REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 60 OF 2020

NELSON WANYAMA SIMIYU..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

[An appeal from the conviction by Hon I.G Ruhu (R.M) and the subsequent sentence by

Hon G.A Adhiambo (P.M) in original Kimilili Law Courts criminal case

No. 53/2015 delivered on 15.4.2020]

JUDGEMENT

The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006. The particulars of the offence were that the accused in the month of May 2014 within Bungoma County intentionally caused his penis to penetrate the vagina of CI, a child aged 16 years.

At hearing, the prosecution called 6 witnesses whereupon the appellant was put on his defence and he called 1 witness.

The learned trial magistrate convicted the appellant, called for a presentence inquiry report and after considering the report together with the mitigation, sentenced the appellant to serve 15 years imprisonment.

In her ruling delivered on 22/6/2020, the trial magistrate pronounced herself thus;

> ***…the accused has abused the trust placed upon him by the society which expected him to be law abiding and to protect vulnerable persons in the society such as the complainant herein. The offence which the accused has committed is prevalent and I find that he deserves a deterrent sentence. I hereby sentence the accused to serve 15 (Fifteen) years imprisonment….***

Dissatisfied, the appellant preferred this appeal vide petition of appeal dated 24/4/2020 raising the following grounds; -

> ***1. That the learned trial magistrate erred in law and fact when he proceeded to hear the evidence of prosecution witnesses when the complainant had already passed on hence fell short of the law in invoking Section 34 of the Evidence Act and Section 80 of the Criminal Procedure Code.***
>
> ***2. The learned trial magistrate erred in law and fact in convicting the appellant when the prosecution had failed to prove their case beyond any reasonable doubt.***
>
> ***3. The learned trial magistrate erred in law and fact in convicting the appellant when there were grave material contradictions, discrepancies, inconsistencies and un-corroborated evidence in the prosecution's case.***
>
> ***4. The learned trial magistrate erred in law and fact in convicting the appellant when basing on speculative and hearsay evidence.***
>
> ***5. The learned trial magistrate erred in law and fact in misapprehending the application of Section 124 of the Evidence Act hence arriving at the wrong findings.***
>
> ***6. The learned trial magistrate erred in law and fact in convicting the appellant on a fatally defective charge sheet that was an affront to Section 134 of the Criminal Procedure Code for want of sufficient information on the exact date of the alleged offence.***

7. The learned trial magistrate erred in law and fact when he extraneously and on suo moto basis admitted the complainant's death certificate exhibits when the prosecution had not applied to have the same produced as prosecution exhibits.

8. The learned trial magistrate erred in law and fact in failing to appreciate that the element of penetration as a requirement was not proved as having been caused by the appellant and which penetration element per se was not proved at all regardless of who the perpetrator was.

9. 9.The learned trial magistrate erred in law and fact by failing to take into account that no valid documentary and/or oral evidence was adduced as evidence in with regards to the age of the complainant.

10. The learned trial magistrate erred in law and fact in failing to draw an adverse inference against the prosecution for failing to call certain crucial witnesses.

11. The learned trial magistrate erred in law in shifting the burden of proof to the appellant when it was the duty of the prosecution to prove their case beyond any reasonable doubt.

12. The learned trial magistrate erred in law in rejecting the appellant's defence which was firm and cogent.

13. The learned trial magistrate erred in law and fact in failing to consider the presentence report hence slapping the appellant with excessive punishment of 15 years imprisonment.

The appeal was disposed of by way of written submissions. Both parties filed and the court has considered them.

This being a first appeal, the principles guiding the court were stated in ***Kiilu & Another vs. Republic [2005]1 KLR 174***, where 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.

The appellant's counsel submits that the magistrate fell into error by hearing the prosecution's evidence when the complainant was already dead hence fell short of the law in invoking Section 34 of the Evidence Act and Section 200 of the Criminal procedure Code. The respondent through Mr. Thuo on the contrary submits that the requirement of evidence of the minor under Section 124 of the Evidence Act were satisfied.

From the trial court proceedings, the minor testified on 7/4/2016. Subsequently, 3 other witnesses testified and on 13/2/2019, the appellant's counsel informed court that the trial magistrate was on transfer and that there was an order that the matter starts *de novo*. Pursuant thereto, the court ordered;

I have considered the application from the accused counsel and further to the order that the matter starts de novo. I hereby allow the same.

Section 200 of the Criminal Procedure Code provides;

(1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) …..

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

Section 34 of the Evidence Act provides;

(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

Section 124 of the Evidence Act on the issue of corroboration provides;

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.

The question that arises for determination is whether the trial magistrate fell into error by adopting the evidence of the deceased complainant.

It is the position of the law that when a new magistrate takes over the conduct of an ongoing matter, the rights of the parties under Section 200 of the Criminal Procedure Code must be explained to both parties.

The reasons for requiring courts to comply with the dictates of Section 200 are immense. It goes into the very root of our criminal justice system and touches on an accused person's right to fair hearing.

In ***Ndegwa v. R (1985) KLR 535*** Madan, Kneller and Nyarangi, JJ.A held:-

"It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow.

In ***Abdi Adan Mohamed v Republic (2017) eKLR***, the Court of Appeal observed;

……But the succeeding magistrate may also recommence the trial and re-summon witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern.

Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start de novo.

There is ample evidence on record that the appellant's rights under Section 200 were explained to him and opted to have the matter start afresh.

The court notes that an application to admit the deceased complainant's evidence was made on 23/5/2019 on the ground that the complainant was dead. A death certificate was produced in proof.

There is no evidence that the appellant ever objected to the adoption of the evidence.

When faced such a scenario, the courts consider the reasons given for non-attendance by the witness. The curt must consider *inter alia* the difficulty encountered in bringing the witness to court.

In ***Abdi Adan Mohamed v Republic (supra),*** it was held;

It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.

The court proceeded to hold;

> ***Where, in the language of Section 200(3) the accused demands that any witness be"re-summoned and re-heard," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re- summoned is deceased, to insist on calling such a witness. …….. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith.***

The instant appeal hinges on the scenario where the complainant has passed on. It was impractical for all intents and purposes to procure the attendance of the witness. The court has considered is the fact that the appellant had chance to cross examine the witness. His rights were adequately covered through such cross-examination and therefore there was no miscarriage of justice.

The other issue that this court must address is whether the offence of defilement was proved to the standards required by law. It is now accepted that to secure a conviction for the offence of defilement; the age of the complainant, proof of penetration and positive identification of the assailant have to be sufficiently proved.

On the issue of age, the evidence on record is not conclusive and contradictory to some extent. The P3 form which was filled on 1/9/2015 indicates the age of the complainant as 16 years. The death certificate which was produced as PEXH 5 indicates 18 years meaning the complainant was born on 2000. This therefore means the complainant should have been 15 years when the P3 form was filled. When the complainant testified on 7/4/16, she stated that she was aged 16 years. The Charge Sheet indicates that the complaint was 16 years in 2014.

Having carefully perused the record, the slightest mention of the Birth Certificate was in the complainant's evidence in chief. She stated that she had a birth certificate which showed her date of birth as 16/1/1999. The Birth Certificate was marked as PMFI-2 but unfortunately never produced into evidence.

In the case of ***Hilary Nyongesa Vs Republic (Eldoret Criminal Appeal No 123 of 2009)*** Mwilu J (as she then was) that:

> ***"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved….And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."***

From the evidence on record, if it is true that the complainant was born on 16/1/1999, then, in 2014 she was 15 years. This court notes that there is material inconsistency regarding the age of the complainant. No age assessment was done to ascertain the fact. The birth certificate that would have formed the basis having not been produced.

The court finds that the trial magistrate did not properly assess the evidence to satisfy herself on the age of the complainant and the resultant repercussions in sentencing. As a fact, two different sets of age have been given, 15 years and 16 years. There is a high chance that a conclusive determination of the age would possibly alter the sentence to be imposed.

The other ingredient that must be proved beyond reasonable doubt is the element of penetration. Penetration is a very crucial element of the offence and cogent evidence must be adduced in that regard.

The P3 form was filled on 1/9/2015. The offence was allegedly committed in the month of May, 2014. The doctor's conclusion was that the hymen was perforated. He could not however tell the age of the injury of the hymen. The hymen was not freshly torn.

The complainant on her part stated that she was first defiled by the appellant on 9/5/2014 in the appellant's house. That she was again defiled in August, then November and December. That she reported the matter to her mother who did not take the issue seriously.

On her part, PW2, the complainant's mother in her cross examination stated that her daughter was defiled on 26/6/2015. This, she said because her daughter had confessed in the letter.

A period of over 1 year had lapsed between the time the complainant was allegedly defiled and the time the complainant was medically examined.

The P3 form that was produced as PEXH 2 indicated that there were no injuries to the labia majora and minora and that the hymen was perforated.

The court notes that no conclusive and cogent evidence was produced by the complainant on this limb. Her evidence has not been corroborated by the medical evidence produced.

The Charge Sheet indicates that the offence was committed in the month of May, 2014. The other dates that the offence was allegedly committed including the one of 26/6/2015 have not been captured in the Charge Sheet.

The evidence that she was defiled severally by the appellant which information the complainant did not relay to her mother compounded by the fact that medical examination was conducted much later is a fact that should be discounted in favour of the appellant.

There is a possibility that the hymen was perforated through sexual act, if any, with a person other than the appellant. In ***Dominic Kibet Mwareng v Republic [2013] eKLR***, on the issue of penetration and the resultant P3, the court held;

> ***The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time. According to the***

Medical Examination Report produced as MF1, there were no obvious tears on the Complainant's genitalia. There was however evidence of old penetration. In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence. The Complainant in the instant case testified that the Appellant was previously known to her. She even claimed that he had defiled her on two previous occasions, although she had not reported the previous defilements.

Having subjected the evidence to fresh scrutiny to appraise myself with the evidence adduced, this court is of the view that the elements constituting the offence were not proved to the standards required by law.

In the circumstances, the appeal is meritorious and is allowed. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AT BUNGOMA THIS 10TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE