REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 114 OF 2019

MJS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence for twenty (20) years

by Honourable Dominica Nyambu in Kwale Criminal Case No. 746 of 2012

delivered on the 30th day of July 2018).

J U D G M E N T

1. The appellant MJS was charged in Kwale Chief Magistrates Court Criminal Case No. 746 of 2012 with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that MJS on diverse dates between 25th November 2011 and 1st December 2011 in Kwale County unlawfully and intentionally because his penis to penetrate into the vagina of MS a girl aged 15 years.

3. In the alternative the appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

4. The prosecution relied on the evidence of the complainant- PW 2 and PW 3 the father of complainant who were recalled to testify afresh on 14/6/2017 when Hon. B. Koech (Mrs) SRM took over the conduct of the trial from previous Magistrates. PW 1 Phillip Kibet Cheboi Clinical Officer also testified and produced P3 form prepared on 19/1/2012. PW 4 the sister to PW 3 also testified.

5. On 15th June 2017, the prosecution applied that the evidence of witness who testified previously as PW 3 be adopted as she could not stand or walk and therefore could not attend court. The appellant had no objection and the court allowed the application. From the record the witness who testified previously as PW 3 was AN. She testified on 11/7/2013. The court noted then she was advanced in age. She said that appellant's grandfather was related to complainant's father – PW 3. She said PW 3 who is her son told her the appellant had requested complainant to assist him cook for him but while she was there he had sex with her for 3 days.

6. Based on the evidence of the 5 witnesses who testified *de novo* before Hon. B. Koech SRM and PW 3 who had previously testified before Hon. E.K. Usui Macharia Ag. SPM and evidence of the appellant and his witness on defence, the trial Magistrate found the appellant guilty and convicted him and subsequently sentenced him to serve 20 years imprisonment which according to the trial Magistrate was the minimum sentence under Section 8(4) of the Sexual Offences Act No. 3 of 2006.

7. The appellant was aggrieved by the conviction and sentence he preferred his petition of appeal dated 29th November 2019 on the following grounds:-

i. That the learned Magistrate erred in law and fact by convicting him on defective charge.

ii. That the learned Magistrate erred in law and infat by failing to take cognizant of the fact that the was a land dispute between the complainants father and the appellants herein that later culminated into these charges.

iii. That the learned trial Magistrate misdirected herself by failing to appreciate the charge was not proved beyond all reasonable

doubt.

iv. That the learned trial Magistrate gravely erred in law by finding and holding the appellant guilty on a balance of probability.

v. That the learned Magistrate erred in law and fact to have placed the blunder of proof on the appellant.

vi. That the learned Magistrate erred in law and fact on convicting the appellant on contradicting evidence.

vii. That the learned Magistrate erred in law and fact by failing to realize that the prosecution's evidence was contradictory, uncorroborated and with gaping holes so as to sustain a conviction or at all.

viii. That the learned trial Magistrate erred in law and fact in solely convicting the appellant on circumstantial evidence only.

ix. That the learned Magistrate erred in law and fact in failing to consider the evidence of the Appellant at all.

x. That the learned Magistrate erred in law and fact in failing to appreciate the evidence produced by the Appellant in defence of his case.

xi. That the learned Magistrate meted out a sentence which was excessive in these circumstances.

xii. That the judgment was against the weight of the evidence on record.

8. The appellant prayed that the appeal be allowed and conviction and sentence of the lower court be quashed and set aside and in the alternative and without prejudice the sentence be varied. This appeal was heard by way of written submissions.

9. The appellants counsel in submissions argued that there were material contradictions/errors in the prosecution evidence contained in Exp4 – Immunization Card in that the date the Complainant was seen and vaccinated took place before she was born and the document could not be relied on to prove age as it was inconsistent and uncertain. It was submitted that the trial Magistrate did not go into the analysis of the evidence with the thoroughness that was required of her as if she did, she could probably have arrived at different conclusion.

10. The appellants counsel urged the court to resolve the lingering doubts in favour of the appellant. To support the argument that complainant's age was not proved beyond all reasonable doubt. The appellant relied on the holding in **Court of Appeal Criminal Case No. 102 of 2016 Eliud Waweru Wambui vs Republic where Nambuye, Musinga and Kiage JJA** held:-

> ***"…and we think that he is quite plainly right in arguing that what was produced was not a document that could be relied on in prove of the complainant age. Thinks are only made worse by the fact that the document itself purpose to have been issued before the birth of the complainant, evidence of which it purported to be which is a logical impossibility. The document as is, is therefore of clearly no probative value ….."***

11. The appellant also relied in the holding in **High Court of Kenya at Machakos Criminal Appeal No. 179 of 2013 – Shadrack Moi vs Republic** where Mutende J held:-

> ***"The age of the child in the case was contentious. In the case of Francis Omwinoni vs Uganda, CR. Appeal No. 2 of 2000. It was held inter alia that; "In defilement case Medical evidence is paramount in determining the age of the victim and that the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence apart from medical evidence age may also be proved by birth certificate, the victims parents or guardians and by observation and common sense".***

12. The appellant submitted that the discrepancies in respect of age of the complainant as established should have required the trial court to make an observation of the complainant. That having failed to do so the court should have relied on the evidence of the medical practitioner that established that at the time of examination the complainant was aged 16 years. That failure to tender any evidence to prove the complainant's age is a fatal omission in a charge of defilement. That in the absence of any proof of the child's age the conviction was not sound as a critical aspect of the charge remained unproved.

13. On the ground that prosecution evidence was riddled with material contradictions and inconsistences, the appellants counsel argued that there is a confusion on the dates from the witnesses who testified particularly PW 2 and PW 4. It was submitted that in initial evidence it was stated in cross examination that complainant stayed at the appellants place for 5 days on Friday, Saturday and Sunday and on Monday she went to school then to her parents and later complainant said she stayed for one week.

14. It was also argued that there was a confusion as to whether M was appellant's son as stated by complainant at page 5 in initial proceedings or a girl as shown in the proceedings at page 54. It was said that the date of arrest was also confusing. The dates on P3 form is indicated as 16/01/2012 and yet PW 3 said at page 55 that he reported on 5/12/2011. The appellants counsel argued that an eye witness one Bakari was never called to testify.

15. There was submission that evidence on specimen of the bedsheet and part at page 13 which was allegedly taken to the Chairman was never produced in court and further tests done to confirm DNA composition. It was claimed that there was land dispute between appellant and complainant's father and that the offence that was reported 1st was assault of the complainant by the appellant's wife and not defilement.

16. On the appellant's defence of alibi, it was argued that the evidence of PW 3 exonerates the appellant. That the appellant was not at Kimwambale Village at the time of the alleged offence. He said the complainant didn't to go to his house. That the mother of the complainant didn't testify to dismiss the claim that she was with the complainant in Kisimani between 25/11/2011 to 5/12/2011. It was argued that the prosecution failed to rebut the appellants defence of alibi and that failing should be to the benefit of the appellant. The appellants counsel cited and relied on the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** which stated:-

"It is trite law that the burden of proving falsity. If at all of an accused's defence of alibi lies on the prosecution".

17. The Respondent in opposition to the appeal filed written submissions dated 11/12/2020 and argued that all prosecution witnesses were on same page as regards the age of the complainant and when the case started *de novo* the child had grown and her age was now different. It was argued that the discrepancies on the Child Health Card were typographical errors and that the complainant was born on 10/2/1996 and not 10/12/1996.

18. It was argued that the errors were not brought to the attention of the trial court at the earliest opportunity for a determination to be made on it. It was submitted that the court made on determination at page 75 that the complainants age was 15 years and 11 months at the time of the alleged offence hence a child within the meaning of Section 2 of the Children's Act 2001. That the insistence by appellant's counsel that complainant was 16 years is a probability as the court found she was one-month shy of turning 16 years.

19. The Respondent submitted that the contradictions cited by the appellants counsel were not material to the substance of the charge and cannot disprove prosecutions case. That it is not uncommon for witnesses to forget dates or places or even the days involved in the commission of an offence. It was argued that the trial magistrates had an opportunity to see and hear all the witnesses after which she made a final determination that prosecution witnesses' evidence convinced her the offence was committed.

20. It was argued that had it not been that the appellants wife had assaulted the complainant for sleeping with her husband the offence of defilement could not have been known. It is when the complainant's father had reported that appellants wife had assaulted the complainant that it came out that it was because the appellant had slept with the complainant for 3 consecutive nights during the time, his wife was in hospital and he had taken the complainant to cook for his children.

21. The matter was before the village elder and the appellant was present but when the complainant revealed why she had been assaulted the appellant disappeared for 5 months. In response to the holding in **Phillip Nzaka Watu vs Republic [2016] eKLR** which was relied upon by the Respondent it was argued that the discrepancies were not material. That they were simply natural in the normal cause of the witnesses' testimony.

22. It was also submitted that the appellant never raised the defence of alibi in his defence during trial. That his defence was that he was arrested and he thought it was due to an offence and assault. He also said he was fabricated owing to land boundary dispute the 2 families had but which according to DW 2 had long been resolved before the charges herein were brought.

23. The state conceded to ground 11 of appellant's appeal in that the age of complainant fell between 15 years and 16 years and that as was held in the case of **Alfayo Gombe Okello vs Republic [2010] eKLR**, the lacuna must therefore be constructed in favour of the appellant. The Respondents proposed that sentence be revised to 15 years from 20 years. It was urged that appeal on conviction should be dismissed.

24. Being that this is a first appeal the court is enjoined as was held in the **Okeno vs Republic [1972] E.A. 32** and in **Eric Onyango Ondeng' vs Republic [2014] eKLR** to revisit the evidence before the trial court; to re-evaluated and analyze evidence and come to its own conclusion bearing in mind that it did not have the benefit of seeing the demeanor of the witnesses and can only rely on the evidence on record.

25. I have considered record of the trial court, as well as judgement of the trial Magistrate; I have also considered the grounds of appeal and the submissions by respective parties and come up with the following conclusion.

26. The 1st ground raised by appellant why the appeal should be allowed is that the appellant was convicted on defective charge. In the appellants submissions it appears that the advocate did not address the grounds one by one but rather raised other issues for court's determination. The defect in the charge sheet was therefore not addressed specifically.

27. In the 2nd ground the appellant complained that the trial Magistrate failed to take cognizant of the fact that there was a land dispute between the complainant's father and the appellant that culminated into these charges.

28. In the submissions the counsel for the appellant failed to address this issue totally. In the judgement the trial Magistrate addressed the issue of the alleged land dispute and found as the appellants own witness. DW 2 testified that the land dispute between the complainant's father and the appellant was resolved long before the incident herein took place and was not the basis for which the appellant was charged.

29. Grounds 3, 4 & 5 of the Appeal are not explained in the submissions. On grounds no. 6, in regard to contradicting evidence, the appellants counsel, relied on evidence adduced on 30/11/2012 before the proceedings started *denovo* and PW 1 was recalled to testify. The evidence to be considered as having been tendered by PW 1 is that which was taken by Hon. B. Koech SRM on 14th June 2017.

30. The evidence of the complainant's father tendered on 14th June 2017 does not also indicate that the complainant was at Kisimani. From the proceedings that started *denovo* the father of complainant is PW 3 and from the charge sheet it is not in dispute that the appellant was arrested on 13th June 2012 and whether or not the witnesses contradicted themselves on the date of arrest, this court finds that it doesn't go to the substance of the charge before court which is that of defilement. The date of arrest simply confirms as allegedly by the witnesses that appellant went underground and it took long to have him arrested. As the Respondents submitted the discrepancies in the prosecution's case

were not material and did not affect the fact that appellant defiled the complainant.

31. In submissions the appellant questions why it took long to have the complainant examined. From the evidence on record, the wife to the appellant discovered that the appellant had had sexual intercourse with the complainant while she was in hospital and assaulted the complainant. The complainant said that while helping out with house chores and taking care of the appellant's children while the wife was in hospital the appellant had sexual intercourse with her for 3 consecutive nights. That the appellant could get her from where she was sleeping with his children and defile her in his room and then warned her not to tell anyone as they could both be arrested and locked up.

32. The trial Magistrate noted in her judgement that had it not been for the assault on the Complainant by the appellant's wife the offence could not have been known. It therefore goes without saying that by the time the matter was discovered and complainant taken to hospital a lot of time had lapsed. The complainant was established to have been defiled and infected with Syphilis. The appellant argued that he was examined and he didn't have Syphilis but the Medical Officer – PW 1's response was that it was possible he had gone for treatment because it took over 5 months before he was arrested. The Appellant had all the time to go for the treatment. When the matter was taken before the elders so that the appellant's wife could explain why she had assaulted the complainant, the appellant made it impossible for the proceedings to go on and the matter was referred to the police while the appellant went underground.

33. On whether appellant was convicted on circumstantial evidence, the appellant's submissions do not point out which evidence on record is circumstantial. According to PW 4, the aunt to the complainant the appellant was their relative. The complainant therefore knew the appellant. The complainant said appellant send his 2 daughters to call her so she could help them with household chores as appellants wife was in hospital and that in the course of carrying out the said chores she stayed at appellants house for about one week during which the appellant preyed on her at night and had sex with her on 3 consecutive nights but warned her not to tell anyone as they could both be arrested and locked in.

34. I do not find how the issue of circumstantial evidence comes into play. The complainant stated it is appellant who defiled her. It was not suspected that appellant defiled the complainant. There is direct evidence that the appellant defiled the complainant.

35. Whether the trial Magistrate failed to consider and appreciate the evidence of the appellant the trial Magistrate considered the issue of land dispute as reason for allegedly fabricating the appellant and found that although there was land dispute as confirmed by PW 3 and DW 2, the same had been resolved long before the offence herein was committed by the appellant. The reason why it was discovered that complainant was defiled by the appellant was because his wife on coming from hospital assaulted complainant on allegations she had slept with appellant. It is therefore apparent that the appellants defence was considered and analyzed as against prosecution evidence before the trial court concluded that the charge against him had been proved beyond all reasonable doubt.

36. On the age of the complainant, the trial Magistrate found that she was 15 years and 11 months and was at the verge of turning 16 when she was defiled. The P3 form indicates the complainant was 16 years old at the time she was examined and P3 form filled and therefore the section under which the appellant was charged Section 8(1) as read with Section 8(4) of Act No. 3 of 2006 was the relevant section. The trial Magistrate therefore was not at fault to pass sentence that is over 15 years when the law provides the minimum sentence at 15 years imprisonment. The accused/Appellant should always benefit from the lowest possible punishment provided for by the law unless otherwise stated out clearly by the trial Magistrate.

37. This court therefore finds that save for the issue of sentence, the other grounds of appeal cannot be sustained. The appeal against conviction is dismissed.

38. The appellants appeal on sentence is successful. The term of 20 years imprisonment is hereby set aside and substituted with one of 15 years imprisonment to run from 29th April 2016. The appellant has a right to appeal on points of law to the Court of Appeal within 14 days.

Dated, signed and **delivered** at **Mombasa** this **04th** day of **February 2021.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE