REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 8 OF 2018

(From original conviction and sentence Criminal Case. 14 of 2013

of the Principal Magistrate's Court at Gichugu –M. ONKOBA – AG. SRM)

JAMES KARIUKI KANA.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

1. The appellant James Kariuki Kana was charged before the P.M's Court Gichugu with the offence of defilement contrary to **Section 8(1)(3) of the Sexual Offences Act.** It was alleged that on 4/11/2007 at around 2.00 Pm in Kirinyaga East District within Kirinyaga County the appellant unlawfully and intentionally caused his penis to penetrate the virgina of JWN a child aged 13 years. The appellant was convicted after a full trial and sentenced to serve Twenty years imprisonment. The appellant was dissatisfied with both the conviction and sentenced and filed this appeal. He filed Eight grounds of appeal which are as follows:-

a) That, the learned trial Magistrate erred in both law and facts by not considering the ingredients of the offence were not proved ie penetration.

b) That, the learned trial Magistrate erred in both law and facts by giving me a harsh and excessive sentence and failing to consider he time I was in remand in accordance with Section 137 (1) of Criminal Procedure Code Cap 75 Laws of Kenya.

c) That, the learned trial Magistrate erred in both law and facts by failing to consider that I was not medically assessed as the law stipulates.

d) That, the learned trial Magistrate erred in both law and facts by failing to consider that the case was full of contradictions and inconsistencies.

e) That, the learned trial Magistrate erred in both law and facts by failing to consider that the purported exhibit was never produced in court ie the medical report and underwear.

f) That, the learned trial Magistrate erred in both law and facts by not considering that the case was not proved beyond any reasonable doubts.

g) That, the learned trial Magistrate erred in both law and facts by not considering the case was full of contradictions and inconsistencies.

h) That, the learned trial Magistrate erred in both law and facts by not considering my defence.

2. He prays that the appeal be allowed, conviction be quashed, the sentence be set aside and he be set at liberty.

3. The brief facts of the case are that on 411/2007 the complainant JWN who was then a girl aged 13 years old was sent to go and collect firewood. While there the appellant emerged and held her two hands and blocked her mouth. The appellant threatened to kill her if she screamed. He then led her to his house and locked the door. He then put the volume of the radio at full blast. The appellant then placed her on the bed and removed her inner wears, a biker and pant. The appellant removed his trouser and inner wear and using his erect penis, he penetrated her vigina. The appellant was crying during the ordeal. Neighbours were attracted and PW-2- who had been sent to go and look for the complainant.

4. PW-2- and other neighbouts raised alarm which attracted members of public. The appellant opened the door and irate members of the public started beating him. The complainant came out of the house. The Assistant Chief was called on phone by one Cyrus Muriithi who informed him what was happening. He went to the scene and interrogated the appellant and the complainant. On realizing that there was an allegation of defilement, PW-3- arrested the accused and took him to Kithure Police Patrol Base. The complainant was escorted to Kerugoya District Hospital where she was examined by a Clinical Officer, Mr. Gathuku (PW-5-) who found that her vulva was swollen and was contaminated with stool. A High Virginal Swab was done and pus cells were noted as well as yeast cells. No spermatozoa was seen. PW-5- confirmed that there was penetration due to the swollen vulva and contamination of the vigina with stool. The swollen vulva was as a result of trauma caused by a blunt object and suggested a struggle to penetrate. He confirmed that penis could cause such trauma. He filled a P3 form which he produced in this court as exhibit.

The appellant was then charged.

5. The appellant in unsworn defence stated that he accompanied some people to Kianyaga Police station and while there he was placed in the cell and later charged. He denied that he defiled the complainant and stated that he was framed.

6. The court gave directions that the appeal be disposed of by way of written submissions. The appellant filed submissions and the State also filed. I have considered the appeal, the grounds and the submissions.

7. This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence which was adduced before the learned trial magistrate and come up with its own independent finding. I have to bear in mind that I did not have the advantage to see and hear the witnesses when they testified and leave room for that. The case of**Okeno –v- R (1972) E. A 32** refers. The Court of Appeal in **Odhiambo –v- R C.R Appeal No. 280/04 (2005) eKLR** stated as follows:-

> ***"On a first appeal the court is mandated to look at the evidence adduced before the trial court afresh re-evaluate it and re-assess it and reach its own independent conclusion. However it must warn itself that it did have the benefit if seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor."***

8. In line with these decisions, I have gone through the record of the trial court and read the Judgment. I have considered the evidence and re-evaluate it. I will proceed to consider the grounds. I will omit ground 1 & 2 and consider them at a later stage.

9. The appellant faults the conviction on the ground that the trial magistrate relied on evidence riddled with inconsistencies and contradictions. This is in his submissions which have heading ground No. 3. He disputes the age as he says in 2007 the complainant said she was 13 years. I find that there were no material contradiction. In any case, the prosecution produced her birth certificate exhibit -1- which shows that she was born on 20/5/1994. The offence was committed on 4/11/07. The age that matters is the age of the complainant at the time the offence was committed. There was therefore no contradiction on the age of the complainant. The age of the complainant at the time of the offence was committed is a key ingredient of the charge as it determines the Section under which the offender was charged and the punishment. I find that the prosecution proved that the age of the complainant was 13 years at the time the offence was committed with the production of the birth certificate. The ground is without merits.

10. The appellant further submits that the trial Magistrate erred by dismissing his defence without giving reasons. This is far from the truth. The trial magistrate considered the defence and gave reasons for rejecting it, At Page 49; Line 27 to Page 53 Line 13. The ground is a sham.

11. The appellant further submits that some witnesses were not called. This trial was a retrial which was ordered in 2013. The court was informed by PW-6- Cpl Kioko Mutunga that the Investigating Officer had left the service, his whereabouts were unknown and he could not be traced. One Emily Wakabari died while Roseline Wangari Njagi could not be traced.

Section 143 of the Evidence Act provides:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

12. No particular number of witnesses is required to prove a fact. The learned trial Magistrate found that the prosecution had availed enough witnesses. Indeed looking at the evidence, the testimony of the complainant was corroborated by witnesses who were present at the scene. It was in broad light and they could see. They gave direct evidence. Their evidence is consistent that there were many members of the public. The prosecution had no obligation to call a whole village to prove its case. It was enough to call witnesses who would prove the allegations to the satisfaction of the court. The trial Magistrate was right in view of the circumstances of this o hold that the prosecution tendered sufficient evidence. Ground is without merits.

13. Turning to the first ground the appellant submits that there was no penetration simply because the hymen was not broken. This submission is made in ignorance as penetration need not result in perforation of the hymen for the offence of defilement to be complete. This is because penetration does not have to be complete insertion of the male genital organ into the female genital organ. Partial penetration amounts to penetration. **Section 2 of the Sexual Offences Act** defines penetration as follows:

> ***"Penetration" means the partial or complete insertion of the genital organs of another person."***

14. The testimony of the appellant is that the appellant penetrated her. The evidence of penetration was corroborated by the testimony of PW5 the Clinician who found that the complainants vulva was swollen and contaminated with stool. He concluded that there was penetration. The prosecution discharged the burden to prove that there was penetration. The ground is without merits.

15. The appellant submits that the sentence was harsh and that the trial Magistrate failed to reduce the sentence by the period he had spent in the remand. **Section 8(1) (3) of the Sexual Offences Act** provides:-

> ***"(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."***

The appellant was sentenced to the bare minimum provided under the section. Be thus as it may I agree with the appellant that the trial Magistrate by not taking into account the period the appellant had stayed in the remand as he waited for the trial to be concluded. **Section 333 of the Criminal Procedure Code** provides:-

> ***"(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.***
>
> ***(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."***

16. The provision is mandatory. It is a matter of fair trail which considers the period the appellant has been in custody when computing the sentence. It is not a matter of the trial court exercising discretion, the court is mandated to take into account the period the accused person has been in remand.

17. Having considered the grounds, I find that the appeal is without merits. The conviction was based on cogent evidence. The appellant was caught in the act. The appellant had no defence and the trial court was right in dismissing the defence. I come to the conclusion that the appeal is without merits. The appellant was given the bare minimum. I will therefore not interfere with sentence. I however order that the sentence shall be reduced with the number of years the appellant had spent in remand during the trial, the period he served sentence before retrial was ordered and the time he spent in remand during the retrial.

Dated at Kerugoya this 6th Day of February 2020.

L. W. GITARI

JUDGE