REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 55 OF 2019

JILLO SALIMU ABDALLAH .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate Court at Hola by Hon A. P. Ndege delivered on 18th July, 2018 in Criminal Case No. 14 of 2017)

Coram: Hon. Justice R. Nyakundi

Mr. Orwa for the state

The Appellant in person

J U D G M E N T

Jillo Salimu Abdalla, the appellant herein was tried and convicted by Principal Magistrate at Hola on a charge of defilement contrary to Section 8 (1) as read with 8 (3) of the Sexual Offences Act. The appellant was duly sentenced to twenty five (25) years imprisonment in brief, the appellant was alleged to have committed the offence on 17.9.2017 at [Particulars Withheld] – in Tana River, where he intentionally and unlawfully caused his penis to penetrate the anus of **BG** a child aged thirteen (13) years.

Being aggrieved with conviction and sentence, the appellant now appeals to this Court for the orders to be set aside. The appellant in his written submissions submitted and argued the appeal premised on the following points. The first point was on identification discrepancy so according to the appellant this was a single identifying witness who alleged that he had only met him two days prior to the occurrence of the crime. The appellant further argued and submitted that on cross-examination, the victim alleged that he learnt of his arrest from the father **(PW3).** Whereas when it came to the testimony of **(PW3)** he was categorical of not knowing or identifying the appellant. Secondly, leaving identification aside, the appellant argued and submitted that by virtue of Article 50 (2) (1) of the Constitution he was denied a right to benefit from a lesser sentence. As a result, that denial rendered him to serve a manifestly excessive sentence. With this the appellant urged the Court to allow the appeal.

On the part of the respondent **Mr. Orwa** Senior Prosecution Counsel submitted that the claim of a defective identification is not supported by any iota of evidence. In support of this contention, **Mr. Orwa** reiterated the evidence given at the trial Court by (PW1), (PW2) and **(PW3)** respectively. **Mr. Orwa** relied on these decisions to buttress his submissions **Anjononi v R {1980} KLR 59, Peter Mwanzia v R {2008} eKLR, Maituyi v R {1986} eKLR.**

As regards sentence, **Mr. Orwa's** contention was to the effect that on the face of it no grounds have been meritorious put forward by the appellant that the Learned trial Magistrate misdirected himself on the matter of sentencing verdict. In support of this ground he relied on the principles in the case of **Wanjema v R {1971} EA 493**. It was further submitted by Mr. Orwa, that on the issue of a defective charge sheet, its clear from the record that the same was properly framed with all the ingredients captured as required by Law. In this argument he relied on the legal principles illuminated in the case of **Yosefa v Uganda {1969} EA 236, Joseph Mwangi v R CA No. 73 of 1993.** The other issue tackled by the respondent counsel **Mr. Orwa** was on the aspect of contradictions and discrepancies in the evidence at the trial. In his view **Mr. Orwa** submitted that the appellant has failed to point out the nature of fatal contradictions and inconsistencies in the prosecution case rising to a level for this Court to vitiate the conviction. To urge this Court not to be persuaded by this line of submissions **Mr. Orwa** on the principles in **Uganda v Rataro {1976} HCB, Philip Nzaka v R {2016} eKLR, Joseph Mwangi v R CR Appeal Case No. 73 of 1993, Dickson Shapwata v R CR Appeal No. 92 of 2007.**

In the circumstances **Mr. Orwa** submitted that the case before the trial is yet to be impugned on appeal. That is the reason he submitted that the appeal should be dismissed.

Determination

The crux of the matter with all these arguments and counter arguments is whether, the appeal has merit to be allowed by this Court in favor of the appellant. The way to approach the appeal is to evaluate the evidence on record afresh and after doing so to come to my own independent conclusion but putting in mind that the trial Court had the advantage of hearing and seeing witnesses to apply features of demeanor and reliability in the ultimate findings. That allowance has to be given its due benefit to the trial Court **(See Okeno v R {1972} EA 32).**

In the case at bar, the state being the burden bearer was required by Law to discharge it beyond reasonable in the context of the following elements:

(a). Defilement of the victim.

(b). That the victim so sexually assaulted was aged below eighteen (18) years.

(c). That the appellant was the principal and final perpetrator of the sexual act.

Indeed as was correctly stated under Section 107 (1) of the Evidence Act:

"Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

Subsection (2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. On the first ingredient of defilement or carnal knowledge, the prosecution was to establish existence of partial or complete insertion of the appellant genitals with that of the victim **(PW1).** In the case of **Mwarunga v R {2013} eKLR**, the Court remarked interalia:

"In cases of defilement, the Court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence."

It is important to note that a fact in issue may be conclusively proven by a single identifying witness without corroboration. That is the principle in **Maitanyi v R (supra)** and the proviso to Section 124 of the Evidence Act. In this respect and on scrutiny of the record, **(PW1)** recounted the events of 17.9.2017 which he was sexually assaulted by the appellant using his genitals against the victim. Apparently, in approaching the victim, appellant was in possession of a panga, which he put aside to accomplish his immoral mission. The horrific sexual acts by the appellant occurred in and out to a aggravated scale described by the victim as a three time entry of his genitals. The conduct of the appellant as described by the victim was that of a reckless person motivated with malice as he walked out of the scene leaving his vulnerable victim in pain. That ordeal was to be explained to **(PW2),** a mother to the victim. In her observations the victim **(PW1)** came home without a leso, or shoes and blood streaming down his legs. Further **(PW3)** on receipt of the complaint from **(PW1),** he proceeded to the police station so that remedial action could be taken against the suspected defiler.

In relation to this element the Learned trial Magistrate had before him, the evidence of the victim **(PW1),** as corroborated by **(PW2),** the mother who was the first contact with her son in a distressful and painful condition. Against this background, the victim **(PW1)** underwent a medical examination as illustrated by **(PW4)** the clinician at Medina Hospital. According to **(PW4),** the victim came in with a history of having been defiled. On examination his genitals were at pains, bleeding, bruises at the anal orifice indicative of penetration. In support of the medical examination positive findings, **(PW4)** relied on the contents in the P3 and corresponding treatment notes.

Therefore, from an evaluation and examination of the evidence in line with the principles in **Okeno (supra)** the accepted prosecution case at the trial comprised of **(PW1)** own testimony as independently supported with that of **(PW2)** and **(PW4)** respectively. It's clear beyond peradventure that the victim was defiled and the statements on oath by **(PW1), (PW2)** and **(PW4)** amounted to evidence against the appellant on this element proven beyond reasonable doubt. Having taken this element out of the queue, the other critical feature of a case of this nature is to proof the age of the victim. The Law is settled as reflective of the principles in **Francis Omuroni v Uganda CR Appeal No. 2 of 2000** Suffice to say that:

"the age of a victim in sexual assault under the Sexual Offences Act may be proved by medical evidence, birth certificate, the victim parents/guardians and finally by observations and common sense."

In the circumstances of this case, therefore age was proved by **(PW2)** testimony, the mother to the victim **(PW1)** and medical assessment done at Hola District Hospital dated 17.9.2017. There is no error, mistake as to how old was the victim of the offence. That ground is also dispensed with in favor of the prosecution.

On identification, whereas the appellant submitted that there were glaring contradictions to render it unreliable, there exist overwhelming evidence from **(PW1)** to identify him as the assailant against his victim **(PW1)** on the material day.

It is trite that a fact may be proved by a single witness but when such evidence is in respect of identification, it must be tested with the greatest care **(See Roria v R {1967} EA 583, Abdalla Bin Wendo v R {1953} 21 EACA 187, Maitanyi (supra)).**

In the instant case, the victim **(PW1)** gave the description of the appellant and the circumstances which made it possible for a positive identification to take place. Having considered and tested as required the testimony of the victim on identification and bearing in evidence the surrounding environment and time of the offence, I can safely say the evidence on identification was free from error or mistake. The Learned trial Magistrate correctly directed himself on the issue of identification, that it was proved beyond reasonable doubt.

There are two other matters which emerged in this appeal upon which I wish to make a commentary. First, its on whether the charge sheet was defective. In the case of **Jason Yongo v R {1982-88} IKAR 167:**

> ***"an indictment is defective when it is bad, on the face of it but also when it does not accord with the evidence before the convicting Magistrate either because of inaccessibilities or defectiveness in the indictment or because the indictment charges, offences, not disclosed in that evidence or fails to charge an offence which is disclosed therein. When for each reasons, it does not accord with the evidence given at the trial."***

I have reviewed the evidence on record, I do not think the charge in the present appeal was at variance with the evidence. That ground also fails.

Secondly, the issue of sentence being punitive featured preeminently in this appeal. I dare say that sentencing falls within the purview of the trial Court. That discretion once exercised within the bounds of the Law is not impeachable by the appeals Court. The jurisdiction not to interfere is ring-fenced by the provisions of the Criminal Procedure Code as expressly stated in Section 382: Thus

> ***"Subject to the provisions, herein before contained no finding, sentence or over 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 under this Code, unless the error, omission or irregularity has occasioned a failure of justice. In our jurisdiction sentencing is critical to legitimizing the rule of Law and maintaining society's confidence in our justice system. It has to be effective to meet society's expectations and should be commensurate with the offence."***

The comprehensive sentence of the principles and purposes of sentencing is anchored in the sentencing policy of the **Judiciary 2016.** It sets out a statement of the purposes of sentencing as follows:

> ***"That any Court dealing with an offender in respect of his or her offence must have regard to the following purposes of sentencing (a). The punishment of offenders. (b). The reduction of crime including its reduction by deterrence. (c). The reform and rehabilitation of offenders. (d). The protection of the public and (e). The making of reparation by offenders to persons affected by their offences."***

Equally, the concept of proportionality in the use of custodial sentences runs through our criminal justice system. With that in mind, a review of any sentence on appeal has to be grounded by the principles in **Wanjema v R case (supra).**

I Observe that in this appeal, the appellant was sentenced to twenty-five (25) years imprisonment and in addition the Principal Magistrate made the order requiring him to undergo long term supervision to rehabilitate him back to the society if and when he is released by the police for a period of five (5) years). I think I have no problem with the sentence of twenty five (25) years imprisonment. It's within the legislative scheme sanctioned by parliament what I find difficult to appreciate is an automatic order for this appellant to undergo police supervision upon being released from custody. The main source of discomfort is the capacity and high administrative costs to the system charged with the responsibility of supervising the appellant for a further five (5) years after serving a length period of twenty five years imprisonment. The degree of severity of that sentence is enormous.

In my view abhorrence of general warrants of sentences issued without express statutory sanction is not a useful or permissible exercise of discretion donated to the Learned trial Magistrate. The issue is whether the specification on police supervision is sufficient in particular to this case, or is a new jurisprudential principle to cover objectives of sentencing offenders under the Sexual Offences Act. The legality, necessity and proportionality of that sentence on police supervision is in the context of Section 382 of the Criminal Procedure Code a decision made without jurisdiction because of an error of Law on the part of the Learned trial Magistrate. Indeed it occasioned prejudice and an injustice to say the very least.

The upshot of what I have said is that the substantive appeal on conviction and sentence lacks merit. The alternative order on police supervision is illegal, unjust and in breach of Article 50 (2) (p) of the Constitution on the right of an appellant to be accorded a benefit of the least severe of the prescribed punishment. Save for that variation I hold the appeal as non-suited as a consequence it stands dismissed.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for the state