REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 16 OF 2019

OSMAN HASSAN ALIAS ISMAEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from the original Criminal Case No. 763 of 2015 in a judgment delivered on 31.8.17 by Hon. Dr. Julie Oseko – CM)

CORAM: Hon. Justice R. Nyakundi

Mr Mwangi for the state

Appellant in person

J U D G M E N T

The appellant appeared before a Principal Magistrate at Hola on a charged of contravening Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter "the Act") in the main charge. He was alternatively charged with the offence of Committing an indecent Act with a minor contrary to Section 11(1) of the Act. The substance of the main charge revealed that the appellant was alleged to have intentionally caused in genital organ to penetrate the genitalia of the complainant, a child aged 6 years on the 8th of July 2018. The alternative charge alleged that the appellant on the same date and time intentionally touched the anus of the same child with his penis.

The appellant denied both charges but he was convicted after a full trial. He was sentenced to five years imprisonment. He now appeals against both conviction and sentence. Despite the lack of clarity and preciseness in the appellant's grounds of appeal, what appears to be the crux of appellant's appeal is that:

a. That his mitigation was not taken into consideration by the learned trial magistrate.

b. That the sentence imposed by the learned magistrate is harsh and excessive.

The factual matrix of the matter is as follows. The prosecution called a total of 7 witnesses while the appellant called no witness to support his version of the story. He was not represented throughout the trial and he also opted to remain silent at the matter was therefore closed. He was also not on bond terms. Pw2 the complainant, was examined by Pw7, Jared Omanga Obaga, a community health officer at Hola District Hospital. His assessment put the minor's age at 6 years old. The Age assessment Form was produced herein as PEXH No.3. The complainant's mother who testified on his behalf told the trial court that the appellant put something into his buttocks, he removed it and put it into him and that thing is used for short call. He went on to point at the area of the body that was penetrated. He pointed at his anal orifice and explained that the appellant put his genital organ into his anus. The minor also alleged that the appellant ejaculated inside his anus before he escaped. That the defendant had earlier with him with a borrowed panga from his parents.

The victim's parents PW1 and PW3 confirmed that they responded to some cries from the forest, where the appellant had taken the complainant with him. The victim's mother, PW1, testified that she found the victim while with the appellant and that was the offence had already been perpetrated. The incident was reported to the police after which the appellant was later apprehended and charged with the present offences. The victim's genitalia was cleaned of the filthy and he was take to Hola Hospital County Referral Hospital where he was attended to by PW6, Elizabeth Habonaya Mathews, a clinical officer. She found him with no bruises, discharge or trauma at his anus. After all the examinations were complete, the minor was found to be normal and did not yield any abnormality or peculiar result. PW6, produced the treatment notes which were marked as PEXH. No.1.

The matter was handled by PW5, NO. 96095 CPL Esther Mutemi, received and handled the report. She testified that she referred the complainant to the hospital for the age assessment and medical examination. The second medical examination was performed by PW4, ISMAIL HIRSI, a clinical officer at Hola Hospital, who confirmed that the victim was in general fair condition, with trauma, laceration, discharge, spermatozoa, bleeding or crack at the anal region. There was no evidence of forceful penetration on the victim. He produced the Medical Examination Report (P3 Form) which was marked as PEXH.No.2.

Submissions

The appellant submitted that the sentence awarded to him by the learned trial magistrate was severe and he begged for lenience. He appears to state that, despite having been given a chance to mitigate that he is an orphan. He stated that he was left in the care of his neighbors after his parents passed. Now the neighbors are misusing the properties and domestic animal left for him. He does not have siblings who can look after them. Further that he is a first offender and that he is remorseful and he regrets his actions.

The state tendered its submissions in opposition of the appeal.

After having read all the evidence on record, the issues for determination in this matter is whether the charge of defilement was proved beyond reasonable doubt, whether there was ample evidence to prove the alternative charge of committing an indecent act with a minor and whether the sentence meted out by the learned trial magistrate was harsh and excessive in light of all the aggravating and mitigating circumstances available.

The Law

The offence of defilement is defined in terms of section 8 of the Act which states that; "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement." For a charge of defilement to stand, the onus resides with the prosecution to prove the following elements:

a. The minority age of the complainant;

b. That there was penetration of the complainant's genitalia; and;

c. That the appellant/accused was positively identified as the perpetrator of the alleged penetration of the complainant's genitalia.

In terms of Section 2(1) of the Act, penetration is defined to mean the partial or complete insertion of the genital organ of a person into the genital organ of another person. Genital organs have been defined to mean the whole or part of a male or female genital organs and the same includes the anus.

In the alternative charge, the prosecution was charged with the onus to prove beyond reasonable doubt that the appellant/accused intentionally touched the anus of the complainant with his penis.

Analysis and Determination

As regards the charge on defilement, it is as clear as the night follows the day that the evidence on penetration is wanting. Put, differently, a defilement charge cannot stand when there is no sufficient evidence establishing that the appellant's genital organ penetrated that of the complainant. The complainant was candid in his testimony that the appellant's genital organ penetrated his anal orifice. The medical evidence introduced by two medical officers proved otherwise. The medical report suggest that there was no sign of sexual activity on the complainant's anal area. Thus, the evidence on penetration is not sufficient for a charge of defilement to stand. I find no misdirection on the part of the learned misdirection on this particular element of the offence of defilement.

On the element of the minority age of the complainant, evidence tendered by PW7 which is the age assessment report is in my view sufficient to prove the age of the victim. PW7 elaborated with sufficient detail to satisfy the trial court on how he arrived at his findings on the age of the minor. The trial court also had the opportunity to see the minor in court during trial, and it was satisfied that the complainant is a child of tender age. Therefore, the prosecution sufficiently proved the minority of the complainant to the required standard of proof, to wit, proof beyond reasonable doubt.

As to whether or not the appellant was positively identified as the perpetrator of the alleged offence, the complainant points his fingers of the appellant saying that he was the perpetrator of the alleged offence. On the material date, the appellant visited the complainant's homestead with a view to borrow a panga from them. Pw1 stated that she even served him with tea. PW3 also confirmed the same. Shortly after, the defendant left with the complainant to heard cattle. It is noteworthy that it was the minor's sole evidence that implicated the appellant as having committed the alleged offences. There no eyewitnesses to corroborate the commission of the offence by the appellant against the complainant.

The identification of the appellant herein, despite having been out of the sole evidence of the complainant, cannot be problematic. The appellant is a neighbor to the complainant and his family. The appellant is therefore well known to them. Thus this matter becomes one of identification by recognition. Identification by recognition has the effect of considerably reduce the probability of mistaken identity of the part of complainant, eyewitnesses or a passersby who might have witnessed commission of an offence. The fact that the offence was committed in broad day light makes the evidence on the identification of the perpetrator even more watertight. I am therefore inclined to agree with the learned trial magistrate that the evidence placed before court is sufficient to prove the element of positive identification of the perpetrator. It is noteworthy that the evidence adduced before the trial court against the appellant was uncontroverted as he opted to remain

silent. Remaining silent does not make him outright guilty, it is his right enshrined in terms of the Constitution but however, does remaining silent helps his case? In the circumstances I answer in the negative.

Despite the silence by the accused in court, the prosecution was still required to provide evidence sufficient to prove its case beyond reasonable. The evidence on record, as correctly established by the learned trial magistrate is insufficient to prove the main charge on defilement. On whether the prosecution sufficiently proved the charge of committing an indecent act as defined in Section 11(1) of the Act, the circumstances of this case calls into question the credibility of the complainant's evidence since this matter largely relies on his oral evidence. To prove an allegation in terms of Section 11(1) of the Act, the prosecution must prove the minority age of the complainant, positive identification of the perpetrator and that the accused or appellant intentionally touched the genitalia of the victim, in the circumstances, using his penis as indicated in the charge sheet. I have already dealt with the first two elements in the charge on defilement and I found both of them to be watertight.

The only element to ponder in regards to the alternative charge is the question as to whether the appellant intentionally touched the buttocks of the complainant using his penis. The evidence of the complainant suggest that the appellant forcibly inserted his penis into his anal orifice and that he even ejaculated inside it. This evidence was completely rules out by the evidence of PW4 and Pw6 who examined the complainant. Both of the medical reports found that the victim was in general fair condition, with no trauma, laceration, discharge, spermatozoa, bleeding or crack at the anal region. This was a very significant finding in this matter which suggest that there was no evidence of forceful penetration on the victim. This same piece of evidence is the same being used to prove that there was an intentional touching of the complainant's buttocks by the appellant using his penis.

In my view, the forgoing calls into question the credibility of the complainant's testimony as far is the evidence on the element of the appellant having touched the complainant's buttocks with his manhood. I place reliance on the proviso under Section 124 of the Evidence Act which provides as follows:

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for a reason to be recorded in the proceedings, the court is certified that the alleged is telling the truth."**

After the evidence on penetration has been completely ruled out in the main charge, can the same evidence stand in the alternative charge as far as the circumstances of this particular case is concerned? Going by the aforesaid proviso, for the Court to find the complainant's evidence credible, without corroboration, so as to convict, there must there must be ample reasons for that finding. The evidence of the minor was adduced through his mother, which makes the same hearsay evidence. The mother was not present at the scene of the crime. The evidence of the complainant completely contradicts the medical reports tendered before the trial court. That alone makes the prosecution evidence unimpressive and inconsistent with the charges brought against the appellant. Put differently, in the circumstances of this case, the evidence adduced by the prosecution on the question of penetration having been completely disproved by way of expert evidence of the clinical officers, cannot be used to convict the appellant in the charge of committing an indecent assault, without raising a reasonable doubt in the mind of the court on the basis of the credibility of the witnesses, particularly the testimony of the complainant. Further, in my view, there was no room for the learned magistrate to assume that the ejaculation of spermatozoa into the complainant could have happened on the outside of the buttocks. Such evidence is not available on record. It was a clear misdirection on the part of the learned trial magistrate.

According the celebrated case of ***Woolmington v DPP (1935) UKHL1***, the onus of proof that lying with the prosecution is proof beyond reasonable doubt. The credibility of complainant's evidence raises doubt in the mind of the court. This is further exacerbated that despite the fact that the appellant was unrepresented and he decided to remain silent, the prosecution still failed to satisfactorily prove its case beyond reasonable doubt. In that regard I find that the charge on committing an indecent act with a minor was not proved to the required standard of proof beyond reasonable doubt.

In light of the foregoing, the appeal on both conviction and sentence is meritorious and is hereby allowed. I hereby quash both the conviction and sentence imposed on the appellant.

The appeallant is hereby released from prison unless otherwise lawfully held.

Orders Accordingly.

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

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr Mwangi for the state

2. Appellant