REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 54 OF 2016

WSN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of Chief Magistrate's Court at Malindi Hon. C. G. Mboga (CM) delivered on 14th November 2016 in Criminal Case No. 411 of 2013)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

The appellant was indicted with the offence of incest contrary to Section 20 (1) of the Sexual Offence Act. He was tried and convicted and finally sentenced to ten (10) years imprisonment. He is aggrieved with the order on conviction and sentence of the trial court, hence his appeal on the following grounds:

(1). That the Hon. trial Magistrate erred in law and fact by not seeing that the charge sheet was defective.

(2). That the Learned trial Magistrate did not consider that the medical evidence adduced was un-reliable to warrant my conviction and sentence.

(3). That the Hon. Trial Magistrate did not consider that my arrest had no any link with the matter in question.

(4). That the Learned trial Magistrate failed to see that my defence was reliable to award me the benefit of doubt.

Background

As stated in the charge sheet to this case on 11.6.2013 in Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of **RK** who is to his knowledge his niece. The summary of the case was set out as follows.

PW1 Ibrahim Abdullahi – a clinician based at Malindi Hospital testified that he medically examined the victim of defilement. **PW2 RK,** apparently had also been seen by **Benjamin Menza.** From (PW1) testimony, the victim was bleeding from the vagina and laboratory test done showed presence of spermatozoa in her urine. He also stated that the age assessment was done at the dental clinic which assessed her age at 16 years. Further, the two medical documentary exhibits were produced in evidence in support of the prosecution case.

PW2 – RK. the alleged victim of defilement gave evidence that on 11.6.2013 on her way back from school she met with her cousin the appellant. She claimed that the appellant offered to give her a lift on his bicycle. According to PW2 as they cycled, the appellant suddenly yielded abandoned cycling and went for her demanding sexual intercourse. That subsequent to that the appellant had dragged her into the nearby bushes where he forcibly undressed her to gain access to the genitalia. The victim was later to be left at the scene, but managed to walk home where she explained to her father PW3 about the incident. What followed was a report to the village elder and the police station.

PW3 – KM told the court that PW2 got home at about 10.30 pm where she explained that on her way home she was way laid by the

appellant who is also an uncle and an act of sexual intercourse was committed against her. It was at the time he proceeded to have the report booked at the police station for further investigations.

PW4 - C on the other hand also stated as to the circumstances of the defilement on the same account of PW3 as both of them happen to be parents of the victim (PW2).

PW5 – APC Kigunya of Lago Baya Police station gave evidence on the aspect of executing a warrant of arrest against the appellant. Thereafter he handed him over to Malindi Police Station for purposes of investigations.

At the conclusion of the prosecution case, appellant was placed on his defence. He confirmed that the victim went to his home at about 10.30 p.m. and joined him and the family for dinner. Further, the appellant explained that after dinner under instructions from his mother he did escort PW2 home and on return went back to sleep. He denied the act of defilement which he only learnt of the following day from the village elder **(DW2) – Tangari Mawaruga.**

At the hearing DW2 confirmed that the father to the victim passed through his home to report the defilement incident between (PW2) and the appellant. The other evidence by the defence was that of **DW3 – KJ** who confirmed that the victim had dinner with them on her way from school, thereafter she was escorted to her home by the appellant.

On appeal the appellant relied on his written submissions within the guidelines of the grounds of appeal. The appellant submitted that the Learned trial Magistrate failed to construe and give effect to the provisions of Section 199 of the Criminal Procedure Code and Section 124 of the Evidence Act.

In the first instance, appellant felt aggrieved that the Learned trial Magistrate failed to record remarks on the demeanor of witnesses whilst under cross-examination in their attempt to prove facts against his indictment. Secondly, the appellant complained of the discrepancy by the Learned trial Magistrate failure to indicate on record whether the victim was telling the truth being a single identifying witness to the defilement. The appellant attached reliance to the cases of **Ogeto v R CR Appeal No. 1 of 2014, Bonface Ngumbas v R CR Appeal No. 51 of 2016, Stephen Leting v R {2009} eKLR, George Mathu v R {2007} KAR.**

The appellant further submitted the omission with regard to DNA as evidence dealt a blow to the charge which could have implicated him with the alleged defilement. He therefore, urges this court to find that the Learned trial Magistrate erred in fact and law by ruling that the evidence by the prosecution supported the elements of the offence. In a nutshell appellant stood his ground that he never convicted the offence of which he was convicted and sentenced by the trial court.

The respondent submissions

The Learned prosecution counsel **Ms. Sombo** on the other hand opposed the appeal and urged this court to find that the charge against the appellant was proved beyond reasonable doubt. That the four grounds of appeal have not satisfactorily disparaged any of the witnesses both direct and circumstantial which placed the appellant at the scene. Learned counsel argued and submitted that there were no inconsistencies nor contradictions to weaken the prosecution case to render it in doubt for the benefit of doubt to be resolved in his favour. She further argued that in appraising the evidence this court appreciates the veracity and credibility of the victim testimony as narrated before the trial court to proof elements of the offence 20 (1) of the Sexual Offences Act Learned counsel prayed that the appeal be dismissed for want of merit.

Consideration of the appeal

As stated in the case of **Okeno v R {1972} EA 32,**

> ***"In an appeal of this nature the rule is that a first appellate court is obliged to analyze and re-evaluate the evidence adduced before the trial court, independently, draw its own conclusions, of course without over looking or disregarding the findings of the trial court, and to bear in mind that unlike the trial court it did not have the opportunity of hearing and seeing witnesses testify."***

Upon carefully reading of the Chief Magistrate Judgment its apparent that the appellant faced a charge of incest contrary to Section 20 (1) of the Sexual Offences Act. The elements set to be proven by the prosecution beyond reasonable doubt as postulated in **Woolmington v DPP {1935} A. C. and Miller v Minister of Pensions {1942} ALL ER** constitute the following elements:

> ***(a). The act of penetration of a female genitalia.***
>
> ***(b). The age of the victim.***
>
> ***(c). The identification of the appellant as the perpetrator of the sexual offence.***
>
> ***(d). That the victim of the sexual assault falls within the consanguinity category in Section 20 of the Act.***

The court in **Charles Wamukoya Karani v R CR Appeal No. 72 of 2013** dealt with defined criteria of the offence of defilement as follows that:

> ***"The critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant."***

In this appeal from both the evidence of PW2 as well as the medical evidence by **(PW1) Abdullahi** of Malindi Hospital demonstrate that PW2 was sexually penetrated on 11.6.2013. According to PW2, immediately after the defilement by the appellant she went home and reported the whole circumstances to her father **PW3 – KM** and mother **JK (PW4).**

As the prosecution endeavored to demonstrate, the victim was medically examined soon after the defilement which showed bleeding from the genitalia and presence of spermatozoa in her urine.

In Law the evidence of PW1, PW3 and PW4 amounts to corroboration to satisfy the condition of other independent evidence that the victim was telling the truth. In the case of **Uganda v George Wilson Sumbwa SC Criminal Appeal No. 37 of 1995,** the court held that:

> ***"Corroboration affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at Common Law or within the class of offences for which corroboration is required."***

In this appeal, although in **Kassim Ali v R CR Appeal No. 84 of 2005** the court held that the absence of medical evidence to support the fact of rape is not decisive as to the fact of rape. As regards the case against the appellant, prosecution, firmed it up with medical evidence of (PW1). The significance of medical evidence by (PW1) was the fact of vaginal bleeding and presence of spermatozoa in the urine. The import of Section 2 on penetration under Sexual Offences Act is to ensure evidence availed by the prosecution established sufficiently beyond reasonable doubt that partially or completely there was insertion of the penis of the appellant into the vagina of the victim (PW2).

In my humble view, the clarity of the testimony by (PW2) as corroborated with the medical examination report by (PW1) there is no hesitation to find as the trial court did in concurrence on penetration of the victim genitals. Further, in **R v Manilal Purohit {1949} EACA 58:**

> ***"The court held corroboration in some additional evidence rendering it probable that the evidence of the witness is true and it is reasonably safe to act upon it, that it must be independent evidence which affices the accused by connecting him or tending to connect him with the crime confirming in some material particular, not only the evidence that the crime has been committed, but also that the accused committed it."***

It is important to note that primarily that trial was a mixed combination of elements of single identifying witness and recognition evidence. Here in this appeal there is evidence on recognition properly accepted by the Learned trial Magistrate especially in the direct testimony of the victim (PW2). There can be no doubt that the evidence of PW2 involved both voice and visual identification of appellant.

In **Rosemary Njeri v R CR Appeal No. 27 of 1997** the court held that:

> ***"That identification by voice is less satisfactory than visual identification. In view it can be equally safe and free from error more so if the identification takes place at night. We agree with the two lower courts that in the particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, possibility of error was excluded."***

However, it is to be remembered that the complainant's testimony admissibility must be tested within the dictum in **Abdalla Bin Wendo & Another v R {1953} 20 EACA 166 and Roma v R {1967} EA 583** which held as follows that:

> ***(a). The testimony of a single witness regarding identification must be tested with greatest care.***
>
> ***(b). The need for caution as even greater when it is known that the conditions favouring a correct identification were difficult.***
>
> ***(c). Where the conditions were difficult, what is needed before convicting is other evidence pointing to guilt.***
>
> ***(d). Otherwise, subject to certain well known exceptions, it is lawful to convict on identification of a single witness so long as the Judge adverts to the danger of basing a conviction on such evidence alone.***

In the instant case, in my opinion the victims evidence taken together with material evidence of **KJ (PW2)** it was sufficient to enable the trial court establish that the conditions obtainable to recognition was free from any error or mistake to place the applicant at the scene.

Undoubtedly, the appellant statements and his witnesses in his defence correctly admitted that he was the last person to escort the victim to her home at about 10.30 p.m. Moreover, although, the appellant admits escorting the victim to her home, he denies that at the time he physically entered the homestead, that night. It will be observed and permissible to treat such evidence on motive.

In **Karukenya v R CR Appeal No. 53 of 1983,** the court held:

> ***"Whilst motive and opportunity are important matters to be considered when weighing the prosecution case they cannot in themselves be regarded as corroboration."***

In those circumstances it seems to me that the conduct of the appellant can be brought within circumstantial evidence as part of the chain that he was the one who committed the crime. It was held in **Choge v R {1985} KLR;**

> ***"Under Section 9 (3) of the Penal Code (cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not."***

It is right to say therefore, that before the appellant and the victim left his home fundamentally, the act of sexual intercourse had not taken place. For reasons I have no mistaken fact but to hold that between the time appellant was instructed to escort the victim to her home there is no admissible intervening factor that some other person committed the offence. Arguing the appeal on this grounds, the appellant pointed out incorrectly that application and interpretation of Section 199 of the Criminal Procedure Code and Section 124 of the Evidence Act by the Learned trial Magistrate.

The appellant was the last person who was with the complainant before the defilement incident that being the position under Section 111 of the Evidence Act the Law places a burden on him to show by way of evidence to disapprove her evidence pointing at him as the perpetrator of the crime. On evaluation of his evidence and witnesses summoned in support of the defence nothing but inconsistencies and contradiction incapable of controverting the primafacie evidence on carnal knowledge on the 11.6.2013.

As I have outlined already besides penetration as a key element being proved beyond reasonable doubt the second most important element is of age of the complainant was also proved by way of age assessment report. The victim was defiled at the age of 16 years old. The weight of the evidence is consistent with the principles in Francis **Omuroni v Uganda Court of Appeal in Criminal Appeal No. 2 of 2000.** The court held that:

> ***"age of the victim can be armed by medical evidence in absence of any other evidence."***

Taking into account the grounds of appeal and carefully testing them against the ingredients of the offence the evidence of both the prosecution and the defence put in perspective, I reach the following findings the substances of the four grounds could not amount to the weight to discredit the watertight evidence on conviction as aimed at by the trial court on that material there was strong basis for the finding that the appellant committed the offence of incest contrary to Section 20 (1) of the Sexual Offences Act.

For these reasons, I am of the view that the appellant was safely convicted and sentenced by the Learned trial Magistrate. His Judgment is confirmed and the appeal dismissed for lack of merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2020

R. NYAKUNDI

JUDGE