REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 20 OF 2019

CHING'ANG'I NYANJE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kwale Cr. Case No. 99 of 2017 delivered by Hon. Patrick Wambugu, PM on 26th June, 2018)

J U D G M E N T

1. The Appellant was charged with defilement contrary to section 8 (1) & (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 11th October 2018 2017 at [Particulars Withheld] area in Lunga Lunga location Kwale County with Coast region, the Appellant intentionally caused his penis to penetrate the vagina of KM, a girl aged 13 years.

2. The Appellant pleaded not guilty and the matter went to full trial. After trial, the trial Court found the Appellant guilty of the main charge and he was convicted and sentenced to serve 25 years' imprisonment.

3. Being aggrieved by the conviction and sentence, the Appellant filed his appeal vide a petition of appeal filed on 5th December, 2019 on the following grounds:

> **1. That the learned Magistrate erred in law and fact by finding my conviction and sentence without considering that the sentence of 20 years was unlawfully for the age of the complainant was not proved beyond reasonable doubt.**
>
> **2. That the learned Magistrate erred in law and fact by convicting and sentencing me to 20 years imprisonment without considering that the evidence made in court was contradictory.**
>
> **3. That the learned Magistrate erred in law and fact by failing to note that section 150 of the C.P.C was not considered for the alleged mob justice alleged to have arrested me were never summoned to testify.**
>
> **4. That the learned Magistrate erred in law and fact by failing to consider my defence statement.**

4. Directions were taken on 13th October, 2020 that the appeal herein will be canvassed by way of written submissions.

5. In his submission the Appellant argued that PW3 (the victim) gave an account which was that during the alleged ordeal, she screamed for help and her brother B came to help her. However, upon cross-examination, it was confirmed that PW3's brother left her with the Appellant. Therefore, the fact that it was only PW3 who witnessed the defilement but unfortunately could not give sworn testimony, then PW3's evidence needed to be corroborated by an independent witness in this case would have been PW3's brother B but unfortunately, PW3's testimony lacked credibility and the said evidence was not corroborated as required under Section 124 of the Evidence Act.

6. The Appellant submitted that the trial abdicated its duty pursuant to Section 150 of the Criminal Procedure Code by failing to summon B in order to ascertain the allegations by PW3. Therefore, crucial evidence was withheld.

7. The Appellant further submitted that there was evidence of bad blood between the complainant's family and Appellant as confirmed in cross-examination of PW 2 MM who confirmed that indeed the Appellant had fought her young son. Therefore, the allegations by the complainant were a fabrication of lies, which resulted to a made up case.

8. On the sentence, the Appellant argued that the sentence was excessive since he was supposed to be sentence to not more than 20 years yet the trial magistrate sentenced him to 25 years imprisonment. Therefore, the Appellant prayed that his sentenced to be reviewed downward bearing in mind that he is currently 61 years of age and he cited the Supreme Court decision of **Francis Kariokor Muruatetu** case where the Court held that mandatory sentences could now be construed as discretionary in the sentencing process.

9. From the Appellant's Grounds of Appeal, the Prosecution identified three grounds: identification; crucial evidence being withheld; fabricated case; and the sentence being excessive.

10. On identification, **Mr. Mulamula** submitted that the PW1 MM and PW2 knew the Appellant prior to the incident and on the day of the incident, PW3 arrived home at 8:00 pm and informed PW1, PW2 and PW5 that she had come from the Appellant's abode and that the incident had occurred. Therefore, the identification was free from possibility of error. Further, the appellant was properly identified and placed at the scene of the crime.

11. On the issue of critical evidence being withheld, it was submitted that the ingredient of defilement are proof of age, identification of the assailant and, penetration. Therefore, PW5 who examined PW3 confirmed that her hymen was broken, the labia majora had blood clots and a white discharge and her clothes had been soiled which was pointed to a struggle the Appellant had with PW3 during the incident. Therefore, the evidence by PW3 was corroborated by the evidence by PW5. Therefore, with the overwhelming evidence of defilement, the allegations of a made up case because of bad blood between the complainant's family and the Appellant did not in any way sway the prosecution in making a decision to charge the Appellant.

12. On the issue of the excessive sentence, it was submitted that under Section 8(3) of the Sexual Offences Act, the minimum sentence prescribed is 20 years imprisonment. Therefore, the Court noted that the demeanor of the Appellant was wanting and he did not shoe remorse. Therefore, the Court exercised its discretion in sentencing the Appellant to 25 years imprisonment.

13. The court was therefore urged by the Prosecution to dismiss the appeal in its entirety and uphold the conviction and the sentence.

14. In rejoinder, the Appellant submitted that the corroboration of the medical evidence produced by PW5 did not in any way link the Appellant to the offence. He cited the finding of the Court of Appeal in **Dhalay Singh vs Rep Cr. App No. 10 of 1997** where the Court held that if there are other co-existing circumstances, which would weaken or destroy the inference of guilty, then the case has not been proved beyond reasonable doubt and an accused is entitled to an acquittal.

15. On his enhanced sentence, the Appellant submitted that there was no any justified reason to enhance his sentence by the trail Court. This is because he was a first offender and a family man with two wives and 9 children and currently 67 years old.

ANALYSIS & DETERMINATION

16. This being the first appellant court its duty as was stated in the case of **Kiilu & Another vs. Republic [2005]1 KLR 174,** by the Court of Appeal is:

> **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.**

17. The Appellant seeks to challenge his conviction and sentence for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The Section reads;

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(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.**

18. Revisiting the evidence adduced before the trial court, the prosecution evidence as laid out was as follows: PW3 SFN the complainant & a minor gave unsworn testimony as she did not understand the nature of solemnity of an oath. She testified that she was at home cleaning and fetching water when the Appellant called her into his house and lured her with promises of buying her shoes. They took a motorcycle to the Appellant's house and that PW3 saw a bed, some utensils and electricity. The Appellant removed PW3's panty, he spread a *leso* on the floor, removed his shorts and the removed his penis to enter PW3's vagina. PW3 testified that the Appellant finished and she screamed for help which led to her brother B who heard her help come to her rescue. PW3 further testified that here vagina was wet but it was semen. She felt pain when the Appellant was penetrating her.PW3 also stated that the Appellant took her home and left her there and when her mother asked where she had been she said that she was at Kingangi's place. On cross examination, PW3 confirmed that her brother left her with the Appellant.

19. PW2 MM in her testimony stated that her daughter went to fetch water and never came back. At 8: 00 pm, her daughter came home and when asked where she was, she said she was called by the appellant at his house and that she went and had sex with the appellant. On cross-examination, PW2 confirmed that the appellant had fought with her son **M** and she had confronted the appellant why he was fighting with his

young son.

20. PW5 Mwachaka Sumbi Ndege testified and stated that he examined the complainant and found no blood on the clothes but they were soiled. Further, PW5 testified that PW3's vagina labia Majora had blood clots and a white discharge. There was no smell and he categorize the injury suffered by PW3 as harm. On cross-examination, PW5 confirmed that the blood in the vagina was not menstrual fluid since it was not continuous bleeding and that PW3 did not have pads or sanitary towels.

21. It was the appellant's testimony that he was a mason and that he knew the complainant. He testified that he had initially disagreed with one B a brother to the PW3 on the 7th August 2017 which led to him slapping B and that he talked to PW2 who is B's and PW3's mother and he had decline to return B to work .The appellant also stated that on 12th October 2017 he was accused of raping PW3 who is B's sister. On cross-examination, the appellant confirmed that he had no evidence that he was at Mondi's house at the time the incident happened and that there are many men in Sega "A" area and that the charges are because of a grudge with PW3's brother.

22. I have gone through the record of appeal and the submission on record and in my view, the issues that arises for this Court to determine are:

a) Whether the age of the complainant was proved beyond reasonable doubt

b) Whether the prosecution evidence was contradictory

c) Whether the court abdicated its duty of summoning witnesses as required under section 150 of the Criminal Procedure Code.

d) Whether the sentence imposed by the trial Court was manifestly harsh and excessive.

a) **Whether the age of the complainant was proved beyond reasonable doubt**

23. At page 9 of the record of appeal, it is noteworthy that Pw2 stated as follows:" the child is 13-14 years. I have a clinic card. A Health card was produced ad marked MFI -1 and on the clinic card that was produced as exhibit 1, it is indicated that the complainant was born on the 12th September, 2003 and it was proved that PW3 was 13 years of age at the time the offence was committed. In the case of **Gilbert Miriti Kanampius -V- Republic (2013) e KLR,** , Gikonyo J. while relying on the case of **Fappyton Mutuku Ngui vs Republic, Machakos H.C.Cr. Appeal No. 296 Of 2010**, noted as follows;

> ***"Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J. in MACHAKOS HC. CR. APPEAL NO. 296 OF 2010 FAPPYTON MUTUKU NGUI -VS- REPUBLIC: "... that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."***

24. In this instance, the child's mother confirmed her year of birth, which was supported by the immunization child health card. I accordingly find that the health immunization card was properly produced as an exhibit and could be used to find the apparent age of the victim, which was 13 years.

b) Whether the prosecution evidence was contradictory

25. The Court of Appeal of Kenya addressed itself on the issues of contradictions in the case of **Richard Munene v Republic [2018] eKLR** stated:

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

26. Similarly, in ***Jackson Mwanzia Musembi v Republic [2017] eKLR*** quoting the case of Uganda Court of Appeal in ***Twehangane Alfred v Uganda - Criminal Appeal No 139 of 2001, [2003] UGCA, 6*****,** a decision relied by the Appellant, the court in respect to contradictions noted that not every contradiction warrants rejection of evidence. It stated:

> **"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."**

27. The contradictions that the appellant alludes to relates to the failure by the prosecution calling one B whom the complainant alleged went to her rescue when he heard her screaming but then left her when the appellant was defiling her. The appellant also claimed that he was framed up because he beat the complainant's brother. This courts view is that those claims do not amount to contradiction of the Prosecutions' evidence. The prosecution proved that the complainant was defiled by a person who was known to her and failure to call B cannot be said to be fatal to the Prosecutions' case. That one witness also testified that the appellant was the grandfather of the complainant and his identity could not have been mistaken.

28. ***Section 124 of the Evidence Act*** (a proviso thereof) is clear that a trial court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief.

29. In **J.W.A. v Republic** ***[2014] eKLR***, the Court of Appeal observed: -

> **"We note that the Appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."**

30. The trial magistrate in ***Page 13*** of his judgement stated and I quote,

> **"I heard the prosecution witness and also the accused.** I had the opportunity to hear them in Court; I also considered the accused defence that he was framed.
>
> ***I found the accused demeanour wanting though the issue of the assault of complainant's brother was raised and the accused having acknowledged the same, he failed to convince the court that it could have been the genesis of the complainant's claim. I this found his defence of being framed wanting as it had no bearing with the complainants claim.***
>
> ***The accused was positively identified by the complainant .Thus i believe the complainant and her evidence was corroborated by the evidence of other witnesses"***

c) ***Whether the court abdicated its duty of summoning witnesses as required under section 150 of the Criminal Procedure Code.***

32. Section 150 of the CPC provides that:

> **"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:**
> **Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."**

33. A reading of Section 150 of the CPC shows that it empowers the court to, at any stage of the trial, summon a new witness, or recall a witness already examined for re-examination. Where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness. In exercising the power, the court should ensure the protections afforded to the parties in the proviso are adhered to.

34. In **Kulukana Otim v R [1963] EA 257,** cited by J. Ngugi, J in **Stephen Mburu Kinyua v Republic [2016] eKLR,** the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the CPC, stated that:

> **"It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself…."**

35. The appellant was charged with the offence of defilement and the duty of the prosecution was to prove the age of the complainant, penetration and the identity of the assailant. The appellant has not established that if B had been called as a witness for the prosecution his evidence would have vitiated the prosecution's evidence that the Complainant was defiled. It has not been shown that the B would have given essential evidence in proving that the complainant was defiled by the appellant. And failure to call the said B should not be used to rubbish the crucial evidence that has been tendered by the other prosecution witnesses. PW5 produced medical evidence that proved that the complainant was defiled and he assessed the degree of injury as harm. In the circumstances, this court finds that this ground of appeal cannot succeed.

36. In conclusion, this court finds that the appeal herein has no merit and the same is dismissed.

The Appellant has a right of appeal within 14 days. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE THROUGH MS. TEAMS ON THIS 9TH DAY OF DECEMBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Mr. Otolo – Court Asst.

Appellant – Present in person

Respondent’s Counsel – Mr. Mulamula – No appearance

Hon. Lady Justice A. Ong’injo

Judge