REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.12 OF 2012

(From original conviction and sentence in criminal case no.8 of 2010 (consolidated with 9 of 2010) of the CM Court Malindi before Hon D. W. Nyambu)

SAHALI OMARI.....APPELLANT

VRS

REPUBLIC….....RESPONDENT

JUDGMENT

The appellant was charged in two separated cases with the offence of defilement. The two cases were consolidated and heard together there being criminal cases number 8 and 9 of 2010 before the Malindi Surbordinate Court. In criminal case number 8 of 2010, the appellant was charged with the offence of defilement contrary to section 8 (3) of the Sexual Offences Act No.3 of 2006: the particulars were that on diverse dates in the month of August 2009 and 12th March 2010 in Malindi District, the appellant intentionally and unlawfully committed an act which caused penetration of his genital organs of A W, a girl aged 12 years. The appellant faced an alternative count of indecent act with the child.

In Criminal Case No. 9 of 2010 the complainant was JK aged 9 years. The particulars of the offence are similar to those in case number 8 of 2010 only that J was aged 9 years old and section 8(2) of the Sexual Offences Act was used. The appellant was convicted of the main counts and sentenced to serve twenty (20) years in case number 8 of 2010 and life imprisonment for case number 9 of 2010.

The appellant filed his grounds of appeal and later filed amended grounds of appeal. The original grounds of appeal were that the trial court erred in law and fact by having the two cases heard together, that the P3 form exonerated the appellant, that the charge sheet was defection and that the prosecution evidence had glaring contradictions. The final ground is that the appellant's defence was not considered. The handwritten amended grounds of appeal reiterate that the charge sheet was defective, the medical evidence did not link the appellant to the offence, that the Investigating Officer did not testify and that his alibi defence raised doubt on the prosecution case.

The appellant filed written submissions and entirely relied on them. The appellant contends that the charge sheets used the sentencing sections 8 (2) and 8 (3) of the Sexual Offences Act instead of section 8 (1) of the Act. That mate the charge sheet defective. The charge sheet ought to have read section 8 (1) as read with section 8 (2) and 8 (3): This was contrary to the provision of sections 137, 275 (2) and 276 (1) of the Criminal Procedure Code. Since section 8 (1) was not used then the alleged act of penetration was not proved. The appellant relies on the Case of **Samuel Fondo Gona v Republic, Malindi Criminal Appeal No.119 of 2009.**

It is further contended that the medical evidence disproved the offence. The complainants were not examined immediately after the occurrence of the offence. The offence occurred about four months before the complainants were examined. The medical findings failed to create a clear line of reasoning confirming the act of defilement. No spermatozoa was seen and no puss cells or lacerations were seen: Further, the trial court ought to have invoked the provisions of section 36 (1) of the Sexual Offences Act and call for samples to be taken for medical examination.

The appellant also contends that the investigating officer was not called to testify. The arresting officers were also not called. There was one S who notified the complainants' parents but she was not called as a witness. The appellant relies on the Case of **Bukenya v Uganda [1972] E. A 549** where the court held that failure to call crucial witnesses by the prosecution may lead the court to conclude that their evidence would have been inconsistent to the prosecution case.

The appellant maintains that he raised an alibi defence. He was not bound to defend himself. The burden of proof was shifted. The complainant's evidence was not backed by any other evidence and the prosecution did not prove its case:

The State opposed the appeal. Mr. Nyongesa, State Counsel, submitted that the charge sheet was not defective. The appellant knew the charges he was facing. The evidence was concrete and proved the charges. There was penetration. The medical evidence was not challenged. The Investigating Officer did not testify but that was not fatal. The sentence of twenty years imprisonment ought to be kept in abeyance as there is life imprisonment.

The record of the trial court shows that five witnesses testified for the prosecution. **PW1 JK** testified that she was 11 years old and a standard three pupil. In October 2009, she was with PW2. The appellant asked them to fetch water for him. While in his home, the appellant defiled them. He started with PW2 and then turned on her. Later on a Friday after the incident, she was unable to walk properly and she was in pain. She was taken to hospital. Part of PW1's evidence is that the appellant defiled them twice. However, the appellant only inserted his fingers to their vaginas. According to her, **PW3 A** and **PW4, L**, who are her brothers witnessed the incident.

PW2 A testified that she was twelve years old and in class three. In October, 2009 the appellant asked her to clean his house. She was alone and while the house, the appellant defiled her and asked her not to tell anyone. It is her evidence that in the first incident the appellant licked her genitalia and defiled her. No one witnessed that incident. In the second occasion, the appellant grabbed her and started licking her private parts. He then gave her money. The 3rd time she was with PW1, the appellant put them on a mattress and defiled them. On the 4th occasion she was alone when the appellant sucked her breasts and let her go. On the 5th occasion she was with PW1. The appellant put her on a mattress and when he tried to penetrate her. PW1 called her brothers who went and started peeping. The matter was reported to the police and she was to taken to hospital for treatment.

PW3, AK was 13 years old and in class three. In October 2009, he saw PW1 standing outside the appellant door laughing. She asked him to go and see. He went there and saw the appellant asking PW2 to lie down. He was peeping through the window, He called PW4 who also went to the appellant's home and peeped through the window. The appellant saw them and they ran away. Sometimes later, PW1 started walking in a funny way. On being interrogated by their mother, she revealed that the appellant had defiled her and PW2. **PW4 L K** was 13 years old and a class five pupil. In October, 2009, he was with his younger brother PW3. They saw PW1, their sister, laughing while standing at the appellant's door. They went to the appellant's house and started peeping through the window. They saw the appellant fondling PW2's breasts and asking her to lie down. The appellant them and they ran away. Sometimes later, their sister, PW1, had difficulties in walking.

PW5 Ibrahim Abdullahi is a registered medical practitioner based at Malindi Hospital. On 12/3/2010, he examined PW1 and filed her P3 form. Her hymen was broken. Her age was assessed and confirmed to be 9 years. He concluded that there was penetration. He also examined PW2. Her hymen was missing and penetration noted. It is his evidence that the examination occurred two months after the incidents.

PW2's age was assessed by Dr. Anga and found to be 12 years old.

In his unsworn defence, the appellant denied committing the offence. He testified that he is a fisherman. On 12/2/2010 he was from the sea at about 6.00 a.m and met his neighbour Chiko anderson who inquired whether he had fish. Chiko insulted him. He then left with his wife and child to Mambrui so that they could circumcise the child. He went back home and two police officers arrested him on allegations that he had stolen a mobile phone. He was then released . One Kahindi asked for fish from him and he refused. Kahindi informed him that he will regret his actions. He was arrested and charged with the offence.

The main issues being raised by the appellant are that the charge sheet was defective, that his alibi defence was not considered, that the medical evidence did not link him to the offence and that the case was not proved beyond reasonable doubt. The main issue for determination is whether the prosecution proved its case beyond reasonable doubt as required by the law.

The main contention in relation to the charge sheet is the use of sections 8 (2) and 8 (3) of the Sexual Offences Act as the charging section. The appellant had been charged in two separate cases involving PW1 and PW2. The two cases (Cr. Case No.8/2010 and 9/2010) were consolidated. The appellant was represented by an advocate during the trial. He knew the charges he was facing as they were read to him. The issue is whether by leaving out the defining section (8) made the charge sheet defective. The Court of Appeal in **Amedi Omurunga v Republic [2014] eKLR** held in similar circumstances that there was no failure of justice. The court noted that the charges were read over to the appellant and the particulars of the offence were explained to him. No prejudice was occasioned to the appellant.

Section 382 of the Criminal Procedure Act states as follows:-

> ***"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.***
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> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

The evidence of PW1 is that she was defiled once by the appellant. She later changed her story and stated that the appellant used his fingers. According to PW2, the appellant defiled her several times. In the first incident, she was alone and the appellant licked her vagina (genitalia) and then defiled her. The record shows that the incidents were not reported immediately. According to PW5, he examined PW1 and PW2 two months after the incidents. PW1 and PW2 knew the appellant as their neighbour. The two complainants had their ages assessed and were found to be 9 years for PW1 and 12 years for PW2 respectively.

The trial court dismissed the appellant's defence as an afterthought. It noted that while cross-examining witnesses, the name of Chiko Anderson or the issue of mobile phone were not raised. I do note that the defence does not raise any doubt on the prosecution case. The evidence of PW1 and PW2 is corroborated by the medical evidence of PW5. The contention by the appellant that the medical evidence did not prove the case is not true. The medical evidence proved the age of the two complainants and the fact that they were penetrated. It did not have to prove that it was the appellant who penetrated them. This part of evidence was proved by PW1 and PW2. Under section 124 of the Evidence Act, the trial court can convict an accused person in sexual offences case entirely on the basis of the complainant's evidence if it is satisfied that the complainant was telling the court the truth. PW1 and PW2 were minors. They knew the appellant. The evidence shows that the appellant used to give them money and threatened them not to tell anyone. That is why the incidents were not discovered at an earlier stage.

The appellant took plea in two separate cases. When the cases were consolidated, he did not take a fresh plea. It was assumed that the appellant had pleaded not guilty. I do find that the omission by the trial court not to ask the appellant to take a fresh plea did not prejudice the appellant or cause injustice. In any any case, the appellant has perpetually denied commiting the offences. In the Case of **Vincent Shatuma Naste v Republic [2014] eKLR,** the Court of Appeal held that the fact that the appellant had not been called upon to take a fresh plea after the charges were substituted did not prejudice the appellant. I do find that there was no miscarriage of justice.

The appellant has also raised the issue that no police officer testified. The record shows that the investigating officer did not testify. The fact that the appellant was charged in court and that this was not private prosecution proves that the case was investigated by the police. The charge sheet shows that the appellant was arrested on 12/3/2010. Two P3 forms for each complainant were issued by the police. This proves that there were investigations. The P3 forms were produced by PW5.

In the end, I do find that the prosecution proved its case beyond reasonable doubt. The appellant took advantage of the two minors, defiled them and gave them some money. The appeal lacks merit and is disallowed.

Dated, signed and delivered at Malindi this 23rd day of July, 2015.

SAID J. CHITEMBWE

JUDGE