REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 61 OF 2019

MOSES ACHOTI ONDIEKI .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from a conviction and sentence in Chief Magistrates Court at Makadara in Makadara Criminal Case No. 163 of 2016 dated 21.11.2018 by the Hon. H. Nyaga, C.M).

JUDGMENT

The appellant herein ***MOSES ACHUTI ONDIEKI*** was charged before the lower court with 1 count of a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. That on 13.1.2016 at [Particulars withheld] area in Njiru sub-county within Nairobi County, he intentionally and unlawfully caused his genital organ, namely, penis to penetrate the anus of LW, a child aged 3 years.

He faced an alternative charge of committing an incident act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. That on 13.1.2016 at [Particulars withheld] area in Njiru sub-county within Nairobi County, he intentionally and unlawfully committed an incident act with LW, a child aged 3 years by touching her private part, namely anus with his fingers.

Upon his pleas of not guilty to the charges, the case proceeded to hearing. The appellant was eventually convicted on Count I as charged. On 21.11.2018, he was sentenced to serve life imprisonment.

Dissatisfied with the said conviction and sentence, the appellant filed an appeal to this conviction and sentence, the appellant filed an appeal to this court. The appellant's petition of appeal dated 15.1.2019 and filed on 15.3.2019 raises upto 6 grounds of appeal as follows:

*1. **THAT** the learned trial magistrate erred in law and fact by violating the provisions of Article 50(2) of the constitution.*

*2. **THAT** the learned trial magistrate erred in law and in fact by failing to appreciate that the minor was coached on hot to incriminate the appellant*

*3. **THAT** the learned trial magistrate erred in law and fact by failing to consider that there was a grudge existing between the appellant and the father of the minor as regards the nature of their work.*

*4. **THAT** the learned trial magistrate erred in law and fact by failing to observe that the case of the prosecution contained contradiction and inconsistence thus contrary to section 163 of the Evidence Act*

5. THAT the learned trial magistrate erred in law and fact in failing to observe that the provision of section 169 of the Criminal Procedure Code was contravened.

6. THAT the case of the prosecution was not proved to the required standard need in law.

The appellant later filed an amended grounds of appeal listing 4 grounds as follows;-

*1. **THAT** the learned trial magistrate erred in law and fact failing to find that the prosecution did not prove penetration beyond any reasonable doubt.*

*2. **THAT** the learned trial magistrate erred in law and fact by failing to find that vital prosecution witnesses necessary to prove basic facts did not testify.*

*3. **THAT** the learned trial magistrate erred in law and fact by failing to find that crucial exhibits were not produced.*

*4. **THAT** the prosecution did not prove its case beyond reasonable doubt as required by the law.*

The appellant has pleaded that this appeal be allowed, conviction quashed and the sentence be set aside. The prosecution, on the other land has urged that this appeal be dismissed and the conviction and sentence to be upheld.

This appeal has been canvassed by way of written submissions. The 2 sides duly filed their submissions in court.

The appellant first submitted on the ingredients of the offence of defilement. He relied on ***Fappyton Mutuku Ngui versus Republic, Cr. Appeal BNo. 296/2010 (machakos)*** and ***Charles Wamukoya Versus Republic, Cr. Appeal 72 of 2013*** on the 3 ingredients being

- ***Age of the complainant***
- ***Proof of penetration***
- ***Positive identification of the assailant.***

That these 3 elements were not proved. That whereas PW3 Dr. Maundu who examined the complainant found a tear at the anus, the genital parts of the appellant, on being examined, were found to be normal. The appellant conceded to the fact that the complainant knew him well but denied that he was the perpetrator of the offence.

The appellant challenged the accuracy of medical diagnosis e.g that a broken hymen does not necessarily prove penile penetration. That the doctor was likely to be bias. That there being no evidence of presence of semen, seminal fluid or corroborative evidence, it is safe to arrive at an inference of sexual abuse.

On the issue of crucial witnesses not being called to testify, the appellant relied on ***Juman Ngodia Versus Republic (1982 – 88)KAR 454(CA)*** that;

> ***"The prosecutor has in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced would if produced have been unfavourable to the prosecution."***

He noted that several witnesses did not testify with no explanation given. He gave the examples of the parents of the complainant and the arresting officer. Replying on the case of ***Evans Kalo Callos Versus Republic Cr. Appeal No. 360/2012,*** he urged the court to make an adverse inference to the prosecution's case from the possible evidence from the witnesses who were never called to testify.

With regard to the application of section 124 of the Evidence Act, the appellant urged that it was improper for the learned magistrate to convict him based on the evidence of the minor with no other member of the family testifying. He also maintained that the learned magistrate did not give reasons why he believed the minor contrary to the finding in ***Peter Kimanzi Versus Republic (2013)eKLR***.

The appellant, while relying on the authority of ***Omuroni Versus Republic (2002)2 EA 508,*** held that for a court to convict based on demeanor, must give and point out what constituted the demeanor which influenced the Judge.

The appellant also submitted on the duty of the appellate court to re-evaluate the evidence before satisfying itself on whether the prosecution had proved its case beyond reasonable doubt ***(Ouma Versus Republic, Cr. Appeal No. 91/85)***. He also relied on the requirement of proof beyond any reasonable doubt as postulated in ***Woolmington Versus DPP (1935)AC 485.***

The Respondent, has on the other hand, opposed this appeal, an maintained that the prosecution discharged its burden of proving the case beyond any reasonable doubt. That the medical report confirms age of the minor as 3 years. And that both the medical report and the post Rape Care form produced as exhibits confirm penetration. Lastly, that the identity of the appellant was proved and is not in dispute.

Counsel relied on section 143 of the Evidence Act, that on particular number of witnesses, shall, in the absence of any provision in law to the contrary, be required for any proof of fact. Also ***(Jeremiah Gatuiku Kirungi Versus republic (2009)eKLR,*** that failure to call the investigating officer is not fatal to the prosecution's case.

The jurisdiction of this court over this matter, as a first appellate court, was long established in the case of ***Okeno Versus Republic (1972)EA***, that is to consider and itself weigh the conflicting evidence and draw its own conclusion. It is therefore imperative that this court fully considers the evidence as presented before the trial court before arriving at its own conclusion. This, I shall do as follows:-

PW1, LW, a minor gave very terse evidence. That she knows the appellant whom he called Baba Michele and hat he put his "Chuchu" in her buttocks. This was in his house. He had removed her clothes. PW2, Salano Barbara Kere, a clinical officer at MSF France, examined PW1, born on 19.1.2013. on examination, she found her hymen intact. The anal examination revealed a small tear at 12o'clock position, about 0.2 to 0.3cm Long. In her opinion, there was evidence of defilement of the anus, though no spermatozoa were noted. She produced the medical certificate and the post rape care forms as exhibits.

Dr. Joseph Maundu, a police surgeon was PW2. He examined PW1 on 15.1.2016. he noted that she was aged 3 and she alleged to have been defiled on 13.1.2016. on examination, she had no physical injuries, no tears on hymen. She however has a tears at the anus. He produced the

child's P3 form, as well as that of the appellant. There were the 3 witnesses the prosecution summoned and whose testimonies were taken by the court.

And when put to his defence, the accused denied the charges. He also denied that he is Baba Mitchel. He also claimed he had been framed by the complainant's father. He called no witness.

I have considered the evidence as above. In my view, the following issues are up for determination in this appeal.

i) Age of the complainant

ii) Proof of defilement/penetration.

iii) Identification of the appellant.

iv) Defence of the appellant

v) Whether the prosecution discharged its burden of proof.

The age of the complainant was proved by the 2 medical reports produced by PW2 SalanoBarbara Kere and PW3 Dr. Joseph Maundu, who examined the complainant. They both confirmed that the minor was aged 3 years. I have no reason to doubt this is view of the fact that even the appellant never challenged the prosecution's case on the case.

On the 2nd issue on proof of defilement, it is important to decipher a number of issues regarding same. Section 8(1) of the sexual Offences Act, No. 3/2006 defines defilement as

"a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

And at section 2(2) of the said Act, penetration is described thus;

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

The term "***genital organs***" is also describes under the same provision of the Act, as;

"Genital organs included the whole or part of male or female genital organs and for purposes of this Act includes the anus."

The evidence of both PW2 and PW3 were to the effect that on examination, years were noted on the anus of the complainant making the 2 witnesses form the opinion that the complainant had been defiled. The evidence of the 2 witnesses was opinion evidence which proved to the court that indeed he complainant had been defiled.

The main issue in this appeal remains that of identification of the appellant as the perpetrator of the vice. From the record, the prosecution called only 1 witness, PW1 LW, the complainant, regarding the identification of the appellant. This witness was only 3 years old. Her evidence was only a 2½ lines. That;

"I am LW. I know that man (points to accused). He is called Baba Michelle. He put his "Chuchu" here (touches her buttocks). I had gone to his house. He removed my clothes and put his "chuchu" here. I told mum about it."

This court is therefore expected to determine whether the above evidence of PW1 was sufficient on the question of PW1 was sufficient on the question of identification of the appellant. From the record of proceedings, it is clear that he learned trial magistrate struggled, and rightly so, in extracting any evidence from this witness. She was only 3 years old. And on conducting the voire dire examination, the court observed that the witness was too young to be sworn or affirmed and that it was difficult to assess her as required. If the witness could not even be assessed during viore dire examination, I do not sincerely understand how the same child would proceed to testify. And if she testified, whether whatever evidence she gave would be verifiable or believable.

The court also noted the several occasions that the case was adjourned for lack of prosecution witnesses. On at least 2 occasions the investigating officer had to state on oath the difficulties he experienced in this regard. This probably left the prosecution with no choice but to suddenly close their case on 28.6.2018.

The net effect is that on the issue of identification, the court was left with only the evidence of the minor. At her age, the minor could not state the date of the incident, time of the same or the detailed circumstances leading to and after the incident. There was not even evidence of how the appellant was arrested. All that is on record are that the 2 families were neighbours.

The appellant in his defence denied the charges nor that he is baba Michele as identified by the complainant. This would raise a question as to whether the minor had mistaken his identity.

The learned trial magistrate clearly agonized over this issue of identification and proceeded to warn herself accordingly on reliance on the evidene of 1 witness, under section 124 of the Evidence Act. In my view however, the evidence on identification by this single witness

(PW1) left a soubt as to whether it was the appellant who defiled the minor.

In the case cited by both sides of Woolmington Versus DPP (1935)AC, a landmark case, it was held;

> "Throughout the web of English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoners' guilt (subject to the defence of insanity and subject to any statutory exception) no matter what or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

And the standard of proof expected of the prosecution is one of beyond any reasonable doubt. In this appeal, I regrettably, find that the prosecution failed to discharge this burden. The evidence produced before the lower court left doubt as to the guilt of the appellant, and it is the appellant who is entitled to the benefit of that doubt.

I accordingly therefore allow the appellant's appeal herein filed on 15.3.2019. I set aside the Judgment, conviction and sentence of the lower court. I order that the appellant be released forthwith unless lawfully held.

D. O. OGEMBO

JUDGE

17.11.2021.

Court:

Judgment read out in open court (on-line) in the presence of the appellant (Kamiti) and Ms. Ndombi for the state.

D. O. OGEMBO

JUDGE

17.11.2021.

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FROM: HIGH COURT APPELLATE SIDE

TO: @ G.K. PRISON ALLO. KAMITI PRISON MAIN

INFO: PHQ.

17TH NOVEMBER 2021

HCCR APPEAL. NO. 61 OF 2019

HIGH COURT CRIMINAL APPEAL NO. 61 OF 2019 ORIGINATING FROM THE CHIEF MAGISTRATE'S COURT AT MAKADARA CRIMINAL CASE NO. 163 OF 2016. APPELLANT MOSES ACHOTI ONDIEKI (KAM/1499/018/LS) JUDGMENT, CONVICTION AND SENTENCE OF THE LOWER COURT SET ASIDE. APPELLANT BE RELEASED FORTHWITH UNLESS LAWFULLY HELD.

DEPUTY REGISTRAR