REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 24 OF 2016

RODGERS OVITA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Kapsabet Principal Magistrate's Criminal Case No.3600 of 2013 by Hon. G. Adhiambo, SRM, dated 3 February 2016)

JUDGMENT

[1] This appeal arises from the decision of the Senior Resident Magistrate, **Hon. G. Adhiambo**, in **Kapsabet Principal Magistrate's Criminal Case No. 3600 of 2013: Republic vs. Rodgers Ovita**; wherein the appellant herein was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act, No. 3 of 2006**. In the alternative, he was charged with the offence of indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act.** The appellant denied the charges.

[2] The Appellant denied the charges and upon trial, the Learned Trial Magistrate found the appellant guilty of the offence of rape under **Section 3(1)** of the **Sexual Offence Act**, and convicted him thereof in a Judgment delivered on **3 February 2016**. She then proceeded to sentence the appellant to imprisonment for 10 years. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **15 February 2016** on the following grounds:

[a] The Learned Trial Magistrate erred in fact and in law in convicting the Appellant on the evidence before her;

[b] The Learned Trial Magistrate erred by convicting and sentencing the appellant for an offence not charged;

[c] The Learned Trial Magistrate misconstrued the provisions of **Section 179** of the **Criminal Procedure Code** since rape cannot be said to be a minor offence to defilement;

[d] The Learned Trial Magistrate convicted and sentenced the appellant on a charge that he was not given a chance to defend himself on, thereby occasioning a serious miscarriage of justice;

[e] The Learned Trial Magistrate failed to realize the glaring contradictions in the evidence of the Prosecution;

[f] The Judgment of the Learned Trial Magistrate is against the weight of the evidence;

[g] The Learned Trial Magistrate erred by sentencing the appellant for an offence not charged;

[h] The Learned Trial Magistrate relied on the wrong provisions of the law, namely**, Sections 3(1) and 3(3)** of the **Sexual Offences Act** in sentencing the appellant, which provisions describe a totally different offence from the offence the appellant was charged with;

[i] The Learned Trial Magistrate convicted the appellant on a charge of defilement when it is clear that the complainant was an adult;

[j] The Learned Trial Magistrate erred when she put the appellant on his defence;

[k] The Learned Trial Magistrate failed to appreciate the bad blood between the complainant's family and the accused person's

family;

[l] The Learned Trial Magistrate disregarded the appellant's defence;

[m] The Learned Trial Magistrate contradicted her judgment at page 19 when she stated that the accused did not commit the act of defilement as charged and yet proceeded to convict him for an offence not charged**.**

[3] Consequently, the Appellant prayed that his appeal be allowed; that the conviction and sentence passed against him by the lower court be set aside, and that he be set at liberty. The appeal was urged on behalf of the appellant by **Mr. Rotich, Advocate,** vide his written submissions dated **7 November 2018**. The main argument advanced by learned Counsel for the appellant was that the Prosecution case was marred by numerous contradictions; particularly as regards the age of the complainant; the time of the alleged offence as well as the duration it took. Counsel also raised the question as to whether the evidence of identification adduced before the lower court can be said to be free from the possibility of error. In the submission of learned Counsel, the Prosecution utterly failed to prove its case against the appellant beyond reasonable doubt; and as such, the appeal ought to be allowed and the orders prayed for in the Petition of Appeal granted. He relied on the case of **Charles Anjere Mwamusi vs. Republic**, Criminal Appeal No. 226 of 2002, to support his argument that the burden was on the prosecution to prove its case beyond reasonable doubt.

[4] Ms. Kagali, learned Counsel for the State, opposed the appeal contending that although the appellant was charged with the offence of defilement, what was proved was the offence of rape; and that the evidence adduced by the Prosecution was credible, consistent and well corroborated. Counsel pointed out that the appellant was caught red-handed in the act by **PW3,** and that medical evidence confirmed penetration. It was, therefore, her submission that all the ingredients of the offence of rape were proved beyond reasonable doubt, including proof that consent was obtained by force.

[5] On the aspect of identification, Counsel for the State urged the Court to note that the complainant and the appellant are neighbours, and that this was a case of recognition. She therefore posited that the contention of the appellant that his prosecution was actuated by malice is an afterthought, as no suggestion was made thereof during cross-examination of the relevant prosecution witnesses. Counsel for the State accordingly urged for the dismissal of the appeal.

[6] The Court has given careful consideration to the appeal and taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to subject the evidence to a fresh analysis, while giving allowance for the fact that I did not have the opportunity of seeing or hearing the witnesses. This approach was well explicated in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

> **"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 whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; it must make its own findings and draw its own 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..."**

[7] Accordingly, I have perused and considered the evidence adduced before the lower court and note that the complainant testified as **PW1**. Her evidence was that, on **19 October 2013**, she had been sent to the nearby shops by her mother; and that on her way back home, the appellant grabbed her from behind, dragged her into the bush and raped her. She explained that it was about almost 7.00 p.m. and that although it was getting dark, it was still possible to see and identify her assailant; and added that she was unable to scream for help because the appellant had covered her mouth. She also mentioned that the matter was reported to the police and action taken against the appellant. She was then issued with a P3 Form which was filled at **Kapkangani Health Centre.**

[8] The complainant's mother, **R.M. (PW2)**, confirmed that she had indeed sent **PW1** to the shops on **19 October 2013** at about 6.30 p.m. and that she took unusually long to return; and so she sent **Francis Olewa, PW3** to go and check on her. She further stated that **PW1** returned home about 9.00 p.m. and that she looked confused. She tried to inquire from her if there was a problem but **PW1** did not respond; and that it was **PW3** who then told her that he had found the appellant raping **PW1** in the bush. **PW2** told the Court that she took up the matter by taking **PW1** to hospital for examination and treatment, after which she reported the incident to the police. It was her evidence that the complainant was aged 17 years at the time; and that age assessment was conducted and a report given which she identified before the lower court.

[9] PW3 on his part, stated that, on the **19 October 2012** at about 6.45 p.m. he was asked by **PW2** to check on her daughter, **M.A.** who she had sent to the nearby shops and was yet to return. It was the testimony of **PW3** that he followed the route leading to the shops but did not find **PW1**; and that on his way back home, he heard some commotion in the bushes by the roadside; and on checking using his torch, he saw the appellant rise up and run away. He then saw the complainant lying down bleeding from her vagina. The girl then rose up and walked home while he remained at the scene to see whether the appellant would return, but he did not. PW3 further stated that he reported the occurrence to the sub-chief and was instructed to inform the complainant's mother to take her to hospital. He confirmed that he accompanied **PW1** and **PW2** to hospital and that the complainant was examined and treated; and that thereafter, the appellant was arrested and arraigned before court.

[10] PW4, a Nursing Officer at **Kapkangani Health Centre** confirmed that he was on duty on **25 October 2013** when the complainant went there for examination and treatment following allegations of defilement. She had been referred to their facility and was under the escort of police officers from **Kaimosi Police Station**; and that on examination, she was found with a bruise mark on the left leg on the cuff muscles. **PW4** further testified that when he examined **PW1'**s lower genitalia, he noted that she had bruises between the anus and vaginal orifice, and thus, formed the opinion that **PW1** had been defiled. He also noted the presence of a whitish discharge in **PW1'**s genitalia, indicative of a sexually transmitted infection. He accordingly prescribed some treatment for **PW1. PW4** produced the P3 Form that he filled and signed as

the **Prosecution's Exhibit 1b.**

[11] PW5, IP Agripina Lugonzo on her part, told the lower court that she was transferred to **Kaimosi Police Station** on **20 October 2014** from **Kapsabet Police Station**; and that on arrival, she was given some files, including this file, which were pending investigations in which the investigating officers had since been transferred. She perused the police file involving this particular complaint and noted that there was an age assessment report in respect of the complainant. **PW5** accordingly identified the report before the lower court.

[12] Silas Ruto, a clinical officer at Kapsabet County Referral Hospital testified as **PW6.** His evidence was that he was on duty on **10 November 2014** when a request was made by **Kaimosi Police Station** for the assessment of the age of **M.A**., the complainant herein. He thus carried out a radiological examination of **PW1** and came to the conclusion that she was an adult of 18 years and above. **PW6** produced the Age Assessment Report that he prepared and signed as the **Prosecution's Exhibit No. 2** before the lower court; and with that the Prosecution closed its case.

[13] On his part, the appellant gave a sworn statement of defence on **30 October 2015** denying the allegations against him. He denied having come into contact with the complainant on the date of **19 October 2013**. He added that the road to the shops in question is a busy one and that there were many women selling their wares along that road, such that it was impossible for such an occurrence as alleged to take place without their attention being drawn to it. He attributed his arrest and prosecution to a longstanding land dispute between his family and the complainant's family. He particularly impugned the evidence of **PW3** contending he lied to the lower court, he being a stepfather of **PW1**.

[14] In support of his case, the appellant called a neighbour by the name **Pamela Imbala Mugolwe (DW2);** one of the women who were doing business along the road. According to her, nothing unusual happened on the evening of **19 October 2013**; and that the accused was being framed for an offence that he did not commit.

[15] A technical point having been raised in the appeal as to whether it was open for the trial court to convict the appellant of an offence of rape, with which he was not charged, it is imperative for this issue, which is indeed the dominant issue in the appeal, to be considered upfront. The issue arose from the Age Assessment Report and here is how the Learned Trial Magistrate reasoned on the matter:

> **"It is noted that PW1 and PW2 that is the complainant and her mother told the court in their respective testimony that PW1 was aged 17 years. It is noted however that PW6 the expert witness that is the clinical officer who did the age assessment confirmed that upon doing the assessment on PW1 on 10/11/2014 he found that PW1 was above 18 years because when an X-ray of the knee of PW1 was done it was found out that the growth plates of the bones were aligned fused with smooth edges and that the central and epithelial growth were fused with smooth edges meaning that there was no active growth.**
>
> **I have analyzed the age assessment report produced as pexhibit 2 and do find that the contents thereof are consistent with the testimony of the maker while noting that the birth certificate of PW1 was never produced as exhibit as well as her immunization card. I find that there was no evidence adduced before this court to prove that indeed as at 19/10/2013 the date of the alleged offence she was a minor. I find that this court based on the evidence of PW6 can safely presume that as at 19/10/2013, the date of the alleged offence, the complainant was an adult.**
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> **In view of the foregoing, I therefore find that the accused cannot be found to have contravened the provision of section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006 which relates to defilement of a child aged between 16 to 18 years old."**

[16] As rightly pointed out by Counsel for the appellant, the evidence presented by the Prosecution was manifestly at variance with the charge as laid**;** and the record shows that the Prosecution had notice of this as from **10 November 2014** when the Age Assessment Report was prepared by **PW6.** The course of wisdom, then, would have been for an application to be made pursuant to **Section 214(1)** of the **Criminal Procedure Code** for amendment of the charge to align it with the evidence; which was not done. That provision states thus:

> **"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks to meet the circumstances of the case."**

[17] No such amendment having been done by the time the trial came to a close, the Learned Trial Magistrate opted to register a conviction for rape instead; an offence that the appellant had not been charged with. She did not specify under what provision of the law she did this, but simply stated thus:

> **"…I find that the prosecution has proved its case of rape against the accused. I will therefore find the accused guilty of a lesser charge that is rape contrary to section 3(1) read together with section 3(3) of the Sexual Offences Act No. 3 of 2006. I hereby convict the accused under section 215 of the criminal procedure code."**

[18] Under **Section 179** of the **Criminal Procedure Code**, it is permissible for a court to convict an offender for an offence with which he was not charged, so long as that offence is cognate to the offence charged. It provides that:

> **"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

[19] Thus, in the **Criminal Procedure Bench Book**, February 2018, examples of cognate offences are provided in paragraphs 19 and 20 of Chapter 4, on pages 113 and 114, to be murder and manslaughter; robbery and stealing; defilement and sexual assault; and robbery with violence and grievous harm. The question that then arises is whether rape is cognate to defilement or is a lesser offence for purposes of **Section 179** of the **Criminal Procedure Code**. In the persuasive authority of **Chris Mang'era Arunga vs. Republic** [2017] eKLR, this issue presented itself for determination and the Court **(Hon. Wendoh, J.)** took the following view, which I entirely agree with:

"In this case both defilement and rape are sexual offences. For both offences, one of the ingredients is proof of penetration. Whereas defilement involves children under 18 years, no proof of consent is required. Rape involves adult victims and there has to be lack of consent. Besides, under section 4 of the Sexual Offences Act, upon conviction, one is liable to be sentenced to not less than 5 years' imprisonment but it can be enhanced to life imprisonment depending on the circumstances of the case. Defilement is a more serious offence that attracts a sentence of 15 years to life imprisonment depending on the age of the victim."

[20] Thus, rape being a minor offence in comparison to defilement in terms, it was permissible for the trial magistrate to convict the Appellant of it, pursuant to **Section 179(2)** of the **Criminal Procedure Code**, although he was not charged with the offence of rape; the only safeguard being the need to ensure that all the ingredients of rape, including lack of consent were proved. And, at pages 45 – 51 of the Record of Appeal, the trial magistrate analyzed the evidence and was satisfied as to penetration, the identity of the offender, as well as lack of consent. Here is an excerpt of the Judgment:

"The issue now for determination is whether from PW5's narration that she alleges was done to her amounts to an alleged rape and in my view the answer is yes. First from the facts that is the testimony of PW1, she stated that a person who she identified as the accused inserted his penis into her vagina. Secondly from her narration it is evident that there was no consent. She told the court that the person whom she identified as Rodgers the accused found her on the way and approached her from behind then pulled her into the bush, pulled her clothes and raped her. She even stated that she tried to scream but … the accused covered her mouth. PW1 demonstrated that three mandatory ingredients cited in section 3 of the Sexual Offences Act No. 3 of 2006 were existing in the circumstances under which she alleged she was raped. She demonstrated that a person she identified as the accused coerced her into engaging in a Sexual Act with him by using force against her…"

[21] The trial magistrate then proceeded to examine and test the evidence of the complainant to satisfy herself that it was free of error in line with the guidelines set out **in Republic vs. Turnbull** [1976] 3 AllER 549. The lower court was thus satisfied that the evidence of identification by the complainant was not only free from error, the Appellant being a person she had known well before the date of the incident, but was also corroborated by the evidence of **PW3,** who found the Appellant at the scene with the complainant. Having independently reviewed the entire body of evidence adduced before the lower court, I am satisfied that the trial magistrate's conclusions and findings were based on sound evidence, and that the variance between the evidence of the Prosecution and the particulars of the charge as to the age of the complainant were well taken care of. It is likewise evident at pages 49 and 50 of the Record of Appeal that the defence of the appellant, including the evidence of **DW2**, was given due consideration by the trial magistrate and dismissed as an afterthought for reasons that have been set out therein.

[22] In the result, I find no particular reason to fault the finding of the trial court in so far as the Appellant's conviction is concerned. On sentence, **Section 3(3)** of the **Sexual Offences Act** provides for up to life imprisonment. The Appellant's 10-year jail term cannot, in the circumstances be said to be excessive. Thus, I find no merit in the appeal. The same is hereby dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF FEBRUARY, 2020

OLGA SEWE

JUDGE