REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO.42 OF 2019

OMAR BASHORA BUBU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 6 of 2019

of the Resident Magistrate's Court at Hola Law Court-B.N. Kabanga, RM dated 16th October, 2019)

CORAM: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the State

J U D G M E N T

The appellant was charged with Defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 27th day of February, 2019 at [Particular withheld] Village, in Tana River Sub County within Tana River County, the appellant intentionally caused his penis to penetrate the vagina of FLB a child aged 14 years old. The appellant was charged with an alternative charge of committing an indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 27th day of February, 2019 at [Particular withheld] Village, in Tana River Sub County within Tana River County, the appellant intentionally touched the vagina of FLB a child aged 14 years with his penis.

Aggrieved by the sentence and the conviction of the trial court, the appellant lodged an appeal on the following grounds:

> *1) **That the Learned trial Magistrate erred in law and fact by failing to consider that the prosecution witnesses failed to discharge the burden of proof to their case as required by the law.***
>
> *2) **That Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 fetters the discretion of the court to give a minimum sentence under Section 329 of the C.P.C.***
>
> *3) **That the Learned trial Magistrate erred in law by sentencing him to 20 years imprisonment without proper finding that the charge of defilement was not proved beyond reasonable doubt.***
>
> *4) **That the Learned trial magistrate erred in law and fact by no considering there were massive contradictions from the prosecution's case.***
>
> *5) **That the Learned trial Magistrate erred both in law and facts by failing to consider that there were no cogent reasons to link I, the applicant to the commission of the alleged offence hence the conviction was against the merits of the entire case.***

Background

PW1 FLB, the victim was sworn in after a voire dire examination. She informed the court that she was in class 7 at [Particulars withheld] Primary School. That on the 27th day of February, 2019 at around 8:00 p.m. she was at home with Gumi when **Adhe** and the appellant came on a motorbike and called them to follow them. She stated that they went to Chanani on a motorbike and along the way, she and the appellant alighted while the other two proceeded. That they went to the forest where the appellant told her to stripe naked. That he also stripped naked and they had sex.

She told the court that the appellant told her to bend over and that he inserted his manhood into her vagina. She also said that when they came out of the forest, they met the other two, **Gumi** and **Adhe** who took them home at around 6:00 a.m. She further told the court that at home they found Gumi's mother who asked them where they were coming from but they did not tell her.

She also added that she took them to the chief and that **Adhe** and **Omar** were also called by the chief where they were arrested. That she was taken to hospital at Hola.

Upon cross examination, she stated that they left **Fatuma's** place at around 8:00 p.m. and that **Gumi** told her that the appellant and **Adhe** were coming. She also told the court that she did not have a witness who saw them having sex. That they feared going home so they went to madrasa and spent the night there. She also said that they went to the appellant's place in Chanani then he woke her up to take her home. That when they went home at night and could hear their parents complaining.

PW2 Ismail Hirsi was a medical officer from Hola County Referral Hospital. He confirmed that he had a P3 Form for the victim filled on 4th March, 2019 and according to the information he had, the female had a history of eloping with her boyfriend. That according to the treatment notes, the hymen was broken but old and not freshly broken, there was no discharge or blood stains and that the client has taken a bath prior to examination. The P3 form was produced as P. Exbh. 3.

PW3 Mohamed Galgalo Shambaro, an oral health officer at Hola County Referral Hospital told the court that on the 2nd day of March, 2019 he received a girl FLB and conducted and age assessment on her based-on sequence of tooth eruptions formula which is the universally accepted method of determining the age of a patient. That he used that method and found out that she was 14 years old. He prepared the age assessment which was produced as P. Exhb. 2.

On cross examination, he confirmed that he assessed the victim and confirmed that she was 14 years.

PW4 Gumi Mwanadiye was sworn in after a voire dire examination. She informed court that on the 27th day of February, 2019 she was at [Particulars withheld] Village with the victim where the appellant and **Adhe** came on a motorbike and requested them to go with them to Chanani. She said that along the way, the appellant and the victim alighted but she did not know where they went. That the appellant and the victim came to **Adhe's** place in the wee hours of the night at around 4:00 a.m. and they all boarded the motor bike and went back to Laini.

She further stated that they went home at around 5:00 a. m and that when they went to the chief they explained that they were coming from Chanani.

On cross examination, she stated that they went to Chanani and she did not know where the appellant and the victim went. That they alighted at Chanani and that no one saw the appellant picking them at Fatuma's place.

PW5 Stephen Khamisa Bayaya clinical officer at Hola County Referral Hospital told the court that he examined the victim on the 2nd March, 2019. There was some discharge from her vagina, the hymen was broken. The Treatment Notes were produced as Plaintiff Exhb. 1

PW6 Adan Salim the Assistant Chief Laini Sub Location told the court that on the 1st day of March, 2019 two parents came to see him in the company of their daughters. That they explained that the two girls went missing on the 27th day of February, 2019 at night only to be seen the following morning, they tried to ask them where they were coming from but the girls did not disclose and they therefore decided to get help from the chief. He stated that upon investigation, they disclosed that there were two boys who took them to Chanani.

He also said that he told the girls to call the appellant and **Ismael Adhe** so that they could go home and inform the parents that they are dating the girls so that the parents are aware. That the boys agreed to come at 12:00 noon where he organized to arrest the two while they were talking to the girls. He further stated that the two boys admitted that the girls were with them that evening.

PW7 was the victim's mother. She told the court that on the 27th day of February, 2019, the victim went missing at around 9:00 p.m, she went to the neighbours to check where she also confirmed that her daughter was also missing. She also told the court that both Gumi and the victim were missing and they searched for them for the better part of that night.

That the next day in the morning, the victim came back home and she interrogated her, they took both girls to the chief where they said that they had gone to Chanani. That upon the arrest of the Appellant, the victim said that the accused took her and had unprotected sex with her.

PW8 Cpl M Agiza attached to Hola Crime office told the court that on the 2nd day of march, 2019 he received two women and the chief had called indicating the two girls eloped on the 27th day of February, 2019 and they were also in the company of two accused persons who had been brought on allegations of having raped the girls. That he interrogated them and they mentioned the two accused persons.

He also stated that according to his investigations, the two girls had been picked by a motorbike and taken to Chanani, that the victim and the appellant alighted at a forest where the appellant defiled the victim. He recorded the statements and took them to Hola County Referral Hospital for examination as well as for age assessment at the hospital.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence. The appellant elected to give unsworn evidence and stated that he did recall that on the 12th day of February, 2019 he was at Kipini unwell. That when his condition worsened, he came to live with his mother in Hola, his mother took him to Hola Hospital on 19th September, 2018 where he was confirmed to have Tuberculosis and the doctor warned him against having sex, working hard or getting annoyed.

He also said that on the 27th day of February, 2019 he came to hospital for routine checkups and was told to collect results the following day. That he was unable to go on that day but he instead went on the 1st day of March, 2019 and delayed there while taking drugs. He further stated that he left at around 2:00 p.m. and walked to Mikiki stage to get a motorcycle to take him home. That upon reaching Kone, some people stopped them and informed them that the chief **Bashir Ali Doyo** was looking for him. That afterwards, three people in civilian clothes came and arrested him while tying him with ropes. That he was not informed what offence he had committed and it was at this point that the chief proceeded to call the police vehicle which came and took him to the police station.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. **(See Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR).**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the appellant.

In order for the offence of defilement to be proved, the prosecution must prove all the three elements of defilement being the age of the Complainant, proof of penetration and the positive identification of the perpetrator. **(See Charles Wamukoya Karani v Republic Criminal Appeal No.72 of 2013).**

It is trite that under the Sexual Offences Act with regard to defilement age apparently is one of the critical elements to be proved beyond reasonable doubt by the prosecution because of its application in appropriating the correct sentence for the offence. The prosecution must give proper and sufficient evidence in respect to age of the complainant. Such evidence is then considered along with other available material in support of the charge capable of discharging the burden of proof under Section 107(1) of the Evidence Act.

Additionally, on the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. **(See Moses Nato Rapheal v Republic (2015) eKLR).**

It has been held that the age of the victim in sexual offences can also be proved by the direct evidence of parents or guardian or by observation by the court. In **Thomas Mwambu Wenyi v Republic (2017) eKLR** cited with approval **Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** which held that:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

In **Richard Wahome Chege v Republic (2014) eKLR** the Court of Appeal sitting in Nyeri pronounced itself thus:

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate.PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself"***

In the instant case, proof of age of the complainant was given by the victim as well as the mother. **(PW1)** stated that she was fourteen (14) years at the time of giving her testimony and at the time of committing the offence. Similarly, **(PW3)** who is a clinical officer informed the court that the victim was fourteen years old based on an age assessment. There was no dispute as to the age of the complainant and I hold that it was satisfactorily proved.

On the element of penetration, Section 2 of the Sexual Offences Act defines penetration as :

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

Section 9 (1) of the Sexual Offences Act provides as follows;

> ***"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed as attempted defilement".***

The prosecution has a duty to establish that the appellant defiled the victim. In determining penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng v Republic (2013) eKLR** where the court stated that:

> ***"In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence…"***

In this case, the victim clearly recounted in court how on the material day **Adhe** and the appellant came on a Motorbike and called Gumi and the victim to follow them. That in the forest, the appellant told her to strip naked, he then striped naked and they had sex. She further stated that he inserted his manhood into her vagina.

Having assessed the evidence on record, the victim clearly recounted that the said act of penetration was committed by the appellant. It is common place that penetration can be proved by the evidence of PW1 alone as provided by Section 124 of the Evidence Act which provides that:

> ***"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"***

This position was succinctly held by the Court of Appeal in **Williamson Sowa Mbwanga v Republic (2016) eKLR**, where it stated that:

> ***"The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this court in George Kioji V Republic Cr App. No.270 of 2012 (Nyeri): "where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and record the reason for such belief"***

On identification, where identification is based on Recognition, this is where the complainant knows the accused and it has been held to be more reliable than identification of a stranger. The court of Appeal in **Francis Muchiri Joseph v Republic (2014) eKLR** held that:

"In LESARAU v R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name".

In the instant case, the victim informed the court that the appellant took her to the forest and had sex with her. According to **(PW1)** evidence the period of observation of the appellant was over long period of time to support recognition of the appellant positively and to this extent this is not in contention.

Having looked at the above elements, the only question is whether the appellant defiled **(PW1).** I have weighed the evidence of the prosecution against that of the appellant. There is no doubt that **(PW1)** and the appellant knew each other but the extent of their relationship is unknown and the prosecution was also evaded bringing this out for the obvious reason that it would paint a bad picture of their case should the truth come out. What is curious and appalling about this case is that the investigating officer did not issue any substantive evidence to prove that the offence of defilement was committed.

The doctrine of proof beyond reasonable doubt was discussed in **Woolmington versus DPP 1935 AC 462** and also **Miller versus Minister of Pensions 1942 AC** where **Lord Denning** stated on the phrase of beyond reasonable doubt as follows:

> ***"It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice"***

Having reached the conclusion that there was no sufficient evidence that the appellant defiled the complainant, I have no option but to resolve the issue in favor of the appellant. In the final analysis, I find that the appeal is merited and thereby quash the conviction and set aside the sentence of the trial court is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF NOVEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state

2. The Appellant