experience. In any event, Article 50 (2) (e) clearly stipulates that an accused person has the right **"to have the trial begin and conclude without unreasonable delay."** In my humble view what the trial court did was aimed at expediting the conclusion of the case against the appellant and this was for his own good. No prejudice was suffered by the appellant as a result thereof.

25. The final issue for determination is whether the appellant was properly identified as the culprit. On this issue this court has not doubt. Both E.W. and N.W. and their two brothers lived under the same roof with the appellant and they knew him. E.W. stated that after they had eaten chapatti and gone to sleep on 25th December, 2015, **"At night John accused called me and my sister. He told us to have sex with him. He threatened to kill us. Our brother was sleeping. Accused took me to bed, he removed my clothes and inserted his penis into my vagina. He then did the same to my sister. The following day accused bought me a lemon."** According to E.W., the appellant told her that since she had sex with other people he also wanted to have sex with her. N.W. confirmed as much.

26. In my humble view the two girls could not have been mistaken about the person who spoke to them before taking them to his bed and defiling them. I am therefore satisfied as the trial court was that the appellant committed the offence against E.W. and N.W.

Conclusion

27. In light of the above findings I have no hesitation in concluding that his appeal lacks merit on both conviction and sentence and is accordingly dismissed. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this Judgment.

It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Nyeri on 20th day of December, 2018

HON. A. MSHILA

JUDGE.

In the Presence of

Appellant present in person

Gicheha for respondent

Kinyua – Court Assistant