REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 15 OF 2019

PHANUEL ONYANGO……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal from the conviction of the Learned Chief Magistrate (Hon. Maundu) in Garissa Chief Magistrate's Court Criminal Case No. 326 of 2016)

JUDGEMENT

1. **PHANUEL ONYANGO** was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.

2. The Particulars of the offence were that on the 29th day of March, 2016, at [particulars withheld] Academy in Garissa township within Garissa County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of **IIS**, a child aged five (5) years.

3. The appellant faces 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.

4. He pleaded not guilty and matter went into full trial.After full hearing, the appellant was found guilty and sentenced to serve 15 years imprisonment.

5. Being aggrieved, he filed instant appeal and set out the following grounds:

i. There was no proof of age upon which a lawful sentence under the Sexual Offences Act could be based.

ii. The learned trial magistrate erred by, in effect, shifting the burden of proof from the prosecution to the defence contrary to the law.

iii. The learned trial magistrate erred by failing to notice that on or about the time of the alleged offence namely 4.00pm the location as where as well as the activity the appellant was involved in within the school was fully accounted for.

iv. The learned trial magistrate erred by failing to give due regard to the detailed sworn testimony of the appellant which testimony was fully corroborated by credible defence witnesses including the head-teacher of the school all of whom were in the school at and around the time of the alleged offence.

v. The conviction of the appellant was against the weight of the available evidence.

6. Parties were directed to file submissions.

APPELLANT'S SUBMISSIONS

7. The appellant submitted that, on whether the conviction was merited, the appellant laid bare the numerous areas where the complainant's testimony was contradictory as well as areas where she gave different accounts to the police and to the court.

8. He has also demonstrated instances where PW1 denied the contents of P3 form which was PMFI-1. Thirdly, the trial of very crucial exhibits suddenly went cold without any explanation whatsoever. It is the appellant's submission that those exhibits were not produced

because they would have exposed information adverse to the prosecution's case.

9. There is no evidence anywhere that an identification parade was ever conducted anywhere or that all the teachers of the school were ever paraded together and that it was from that parade that the accused was picked out by PW1. The trial court clearly assumed, without evidence, that the teachers were paraded together when it said:-

> ***"The accused person admitted that he was a teacher at [Particulars Withheld] when the incident allegedly took place. In his evidence he said there were 13 teachers as at that time. The complainant only identified him among all the thirteen teachers."***

10. The court clearly misapprehended the recorded evidence which was as follows:-

> ***"By accused –***
>
> ***'We had 13 teachers. 5 were male. I am one of the male teachers.....'***
>
> ***By DW4 the head-teacher –***
>
> ***'I had 13 teachers for the formal classes. The school is integrated. Phanuel Onyango was one of the teachers...."***

11. Clearly the learned Chief Magistrate did not take into due account the fact that he did not have the advantage of seeing the complainant testify. That fact alone should have made the trial court very cautious and thorough in his analysis of the record evidence and supporting exhibits.

12. Despite the high quality of the defence case it is obvious that the learned trial magistrate proceeded on the erroneous premise that he was dealing with a truthful witness.

13. By so doing he failed to evaluate the defence case against the prosecution case. That situation fits exactly the comments made by **Dulu J** in Garissa Criminal Appeal No. 38 of 2018 when he said:

> ***"I will have to mention here that in addition to the fact that the magistrate who wrote the judgment did not have the advantage of seeing witnesses testify, the magistrate also failed to weigh the defence of the appellant as against the evidence of the prosecution.***
>
> ***In the analysis and determination in the judgment the learned magistrate proceeded on the premise that he was dealing with truthful prosecution witnesses and did not mention or consider the defence of the appellant or evaluate it against the evidence of the prosecution witnesses. He merely dismissed it by stating that he was not convinced..."***

14. And then there is the unimportant question of who left the school last. By 5.30 or 6pm the time of the alleged offence had long passed. It is surprising that the court took its time to point out an apparent discrepancy between the evidence of DW2 and that of DW4 as to who was the last person in school. He thereby gave the impression that he was giving the appellant the burden of proving himself innocent contrary to the law.

15. But despite the court's negative comment, DW4 was very clear even during cross examination when he said:-

> ***"On the material date I was in school upto 6.10pm. I was the last person to leave the school. I was alone. I am the custodian of the keys of the staffroom, my office and the gate. I am the custodian of keys for the classrooms. The keys are kept in my office.....I close the gate."***

RESPONDENT'S SUBMISSIONS

16. The prosecution submitted that, the appellant has raised a number of issues contesting both conviction and sentence.

17. On the age, the complainant stated that she was 5 years during the voire dire examination. The father to the complainant also indicated that the complainant was 5 years old. The P3 form also indicates that the complainant was 5 years.

18. In the case of ***Robert Kuria Mwangi vs Republic Criminal Appeal No. 128 of 2014, High Court of Kenya at Nakuru***, the court stated thus:

> ***"In proving the age in defilement cases:***
>
> ***In the absence of documentary proof, the court would accept an oral statement from a parent or guardian of the complainant corroborating her evidence regarding her age."***

19. The prosecution submitted that, in the instant appeal the parent confirmed the age.

20. On penetration, the complainant testimony was that she was defiled and went home and told the mother that she had been defiled.

21. PW4, the Reproductive Health Department In-charge gave an account on how the complainant's genitalia had lacerations in the vagina and vulva. Hymen was freshly broken. There was whitish discharge on the perineum. There were few pus cells. All these pointed to defilement. The witness confirmed that there was penetration.

22. On identity of the assailant, the complainant identified the appellant as the person who defiled her. She indicated that the appellant taught in the school ([Particulars withheld] Academy) for a long time. She further identified the appellant in the dock.

23. On issues in the appeal, in complying with section 124 of the Evidence Act, the trial court analyzed the evidence of the complainant and concluded the evidence to be cogent against the appellant.

24. On the discrepancies about the time, place (surroundings) and other factor. In the instant case, the variance is not so material as to denudate the evidential value of the case.

25. The issue of ethnic and religious divide raised is farfetched. It is not borne out of the record. This is a court of record.

26. On the variance of evidence of the complainant and in distinguishing the authority in the ***Criminal Appeal No. 82 of 2015 – Abdiakin Abdullahi Aden vs Republic*** cited by the appellant, in the referenced case, the complainant stated that she was penetrated whereas the clinical officer found no evidence on penetration. That is why the said appeal succeeded. In the instant appeal, the medical officer confirmed there was vagina penetration.

27. On the issue of a single witness evidence under the instant offence, section 124 of the Evidence Act, Cap 80 is apt, it states that the evidence of a single minor sexual offence victim can be sufficient to sustain a conviction in a criminal case if the court believes the same for reason to be stated thereto.

28. In the instant appeal, the court analyzed the evidence of the complainant and concluded that it was satisfied with the identification of the appellant by the complainant was beyond possibility of an error.

29. All other ingredients having been proved, the trial magistrate had no choice, but to convict the appellant accordingly.

EVIDENCE ADDUCED

Prosecution's Case:

30. This case was partly heard before Honourable M. Wachira (Chief Magistrate).

31. To prove its case the prosecution called a total of four witnesses. The complainant (PW1) in her unsworn testimony - testified that on the material date at about 4.00p.m, she was walking home from school.

32. When she reached at the school entrance the appellant who was a teacher in that school came and held her hand. The appellant informed her that he was instructed by the school headmaster to hold her hand and help her to cross the road. The appellant led her to a corner where there were iron sheets. When they arrived there the appellant covered her mouth with his hand and choked her. She collapsed and lost consciousness.

33. When she gained consciousness she was still lying on the same spot. Her whole body was aching. She stood up and started walking away. However, the accused person came back. He held a knife against her throat and threatened her not to tell anyone what happened. She said that the appellant defiled her.

34. That when she arrived home she informed her mother what happened. Her mother examined her and confirmed that she had been defiled because there was discharge from her vagina. Her parents escorted her to Garissa Nursing Home. She was referred to Garissa County Referral Hospital where she was examined and treated. From the hospital she was escorted to Garissa Police Station where she recorded her statement.

35. PW2 is the father of the complainant. He testified that the complainant was aged five years at the material date. He told court that on the material date the complainant arrived home at about 4.00 p.m, carrying her shoes. She informed him that she was defiled by her teacher. She demonstrated how the teacher held her hand and nose and she lost consciousness.

36. That he took her daughter to Garissa Nursing Home. The doctor examined her and referred her to Garissa County Referral Hospital. At Garissa County Referral Hospital. The complainant was examined and treated. On the next day he reported the matter at Garissa Police station. Police officers accompanied him and her daughter to [particulars withheld] Academy where she pointed out the appellant herein as the one who defiled her. Appellant was arrested by the police. Later he escorted the complainant to Garissa County Referral Hospital where her P3 form was filled.

37. PW3 Jeremiah Musiobei is a clinical officer based at Garissa County Referral Hospital. He is the one who examined the complainant and filled her P3 form. According to the P3 form the complainant sustained lacerations on the vagina and vulva. The hymen was freshly broken. She also had whitish discharge. No spermatozoa were seen.

38. PW4 P.C Morris Kimotho took over this matter from the initial investigators after they were transferred.

Defence Case

39. When the appellant was put on his defence, he elected to give sworn evidence and he called three witnesses.

40. The appellant denied committing the alleged offence. He said that as at the material date they were 13 teachers at [Particulars withheld] Academy. He alleged that on the material date at around 4.00p.m, he was in Class 8. He left the school for home at around 5.00 p.m.

41. DW2 AMA testified that on the material date he was in Class 8. He said that he was the school head boy and that he was the last person to leave school with one AA. He alleged that they left the school with the accused person on that day.

42. DW3 AS was in 2016 a pupil at [Particulars withheld] Academy. He alleged that on the material date he left school at around 5.30p.m. By the time he left school he could not tell whether the accused person was still in school or not.

43. DW4 Michael Kariuki Ndichu was the head teacher of [Particulars withheld] Academy in 2016. He described where the said school is located. He said that on the material date he was in school between 3.00 o'clock and 6 o'clock. During cross-examination he alleged that he was the last person to leave school on the material date. This contradicts the evidence of DW2.

ISSUES, ANALYSIS AND DETERMINATION

44. After going through the evidence on record, and the parties submissions, I find the issues are; ***whether the ingredients of defilement were proved beyond reasonable doubt? Was appellant defence considered?***

45. The role of this Court as the first appellate Court is well settled. It was held in the case of ***Okeno vs Republic (1977) EALR 32*** and further in the Court of Appeal case of ***Mark Oiruri Mose vs Republic (2013) eKLR*** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

46. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the written submissions.

47. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them.

48. I will start with the issue of penetration. Penetration is defined under Section 2 (1) Sexual Offences Act No. 3 of 2006 as follows;

> ***a. "Penetration" means the partial or complete insertion of the genital organ of a person into the genital organ of another person."***

49. The complainant testified that when she gained her consciousness her whole body including her genitalia was aching. In addition the P3 form indicates that the hymen of the complainant was freshly broken. She also had lacerations on her vagina and vulva. Therefore I have no doubt that there was penetration. The penetration was proved beyond reasonable doubt.

50. I now turn to the issue of identification or recognition of the perpetrator. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in ***Wamunga vs Republic (1989) KLR 424*** at ***426*** had this to say:

> ***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

51. The complainant told court that she was defiled by the accused/appellant herein who was her teacher at [Particulars Withheld] Academy where she used to school. She gave the same information to her parent (PW2) when she arrived home from school on the material date. The complainant gave the same information to the doctor who treated her. This information is contained on page one of the P3 form (General medical history).

52. The information that she consistently gave her parent, the doctor and the police was that she was defiled by her teacher. The complainant's father (PW2) testified that on the next day upon reporting the matter to the Police the complainant led them (PW2 and the police) to the school where she positively identified the accused person as the culprit.

53. The accused person admitted that he was a teacher at [Particulars Withheld] Academy when the said incident allegedly took place. In his evidence he said that they were 13 teachers as at that time. The complainant only identified him among all the thirteen teachers.

54. The complainant was a pupil in the school where the accused person used to teach and therefore she knew him before material date. The act was done in broad day light and the victim had adequate time to see and hear the perpetrator who she said he was their teacher in the academy.

55. The appellant submitted that identification parade ought to have been conducted. However the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

> ***"…….. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, ……made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. ……"***

56. Taking into consideration the evidence adduced in totality the trial court was fully satisfied that the identification of the accused person by the complainant was beyond possibility of an error.

57. I do not find fault in that finding having perused and evaluated all the evidence adduced. Thus the ingredient of identification was proved beyond reasonable doubt.

58. On the issue of the age of the victim the trial court observed that,it was unfortunate the prosecution did not produce any document to confirm the age of the complainant such as birth certificate or clinic card or age assessment report in court. Age of the victim is very important because sentences in defilement cases under the Sexual Offences Act are pegged on the age of the minor.

59. However the court observed that this was a case that the victim was a baby who was in baby class. According to the father she was aged five years. In the P3 form her age is indicated as five (5) years. The finding is supported by the authority of ***Robert Kuria Mwangi vs Republic Criminal Appeal No. 128 of 2014, High Court of Kenya at Nakuru,*** where the court stated thus:

> ***"In proving the age in defilement cases:***
>
> ***In the absence of documentary proof, the court would accept an oral statement from a parent or guardian of the complainant corroborating her evidence regarding her age."***

60. There is submission on appellant side that there were variations and discrepancies in prosecution evidence. He pointed out where the complainant's testimony was contradictory as well as areas where she gave different accounts to the police and to the court.

61. He also demonstrated instances where PW1 denied the contents of P3 form which was PMFI-1. And thirdly, that some exhibits were not produced without any explanation. The aforesaid shortfalls did not affect the cumulative quality of the evidence adduced in support of the prosecution case.

62. Further as regards contradictions in the prosecution's case, superior Courts have consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. (See for example ***Joseph Maina Mwangi vs Republic, CR, App No. 73 of 1993, Kimeu vs Republic (2002) 1 KAR 757*** and ***Willis Ochieng Odero vs Republic [2006] eKLR).*** In ***John Nyaga Njuki & 4 Others vs Republic, Cr. App. No. 160 of 2000,*** the Court of appeal expressed itself as follows on the issue:

> ***"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."***

63. In this appeal, I am satisfied that there were no discrepancies of the nature that would have created doubt and vitiate the prosecution case.

64. In the circumstances I am of the considered view that this was a proper case where the trial court was justified in arriving at a correct decision based on evidence on record.

65. The net result is that, I find that the prosecution has proved the charge of defilement against the accused/appellant beyond reasonable doubt and thus the appeal herein has no merit. The court thus makes the following orders ;

> ***i. The appeal is dismissed the conviction and sentences are upheld.***

DATED, DELIVERED AND SIGNED AT GARISSA THIS 22ND DAY OF JANUARY, 2020.

…….

C. KARIUKI

JUDGE