REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 8 OF 2016

GEOFFREY AMKWACH.....APPELLANT

VERSUS

REPUBLIC .....DEFENDANT

(Being an appeal from the judgement of the Resident Magistrate

(Hon. Mbicha) delivered on 22nd April, 2016 at Kajiado)

JUDGEMENT

The appellant Geoffrey Amkwach, through a petition of appeal filed by his counsel Prof. Hassan was aggrieved with both conviction and sentence arising out of the proceedings in the Resident Magistrate's court presided over by Hon. E. Mbicha.

Introduction and background of the case

In the magistrate's court the appellant had been charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The brief particulars alleged by the state as consisting the offence were that on 5th October2015 in Kitengela, township the appellant intentionally caused his penis to penetrate the vagina of TK a child aged 15 years.

The appellant pleaded not guilty to the charge and this mandated the prosecution to call witnesses to proof their case beyond reasonable doubt. The case against the appellant was based on the evidence of the four witnesses.

In court the victim's mother FMM (pw1) stated that on the fateful day she had left Pw2 KM at home as she went about other responsibilities with her other daughter TKM.

Pw1 told the trial court that upon her return everything was going on well until the 7th October, 2015 when she decided to bath Pw2. In the course according to pw2 she realized flow of mucus from the private parts of Pw1. This caused her anxiety and took a step of beating her in order to reveal what had happened and also to know the source of the mucus. That is when pw1 explained that the appellant had sexual intercourse with her commonly referred to by young children as ***Tabia Mbaya.***

What followed thereafter was to take Pw2 to Nairobi Women's Hospital- Kitengela for examination. It was at the hospital they diagnosed that Pw2 must have been defiled and asked her to seek police assistance. The victim herein referred to as K.M. testified and gave a narrative on the events of the 5th October, 2015 when the appellant committed an act of penetration in their house as pw1 was away at the time.

Pw3 Avan Leyian, testified as the clinical officer who on 9th October, 2015 while on duty at Nairobi Women Hospital Kitengela the victim pw2 in company of her mother pw1 presented a history of a case of defilement. She proceeded to carry out the test and examination which confirmed bruises of the genitalia, and the hymen was also broken. The p3 form and post care rape form adduced in evidence forms part of the record of this appeal.

The police detective Cpl. Daisy Kajuju was tasked with the investigations of the incident by the OCS Kitengela. In her report she compiled the witnesses statements and the p3 form report which formed the basis of arraigning the appellant to face a charge of defilement against pw2.

The appellant in his defence denied the charge though the statement seems to concentrate more on mitigation than addressing the complaint by pw1 in her evidence. The appellant witness who testified as DW 2 identified as R N K told the trial court that most of the hours of the day

on 5th October, 2015 pw1 spent in her premises. She affirmed that during lunch hours as agreed with pw1, the complainant was allowed to go to their house for a meal. It was also the evidence of DW2 that on the 7th October, 2015 pw1 went to her house complaining that pw2 had been defiled apparently during the time under her care.

The appeal

In the notice of appeal the appellant contended that the appeal on conviction and sentence should be allowed on the following grounds.

> **1. That the trial magistrate erred in law and in fact when he convicted him based on a corroborated evidence contrary to the law of evidence.**
>
> **2. That the learned trial magistrate erred in law and fact when he failed to consider evidence raised by the appellant hence leading to miscarriage of justice.**
>
> **3. The trial magistrate erred in law and fact when he convicted the appellant and sentenced him even when there was no sufficient documentary evidence as to the actual age of the complainant.**

The appellant submissions

Prof. Harsan on behalf of the appellant argued and submitted that the mental fitness of Pw2 was not properly inquired into whether she was a competent witness in view of her disability. The presumption that was contended by counsel which could have displaced her competence or capacity to testify was the diagnosis with cerebral palsy. Learned counsel submitted that since the record did not ascertain whether Pw2 could understand and coherently describe the events due to her unsound mind there was no evidence for the trial court to rely on in convicting the appellant. The appellant counsel argued further that under Section 124 of the evidence Act there was no corroboration to support the testimony of Pw1 on the consent of sexual assault. The background against which the appellant proposition had made were the principles in the cases of ***Karanja v Republic 1990 KLR, Asumani Logoni S/O Muza v Rex [1943] 10 EACA 92, Maitanyi v Republic [1986]KLR 1.***

According to counsel the strength of these principles tilt in favour of the appellant to give effect to the prayer of allowing the appeal on conviction. Counsel further contended that the learned trial Magistrate failed to consider the appellant defence which indicated that the complainant Pw2 was not defiled. He faulted the trial Magistrate for relying on the P3 form, Post Rape Care report which were admitted in evidence contrary to provisions of the evidence Act.

This being the first appeal it is manifest upon this court to reconsider this evidence evaluate the record to satisfy itself as to the proceedings and judgment of the trial court, and to draw its own conclusions on the matter. In doing so the court should bear in mind that it has no advantage to assess the demeanour of the witnesses like the trial court (See ***Okeno v Republic 1972 EA 32)***

Following the summary of the evidence before the trial court I see the following broad issues as capable of determining this appeal

> **(a) The first grand issue is whether the prosecution established the ingredients of the offence of defilement against the appellant**
>
> **(b) The ancillary to this is whether the complainant condition of cerebral palsy impaired her mental fitness not to coherently testify as a competent and compellable witness.**

Issue No. 1

It is clear from the provisions of Sexual Offenses Act the ingredients of the offence of defilement constitutes the following:

> **(a) That the female complainant was aged under the age of 18 years.**
>
> **(b) That there was penetrative sexual intercourse with her by another male human being**
>
> **(c) That the accused was positively identified as the perpetrator of the crime/.**

Given the above background I now delve into each singular element and the weight of the evidence before the trial court.

> ***(a)*** **The element on penetrative sex with the complainant is defined Section 2 of the Sexual Offences Act to mean "*penetration to mean the partial or completer insertion of the genital organs of a person into the genital organs of another person*"**

Section 42 of the Act provides that "***A person consents if he or she agrees by choice and has the freedom and capacity to make that choice"***

As regards intention and unlawful Acts Section 43(1) of the Act provides that "***an act is intentional and unlawful if it is committed.***

> ***(a)*** **in any coercive circumstances**

(b) under the false pretences or by fraudulent means or

(c) in respect of a person who is incapable of appreciating the nature of the Act which causes the offence.

Quite properly the courts have provided guidance on the above provisions in the following cases. In ***Philip Chepkwony v Republic High court at Nakuru 2006 UR.*** In this case the appellant was convicted of defilement for taking the complainant to the forest and forcibly having sexual intercourse with her. On appeal the court dismissed the appeal on grounds that sex with any girl younger than 10 years was considered unlawful, whether or not the girl consented.

In the instant case according to pw2 she was lured by the appellant when she went home for lunch from the house of D.W2. The appellant even induced the complainant with some sweets which also ended up in hands of the mother pw1. After a while pw1 had a conversation with pw2 when she noticed some strange mucus from her private parts. That is when pw1 gave a description how she was undressed by the appellant and made her to have sex on the chair.

Apart from Pw1's testimony the clinical officers evidence Pw3 was there she examined the complainant and on physical examination of the genitelia there were bruises and lacerations. She further stated that the hymen was found broken though no bleeding was established. One thing which is obvious is that the evidence of Pw2 statutorily may require corroboration as expressly provided for under the main provisions of Section 124 of the evidence Act. The Section provides:

> "***Notwithstanding the provisions of section19 of the Oath and statutory declaration Act, where the evidence of a child of tender years is admitted in evidence 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"***

Prof Hassan for the appellant argued and submitted that the case does fall under the scope of Section 124 of the evidence Act and not the proviso. The gist of his submissions was that corroboration in sexual offences is essential. Contrary to the submissions by counsel for the appellant the complainant in this case cannot be classified to be a child of tender years envisaged in section 124 of the Evidence Act. It is strange that the learned counsel took no objection to the admission of the complainant evidence at the time in line with the proviso of section 124. I have no hesitation in accepting the trial court position as it was made clear by the court of appeal in the case of ***J.W.A v. Republic 2014 EKLR*** that corroboration in sexual offences is not mandatory in the present appeal there was ample evidence that even without corroboration the learned magistrate could convict the appellant sorely on the testimony of the complainant. It is not in dispute that the evidence alleged to implicate the appellant was not entirely that of the complainant. The other piece of evidence connecting the appellant with the defilement can be traced to the complainant's mother and the clinical officer. It is therefore trite that corroboration in sexual offences is not necessary in law and the court may act on a testimony of a single witness if it is fully satisfied that the evidence points to the culpability of the accused.

As regards the age category classified as of tender years the court of appeal pronounced itself on this principle in the case of ***Patrick Kathurima v Republic 2015 eKLR*** as follows:

> ***"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 is implicates the right to a 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's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the oaths and statutory declarations Act Cap. 15. We have no reason to impose it thereto in the absence of express statutory direction given. The different contexts of the two statutes"***

According to the trial magistrate he was satisfied that the statement by the complainant was truthful on what transpired between her and the appellant. In the present appeal there were no contradictions of evidence by the complainant and her mother pw2. The complainant's testimony is consistent with that of Pw2 who discovered a few days after the act of carnal knowledge of penetration had taken place.

The facts of the complainant presence of mucus, lacerations and bruises of the genitalia together with broken hymen confirms beyond reasonable doubt there was penetration.

The second element which ought to be proved is the age of the complainant. The condition in which the appellant has to be connected is based on the age of the complainant proven by the prosecution beyond reasonable doubt.

In the case of ***Kaingu Elias Kasomo v Republic Malindi Cr. Appeal No. 504 of 2010*** the court stated as follows:

> "***That the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as Baptismal cards, School leaving certificates in my view would also be useful."***

In this regard since the passage of the sexual offences Act, the practise has been that age assessment of defilement victim is carried out by dentists or medical doctors. This is in line with the legal proposition in the cas of ***Francis Omuroni v Uganda Cr. Appeal No. 2 of 2000*** having indeed considered the issue held:

"***That in defilement cases medical evidence is paramount in determining age of the victim but in absence of any other evidence age may also be provided by birth certificate, the victim's parents or guardian and by observations and common sense"***

From the facts and evidence set above the prosecution placed before court notification of birth dated 22nd September, 2001 indicative as the date of birth of the complainant.

According to the evidence of Pw3, the clinical officer who undertook to fill the P3 assessed the age of the complainant to be 15 years. The evidence in support of this ingredient is overwhelming and no amount of attack by the appellant can change that position. The evidence is clear that the complainant was aged 15 years at the time she was defiled by the appellant. The third element the prosecution must proof is that of placing the accused at the scene of the crime. The guidelines and principles laid down in the case of ***Republic v Turnbull 1976 63 Cr. Appeal No. 132*** apply to the facts of this case. The learned trial Magistrate evaluated the evidence of the complainant as to the question on positive identification.

In this case there was no identification parade conducted. The case involved a person known to the complainant prior to the sexual act of defilement. The defilement occurred in broad day light on or about 1.00 p.m. The victim soon thereafter informed her mother that the appellant was her assailant in my view the degree of prior familiarity between the appellant and the complainant satisfied the criteria of accuracy, cogency and free of mistaken identity. To this end I hold that in consonant with the dicta in ***Republic v Turnbull (Supra)*** recognition is more reliable in the identification of the appellant and there are no extenuating circumstances to render the evidence suspect or weak in reliably placing the accused at the scene.

It is undoubtedly clear that the complainant was released by Dw3 to go to their house to have some lunch. The fact that it took about 5 to 10 minutes before she made a comeback is no defence that the unlawful act of defilement did not take place. There is no normal amount of time to have sex. ***Penn State Erie researchers/on a record published in http://www.PSU.Eck*** confirmed that satisfactory sexual intercourse for couples to last from 3 - 13 minutes. This means that contrary to the defence version alluded to by DW 2 that routinely sexual intercourse from penetration between the appellant and complainant could not have taken place is a lie. It has not been shown by medical evidence that if a man ejaculates within one minute of penetration is a lesser offence than the one defined in Section 2 of the sexual offences Act on characteristics of what constitutes penetration.

It behoves on this court to find that recognition of the appellant by the complainant was perfect and free from any error or mistake. Consequently, there is nothing left to impeach the judgement of the lower court on conviction.

As regards sentence in construing the latter and spirit of the sexual offences Act society abhors and resents acts of defilement against young girls. The offences of defilement are dealt with firmly by our courts as a declaration in this respect that the insatiable urge by men of all ages going after young girls including those of tender ages to satisfy their lust would be met with the full force of the law. As the imposition of sentence after conviction of an offender is one of the solemn duty performed by judges and magistrates. Its significance is so important for the very reason that it involves the deprivation of constitutional right to liberty and freedom of a person. However deportation of such liberty is necessary for the advancement of the rule of law. Punishment of offenders as one of the key pillar in our criminal justice system with regard to the sexual offences act is provides for various categories of sentences dependent on the age of the victim of defilement.

A court of Appeal will not normally interfere with sentence of a trial court unless the facts of the case satisfy the principles in the case of ***Ogola S/O Owuora v Republic 1954 21 EACA 270.*** Based on the above principles: First I do not consider the sentence of 20 years imprisonment to be manifest excessive or harsh. Secondly, the trial magistrate did not misapprehend the law nor apply wrong principles in arriving at the decision. Thirdly, given the gravity and aggravating factors present from the facts of the case at the trial, like the appellant luring his victim, enticing her with sweets and proceeding to commit an act of penetrative sex is callous and abomination to the human dignity of an underage child. In the upshot the sentence is just and commensurate to the offence committed by the appellant.

Dated, signed and delivered in open court at Kajiado this 17th day of December, 2018.

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R. NYAKUNDI

JUDGE

In presence of:

Mr. Mutunga holding brief for Hassan Nandwa

Mr. Meroka for the DPP