REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 18 OF 2018

BENSON MAINA WAHOME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence by Hon. S. M. Shitubi, (CM)delivered on 31st October 2017 in Criminal Case No. 18 of 2016 at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 21st day of May, 2016 at Kitengela Township within Kajiado County, he intentionally caused his male organ to penetrate the female organ of GW, a child aged 10 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. Particulars being that on the same day, 21st May, 2016, at the same place, he caused his male organ to "**penetrate**" the female organ of GW, a child aged 10 years.

3. The appellant denied both counts, and after a trial in which the prosecution called 4 witnesses and the appellant's sworn testimony, he was convicted on the main count and sentenced to 30 years imprisonment. He was aggrieved with both conviction and sentence and filed a petition of appeal on 8th February, 2018, that:

> ***1. The trial magistrate erred both in law and fact by convicting him on evidence that was not sufficient to support the conviction***
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> ***2. The trial magistrate erred both in law and fact but failed to find that the burden of proof was not discharged***
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> ***3. The trial magistrate erred both in law and fact by convicting him on contradictory and inconsistent evidence***
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> ***4. The trial magistrate erred in law and fact by convicting him yet failed to find that the case was poorly investigated***
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> ***5. The trial magistrate erred in law and fact by failing to find that his right to fair trial under Article 50(2)(c) of the Constitution was violated as he was not supplied with witness statements***
>
> ***6. The trial magistrate erred both in law and fact by dismissing his defence.***

4. He later filed amended grounds of appeal together with his written submissions on 2nd December, 2020. The amended grounds of appeal were that:

> ***1. The learned trial magistrate erred in law in convicting him without first critically examining and evaluating the evidence adduced by the prosecution witnesses before drawing its own conclusions.***
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> ***2. The learned trial magistrate erred in law in his misapplication of section 124 of the Evidence Act thus convicting him on uncorroborated and incredible evidence***
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> ***3. The leaned trial magistrate erred in law and fact by failing to find that there were so many contradictions, discrepancies and inconsistencies in the prosecution case hence dangerous to convict on such evidence.***
>
> ***4. The learned trial magistrate erred in law and fact by failing to find that the age of the child was not proved to the required***

standard.

5. The learned trial magistrate erred in law and fact by failing to draw adverse inference on the prosecution case due to their failure to call a very crucial and independent witness contrary to section 150 of the Criminal Procedure Code and section 146 of the Evidence Act.

6. The Learned trial magistrate was bias which led him to disregard his defence.

7. The learned trial magistrate erred in law by failing to observe the provisions of Articles 25(c), 50(2) (j) as read with 50(2) (c) of the Constitution.

8. The learned trial magistrate erred in law and fact in not finding that the prosecution did not prove its case against him appellant beyond reasonable doubt.

5. When the appeal came up for hearing, parties relied on their written submissions. The appellant argued that the prosecution did not prove its case beyond reasonable doubt and that the evidence of PW 3 was wanting. According to the appellant, the burden of proof was on the prosecution and relied on ***DPP v Woolmington's case***. He also argued that his defence was not rebutted by the prosecution.

6. According to the appellant the complainant did not identify the attacker and she could not say when the attacker who was said to have been using a touch came into the room. The appellant also argued that PW1 testified that she was defiled on 18th May, 2016 which contradicted the date in the charge sheet.

7. The appellant argued that the complainant was not taken to hospital until 22nd May, 2016 and that PW2 did not tell the court what PW1 had told her but what was contained in a note allegedly written by PW1 which was also not produced in court. The appellant submitted that the issue of defilement was used as an excuse to have him leave the matrimonial home, but not because he had defiled the complainant.

8. Regarding the evidence of PW3, the Clinical Officer, the appellant argued that the evidence was not free from influence by the police and could not be believed. He relied on ***Republic v Bowman*** (2006) EWCA Criminal 417, that expert evidence should be an independent product of the expert uninfluenced as to form or content by any of the parties. He maintained that there was no evidence that he was the one who defiled the complainant.

9. The appellant again submitted that his rights guaranteed under Article 50(2) of the Constitution were violated in that he was not given some witness statements. He relied on ***Morris Kinyalili Liema v Republic*** [2012] eKRL. He also relied on ***Randall vs Republic*** [2002] 1 WLR 2237 for the submission that the right to a fair trial of a criminal defendant is absolute, and ***Simon Githaka Malombe v Republic*** [2015] eKLR for the argument that a fair and impartial trial has a sacrosanct purpose.

10. The appellant further argued that the prosecution did not call material witnesses especially the neighbours to assist the court in determining the veracity of the prosecution's case. He relied on ***Bukenya & others v Uganda*** [1972] EA 549 on consequences of not calling material witnesses.

11. Regarding age of the complainant, it was the appellant's submission that age assessment was done by a dental technologist and age being a vital ingredient of the offence, it was not proved. He also argued that the trial court disregarded his defence despite the fact that he was unrepresented. He faulted the trial court for rejecting his defence without offering any reasons. He urged this court to allow the appeal, quash the conviction and set aside the sentence.

12. The prosecution counsel, also relied on their written submissions in opposing the appeal. It was submitted that there was evidence to prove penetration, that age was proved through the report dated 7th February, 2017 showing that the complainant was below 12 years; that the identity of the attacker was also proved since the appellant was known to the complainant and that orders were made to supply statements and there was nothing to show that the appellant raised the matter again. The court was urged to dismiss the appeal.

13. I have considered this appeal, submissions and the decisions relied on. I have also perused the grounds of appeal and the impugned judgment. This being a first appeal, it is by way of a retrial and parties are entitled to reconsideration, reanalysis and reevaluation of the evidence and this court's determination on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. (See ***Okeno v Republic*** 1972 EA 32).

14. In ***Kiilu & Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

15. PW1, a child aged approximately 10 years testified on oath after voire dire examination, that on Wednesday 18th May, 2016 she was in the house with her younger sister who was in class 2. The appellant went and removed her cloths and proceeded to defile her. Her mother was in hospital with her brother who had been admitted. When she came back on Friday, the complainant informed her what had happened. She took her to Nairobi Women's Hospital where she was treated. In cross-examination, the complainant maintained that it was the appellant who defiled her while she was a sleep because there was no other person in the house.

16. PW2 LMG, mother to the complainant, testified that she had a child admitted in hospital and was discharged on a Friday 20th May, 2016. On the morning of 21st May, 2016 the complainant informed her that she had something to tell her. She told the complainant that she was in a hurry to go to work and asked her to wait until she came back in the evening. In the evening, the complainant had written a note stating that the appellant defiled her on the night of 18th May, 2016. The complainant had asked that the appellant should leave their home. PW2 called a neighbour, known as Wanjiru and together they took the complainant to Hospital. She was examined and it was confirmed that she had been defiled and was treated. She later reported the matter to Kitengela Police Station where a P3 form was issued to the complainant. When the appellant returned home she asked him to leave the house or she would report him to the police. He was later arrested and charged.

17. PW3 Ruth Lengete, a clinical officer with Nairobi Women's Hospital, testified that the complainant was taken to the hospital with a history of repeated defilement since class 4. On examination, the vulva was inflamed. There was a foul smell and yellow discharge from her private parts. The hymen was torn with rugged edges. She signed the P3 on 25th May, 2016 which she produced as PEX1. She also produced PRC as PEX 2. She sent the minor for lab tests and put her on a treatment. Based on the history and examination, she concluded that PW1 had been defiled. In cross examination, the witness stated that the hymen breaking was an old injury not a fresh one.

18. PW4 No. 92751 PC Lebonyo Faith, attached to Kitengela Police Station and the investigating officer, testified that on 22nd May, 2016 she gave a P3 form to the complainant and her mother. She later arrested the appellant and charged him with the offence. The complainant was taken for age assessment. She produced the report dated 7th February, 2017 as PEX 3.

19. The appellant testified on oath in his defence that PW2, his wife, framed him for the offence. He stated that PW2 had initially been retrenched but he encouraged her to go back to work which she did. When she started doing well, she felt his job of a stonecutter was not good. She moved houses when he was away at work but he was able to trace her. She however started mistreating him. In January, 2015, Assistant Chief informed him that he had been reported for neglecting his family and not providing for them. The Assistant chief advised him to part ways with PW2 which they did until August, 2015 when they reunited again. PW2 later asked him to leave because she had another husband. He denied committing the offence.

20. The trial court considered the above evidence and was satisfied that the prosecution had proved its case beyond reasonable doubt. It convicted the appellant prompting this appeal. The appellant has faulted the trial court's decision arguing that the prosecution did not prove its case beyond reasonable doubt; that the prosecution case was full of contradictions and inconsistencies and that the prosecution did not call material witnesses.

21. From the grounds of appeal and submissions by parties, the issue that arises for determination is whether the prosecution proved the case against the appellant beyond reasonable doubt. The appellant was charged with defilement. The prosecution was therefore required to prove three ingredients beyond reasonable doubt, namely; age penetration and identity of the attacker.

22. On age, there was no birth certificate. The complainant testified that she was ten years. She did not tell the court when she was born. PW2, her mother, did not also tell the court when the complainant was born. PW4 testified that the complainant was taken for age assessment and produce the age assessment report dated 7th February 2017 as PEX 3. The report stated that the complainant's age was below 12 years. The reason was for this approximation was **"following expected eruption pattern in African females."** The age as assessed was not conclusive. Moreover, age assessment was done by a dental technologist whose qualifications were not stated. The prosecution did not confirm that a technologist could accurately assess age given the significance of age in a defilement charge.

23. On penetration, the prosecution relied on the evidence of the complainant and that of PW3, the clinical officer. The complainant told the court she was defiled at night as she slept. PW3, the clinical officer, testified that the complainant was examined and the vulva found to be inflamed. There was a foul smell and yellow discharge from her private parts. The hymen was torn with rugged edges. She signed the P3 which she produced as an exhibit. She also produced PRC as an exhibit. Based on the history and examination, she concluded that the complainant had been defiled.

24. It is important to note that in cross-examination, PW3 stated that at the complainant's age, the hymen should have been there but it was not. In re -examination, she told the court that "**the hymen breaking was an old injury not fresh.**" The import of these statements are, first; that hymen can only be lost due to sexual contact. This has been found not to be true and there are many decisions on this. Second, the hymen was not broken on the date the alleged defilement took place. PW3 also stated that the vulva was inflamed. She did not say that only sexual contact can cause inflammation.

25. Particulars of the charge stated that the complainant was defiled on 21st May 2016 and she was examined on 22nd May 2016, about four days later. There was no allegation defilement had taken place on diverse dates. The testimony of the complainant did not also refer to any other previous dates when she was defiled. Allegations of previous defilement were only contained in the testimony of PW3, the clinical officer. This, in my respectful view, raises doubt whether there was indeed evidence of defilement on 21st May 2016.

26. The final and critical ingredient was that of identity of the attacker. The complainant testified that it was the appellant who defiled her. She was sleeping in the house with her sister when this happened. She did not however state how she able to see the appellant defile her given that it was at night. According to her, it could only be the appellant since he was the only man in the house. The evidence of the complainant was not clear that she saw and identified the person who defiled her, but that only the appellant could have done it because he was the one in the house. That in all respects amounts to mere suspicion which is not a basis for conviction in a criminal charge which must be proved beyond reasonable doubt.

27. There is yet another angle in the prosecution case. PW2 did not say the complainant told her that the appellant had defiled her. That information was allegedly contained in a note the complainant had written to her. That note was nether given to the police or produced in court. The actual contents of the note remain known only to the complainant and PW2. It is also curious that the complainant would demand that the appellant leaves the house.

28. This evidence must be weighed against that of the appellant who stated that he was framed up by PW2. According to the appellant, he had had misunderstanding with PW2 which even involved the Assistant Chief who at one time advised them to part ways. They parted ways for some time but got back together again. PW2 once moved houses while the appellant was away at work. It is also not surprising that even PW2 first asked the appellant to leave the house or "he goes to the police station."

29. The law is settled that the prosecution has the burden to prove a criminal charge against an accused beyond any reasonable doubt. In ***Philip Nzaka Watu v Republic*** [2006] eKLR, the court held that that to find conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt.

30. It must be clear that at the end of a criminal trial, there should be no doubt in the mind of the trial court that the accused committed the offence he is charged with. There should be no presumption in a criminal trial about the guilt of the accused. The evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence he is charged with. This is because proof beyond reasonable doubt does not admit of plausible possibilities. (See ***Bakare v State (***1987) 1 NWLR (PT 52) 579)

31. It is also because of the high degree of proof required in criminal trials that the Court of Appeal stated in ***Pius Arap Maina v Republic*** [2013] EKLR, that, the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts, must be in favour of the accused.

32. Having given due consideration to this appeal, reevaluated the evidence and reanalyzed it myself, I am satisfied that the prosecution did not prove its case beyond reasonable doubt against the appellant. There are doubts in the prosecution cased which should have been resolved in favour of the appellant.

33. In the circumstances, I allow this appeal, quash the conviction and set aside the sentence. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Kajiado this 5th day of February, 2021.

E.C. MWITA

JUDGE