REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 80 0F 2019

WILLIAM TOM MBOYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. SO Ongeri, Principal Magistrate (PM), delivered on 19th June 2019 in Vihiga SPMC Sexual Offence No. 8 of 2018)

JUDGMENT

1. The appellant was convicted and sentenced to serve 20 years' imprisonment for the offence of incest, contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on the 26th December 2015 at [particulars Withheld] area within Vihiga County, he intentionally caused his penis to penetrate the anus of WOM, a child aged 8 years. He also faced 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. He pleaded not guilty to the charges before the trial court on 7th February 2018, he was tried, convicted of the offence of sodomy, and sentenced to serve 20 years' imprisonment for the offence in a judgment delivered by the trial court on 19th June 2019.

2. The appellant being aggrieved by the judgment of the trial court, has preferred this appeal, against the conviction and sentence. his grounds of appeal as stated in the petition of appeal, dated 8th July 2019, and they relate to failure by the trial court to consider that the age of the complainant was not proved beyond reasonable doubt by way of production of documentary evidence, failure to consider that the prosecution evidence was full of contradictions and inconsistencies hence it ought not be relied upon, and failure to consider the statement of the appellant in his defence.

3. The offences charged are defined under the Sexual Offences Act. Incest is defined in section 20(1) of the Sexual Offences Act, as follows:

> "Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

4. On the other hand, section 11(1) of the Sexual Offences Act provides for the sentence for the offence of committing an indecent act with a child, and it states as follows:

> "11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

5. On the contention by the appellant that the age of the complainant was not proved, 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 eighteen years establishing the offence of defilement; and, secondly, it establishes the age of the complainant for purposes of sentencing. Rule 4 of the Sexual Offence Rules of Court 2014 provides that:

> "When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

6. With regard to that, it was said, in Hilary Nyongesa vs. Republic [2010] eKLR (Mwilu J), that:

> "Age is such a critical aspect in Sexual Offences that it has to be conclusively proved and this becomes more important because punishment under the Sexual Offences Act is determined by the victim. I agree and add that while the court may certain circumstances rely on evidence other than age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant is to their age does not in my view constitute such proof."

7. Similar sentiments were expressed in Elias Kasomo vs. Republic Cr. Malindi Criminal Appeal No. 504 of 2010, where the Court of Appeal said:

> "The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence … Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim ...'

8. In the instant case, the prosecution produced a report from the Department of Health, County of Government, Vihiga, which clinically assessed the age of the complainant at fifteen years in 2019. The age of the complainant was, therefore, established beyond doubt, and the trial court did not fall into any error with regard to that.

9. On the ground that the prosecution case was full of contradictions and inconsistences, I will cite the decision in Twehangane Alfred vs. Uganda Crim. App. No. 139 of 2001 [2003] UGCA 6 (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha JJA), where it was said that not every contradiction warrants rejection of evidence, and that contradictions and inconsistencies can be ignored where they do not affect the main substance of the case by the prosecution, unless they point to deliberate untruthfulness. It was also said, in Philip Nzaka Watu vs. Republic [2016] eKLR (**Makhandia, Ouko & M'Inoti JJA**), that it was humanly impossible for two witnesses to recall exactly the same thing to the minutest detail, emphasizing that inconsistency in evidence may signify veracity and honesty, while unusual uniformity may signal fabrication and coaching of witnesses. See also Erick Onyango Ondeng' vs. Republic [2014] eKLR (**Githinji, Musinga & M'Inoti, JJA**). I have perused through the trial record, and I am persuaded that, despite whatever discrepancies there might be in the recorded evidence, that the witnesses were honest and truthful, and gave a fair account of what transpired on the material day.

10. The last ground is that the trial court failed to consider the statement of the appellant in his defence. In his defence the appellant had said that on the material day, 26th December 2015, he was in court and no witness came to court at Maseno. He averred that nothing happened on 26th December 2015. I have looked at the judgment, and I have noted that, at page 3, the trial court considered the defence, in the recitation of the testimonies of the witnesses, and under the issues for determination, before coming to the conclusion that the prosecution had proved its case against the appellant.

11. Overall, I am not persuaded that the trial court fell into error in the manner it handled the case and the evidence that was placed before. The appellant was properly convicted and sentenced, and I accordingly uphold the conviction and uphold the sentence. The appeal is hereby dismissed.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER 2021

W MUSYOKA

JUDGE