REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 4 OF 2020

APPELLATE SIDE

(Coram: Odunga, J)

JMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable E W Wambugu

dated 9th April, 2019 in Kithimani PM's Court Case No. SO 13 of 2018)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

JMK.....ACCUSED

JUDGEMENT

1. The appellant, **JMK**, was charged and convicted of the offence of Sexual Assault contrary to Section 5(1(a)(i) and (2) of the ***Sexual Offences Act No. 3 of 2006***. The particulars were that on 4th April, 2018 at around 1400hrs at ***[Particulars Withheld]*** Village in Masinga Sub-county, within Machakos county, the Appellant, intentionally and unlawfully used his fingers to penetrate the vagina **SLM** a child aged 7 years.

2. In the alternative the accused was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act No.3 of 2006.*** The particulars were that on 4th April, 2018 at around 1400hrs at ***[Particulars Withheld]*** Village in Masinga Sub-county, within Machakos county, the Appellant, intentionally and unlawfully touched the vagina SLM with his fingers.

3. The Appellant pleaded not guilty and the matter proceeded to full hearing.

4. The Prosecution's case, in summary as narrated by PW1, was that on the material date which she could not remember, her grandmother, PW2, had gone for a crusade leaving her with the appellant, her grandfather. The appellant then held her by hand, took her to her grandmother's bed, placed her on the bed, removed her inner wear and skirt, removed his trouser and inner wear, removed his penis and put it in her vagina. As a result, PW1 felt pain. However, they were found by PW2 while on bed and inquired from her what had happened.

5. PW2, BL, PW1's grandmother on 8th April, 2018 left both the appellant and PW1 at home eating in the bedroom and proceeded to the market where there was a crusade. After one hour she returned home since PW1 had not joined her and found the door closed. She then pushed the door and when she went into the bedroom, she found the appellant making the bed while PW1 was standing next to the bed. Since PW1 had not finished her food, PW2 admonished her by pointing at her without the appellant noticing after which PW2 returned to the crusade.

6. Felling unsettled, PW2 returned to the house and found the appellant and PW1 eating. The two were however unable to explain to her why they had not finished eating. When the appellant stepped outside the house, PW2 asked PW1 what had happened and PW1 disclosed that the appellant had told her to get onto the bed so that they could do bad things. PW1 explained that the appellant removed his clothes, told her to get onto the bed so that he could have sex with her before PW2 returned. PW2 reported the matter to the Chairman of the market who informed her to take PW1 to Ekalakala Dispensary.

7. At Ekalakala police post, they were referred to the dispensary where PW1 was examined and they then proceeded to Masinga Police Station where they recorded their statements and were issued with a P3 form. According to PW2, it was found that PW1 was defiled. PW2 produced the health card showing that PW1 was born on 5th December, 2009 and was aged 7 years.

8. It was PW2's evidence that she had lived with both the appellant and PW1 for long since PW1's mother was married. She however disclosed that in 2018, she quarrelled with the appellant and they separated and she went to stay in a rented place at the market. However, at the time of the incident she had stayed with the appellant for 2 months and their stay was by then peaceful.

9. In her, evidence, PW2 stated that she was informed by PW1 that the appellant inserted his fingers in PW1's private parts. She disclosed that PW1 was fearing her.

10. PW3, Edwin Mutembei, a clinical officer based at Masinga sub-county hospital testified that PW1, aged 7 years, was taken to the facility with a history of defilement on 8th April, 2018. PW1 was in stable condition and had no physical injuries. Upon examining PW1's vagina, he found that her hymen was missing and there was no discharge. He referred her for laboratory examination for HIV, syphilis, HVS, urine analysis and hepatitis B. While HIV and syphilis tests returned negative results, HVS had pus cells though there were no sperms seen. However, bacteria was present. According to him, PW1 had been seen at Ekalakala Health Centre on 9th April, 2018 and the report was the same. A blood stained skirt was also availed to him. In his evidence, PW1 had no injuries in her private parts though her hymen was torn.

11. PW3 exhibited the P3 form, lab request form and lab results. He also exhibited the P3 form, lab request and results for the appellant. Upon examining him, the results turned out to be negative.

12. PW4, Constable Alex Mwambao, the investigating officer, upon receipt to the report of the incident on 9th April, 2018 accompanied PW1 and a lady police officer, Const. Diana Achieng, to masinga Hospital for examination. Because PW1 was traumatized, they were unable to take her statement that day and it was not until 11th April, 2018 that she recorded her statement and the skirt that PW1 was wearing on that day was availed to him which he exhibited. Based on his investigations, he preferred the said charges against the appellant.

13. Upon being placed on his defence, the Appellant testified that he had differences with his wife, PW2 after finding her with a man. PW2 then threatened him to do a bad thing to him, a threat which he reported to the chief who intervened and their differences were sorted out and they returned home but PW2 left and remarried. According to the appellant these charges were brought against him because PW2 did not want to stay with him and wanted to return to the other man. Though PW2 left and went back to the said man, she returned after the chief intervened but had not changed.

14. It was the appellant's evidence that the evidence against him was fabricated. Upon learning of the offence, he went to the market chairman and requested him to accompany him to the Hospital but the said chairman declined and he proceeded alone to the Hospital where he found PW1 playing and the doctor was not in. he was however arrested by the Hospital watchman and was locked at the A P Camp while the investigations were ongoing.

15. The appellant called SMM, his sister, who testified as DW2. According to her, on 7th April, 2017 she was at a crusade when she heard that the appellant was found defiling his granddaughter. When she went to where the appellant was, the appellant denied the same saying he was not aware of the incident. When she informed him that PW1 and PW2 were at Ekalakala Health Centre on police post, he left but was arrested and taken back to the market ate which the headman took him to the police post and was taken to Masinga Police Station the next day. In her evidence, the allegations against the appellant were untrue.

16. DW2 however admitted that she was not in the house at the time the incident was said to have taken place. She was however the first person to call the appellant who was in a club.

17. In her judgement the learned trial magistrate found that despite the discrepancy between the evidence of PW1 in court and her statement to PW2, which she attributed to PW1's tender age, penetration had been proved. She had no problem finding that the appellant was positively identified. Since the defence of fabrication of the allegation s was not put to PW2 in cross-examination, the court found that the defence failed to shake the prosecution and convicted the appellant of the offence of sexual assault and sentenced him to 12 years.

18. In this appeal, the appellant submits that the prosecution failed to prove penile penetration of PW1's genitalia and that the prosecution's case was based on inadmissible hearsay and mere suspicion. Further, the case was based on contradictory evidence.

19. In response to the Appeal, it was submitted by **Mr Ngetich**, Learned Prosecution Counsel that the ingredients of the offence of sexual assault were proved. He submitted that the prosecution's case which was not challenged by the appellant was proved hence the appeal ought to be dismissed.

Determination

20. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."

21. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

"1. 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.

2. 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."

22. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

23. The facts of this case are that on 8th April, 2018, after preparing food, PW2 left her husband, the appellant together with PW1, her granddaughter aged 12 years in her house and proceeded to the nearby market for crusade. As PW1 delayed in following her, she returned to the house and found the door to the house closed but found both the appellant and PW1 in the bedroom with the appellant making the bed. After admonishing PW1 for having not eaten, she returned to the crusade but on further thoughts decided to return back to the house. Taking advantage of the absence of the appellant, she inquired from PW1 what had happened and PW1 disclosed to her that the appellant had placed her o the bed, removed her clothes and did bad things to her by inserting his fingers in her vagina. Thereafter they reported the matter to the police and took PW1 for examination.

24. Upon examination, though no injuries were found in PW1's genitalia, her hymen was found to have been broken. Though there was no discharge, there was bacterial infection.

25. PW1 in her evidence confirmed that after PW2 left them, the appellant told her to get onto the bed, removed her clothes, undressed and removed his penis which he inserted in her vagina.

26. The appellant, on his part contended that the case against him was instigated by PW2, his estranged wife, with who they were not in good terms.

27. Section 5(1)(a) (1) and (2) of the ***Sexual Offences Act*** provide as follows:

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

28. This provision was the subject of the determination in **John Irungu vs Republic (2016) eKLR** where the Court of Appeal expressed itself as hereunder:

"Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

29. In this case, the first report as narrated by PW2 was that the appellant inserted his fingers in her private parts. The importance of the first report was appreciated in **Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259** where it was held that:

> **"Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."**

30. When PW1 was examined by PW3, it was found that PW1's hymen was broken but there was no discharge. The results of the test revealed that pus cells though there were no sperms seen. However, bacteria was present.

31. It is true that the mere fact that the hymen is broken does not conclusively prove penetration unless there is evidence that the breaking of the hymen was caused by the act of the accused person. As appreciated by the Court of Appeal in **P.K.W v Republic [2012] eKLR:**

> **"15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse"**
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> **16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.**
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> **17.In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor. As we have pointed out the complainant child aged only six behaved normally after the alleged defilement. That together with her mother's behavior, issues that the two lower courts do not seem to have addressed their minds to, has raised doubt in our minds as to the guilt of the appellant. In other words the concurrent findings of the two lower courts are not fully supported by the evidence on record. Consequently we have no option but to give the appellant the benefit of doubt.**
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> **18. Taking all these factors into account, especially the fact that the Appellant had a sour relationship with the child's mother, we believe the evidence of DW2 that the child confessed she was cajoled by her mother to lie against the Appellant. We therefore allow this appeal, quash the conviction and set aside the sentence of life imprisonment. We direct that the Appellant be set free forthwith, unless otherwise lawfully held."**

32. In this case, PW3, in his evidence did not state whether the breakage of the hymen was fresh or had healed. He seemed to have been non-committal in his evidence. While he stated that on physical examination or laboratory examination one can determine if defilement occurred, he did not state whether in the instant case, where both physical and medical examination was undertaken, there had been penetration.

33. In the present case, the appellant testified that he had been framed by PW2. This piece of evidence though given on oath, was never challenged in cross-examination. The learned trial magistrate while taking issue with the fact that the appellant did not cross-examine PW2 on this aspect of evidence, seemed to have been oblivious of the fact that the appellant's evidence was never challenged. Not even a single question was put to the appellant in cross-examination. In **Macharia vs. Republic [1976] KLR 209**, Kneller & Platt, JJ noted that:

> **"Neither of the appellants' statements on oath was tested in cross-examination, which means that the Republic did not challenge it. The magistrate did not touch on this. He did not accept it as true or have any reasonable doubt that it was untrue. We are satisfied that the prosecutor before the magistrate forgot, or did not know, that if the defendant elects to make a statement on oath in his defence he is to be cross-examined on it if it is different from the case for the prosecution and the court may believe the defence or declare that it raises reasonable doubt if it is not so challenged...We hope, in future, that the magistrates will ask a prosecutor who does not cross-examine a defendant on his sworn defence statement, if it is different in any material respect from the prosecution case, whether or not the prosecutor's instructions are that the defence is, or might be, true and exculpatory; and if the prosecutor says that they are not so, the magistrate should advise him to cross-examine and challenge it. The defendant has selected this way of making his defence knowing that he might be challenged with searching questions from the prosecutor designed to reveal to the court whether or not the defence is true or results in the prosecution's case failure to prove beyond reasonable doubt the defendant guilty of the offence charged or any other one open to it on the relevant facts adduced and the law."**

34. In **Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004,** the Court of Appeal noted that:

> **"The appellant also claimed that the complaint was made as a result of grudge between the complainant and the appellant's father over a piece of land that was in dispute between the two. The learned trial Magistrate did not consider this defence and never made any finding on it. The superior court dismissed it stating that the issue was introduced by the appellant late and was not afforded an opportunity to be tested and countered.**
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> **…..**

The court ended its observation by saying that the trial Magistrate must have seen the issue was of no probative value. It did not make any decision on the issue and in our humble opinion, abdicated its role of analysing that evidence (considering that the appellant was unrepresented, and that the appellant was facing a serious charge which carried death sentence) and making its own conclusion on the same. As it stands, all that the superior court did was to state that the matter was introduced late and as there was no opportunity to cross examine on it, the trial court found it was not of probative value. That evidence was on record and deserved to be fully considered and either dismissed or accepted."

35. Having considered the evidence placed before me in this case, I find that the same fell short of the standard expected in criminal cases.

36. In the premises, I allow the appeal, set aside the appellant's conviction and set him at liberty forthwith unless otherwise lawfully held.

37. It is so ordered.

Judgement read, signed and delivered virtually in open Court at Machakos this 3rd day of June, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

The Appellant

Mr Ngetich for the Respondent

CA Geoffrey