REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 76 OF 2015

HBM…….APPELLANT

VERSUS

REPUBLIC……...……..…….……..……RESPONDENT

(An appeal from the judgment of Resident Magistrate M/s C.Njagi delivered o 26th September 2014 IN Criminal case No. 649 of 2013 at Kwale)

JUDGMENT

1.The appellant , HBM was charged with defilement of a girl contrary to Section 8 (1) as read with section 8 (3) of the Sexual Offences Act No 3 of 2006.

The particulars were that on the 19th day of May,2013 in Kwale County within Coast Region the appellant unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of MK, a girl aged 12 years.

The appellant faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the aforesaid date and at the aforesaid village in Kwale county the appellant unlawfully committed an indecent act to MK a girl aged 12 years by touching her private part namely vagina.

2. The case proceeded for hearing and after a full trial, the appellant was convicted for the offence of defilement whereby he was sentenced to serve twenty (20) years imprisonment. There was no finding made in respect of the alternative charge.

3. Upon being convicted, the appellant was aggrieved and he filed an appeal against the conviction and sentence in respect of the main charge.

4. The appellant vide an amended memorandum of appeal filed, faulted the trial magistrate for convicting him. He advanced the following grounds:

> (a) That the learned trial magistrate erred in law and fact by finding my conviction and sentence without considering that section 19 of the Oaths and Statutory and Declaration Act, was violated hence the sentence slapped upon him was unsafe.
>
> (b) That the learned trial magistrate erred in law and fact by finding his conviction and sentence by

relying on circumstantial evidence which was never proved beyond reasonable doubt.

(c) That the learned trial magistrate erred in law and fact by convicting him to 20 years imprisonment without considering that the same was harsh and excessive.

(d) That the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the prosecution's case was not proved to the standard required of law.

(e) That the learned trial magistrate erred in failing to consider his defence.

5. The appellant filed written submissions in court on 15.9.2015 which he relied on to support his grounds of appeal.

(i) On the first ground where the appellant has pointed out that Section 19 of the Oaths and Statutory and Declaration Act was violated, he submitted that the procedure provided for under the aforesaid provision of the law was not put into consideration by the trial magistrate.

(ii) As for the 2nd, 3rd and 4th grounds of appeal, the appellant consolidated and argued them together. He submitted that the issue of defilement was not proved to the standard of law. He stated that no act of defilement was done on the complainant on the material day as alleged for Pw3 who alleged to have been present at the scene on the material day did not tell the court that he caught them in the act of Sexual intercourse. He also stated that the person who the complainant's father informed court gave him the report, that his daughter had been defiled was never called as a witness during the trial.

(iii) The appellant went on to submit that although it alleged that the complainant's hymen was absent, there was no evidence as to how it was linked to the appellant.

(iv) On the issue of the sentence imposed upon him, it was the appellant's submissions that the sentence of 20 years was harsh and excessive since, while section 8 (2) of the Sexual Offences Act provides that for a term of not less than twenty years", the words used are " shall be liable" which means that it is not mandatory.

6. The respondent through the learned state counsel M/s Ocholla, submitted orally and opposed the appeal;

(i) In response to the first ground of appeal, M/s Ocholla submitted that the complaint was 12 years old as evidenced by exhibit P1 and therefore not a child of tender years. That it was therefore not mandatory to consider a voire-dire examination.

(ii) M/s Ocholla also submitted that the prosecution managed to prove that the complainant (Pw1) was a minor and that there had been penetration which are the two crucial ingredients of the offence required to be proved.

(iii) She further submitted that the appellant was not a stranger to Pw1 as they are related and so was positively identified as the perpetrator.

(iv) As for the trial magistrate failing to consider the appellant's defence, M/s Ocholla submitted that there was no defence tendered by the appellant as he opted to remain silent.

(v) On the issue of the sentence of 20 years imprisonment imposed upon the appellant being harsh, M/s Ocholla submitted that this was the penalty provided for under section 8 (2) of the sexual offences Act which the appellant had been charged under.

7. To determine this appeal, it is my duty to reevaluate ad analyze the evidence which was tendered by the prosecution and defence before the trial court and come to my own conclusion and findings, in line

with the case of OKENO VS REPUBLIC 1972 E.A 32 in which the duty of the first appeal court is set out.

PROSECUTION CASE

8. Briefly the prosecution's evidence was that the complainant, MH, a girl aged 12 years old and in standard five (5) at [Particulars Withheld] Primary school had gone to have her hair shaved at the accused person's place on 19.5.2013, when he took her into his house, forced her to his been, stripped her off her underwear and also undressed, then slept on top of her. That he then proceeded to do bad things to her vaginal area that she got hurt.

9. According, to the complainant, the accused, H, had done this to her on 18.5.2013 but she did not tell anyone. But on 19.5.2013 the accused person's elder brother found them in accused's house and went and told the father about it. That the father (Pw2) who was sick at the time took her to the children's officer when he felt better and then to Msambweni Hospital where she was examined. They went to the police station at Msambweni on 10.6.2013 where the matter was reported to Pw4, P.C Reuben Ndiema. Pw4 arrested and charged the accused who had come in with the complainant and her father (Pw2). He produced the clinic card showing that the complainant was born on 18.2.2001 as exhibit P1.

10. Pw5, Philip Kibet Chebii of Msambweni District Hospital examined the complainant and found that her hymen was absent. He concluded that a penetrative sexual act had happened to her. He filled and signed the P3 form which he rubber stamped on 1.6.2013. He produced it as exhibit P2.

11. The accused person, HBM was found to have a case to answer, placed on defence and he opted to remain silent.

12. In her judgment delivered on 26th September, 2014, Hon. C Njagi stated at page 3 lines 11-12.

To that extent the court is satisfied that the primary ingredients of defilement are proved.

And on the same page at lines 21 to 23,she stated;

> "I have no reason to doubt the positive identification of the accused by the complainant MK as her defiler as well as her evidence before this court."

She indicated that this was in line with Section 124 of the Evidence Act.

13. At lines 1 to 2 of page 4 of the judgment, the trial magistrate found that;

> "the prosecution has proved their case as against the accused beyond all reasonable doubt I thus do find that the accused HBM is convicted of the main charge of defilement contrary to section 8 (1) as read with secion 8(3) of the Sexual offences act No. 3 of 2006……."

ANALYSIS AND DETERMINATION.

14. I have carefully gone through the evidence adduced before the trial court together with the grounds of appeal and submissions by both the appellant and respondent's counsel. I find that the following issues emerged for determination;

> (1) Whether the trial magistrate considered a voire-dire examination in accordance with Section 19 of the oaths and Statutory Declarations Act?
>
> (2) Whether the trial court relied on circumstantial evidence which was well proved beyond reasonable doubt.
>
> (3) Whether the 20 years sentence imposed upon the appellant was harsh and excessive.

(4) Whether the trial magistrate failed to consider the appellant's defence.

15. With regard to whether a voire-dire examination was properly conducted in compliance with Section 19 of the Oaths and Statutory Declaration Act, I wish to state that this is a preliminary procedure that is important when it comes to evidence of a child of tender years and, unless there is other evidence before the court, which Could sustain a conviction, courts have quashed convictions for non- compliance with this section (see the case of **NYASAN s/o BICHANA VS REPUBLIC (1958) E.A 190).**

16. Section 19 of the Oaths and Statutory Declarations "Act provides that 19 (1)

> ***" Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, by child of tender years called as a witness doesn't in the opinion of the court or such person, understands the nature of the oath, his evidence maybe received though not given upon oath if, in the opinion of the court or such person, he is possessed of significant 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 decreed to be a deposition within the meaning of that section".***

This section talks of a child of tender years, which under the children's Act is defined as:

> ***"a child under the age of ten years".***

17. In the case in question the complainant was 12 years old as evidenced by exhibit P1, the immunization (clinic) card. I am therefore in agreement with the learned state counsel, M/s Ocholla that the complainant, though a child, was not a child of tender years and therefore it was not mandatory for the trial magistrate to conduct a voire-dire examination in her case.

18. Even then, the record of the trial states that the trial magistrate at page 3 lines 18 to 24 of the proceedings conducted a preliminary examination of the complainant and recorded information given by the complainant which I presume was elicited by questions asked by him. The trial magistrate recorded that :

> ***"I certify the minor understands. I therefore order she gives a sworn statement".***

This must have come from the child's statement.

> ***" I am a Muslim we are taught to say the truth. I have not been forced to be here. I am in Kwale courts. I will say the truth …"***

19. The claim by the appellant that the trial magistrate did not comply with section 19 of Cap 15 of the laws of Kenya by the appellant therefore fails.

20. The next issue for a consideration is whether the prosecution proved their case beyond reasonable doubt or relied on circumstantial evidence to convict and sentence the appellant.

21. The position that has been upheld in numerous cases in Kenyan courts is that the burden of proof in a criminal trial is with the prosecution. This degree is well settled, that in **FESTUS MUKATI MURWA VRS REPUBLIC (2013 e KLR**, it was held:

> ***"That the standard of proof required is proof beyond reasonable doubt."***

22. And even, Section 107 of the evidence Act provides that:

(1) whoever desires any court to give judgment as to any legal right or liability dependant on the

existence of fact which he asserts must prove that those facts exists.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof is on the person."

23. The appellant was charged with defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act provides that:

"Any person who commits an act which causes penetration with a child, is guilty of an offence termed defilement".

24. I have analyzed the evidence on record from the trial court and the relevant law. I have considered the submissions by the appellant and the state counsel.

25. To establish a case under Section 8 (1) of the Sexual Offences Act, the prosecution must prove the elements of the offence which are:

(a) the age of the victim, that is ,that the victim is a child under the age of 18 years.

(b) that there must be an act which causes penetration.

26. I find that the complainant (Pw1) told court that she was 12 years old and that she was born on 19th March 2001 as per the clinic card (exhibit 1) which she identified to court. This was corroborated by the evidence of pw2 her father, HAK who also identified the clinic card (exhibit P1). The said clinic card was produced as exhibit P1 by Pw4 and it confirmed the evidence of pw1 and 2. This evidence was not challenged by the defence and I have no reason not to believe that the prosecution proved that the complainant, aged 12 years old at the time, was a child as defined by the children's Act.

27. The next ingredient that needs to be proved is the "Act which causes penetration…" as contemplated by the Act this means;

"the partial or complete insertion of the genital organs of a person into the genital organs of another person."

28. According to the particulars of the charge against the appellant, it is alleged that the appellant " caused his penis to penetrate the vagina of MK a girl aged 12 years".

29. The evidence adduced by Pw5 Philip Kibet Chebii of Msambweni District Hospital was to the effect that he examined the complainant (Pw1) and found her hymen absent. This established the act of penetration had happened to the complainant.

30. In support of this, the complainant (Pw1) on page 4 of the proceedings from lines 8 to 16 of the proceedings narrated that:

"I was going for a shave at his place. He forced me on his bed……He took me into his house and stripped me off my underwear. He then started the act. He forced me on the bed and slept on top of me. He started doing bad things at my vaginal area (she points at the area) he hurt me. He did it twice.... He had done it also on the 8th May 2013,…… On the 19th may 2013, I met the brother H, his elder brother. He found us in the house in the accused's room. He went and told the mother and then told my parents…"

31. In her judgment, the trial magistrate at page 12 lines 39 to 43 stated as follows:

"Pw1 noted that the accused slept on top of the her and did bad things to her on private parts. (She pointed her vagina) Pw5 also concluded that the minor MK was defiled since her hymen was missing per exhibit P2. Exhibit P2 note that there was no blood and the absence of

hymen confirmed that the penetrative act happened. This penetration has been proved."

32. The appellant's elder brother, NBM , referred to by the complainant (Pw1) in her evidence as being the one who found her in the appellant's house testified as Pw3. In the prosecution evidence, he was the only witness who witnessed the incident and he had this to say in his evidence at page 7 lines 16-21 and lines 1-4 of page 8 of the proceedings.

> ***" On 19th May 2013 at 10.00am I was outside my house, I saw a child playing in front of my brother's house (the accused). The child is my niece. I knew the complainant. Later she entered the accused house. When she entered there were some rumors that the complainant and the accused had an affair. I decided to go to check on them. I went into the house and found them standing. I told the accused they were related and the rumors were not good. I told the accused that the child should not go into his house. I told the complainant's father that M should not play at that place to prevent problems arising. The accused is not married but we cannot substantiate the rumors….."***

33. From the evidence of Pw1 and 2, it is clear that while the complainant gave evidence to the effect that the appellant took her into his house, forced her on to his bed, stripped off her inner wear and his and slept on top of her whereby did bad things to her vaginal area, pw3, testified that he saw the complainant get into the complainant's house and he followed her there. From his evidence, he followed the complainant into the appellant's house almost immediately he saw her enter the house. Pw3 said he found the appellant and complainant standing and this was confirmed by the complainant in her evidence.

34. From the analysis of the evidence of Pw1 and Pw2 one is left wondering what part of the complainant's (Pw3) evidence is the true picture of what happened between her and the appellant.

35. This evidence is further corroborated by the evidence of Pw2, KH, father to the complainant who at page 6 lines 11 to 13 stated:

> ***"On the 19th May 2013, I was at home sick. Then I was told that my child was defiled by H. I investigated. I called the elder brother NB and asked about the incident. He said he saw them together and the mother said also".***

At line 21 on the same page, he said;

> ***"N told me what happened……."***

36. From the evidence of the prosecution witness, Pw3 told court that he is the one who went and told the complainant's father that M should not play at the place again to prevent problems arising. There is nowhere he said that the told him that his child had been defiled by H.

37. While Pw2 did not tell the court who gave this information that his child had been defiled. He gave the confession that after he was given the information, he called Pw3 to confirm the same. In the circumstances. I agree with the appellant's submissions the Pw2's evidence that his daughter had been defiled was hearsay.

38. It is not in doubt that the appellant was found with the complainant on 19th May, 2013.

39. It is also not in doubt that the appellant and complainant are related.

40. What is in doubt is whether the appellant was found to have defiled the complainant since penetration had been proved.

41. From the prosecution's evidence it is clear that there was a lapse of time between the day the complainant is alleged to have been defiled and the time she was examined by the doctor.

42. The complainant is alleged to have been found with the appellant on 19th May 2013 and she was examined o 18th June 2013 at Msambweni Hospital by Pw5.

43. In fact while it is shown in the P3 form (exhibit P2) that the complainant's hymen had been broken, it is not indicated how recently it was.

44. With the evidence by Pw3 NB that he found the complainant and appellant standing and only warned that the accused should not go there because the rumors were not good, it is clear that the two were not caught in the act of sexual activity.

45. The only evidence that is certain is that the appellant was known to the complainant, Pw2 and Pw3 since they are related.

46. It is however, uncertain that the appellant is the one who caused the penetrative act on the complainant.

47. As for the sentence of 20 years conferred against the appellant being harsh and excessive, I found that the complainant was proved to have been 12 years at the time of the alleged offence as per the particulars of the offence and evidence. The sentence of 20 years is the minimum provided for under Section 8 (3) of the Sexual Offences Act No. 3 of 2006. In the circumstances, I found that if it had been proved that the appellant committed the offence of defilement against the complainant was aged 12 years, the sentence would have been lawful.

48. I allow the appeal, quash the conviction against the appellant and set aside the sentence.

Judgment signed, delivered and dated this 16th day of February 2016.

D. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

The appellant in person

C/Assistance - Kiarie