REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 162 OF 2014

MOSES KIPCHIRCHIR.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate

Honourable G. Adhiambo in Kapsabet Criminal Case

No. 1057 of 2014 dated 15th October, 2014)

JUDGMENT

1. The appellant *Moses Kipchirchir Bii* was charged with the offence of defilement contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act.* He was also alternatively charged with the offence of committing an indecent act with a child contrary to *Section 111(1)* of the same Act.

2. After a full trial, he was convicted of the main charge of defilement.

The particulars in the main charge alleged that on 14th March 2014 in Nandi County, the appellant unlawfully caused his penis to penetrate the vagina of MJ (Name withheld) a child aged 13 years.

3. Upon conviction, he was sentenced to thirty five years imprisonment. Dissatisfied with his conviction and sentence, the appellant filed this appeal in person on 29th October, 2014. He later engaged the services of *Ms. Kigamwa & Company Advocates* who filed amended grounds of appeal pursuant to leave granted by this court on 15th December, 2016.

4. In his amended grounds of appeal, the appellant raised seven grounds which can be summarized into three main grounds as follows:-

(i) That the trial magistrate erred in proceeding with the trial on the basis of defective charges.

(ii) That the trial magistrate erred in failing to properly evaluate the alibi defence raised by the appellant.

(iii) That the appellant's conviction was based on evidence which did not prove the charges beyond reasonable doubt.

5. At the hearing, the appellant was represented by learned counsel *Mr. Kigamwa.* In his submissions,

Mr. Kigamwa invited the court to note that though the appellant was charged under *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act (hereinafter the Act),* the victim of the offence was a minor aged 13 years and the charge ought to have been premised on *Section 8(3)* of the *Act;* that failure to invoke the correct provision of the law led to the passing of an illegal sentence on the appellant. That the alternative charge was anchored on S*ection 111(1)* of the *Act* which was non-existent; that therefore the charges were defective and ought to have been rejected under *Section 89(5)* of the *Criminal Procedure Code (CPC).*

6. It was further submitted that defilement was not proved as the medical evidence availed by the prosecution did not conclusively prove penetration; that though there was evidence that the minor's hymen was broken, the age of the injury was not disclosed. Finally, *Mr. Kigamwa* submitted that the trial magistrate failed to consider the appellant's alibi defence and instead shifted the burden of proof on him. He urged the court to find merit in the appeal and allow it.

7. The state contests the appeal. Learned prosecuting counsel *Mr. Muchiri* on behalf of the state submitted that the appellant was properly convicted as all the ingredients of the offence of defilement were proved beyond any reasonable doubt including the act of penetration.

On the claim that the charge sheet was defective, *Mr. Muchiri* conceded that the appellant ought to have been charged under S*ection 8(1)* as read with *Section 8(3)* not *Section 8(2)* of the *Act* and that the Section under which the alternative charge was based was non-existent. But in his view, these anomalies did not occasion a failure of justice. He implored the court to invoke *Section 382* of the *CPC* and find that the errors evident in the drafting of the charges were not sufficient to vitiate the appellants conviction.

8. This is a first appeal to the High Court. I am mindful of my duty as the first appellate court which is to re-evaluate all the evidence presented to the lower court in order to draw my own independent conclusions regarding the validity or otherwise of the appellant's conviction.

See: ***Okeno vs Republic (1972) EA 32; Kiilu & Another vs Republic (2005) KLR 175; Kinyanjui vs Republic (2004) 2 KLR 364.***

9. I have carefully considered the grounds of appeal, the evidence on record as well as the submissions made on behalf of the state and the appellant. I wish to deal first with the appellant's claim that the trial magistrate did not properly evaluate his alibi defence and consequently shifted the burden of proof to him.

A quick perusal of the learned trial magistrate's judgment at page 43 clearly shows that the trial court evaluated the appellant's defence alongside the evidence adduced by some prosecution witnesses and dismissed it as a sham and afterthought. In doing so, the trial magistrate did not shift the burden of proof to the appellant. She was well aware of the principles on the burden of proof in cases where an alibi defence was raised in a trial. To demonstrate this finding, I will reproduce what the trial court stated in its judgment at page 55 line 16;

> ***"I have warned myself that when an accused person does raise defences of alibi, the burden of proof does not shift to him but remains on the prosecution to prove its case. I find that the prosecution has proved beyond reasonable doubt that it is the accused who defiled the complainant on 14th March, 2014....."***.

In the premises, I find no merit in that ground of appeal.

10. Regarding the appellant's claim that he was convicted on defective charges, I agree with the submissions by both learned counsels that there was an error in the drafting of the main charge of defilement given the age of the complainant.

The victim's age as disclosed in the particulars of the offence and in the evidence before the trial court was 13 years. As such, the charge ought to have been premised on *Section 8(1)* as read with *Section 8(3)* of the *Sexual Offences Act* and not *Section 8(2)* as was done in this case.

11. In my view however, this anomaly does not render the charge of defilement defective as the prosecution properly invoked *Section 8(1)* of the Act which is the provision that creates the offence. *Section 8(2)* and *Section 8(3)* of the *Act* only prescribes the sentence to be imposed on accused persons convicted of the offence depending on the age of the victim. I have looked at the charge sheet particularly the particulars supporting the charge of defilement. The statement of the charge and the particulars thereof not only clearly disclosed the offence the appellant was facing but also contained details explaining how the offence was allegedly committed. The age of the minor was also disclosed. It cannot therefore be said that the wrong invocation of *Section 8(2)* of the *Act* created any uncertainty or confusion on the nature of the charges the appellant was facing. The error did not in my opinion occasion any prejudice on the appellant or occasion a failure of justice. It is an error which is curable under *Section 382* of the *CPC* and I so find.

12. On the alternative charge, it is true that it was fatally defective given that it was anchored on a non-existent provision of the law. Nevertheless, it is important to note that the appellant was convicted of the main charge of defilement not on the alternative charge. The trial court did not make any finding on the alternative charge. The defect on the alternative charge did not have any bearing on the main charge. It did not therefore affect the validity of the main charge which founded the appellants conviction. And as the appeal challenges the conviction and sentence in the main charge, I am satisfied that nothing turns on the complaint that the charge in the alternative count was defective.

13. Having made the above findings, let me now turn to the complaint which is the gravamen of this appeal. This is the appellants assertion that he was convicted on evidence which was insufficient to prove the charges beyond reasonable doubt.

My analysis of the evidence on record reveals that only the complainant who testified as PW3 gave material evidence in support of the prosecution case. After a lengthy voire dire examination, she narrated how the appellant, a person she knew well before went to her mother's house on 14th March, 2014 at around 5.30p.m and demanded that she has sexual intercourse with him. This was after he locked out her younger brother (PW4) outside the house. She recalled that on the appellant's instructions, she removed her inner wear and the appellant then defiled her within a minute while standing before leaving the house. Before he left, he threatened her with death if she reported the incident to anyone else.

According to her evidence, this was the third time the appellant had sexually assaulted her. PW1 and PW4's evidence did not add much weight to the prosecution's case as they only reproduced in their testimonies what PW3 had told them.

14. When put on his defence, the appellant denied having committed the offence and claimed that at the time the offence was allegedly committed, he was at a place called Chepkumia. He claimed that the complainant was a stranger to him.

15. Having carefully evaluated the evidence on record in its entirety, I find that though under Section 124 of the Evidence Act the evidence of PW3 alone if believed by the trial court was sufficient to sustain the appellant's conviction, PW3 does not appear to have been a credible witness. To start with, she alleged that prior to 14th March, 2014, the appellant had sexually assaulted her twice but for unexplained reasons, she did not report any of these incidents to her mother (PW1), but she readily narrated to her what happened on 14th March, 2014 even though the appellant had allegedly threatened her with death if she reported the incident to anyone.

Secondly, the treatment sheets from Kobujoi Health centre show that the complainant was examined there on 17th March, 2014 about three days after the alleged defilement and apart from a broken hymen, there were no tears or bruises on her genitalia. Considering the age of the complainant and that the appellant is a fully grown man, if indeed the complainant was defiled as alleged, it is difficult to understand how defilement could have been perpetrated without occasioning visible external injuries to the complainant's genitalia. Thirdly and most importantly, the narration regarding how the appellant allegedly committed the offence defeats all logic. It is in my view completely unbelievable. I fail to see how the appellant could have committed such an act with a minor while standing.

16. It is worth noting that the fact that PW3's hymen was broken is not in itself conclusive evidence of penetration. It is common knowledge that a hymen can be torn owing to reasons unrelated to penetration.

Penetration is a crucial ingredient of the offence of defilement and must be proved beyond all reasonable doubt alongside the other elements of the offence before an accused person can be safely convicted.

17. Given the evidence on record, I am not satisfied that penetration in this case was proved to the standard required by the law. I also find that the learned trial magistrate failed to thoroughly interrogate the complainant's testimony and thereby arrived at the wrong conclusion that she was a credible witness. In sum, I have come to the conclusion that the evidence on record fell short of proving the charge of defilement beyond any reasonable doubt and that the accused's conviction was unsafe. Consequently, I find merit in the appeal against conviction and it is hereby allowed.

18. Having allowed the appeal against conviction, it follows automatically that the sentence imposed on the appellant whether lawful or otherwise must be set aside. But I wish to mention that the sentence passed against the appellant in this case was lawful contrary to the submissions made by *Mr. Kigamwa* on this point. The learned trial magistrate in imposing a sentence of thirty five years imprisonment was apparently mindful of the complainant's age. *Section 8(3)* of the *Sexual Offences Act* prescribes a minimum mandatory sentence of twenty years imprisonment for persons convicted of the offence of defilement where the victim is between twelve and fifteen years of age.

Since the complainant fell into this age bracket, the sentence of thirty five years imprisonment imposed on the appellant was lawful as it exceeded the minimum mandatory sentence prescribed by the law.

19. For all the foregoing reasons, I allow this appeal in its entirety. The appellant's conviction is hereby quashed and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 20th day of December, 2017

In the presence of:

Appellant

Mr. Waziri for Mr. Kigamwa for the appellant

Ms. Kainga for the state

Mr. Lobolia - Court assistant