REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 3 OF 2019

HANCE JILLO KOMORA.....APPELLANT

VERSUS

REPUBLIC.....…RESPONDENT

(Being an appeal against the conviction and sentence from the Original Garsen

Criminal Case No.15 of 2016 in a judgment delivered on 25th May, 2017 by

Hon. E.Kadima – Resident Magistrate)

CORAM: Hon. Justice R. Nyakundi

Mr Mwangi for the state

Appellant in person

J U D G M E N T

The appellant was arraigned before the Senior Resident Magistrate at Mariakanion the charge of defilement as defined in terms of Section 8(1) as ready with 8(2) of the Sexual Offences Act, No. 6 of 2006 (hereinafter "the SOA"). The allegations were that on the 25th of September 2016, the appellant defiled the complainant aged 9 years at [Particulars Withheld].

Despite the appellant's plea of not guilty, the trial court convicted him of the offence of defilement and sentenced him to life imprisonment. Not happy with his conviction and sentence, the appellant brought the instant appeal against both conviction and sentence. The appeal is based on the following grounds:

a) That identification of the perpetrator was not proved beyond reasonable doubt.

b) That the prosecution case was marred with contradictions and discrepancies.

c) That his defence was not considered by the learned magistrate.

The prosecution brought six witness in support of its case whilst defence was the sole witness. Pw1, Daniel Innocent Mabbe, a Clinical Officer testifies that on 25/9/16, three girls were brought to Ngao Sub-District Hospital for examination on allegations of defilement. Upon examination, only one of the girls, the complainant herein was found with bruises on her vagina, her clitoris was swollen and inflamed. Her hymen is distorted, samples were taken to the laboratory for further investigations. The lab results were produced before the trial court and marked as P.Exh No.2, treatment notes, P3 form for the complainant, lab results for the accused, P3 form for the accused as P.Exhibit 3, 1, 4, 5, respectively.

Pw2, FM, a minor aged 9 testified that on the material date, the appellant lured her into his house and had carnal knowledge with her. She gave graphic details of how the intercourse transpired. She identified the appellant as her neighbor in [Particulars Withheld]. Her testimony remained uncontroverted after examination by the accused. Pw3, LM basically corroborated the evidence of Pw2 under oath.

PW4, James Mbili, an assistant Chief, although not an eyewitness in the commission of the offence, he assisted in handing over the matter to the police and prevented members of the public from putting the law into their hand and dissent on the appellant. He confirmed having seen the child who were supposedly defiled.

Pw5, Julius Jonathan Banoni, a volunteer children's officer and boda boda rider testified that he took the minor aged 8 years to Ngao Hospital for examination and also informed Pw4 of a crowd intending to lynch the accused whom he knew. Pw6, Charles Andayi of Tarassa police post, the investigating officer in this matter affirmed that PW5 in company of an Administration Police Officer brought the accused who was smelling alcohol and who had soiled on himself after rescuing him from a lynching mob. He interrogated the accused, the victim was referred to the hospital and a report from the doctor confirmed that the girl had been defiled and he produced a child health Certificate which was marked as P.Exh 1. He also visited the scene of crime and ascertained where the alleged offence was committed. Pw5 also confirmed that the appellant was examined by the doctor on the same day. That marked the end of the prosecution case.

The defence was based on the sole unsworn testimony of the appellant. He basically denied all the charges levelled against him and alleged that he was on a drinking spree and he eventually found himself at the police station on allegations of having defiled the complainant. He alluded to the grudge between him and the Chief upon cross-examination. He also stated that he could not remember how he got to the police station. He could only remember that he was with one Michael Dada Chikanda at Tarassa up to 2:30pm. The defence case therefore rested.

Submissions

The appellant filed submissions on the 15/07/21 in support of the grounds of his appeal. In ground one, he submitted that Section 8(1)(2) of the SOA fetters the discretion of the court to mete out an appropriate sentence. It is stated that the fundamental contentious issue raised in this matter which the magistrates and judges have made public their reservations on the effects of the legal provisions providing for mandatory minimum sentences in the SOA. The act denies exercise of discretion and consideration of mitigation prior to passing a sentence. He cited the case of **Dismas Wafula Kilwakwe vs Republic, Criminal Appeal No. 129 of 2014**, to stress the contention that there is no rational reason why the reasoning of the supreme court which holds that mandatory death sentence is un-constitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the SOA which do exactly the same thing.

He also relied on the Supreme Court Case of ***Francis Karioko Muruatetu (2017) Klr*** to support the foregoing point and stressed that sentencing is part of the fair trial process and mitigation should be given priority as provided in terms of Section 216 of 216 and 329 of the Criminal Procedure Code, Laws of Kenya. He therefore submitted that the court ought to consider his sentence and mitigation so as to mete out an appropriate sentence.

The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt. His argument is that defilement requires partial or full insertion of the manhood into the genitals of the complainant. He therefore argued that there was no penetration and in principle, the offence of defilement fails. He argued that what the evidence of the prosecution established is attempted defilement for the reason that the assailant failed to accomplish the act of penetration of the complainant's genitalia. He referred the complainant's evidence that she screamed, neighbors came, broke the door and he was no longer on her, the neighbors beat him. He therefore argues that the main charge of defilement cannot stand since there was no proof of complete insertion of the genital organ of the assailant into the complainant's genital organ. He argues that the offence ought to have been that of attempted defilement.

In the last ground, he argues that the medical evidence produced in support of the Respondent case during trial was shoddy and inconsistent. He averred that there was no age of the injuries noted on the minor. He cited the case of Athur Mshila Manga v Republic (2016) eKlr in support of this position. He argues that the medical evidence report failed to confirm that the complainant was defilement.

In opposition of the instant appeal, the prosecution filed submissions on the 9th of April, 2021. The Respondent basically argued that it proved its case against the appellant, beyond any reasonable doubt. Further that the evidence on the age, penetration and positive identification of the assailant was all watertight. Mr. F. Sirima, the counsel for the Respondent dismissed any possibility of discrepancies as far as the prosecution case is concerned.

Findings and Determination

I have considered the evidence on record, the grounds of appeal and the submissions of both the appellant and the Counsel for the Respondent, the issues for determination is whether the prosecution proved its case beyond any reasonable doubt and whether there were material discrepancies in the prosecution case which may make the conviction and sentencing of the appellant unsafe.

The Law

The appellant was charged, tried, found guilty and subsequently convicted of the defilement of an eight year old girl in contravention of Section 8(1) as read with Section 8(2) of the SOA which provides as follows:

> ***"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***8(2) A person who commits an offence of defilement with a child aged eleven or less shall upon conviction be sentenced to life imprisonment."***

In terms of Section 8(1) of the SOA, the onus resides with the prosecution to prove beyond reasonable doubt with following elements of the offence of defilement:

> ***(a) The minority age of the complainant.***
>
> ***(b) There was penile penetration into the genitalia of the complainant.***

(c) Positive identification of the alleged offender.

In ***Charles Wamukoya Karani vs. Republic, CR No.72 of 2013***, it was stated that:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

Analysis and Determination

The appellant challenged the conviction and sentence on the basis that the prosecution failed to prove its case beyond reasonable doubt, particularly on the question of penetration. He alleges in his submissions that the medical evidence produced before trial court was marred with discrepancies and inconsistences. He also argued the same evidence was not enough to sustain a charge on defilement but rather the one of attempted defilement as defined in terms of Section 9 of the SOA on the basis that there was no complete penetration of the complainant's genitalia.

Section 2(1) of the Sexual Offences Act, defines penetration to mean:

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

The evidence of Pw2 is that on the material date, the appellant called her to his house, removed her clothes and *"did tabia mbaya"* with her. She further noted that he made her lie on the bed facing upwards, pushed her legs aside and inserted his penis into her vagina. She stated that she felt pain and blood oozed out. This evidence is corroborated by the evidence of the clinical officer, Mr. D. Mabonde, who produced the complainant's treatment notes and P3 from dated 25/09/2016. He averred that upon examination of the complainant he noted that her clitoris was swollen, labia minora inflamed and her hymen distorted. The injury noted on the complainant was classified as grievous harm.

Firstly, I have noted no discrepancy or inconsistency in the prosecution case as far as the medical evidence produced is concerned. The medical evidence available on record is cogent and consistent, as well as corroborating the testimony of the complainant. The testimony of the minor was not hard to belief as it is vividly clear and concise.

Secondly, the distorted hymen, swollen clitoris and inflamed labia minora, is indicative of sexual penetration of the minor's genial organ. There is no other possible explanation of what could have happened to the minor's genital decides evidence that she was defiled. Thirdly, the appellant in his submissions is candid that the evidence on penetration does not sustain a defilement charge but rather a charge on attempted defilement. In the case of ***Mark Oiruri Mose v R (2013) eKlr*** the Court of Appeal stated that:

> ***"Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."***

In light of the above-cited authority as well as Section 2(1) which defines penetration to mean partial and complete insertion of the genital organ of a person into the genital organ of another person, the evidence on record, oral and medical, is sufficient to prove that there was sexual penetration into the complainant's genital organ. Therefore, the prosecution discharged its onus on this limb.

On the age of the complainant, the complainant testified that she was born on the 25/07/2008 and the same is corroborated by the child health card produced before the trial court and marked as MFI 1. It was produced as exhibit 1. At the time the offence was alleged to have been committed, the complainant was 8 years old. She was a minor who falls within the bounds of Section 8(2) of the SOA. The prosecution proved this limb beyond reasonable doubt.

As regards the question of positive identification of the assailant as the perpetrator of the alleged offence, the evidence on record places the appellant on the crime scene. The incident took place in broad day light which enabled the complainant to ascertain the identity of the appellant. The appellant was caught during the act. He did not have a chance to run away such that his identification could have been somewhat difficult to ascertain. The appellant was also well known to the complainant as they were neighbors. She even used to go clean utensils and verandah upon the appellant's request. This matter is therefore one of identification by recognition, which makes the identification of the appellant as the perpetrator of the offence safer. In my view the prosecution evidence on identification was watertight.

As regards the appellant's defence, he simply denied the offence. He told the trial court that he did not know how he found himself in the police station since he was intoxicated. He tried to sneak in an alibi saying that he was with Michael Dada Chikanda at Tarassa shopping centre on the material day. The alibi was not confirmed as one Michael, was not availed in court to testify and support the appellant's position. The learned trial magistrate, in my view, sufficiently put his defence into consideration. . In that regard, I find that the prosecution proved its case beyond any reasonable doubt. Thus the appellant was properly convicted of the offence of defilement as charged.

On the ground on sentence, the appellant challenged the sentence imposed by the learned magistrate on the basis that it is harsh and excessive. He further points out that it is the law that negates judges and magistrates from considering mitigation with a view to mete out appropriate sentences which correspond with the gravity of the offence. The appellant was sentenced to serve a life imprisonment term. In his mitigation, he stated that he is a family man with four school going children. The prosecution also brought evidence in his favor that he does not have a previous criminal record. The offence herein is a very serious one. The same mitigation was also considered by the learned magistrate as he found no compelling reasons to vacate the mandatory minimum sentence.

However, in light of the decision in **Francis Muruatetu Case** and other subsequent cases, the mandatory minimum sentence can be vacated

in appropriate case. Further pursuant to the provisions of section 216 and 329 of the Criminal Procedure Code, Laws of Kenya, mitigation is part of the process under section 329 which provides that the court may before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

Thus, in my view, section 329 of the Criminal Procedure Code, Laws of Kenya gives to for the judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find life imprisonment for a first offender being somewhat too stiff and shatters all the hopes of the appellant to ever reconcile with his family or having another chance to start afresh. Further, there has been no definition of what life imprisonment means. It would be an injustice to keep certain offenders for an indefinite period of time, when the circumstances of their cases suggest that they should at some point be given a chance to start afresh.

Therefore, the appeal of sentence succeeds. The minimum mandatory sentence of life imprisonment is hereby vacated. I hereby resentence the appellant to 18 years imprisonment from the date of his conviction. Thus, from the 25th of May, 2017.

14 days right of appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF JULY, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for DPP

2. Appellant