REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 90 OF 2019

MUTHIANI MANTHI NZIOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. E. Muiru (SRM) in Kilungu Senior Magistrate's Court Criminal Case No. 71 of 2018 delivered on 8th May, 2019).

JUDGMENT

1. **Muthiani Manthi Nzioki** the Appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars indicated that he had on 21st October, 2018 night caused his penis to penetrate the vagina of **FNS** a child aged 15 years.

2. Upon conviction, the Appellant was sentenced to twenty (20) years imprisonment. He filed this appeal on the following grounds:

a) That, *the learned Magistrate erred in both law and facts by convicting him by failing to consider one of the key ingredients of establishing offence of defilement i.e. penetration was not established beyond reasonable doubt as established by law.*

b) That, *the learned trial Magistrate erred in both law and fact by convicting him without regard to his basic right of disclosure of the prosecution evidence which was intended to be brought against as laid down under Article 50(2)(c)(j) of the constitution of Kenya 2010.*

c) That, *the learned trial Magistrate erred in law and facts by convicting him while she failed to consider the prosecution evidence which was untenable, unworthy, contradictory and inconsistent in nature and full of lies and not capable to pass the test of credibility.*

d) That, *the learned trial Magistrate erred in law and fact by convicting him while relying on complainant's evidence which she confessed to have been coached evidence.*

e) That, *his conviction based on the evidence was manifestly unsafe.*

3. The prosecution called a total of five witnesses to prove its case. **PW1 Erick Kasiamani** the clinical officer who examined the complainant (PW2) on 23rd October, 2018 gave his findings as follows: -

- Foul smelling discharge from genitalia with a broken hymen.
- Urine test showed a little pus cells.

Findings on Appellant

- He was aged 18 years.
- Nothing else was established.

4. PW2 FNS admitted having known the Appellant, and having spent the night of 21st October, 2018 with him but denied having involved in any sexual activity with him. Infact, she said when they spent the night together, each of them slept with his clothes on. She was stood down and recalled to testify on a different day. She gave similar evidence changing nothing.

5. **PW3 JKS** the mother of PW2 confirmed that her daughter did not return home on 21st October 2018 after church service. It was the doctor who told her that PW2 had been defiled. She stated that the child was aged 14 years though she could not remember when exactly she was born.

6. **PW4 No.2008139861 Maxwel Odhiambo of** Mavinye A.P camp received a report of defilement from PW2's father called S. He told him that his daughter had escaped from home and it was known where she was. He needed his assistance as the child was a pupil. He went to the home where the child was said to be and met the young man and his mother. On going to the young man's room he found the missing girl there lying on the bed. The O.C.S sent him a motor vehicle to pick the young man and the girl.

7. **PW5 No.106942 PC Florence Menza** received a defilement report from PW4 on 21st October 2018. The officer handed over to her the girl and boy whom she took to Kilungu Sub- county hospital. That the girl was found to have been defiled. She was placed on treatment and they returned to the station.

8. The Appellant gave an unsworn statement of defence saying he was framed by PW2's family and he denied the charges. His mother testified as DW1 and said the Appellant had denied the charges and the complainant had equally denied the charge. That she had talked to PW2's mother who said she wanted to leave the case because she did not know the allegations.

9. When the appeal came for hearing the Appellant relied on his written submissions which were an expansion of his grounds. On the issue of violation of his rights under Article 50(2)(c)(j) and right to fair trial he submitted that he had not been issued with statements. He contends that penetration was not proved. He specifically refers to the evidence of PW1 and PW2. It is his submission that PW2 conducted herself as an adult by coming to his place and nothing happened between them that night. He cited the case of **Martin Ocharo –Vs- R (2016) eKLR** to buttress his argument.

10. Finally, he submits that the evidence is contradictory and that PW2 was coached by her sister on what to tell the police. He also challenges the sentence which he says was made without his mitigation being considered.

11. Mrs. Owenga learned counsel for the State opposed the appeal. It is her submission that the key elements of the offence i.e. age and penetration were proved. Further the Appellant and complainant were arrested from the former's house. She reiterated that the record speaks for itself and no rights of the Appellant were violated.

12. In a rejoinder the Appellant asked the court to reduce the sentence for him.

Analysis and determination

13. This being a first appeal this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It must also bear in mind that it did not see or hear the witnesses. See **Okeno –Vs- R 1972 E.A 32, Kiilu and Anor –Vs- Republic (2005) 1 KLR 174** and **David Njuguna Wairimu –Vs- Republic 2010 eKLR.**

14. I have considered the evidence on record, the grounds of appeal and the rival submissions. I find one issue falling for determination which is whether there was sufficient evidence to warrant a conviction. I will one by one consider the ingredients for proof of a charge of defilement.

Proof of age

15. PW3 who is the complainant's mother in her evidence said the girl was 14 years. She testified on 3rd April 2019. She added that she could not remember when PW2 was born. PW2 herself when testifying said she was 15 years old.

The undated treatment notes and the P3 form dated 23rd October 2018(EXB 1 and 2) indicate her age as 15 years. Besides these, nothing was presented to the court to confirm PW2's age. PW1 who examined PW2 did not have her age assessed. He however had the Appellant who was with PW2 examined for age assessment through the dental process. One wonders the selective action.

16. In the case of **Alfayo Gombe –Vs- R Criminal Appeal No. 203 of 2009 (KSM)** the Court of Appeal stated:

> ***"In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1) ……"***

17. Further, in **Francis Omuroni –Vs- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000.** It was held thus:

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

18. In the instant case there was no concrete evidence adduced to confirm PW2's age. Her mother PW3 could not remember when PW2 was born. PW1 who could have assisted decided to carry out selective assessment. I cannot over emphasize the importance of age of the victim in a case of defilement.

Proof of penetration

19. PW2 the complainant testified twice before the court. On each occasion she denied having been sexually penetrated by the Appellant. She also denied having been threatened by anybody. This is what she said:

> ***"I recorded a statement at the police and signed it. It is the one before the court. However, what I recorded did not happen. My sister N told me to tell the police what they recorded. My sister lives in Mulumini. N is older than me and she is married."***

This is the evidence of the star witness.

20. When she was recalled to testify the 2nd time on 3rd April, 2019 she maintained her position and stood by what she had told the court on 26th February, 2019. The prosecution had on 26th February, 2019 applied for summons for NS (*PW2's elder sister*). Despite this, the said N never appeared before the court to testify. N is the one who allegedly coached PW2 on what to tell the police.

21. Inspite of this evidence of PW2, the learned trial Magistrate proceeded to convict the Appellant while relying on the evidence of PW1. PW2 was taken to hospital on 22nd October, 2018 which was the next day after the alleged incident. She was not found to have any bruises, lacerations or bleeding in her genitalia. PW1 said the girl had a discharge with a foul smell from her genitalia.

22. It is not indicated how long it had been there and what it was. Secondly he said her hymen was broken. Was it freshly broken? He never explained. A missing hymen per se is not evidence of immediate penetration. There ought to have been stronger evidence to this in view of the evidence that had been given by the Complainant (PW2).

23. PW2 may have lied to the court for whatever reason. She was a witness of the prosecution which was in possession of her statement, which she said was dictated to her by her elder sister N, who never came to testify despite being summoned.

24. The prosecution never deemed it fit to apply to have PW2 declared a hostile witness so that she could be properly cross examined. Her evidence should have therefore been taken the way it was presented. The learned trial court ought to have kept an open mind and refrained from doing anything creating the impression of being partisan or biased in its approach to this issue.

25. Upon re-evaluation of the evidence, I find that the age of the complainant was not proved. Secondly, the contradictory evidence between PW1 and PW2 could not be relied on to confirm penetration. The trial court could not without concrete evidence find that because PW2 and Appellant were together they had indulged in sex. The fact that PW2 said that the Appellant was her husband in itself did not confirm their having engaged in sex, that night. There ought to have been more evidence than what was presented to the court, for the prosecution to prove its case.

26. I am satisfied that the appeal has merit and I allow it.

27. **The conviction is quashed and sentence set aside. The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 21st day of January, 2020, in open court at Makueni.

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H. I. Ong'udi

Judge