REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 37 OF 2016

BENARD OLOO OMBEWA…...…….APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 883 of 2011 in the* Senior Resident Magistrate's Court at *Winam on 28.3.12 by Hon. C.N.Sindani (SRM))

JUDGMENT

The Trial

The Appellant herein **Benard Oloo Ombewa** has filed this appeal against sentence and conviction on a charge of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006.The particulars of the charge are that

> ***On 16.8.11 at around 9.00 am at [particulars withheld] in Kisumu East District within Nyanza Province intentionally attempted to cause your genital organ namely penis to penetrate the genital organ namely vagina of J.H.A a girl aged 3 1/2 years***

In the alternative count; the appellant was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge are that

> ***On 16.8.11 at around 9.00 am at [particulars withheld] in Kisumu East District within Nyanza Province committed an indecent act with J.H.A a girl aged 3 1/2 years by removing and touching her pants***

The prosecution called a total of four (4)witnesses in support of their case PW1 C A O told court that the complainant is her daughter and recalled that on 16.8.11, the complainant told her that Papis had put his "dudu in hers". That she understood the report to mean that complainant had been defiled and reported the matter to Kondele Police Station. That the child was later examined at Kisumu District Hospital and was issued with a P3 form He said that accused who was his neighbor's employee was later arrested and charged.

Thecomplainant **J.H.A** was affirmed and she told court that she was 3 1/2 years old and was in baby class in [particulars withheld] Academy. She recalled that on 16.8.11; M sent her to buy mandazi and on the way; she met the appellant who took her to a farm, removed her skirt, removed his trouser and did "tabia mbaya" to her. That she felt pain. That she told her mother who took her to hospital.

PW3 George Mwita examined the complainant on 17.8.11 and found that her outer private parts were

swollen and bruised but the hymen was intact. He produced her P3 as an exhibit.

PW6 PC Shadrack Kipsang, the investigating officer recalled that on 16.8.11, complainant and her mother went to Kondele Police Station and reported that the child had been defiled. That he referred complainant to hospital and her P3 form was filled. That the appellant was later arrested and charged.

At the close of the prosecution case,the appellant was ruled to have acase to answer and was placed on his defence. He gave sworn defence in which he denied the charges. He told court that he was in the farm on the material date and tie and did not know the complainant and did not meet her on that date.

In a judgment delivered on 28.3.12, the appellant was convicted and sentenced him to serve 20 years imprisonment.

The appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 20th June 2013, the appellant set out 4 grounds of appeal to wit:-

1. ***The sentence of 20 years is harsh and excessive***

2. ***The appellant is the sole breadwinner of his family***

3. ***The appellant is remorseful***

4. ***The appellant prays for leniency***

Ms. Wafula, Learned Counsel for the state conceded that the court did not conduct voire *dire* evidence of the minor but that her evidence was corroborated by that of PW1, PW3 and PW4.

This being acourt of first appeal,I am guided by the ruling of the Court of Appeal in the case of ***OKENOVS.REPUBLIC[1972]E.A.32***,where it held that:-

> ***"It is the duty of afirst appellant tcourt to consider the evidence,evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"***

The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

Issues for Determination

1. Was the evidence of the complainant, a minor, corroborated

2. Is the sentence of 20 years is harsh and excessive

In dealing with this appeal, I will separately consider the issues as follows:-

i. Was voire dire evidence of the minor, complainant conducted?

The complainant testified that she was defiled by appellant in a farm and that she felt pain in her private parts. The complainant minor was the only witness to the alleged incident.

I have considered the provisions ofSection 19 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya provides:

> ***(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the***

opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with* section 233 *of the Criminal Procedure Code* (Cap. 75)*, shall be deemed to be a deposition within the meaning of that section.

Under the above cited section, the trial court must be severally satisfied about two main ingredients before proceeding to take the evidence of a child of tender age namely;

1) ***Whether the child understands the nature of an oath; or***

2) If the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

If the child does not understand the nature of the oath, the trial court should determine if he/she possesses sufficient intelligence to justify the reception of the evidence, and he/she understands the duty of telling the truth. It is onlyafter the said inquiry has been conducted that thetestimony of a child of tender age is received in evidence either under oath or as unsworn statement.But in both instances, the child is liable to cross-examination.(See ***BGM HCCRA NO 141 OF 2011 [2013] eKLR)*.**

In the instant case, the trial court did not conduct *voire dire* of the PW2 the complainant, minor, to determine if she was possessed of sufficient intelligence to understand the duty of speaking the truth.

The foregoing notwithstanding, I have considered the provisions of **Section 124**of the Evidence Act Cap 80 Laws of Kenya which provides for conviction on the evidence of a single witness in the following terms:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

Courts have emphasized that non-compliance with the requirements of section 19 of Cap 15 of the Laws of Kenya will result into quashing of a conviction unless there is other evidence before the court which is sufficient on its own to sustain a conviction. (See ***Nyasan S/O Bichana V Republic [1958] EA 190).***

A perusal of the proceedings before the trial learned magistrate shows that the court did not record that it was satisfied that the child was telling the truth.The trial magistrate did not comply with section 19 of Cap 15 of the laws of Kenya.Accordingly, the testimony of PW2 was not properly receivedin evidence.

The question for this court's consideration is whether the conviction could still stand on the other evidence on record.I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides that:

notwithstanding the provision of section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him.

The law on the point was settled in the case of ***Chila V Republic*(1967) EA 722 at 273** that;

''The law of East Africa on corroboration in sexual cases is as follows. The judge should warn

the assessors and himself of the danger of acting on the uncorroborated evidence testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice''.

But before I pose the question whether the trial court warned itself as required by the law, I should first determine whether there was any or other evidence which corroborated the evidence of the complainant on identification. Only, the complainant identified the Appellant. There is no evidence that she knew the Appellant before the incident. Her evidence was, therefore, the only evidence of identification on which the Appellant was convicted. The law is that the court, before convicting on the evidence of identification by a single witness, should warn itself of the possibility of mistaken identity on the part of the witness. The trial court should carefully evaluate such evidence with utmost thoroughness in order for it to be satisfied that it is safe to convict. It should, therefore, consider any other independent evidence on the matter.(*See* ***Abdala Bin WendoV R [1989] KLR 424,*** *and* ***R V Turnbull (1976) 3 All ER 549).*** That law is underpinned by the fact that, although identification by recognition is more reliable than identification of a stranger, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

PW3 George Mwita produced a P3 form which confirmed that complainant's outer private parts were swollen and bruised but the hymen was intact. The learned trial magistrate observed that the evidence by the medical officer corroborated the fact of an attempt to penetrate the complainant.

As much as there is evidence that an attempt was made to defile the complainant; evidence by the complainant that it was the appellant that committed the offence lacks corroboration. Further to the foregoing; the trial court did not warn itself of the dangers of convicting on the evidence of a single witness on identification. It did not apply the law appropriately and I find therefore that on the whole; the evidence on record is unsafe to sustain a conviction.

2. Is the sentence of 20 years is harsh and excessive

Section 9 of the Sexual Offences Act provides:-

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

This court has discretion under Section 354 (3) (b) of the Criminal Procedure Code toincreaseorreducesentence or alter the nature of the sentence. Had the appellant been properly convicted, this is one case where the court's discretion would not been exercised in his favor since the sentenced handed down by the trial court was legal.

Decision

In view of the foregoing analysis, I reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. The appeal is thus allowed. The conviction is hereby quashed and the sentence is set aside. It is ordered that the appellant be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED THIS 22ND DAY OF JUNE 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant FELIX

Appellant PRESENT IN PERSON

For the State MR.GITRO