REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 75 OF 2020

JOSEPH LUBUZELUKOYE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Principal

Magistrate's Court at Kimilili Criminal Case (SO)

No. 74 of 2019, Hon. G. Ollimo, PM on 23rd April, 2020).

REPUBLIC.....PROSECUTION

VERSUS

JOSEPH LUBUZELUKOYE.....ACCUSED

JUDGEMENT

1. The appellant, Joseph Lubuze Lukoye, was charged before the Kimilili PM's Court in Sexual Offences Case No. 74 of 2019 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. The particulars were that the Appellant, on diverse dates between 27th June, 2019 and 30th June, 2019 at [Particulars Withheld] Village in Bungoma North Sub-County intentionally and unlawfully caused his penis to penetrate the vagina of **RNM**, a girl aged twelve (12) years. The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 the particulars being that on diverse dates between 27th June 2019 and 30th June 209 at (Names withheld) village in Bungoma North sub County within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of RNM a girl child aged twelve (12) years.

2. In his judgement, the learned trial magistrate found that the appellant committed the offence with which he was charged in the main charge. It was the learned trial magistrate's finding that the evidence was overwhelming against the Appellant hence the reason he offered so frail a challenge to the testimony of the prosecution's witnesses. He therefore proceeded to convict the Appellant on the main charge and sentenced him to twenty (20) years imprisonment.

3. Being dissatisfied with the conviction and sentence, the Appellant has lodged the instant appeal based on the following grounds:

1) That he did not plead guilty to the charge.

2) That the learned trial magistrate erred in law and fact by failing to observe circumstantial evidence.

3) That the learned trial magistrate erred in law and fact by convicting the Appellant without proper inquiry and investigations.

4) That the learned trial magistrate erred in law and fact by failing to consider forensic investigations that did not correspond.

5) That the learned trial magistrate erred in law and fact by rejecting the Appellant's alibi defence thus convicting him based on weakness of his defence.

6) That the learned trial magistrate erred in law and fact by failing to consider his mitigating factors thus awarding a harsh sentence.

4. In support of its case the prosecution called 5 witnesses. After **voir dire** examination, the court found that though the complainant had sufficient intelligence to understand nature of the trial, she was too young and timid to understand the meaning of an oath and was thus directed to give unsworn statement but would still be cross-examined by Appellant.

5. According to the complainant, who testified as PW1, she recalled in the month of April 2019 at unknown date, the Appellant started seducing her telling her that he loved her. She stated that she accompanied him to his room where he offered her some bananas but she refused. She then excused herself to leave but he declined to release her and instead locked her in the house and forcefully removed her clothes and took her to a room which had two beds). The Appellant then placed her in one of the beds and removed her underpants, slept on her and did a bad thing to her. It was her evidence that the Appellant inserted inside her *sehemu yake ya siri* (her private part). She did not know what the act was called in English but knew it is used for urinating. She added that the Appellant applied Vaseline on his *kitu yake* then inserted *kitu yake kwa sehemu yake ya siri ya kukojoa* Penis) and inserted it inside her vagina. She stated that the appellant did not wear a condom. She added that she spent a night at his house and the next day they were both arrested by Nyumba Kumi vigilantes who escorted them to the village elder (Mukasa) who in turn escorted them to Kiminini police station. The two were later escorted to Ndalu Health Centre where they were examined and later issued with P3 forms.

6. On cross-examination, PW1 reiterated that the Appellant locked her inside his room and that they were both arrested because she was also found in his room. PW1 further testified that, she knew all the three names of the Appellant as Joseph Luguze Walukano. She also stated that the appellant forced her to have sex with him.

7. PW1 was later recalled following amendment of the charge sheet and she testified that she left home on 27th June, 2019 and went to Joseph's home. She added that her mother had been harassing her and that's why she disappeared from home. On cross-examination she identified the Appellant by his name as she knew him to be a servant in a neighbouring home and added that he worked for one *Mwalimu.*

8. According to PW2, **ENM,** a resident in Bunambo and mother to the complainant. She recalls on 27th June, 2019 the complainant disappeared from home after having left home for school on a Friday morning but never returned home. She reported to *Nyumba Kumi* and on investigation they found her at the Appellant's house. Both the lovebirds were arrested and later escorted to the Chief's office in Tongaren and thereafter to the police and Ndalu Hospital. She testified that she was not aware of what the complainant went to do in the Appellant's house. She further added that her daughter was born on 3rd July, 2006. On cross-examination, she identified the Appellant as Joseph Obushlukui.

9. PW3, **Anthony Simiyu**, a clinical officer attached to Ndalu Hospital Centre testified that he was in possession of the medical cards of the complainant and the appellant. He stated that the two were escorted to the hospital on allegations that the Appellant had defiled the complainant. He noted that the complainant had visited the facility twice namely on 30th June, 2019 and 1st July, 2019 with a history of defilement. According to her history, she was first brought in on 30th June, 2019. On examination it was observed that her hymen was not intact. However, the tests for Syphilis and HIV turned out negative. He produced the P3 forms on behalf of his colleague who was then pursuing university studies. On cross-examination, he testified that it was established that the Appellant was in fair general condition but PW1's hymen was absent and that her history indicated that she had been involved in a sexual activity.

10. PW4, **Gilbert Nyongesa**, testified that he was a farmer, and part of the *Nyumba Kumi huruma village* and resides in Bunambo. He recognised PW1 as the daughter to PW2 and that she resides in [Particulars withheld] village. He stated that on 29th June, 2019 he received report from PW2 that she had sent her daughter to go sell vegetables on 27th June, 2019 but she never returned home. He added that he did some independent investigation and spotted the complainant and the Appellant weeding vegetables in the farm. He noticed the Appellant attempting to hide. On 30th June, 2019 at 6.00 am in the company of Francis Maloba and Absalom Jambo they arrested the Appellant and the complainant and escorted them to the sub-chief's office and thereafter to Kapchonge Police station. He further testified that he was not aware if she has ever eloped from her home before. On cross-examination, he testified that he recognized the Appellant and found him in company of the complainant. He added that he met the appellant on the road and who had milk, and that he directed him to escort him to his house so that he could pick the girl and on arrival found the girl still in bed. He stated that he woke her up in the presence of the Appellant, arrested them and escorted them to the relevant authorities.

11. The Investigating officer, PC Maceline Rogena (Pw5), testified that she is attached at Kiminini Police Station. She stated that she undertook investigations of the incident and issued the Complainant with a P3 form which was filled in. According to her, on 30th June, 2019 at around 10.00hours while at the office, a male individual called Gabriel Masika in the company of village elders accompanied PW1 to the station alongside the Appellant. She stated that the said Gabriel Masika reported the parents of the complainant had reported of their missing daughter on the 27th of June 2019. She testified that she visited the scene at [Particulars withheld] Village and on observing the scene of incident she noticed a mattress and bed. She also received a letter from the complainant's school which confirmed that she was in class seven. At the conclusion of the investigations, she preferred changes against the Appellant. On cross-examination, she testified that on visiting the scene of incident she did not recover any property belonging to the Appellant. She further confirmed that the complainant had claimed to have been studying with the appellant in the said house and further that the two were found in the said house.

12. At the close of the prosecution's case, the Appellant was placed on his defence and tendered his sworn evidence on 30th June, 2019 where he stated that he was going about his daily chores around 8.00 a.m when he was arrested, tied up and escorted to the police station by a gentleman who did not give reasons for his arrest. He stated that he was later escorted to the hospital where he gave blood and urine samples. He added that the police demanded aa bribe of Kshs 10,000/ but he had none and was thus taken to court and only became aware of the alleged offence of defilement while in court. On cross-examination, he testified that he did not know the complainant and that he was arrested while he was alone hawking milk. He further denied having sex with any girl.

13. The Appeal was canvassed by way of written submission. Both parties have filed and exchanged their submissions.

14. The Appellant submitted that the Respondent failed to prove their case against him beyond reasonable doubt. According to him, the evidence tendered by the prosecution witnesses was inconsistent and did not link him to the commission of the alleged offence as the said prosecution witnesses' evidence did not even place him at the scene of the alleged crime. It was submitted that although the complainant claimed that she was sent to collect school fees that is why she was not in school on that material she also claimed that her mother got agitated, started yelling and shouting at her and she had left home to spend the night with her neighbour, one miss Juliet. It was therefore submitted that the inconsistent tales from PW1 rendered PW 1's evidence doubtful and even exposed her (PW 1) as a liar.

15. According to the Appellant, the medical evidence adduced by PW3 was devoid of evidential value and in fact, confirmed that PW1 was an untrustworthy witness since PW3 did not find any spermatozoa in the vagina of PW1. What PW3 noted was that PW1's hymen was broken and that she had had a history of sexual activity. It was submitted that the P3 form goes a long way in reinforcing the Appellant's position that someone was out to maliciously destroy his life and disparage his character.

16. It was therefore argued that the Appellant's appeal herein is meritorious and this court ought to proceed to quash the conviction herein and set aside the sentence.

17. On behalf of the Respondent, it was submitted that the appeal ought to be conceded due to inconsistencies on the side of prosecution witnesses. It was therefore submitted that the evidence adduced by the prosecution was not sufficient to prove the offence beyond reasonable doubt.

18. Although the appeal was conceded to by the Respondent, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565**, the court held:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."**

19. This being a first appellate court and as is expected, is obliged to analyse and evaluate afresh all the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it 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."

20. 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.**

21. Section 8 of the Sexual Offences Act provides as follows:

> 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
>
> (5) It is a defence to a charge under this section if -
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

22. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013**, where 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."**

23. PW3's evidence seemed to have corroborated the evidence of the complainant. He produced theP3 form and treatment notes. According to the doctor who examined the complainant and filled the P3 form there was evidence of defilement due to broken hymen membrane and lacerated labia minora. Therefore, lacerations of the genitalia can be proof of penetration even where the hymen is not broken. In fact, the mere fact that no spermatozoa are found does not necessarily mean that there was no penetration though its presence may well prove that there was penetration, though again that is not conclusive proof. In **Mwangi vs. Republic [1984] KLR 595 at 603**, the Court rendered itself thus:

> **"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has had sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."**

24. The complainant maintained that the appellant did insert his penis into her vagina. She also added that the appellant had been wooing her in the past seeking her to become his girlfriend and that they had sex with the appellant on the material dates. It is instructive from the evidence of the complainant's mother (Pw2) that the complainant had disappeared from home on the material days as it turned out that she had eloped with the appellant. The complainant stated that she and the appellant had sex in his house. She was categorical that the appellant inserted his penis into her vagina. The penetration was confirmed by the clinical officer (Pw3). There is no doubt that indeed there was penetration of the complainant's genital organ. Having considered the evidence adduced herein, I have no doubt that the Respondent did prove that there was penetration of the complainant's genital organs.

25. As regards the aspect of the age of the complainant, the certificate of birth produced as exhibit No.1 indicated that the complainant was born on 3rd July 2006 and hence at the time of the commission of the offence herein, she was about seven days' shy of 13 years and was obviously a child within the meaning of the Children Act 2001 as she was below the age of 18 years. This ingredient was proved by the respondent beyond reasonable doubt.

26. As regards the issue of the identity of the appellant as the perpetrator of the crime, the complainant was quite categorical that it was the appellant who actually defiled her. She stated that the appellant persuaded her to escort him towards his house only for him to lock the door and then defile her. She confirmed having been found by the village vigilantes still lying in bed inside the appellant's house. The appellant in his defence vehemently denied knowing the complainant and maintained that the complainant and her mother gave different names of the alleged assailant. The appellant also claimed that he had a solid alibi to the allegations. He maintained vide his submisions that there were contradictions and inconsistencies regarding the evidence of PW2 vis-à-vis that of the complainant. Indeed, the complainant gave the appellant's three names as Joseph Luguze Walukano, her mother (Pw2) stated that the appellant's names as Joseph Obushlukui. It is on that basis that the appellant maintains that the respondent has charged a wrong person. The general rule as regards the effect the discrepancies in the evidence of witnesses have in discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling, substantial or deliberate. See Law of Evidence (10th Ed) Vol. 1 at 46. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6**:

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi)** Tunoi, Lakha & Bosire JJA held: -

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."**

27. Where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the dates of the events, which are mere discrepancies that would not avail the accused person, because some of such discrepancies are expected as being natural **(The State vs. Sunday Dio Dogo (Alias Sunday Idogo) HSO/3C/2012, Oboh J in the High Court of Nigeria)**. It was therefore held in **Njuki vs. Rep 2002 1 KLR 77**, that:

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".

28. The manner of dealing with discrepancies and inconsistencies was stated in **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** where the Court of Appeal of Tanzania concluded that:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

29. In this case, even though Pw1 and Pw2 gave different names of the appellant, what emerged is that they knew him as their neighbour as he used to work for one Mwalimu. The complainant herself stated that the appellant in the past had been trying to woo and seduce her and hence the appellant was not a stranger to her. Both Pw1 and Pw2 knew him quite well and hence the discrepancy in the appellant's names is a minor one that did not affect the evidence since the complainant maintained that it was none other than the appellant who had defiled her. The village vigilante (Pw4) confirmed that he had earlier spotted the appellant in company of the complainant and that he apprehended the appellant from his house as well as the complainant. Even though the appellant's main ground in this appeal relates to contradictions in the evidence of the witnesses, I find the contradictions, if any, did not affect the weight of the prosecution's case as the same is curable under section 382 of the Criminal Procedure Code which provides as follows:

''Subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission, summons, warrant, charge, proclamation, order, judgement or other proceedings under this code, unless the error, omission, irregularity has occasioned a failure of justice.''

30. Iam satisfied by the evidence of the complainant that it was the appellant who had defiled her and not any other person. The minor contradictions in the evidence of the witnesses did not go into the root of the respondent's case in any way and are curable under section 382 of the Criminal Procedure Code. It must be noted that even in the absence of corroborating evidence the evidence of a victim of sexual offence is sufficient under section 124 of the Evidence Act as long as the trial court warned itself on the danger of convicting on such evidence as follows:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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

31. Therefore, the evidence of the complainant if truthful could properly be a basis upon which a conviction could be founded even if she was a child of tender years, which she was. The learned trial magistrate duly warned himself vide the judgement dated 23rd April, 2020. The physical identity of the appellant as the perpetrator of the crime was not in dispute and hence the third ingredient of the offence has been met by the respondent beyond any reasonable doubt. The appellant's alibi was properly rejected by the trial court since the complainant had been acquainted with him previously when they used to meet as he seduced her and could not have been mistaken about his identity. The appellant having been their neighbour for that long could not have been mistaken for somebody else. In any case, the complainant and her mother got the appellant's firs name ''Joseph'' and as such even if the other names did not turn out to be correct the same did not imply that they did not know the person they were referring to. The said witnesses (Pw1. Pw2, pw3, pw4) were quite certain of the identity of the appellant who worked in the area as an employee of on Mwalimu. Hence, I find the respondent did prove the third ingredient beyond any reasonable doubt.

32. The above findings lead me to the conclusion that the conviction arrived at by the trial court was sound and I see no reason to interfere with it.

33. As regards sentence, it is noted that the appellant was sentenced to serve imprisonment for twenty years. Under section 8(3) of the Sexual Offences Act, a person found guilty of defiling a child between the age of twelve years and fifteen years shall be sentenced to serve not less than twenty years' imprisonment. The complainant herein was found to be aged 12 years old and was about to turn 13 years old and hence the sentence imposed fell within the age bracket. It is noted that the trial court duly considered the appellant's mitigation before sentencing him. I find the sentence to be the possible minimum in law. There is no evidence that the appellant was released on bond pending trial and hence the period spent in custody before sentence must be factored pursuant to the provisions of section 333(2) of the Criminal Procedure Code. The sentence imposed should therefore commence from the date of arrest namely 30th June 2019 and hence the appeal partly succeeds to that extent only.

34. In the result, the appeal against conviction lacks merit. The appeal against sentence partly succeeds to the extent that the sentence of twenty years shall commence from the date of arrest namely 30th June 2019.

DATED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF NOVEMBER, 2021.

D. Kemei

Judge

In the presence of:

Joseph L. Lukoye.....Appellant

Mrs. Omondi.....for Respondent

Kizito.....Court Assistant