REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 106 OF 2019

NASIB ALI RAMTU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. R. M. Amwayi, Senior Resident

Magistrate, delivered on 25th September 2019 in Mombasa Chief

Magistrate's Court Sexual Offences Case No. 58 of 2016).

J U D G M E N T

1. The Appellant NASIB ALI RAMTU was accused in Mombasa Chief Magistrate's Court Sexual Offence Case No. 58 of 2016 where he was convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of Sexual Offences Act No. 3 of 2006.

2. The particulars were that Nasib Ali Ramtu on the 21st day of June 2016 in Likoni District within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of MM a child aged 15 years.

In the alternative Nasib Ali Ramtu 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.

3. The Appellant was aggrieved by the conviction and sentence and he preferred this appeal on the following grounds:-

i. That the trial Magistrate erred in both law and fact in failing to appreciate that the evidence in totality adduced by the prosecution could not sustain the conviction of the Appellant.

ii. The learned trial Magistrate erred in both law and fact in failing to notice that essential ingredients of the offence charged were not proved.

iii. That the Learned trial Magistrate erred in both law and fact in failing to consider/subject evidence to scrutiny, re-evaluate the same and analyze as required of it. That if the trial Magistrate had subjected evidence to scrutiny it would have discovered that:-

a. There was no birth certificate tendered to prove the age of the complainant.

b. There were material errors in the prosecution evidence contained in the P3 form, PRC forms.

c. There were material errors in the prosecution that the charges against the Appellant were borne out of malice and ill-will due to the fact that the Appellant and complainant family lived in the dame neighborhood, hence create a reasonable doubt as to the Appellant's guilt and thus entitled to an acquittal in light of Section 111 of the Evidence Act.

iv. That the learned Trial Magistrate erred in both law and fact in failing make finding the conviction was based on speculations and conjecture.

v. The Learned Magistrate erred in both Law and Fact in failing to exhaustively evaluate the appellant's alibi, defence and wholesomely, and improperly so rejecting the defence evidence as tendered by the Appellant.

vi. That the Learned Trial Magistrate erred in both law and fact in sentencing the Appellant to 20 years, a sentence extremely excessive in the circumstances.

vii. That learned trial Magistrate erred in both law and fact in passing an illegal sentence.

4. The appellant prayed that the judgment, conviction and sentence meted out be quashed and set aside.

5. The Respondent's case in summary was that the appellant is alleged to have forcefully taken the complainant to his house using a tuktuk and he locked her therein and defiled her overnight and the next day at 1.00p.m. he brought for her a pair of shoes and gave her 50/= to use as fare to go back home. The Respondent's father – PW2 returned from work and found she was missing and together with PW3 his brother and other members of public they searched for the complainant upto 3.00 a.m. in vain. They then reported to the police. When PW1 returned home the following day, she narrated what happened to her and she was taken to the police station where she recorded her statement and later taken to hospital where she was examined, treated and P3 form and PRC forms duly filled confirming that she had been defiled.

6. The appeal was canvassed by way of written submissions and highlighted by counsel on record for the parties. From the Appellant's counsel oral submissions, it is apparent that due took issue with the manner the trial magistrate evaluated evidence on record which according to the appellant led to wrong conclusion. He submitted that the appellant was not properly identified as the complainant said that it was Bahati who defiled her and yet the appellant was known by a different name.

7. It was also argued that the trial court did not look at ingredients of the offence of defilement which were not proved, it was submitted that issue of age is essential and it was never proved as the notification of birth was merely identified and not produced as the investigating officer didn't testify since the court prematurely closed the prosecution case.

8. The Appellant argued that the trial magistrate ought not to have relied on the P3 and PRC forms to conclude that the complainant was 15 years as they are not credible.

The Respondent on the other hand relied on their written submissions to the effect that charge of defilement was proved in the trial court and that the appellants defence of alibi was properly dismissed as he merely said he was not in Ujamaa on the night of 21.6.2016 but he didn't say where he was.

On sentencing it was submitted that the same was proper and legal as provided by the Sexual Offences Act. It was prayed that the appeal be dismissed for lack of merit.

9. I have re-evaluated and re-examined the evidence in the trial court records as well as the judgment of the trial Magistrate as mandated by the holding in Okeno vs Republic and weighing them against the grounds of appeal and the submissions by the Appellant and respondents counsels the issues for determination are:

a. Whether age of the complainant was proved beyond all reasonable doubt.

b. Whether it was proved that there was penetration.

c. Whether the perpetrator was properly identified.

10. Although the appellant's counsel submitted that the age of the complainant was not proved the trial Magistrate analyzed on details and gave reasons why she believed the complainant was 15 years old. She relied on the holding in **Musyoki Mwakavi –vs- Republic [2014] eKLR** as well as the P3 and PRC forms where age was estimated at 15 years. She also relied on the evidence of the complainant's father who identified birth notification but which document was not produced because the investigating officer didn't attend to testify. The evidence adduced by prosecution witnesses was sufficient to enable the court establish the age of the complainant – identity of the complainant was proved by PW2 and PW3. The appellant didn't dispute the identity of the complainant at trial and it was not an issue and it can't be raised at this stage.

11. On whether the prosecution proved penetration, the complainant – PW1 testified that the appellant told her that they should go so that she sees his home but she refused. That appellant pulled her by the hand into a tuktuk and they went to Ujamaa in Likoni. That when they arrived at Ujamaa the appellant took her into his house locked the door and pushed her onto his bed and defiled her till the next morning. That the next morning the appellant locked her in the house till 1.00 p.m. when he sent her away after buying for her a pair of shoes and gave her 50/= for fare. She said that she took a bath using hot water and that the Appellant accompanied her home but he left her on the way.

12. PW1 was taken to Coast General Hospital and Dr. Nafisa Seif – PW5 examined her and filled P3 form on 26.3.2016, the complainant was found to have injuries on the genitalia with freshly broken hymen. The doctor said that there were multiple lacerations and blood was oozing and there was blood stains on the vagina. He said abrasions and bleeding from the vagina were noted. PW5 produced P3 and PRC forms as well as treatment notes. There was overwhelming evidence of penetration and injuries on the complainant's genitalia following the actions of the appellant. The prosecution proved beyond reasonable doubt that there was penetration.

13. Whether the appellant was identified/recognized properly as the perpetrator the complainant said she had known him before and that he told her he was Bahati. The Complainant accompanied the Appellant in a tuktuk to his house where he locked her and defiled her the whole night. The following day the Appellant again left the Complainant locked in the house upto 1.00 p.m. and after buying for her a pair of shoes

and giving her Kshs. 50/= for fare he accompanied her back home but didn't reach the complainant's home. This was in broad day light and there could not have been possibility of mistaken identity. PW1 and PW3 said that the appellant was arrested when he went again after the complainant and the complainant identified him as the perpetrator. According to PW1 it is the Appellant who gave his name as Bahati. The Appellant having been arrested upon being identified by PW1 it would have been futile to conduct an identification parade. When PW1 pointed out the appellant in the dock it was not the 1st time she was seeing him after arrest. She said at Page 8 of the proceedings.

> ***"Accused was later arrested on 22.6.2016 by my father, brother and grandfather. I identified him to them, he pleaded for leniency but my father refused to heed then police came and he was re-arrested,"***

It is therefore not true that appellant was identified in the dock.

14. The Appellant in his defence raised an alibi by saying that on 21.6.2016 he was not in Ujamaa. This defence was raised long after the matter was investigated and prosecution case closed. The appellant admitted he was arrested by civilians who handed him to the police, he said the police arrested him at somebody's homestead but he didn't know the person. PW2 said he gave the appellant save custody in his house, upon being arrest by Mob. This confirms evidence by PW1, PW2 and PW3 that he was arrested when he came back for the complainant after defiling her. The defence of alibi is therefore a sham and cannot stand.

15. In regard to sentencing, the trial magistrate having ascertained the age of the complainant as 15 years. The applicable section of the law under the Sexual Offences Act is 8(1) and 8 (4) which provides that a person found guilty of defilement of a minor between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years. The sentence meted out by the trial magistrate was therefore lawful and proper in the circumstances and is hereby upheld.

16. The upshot is that the appeal lacks merit and is dismissed.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court Assistant

Ms. Keya for Respondent

Appellant – present in person

Mwadzogo Advocate for the Appellant

Hon. Lady Justice A. Ong'injo

Judge