REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 45 OF 2019

ALVIN KABAKA MAGOLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence of the Senior Principal Magistrates Court at Mavoko delivered on 12.4.2016 by the Resident Magistrate L.A. Mumassabba in Mavoko SPMC Criminal Case SO.11 of 2015***)**

BETWEEN

REPUBLIC .....PROSECUTOR

VERSUS

ALVIN KABAKA MAGOLO.....ACCUSED

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. L.A. Mumassabba RM, in Criminal Case SOA No. 11 of 2015** delivered on **12.4.2016**. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty to both charges.

2. The appellant lodged his memorandum of appeal on 31.1.2019 pursuant to leave granted by this court. The appellant's case is that the conviction and sentence are not supported by evidence and are based on contradictory evidence; that the prosecution case was not proven to the required standard but was based on hearsay evidence; that the appellant's defence was not regarded.

3. The appellant took issue with the amendment of the charge sheet for a 2nd time yet he had objected to the same. The appellant in placing reliance on the case of **EE v R (2015) eKLR** submitted that penile penetration was not proven. The appellant also took issue with the complainant who delayed in reporting the defilement and cited the case of **Elias Kiamati Njeru v DPP (2015) eKLR** in arguing that the delay is unjustified. The appellant submitted that the evidence of Pw1 and Pw4 was hearsay. It was the appellant's argument that the prosecution case was riddled with inconsistencies for instance Pw1 testified that she did not tell her mother about the incident and later she testified that she told her mother who did not do anything. The appellant pointed out that Pw1 testified that she was sent by the appellant to purchase credit for him and Pw4 testified that Pw1 had gone to get money from the appellant. It is in light of the foregoing that the appellant in placing reliance on the case of **Paul Kanja Gitari v R (2016) eKLR** submitted that the inconsistencies ought to be interrogated. The appellant submitted that in terms of Section 7(1) as read with section 7(2) of the CPC, it was the high court and not the Resident Magistrate who had power to pass the sentence. Reliance was placed on the case of **JAO V R Cr App 176 of 2010.**

4. The state conceded to the appeal vide submissions dated 7.1.2020. Learned counsel's singular issue for determination was whether the prosecution proved their case beyond reasonable doubt. Learned counsel submitted that penile penetration was not proven.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was **FN**. A voir dire conducted on her satisfied the court that she had sufficient intelligence to understand the nature of an oath and was sworn in. It was her testimony that between April and May 2015 she used to watch movies at the appellant's house and on one day she was left alone with the appellant and on another day when she went to borrow a matchbox from her aunt the appellant defiled her but she did not tell her mother. She testified of the same incident that occurred on 29.5.2015 when the appellant gave her money to purchase credit and when she returned, the appellant defiled her and a Mama Stella witnessed the incident and reported to Pw1's mother. She testified that she was taken to Nairobi

Women Hospital where she was admitted for a day. On cross examination, she testified that the appellant was her neighbour.

6. **Pw 2** was **Maureen Maitha**, a clinical officer based at Athi River Health Centre. She testified of the examination that was carried out on the complainant and the P3 form that was filled by her on 3.6.2015. She testified that the complainant's hymen was torn and according to her history and examination she concluded that the complainant had been defiled. On cross examination, she testified that she established that Pw1 was aged 13 years and that she did not fill the PRC form.

7. **Pw3** was **Christine Kitesho**, medical in-charge Women's Kitengela. She testified that she had worked with Dr. Musee and was familiar with his handwriting. The prosecution's application to produce documents under Section 33(6) and 77 of the Evidence Act was allowed. The PRC form that was filled by Dr. Musee was produced. It was Pw3's testimony that Pw1 was born on 12.1.2002 and bodily examination revealed that she had a torn hymen but her genitalia was okay; the conclusion was that there was penile penetration and that the form was filled on 1.6.2015. On cross examination, she testified that the examination was done on 31.5.2015 in the morning.

8. The prosecution made an application to amend the charge sheet as the victim was aged 13 years so as to read Section 8(1) and (3). The appellant objected to the same but the prosecution submitted that there was no limit under Section 214 of the CPC as to the number of times that a charge sheet was to be amended. The court allowed the same since the prosecution case had not been closed and under Section 214 of the CPC, a charge sheet could be amended at any time.

9. The appellant pleaded to the amended charge sheet and a plea not guilty was entered.

10. **Pw4** was **AK** who testified that she was the mother of Pw1 and she produced the birth certificate of Pw1 indicating that she was born on 12.1.2002. She testified that on 30.5.2015 she was told that her daughter was seen leaving another house and she confronted Pw1 who informed her that she had sex with the appellant. She testified that the appellant admitted to a pastor that they had sex with Pw1 three times. On cross examination, she testified that Pw1 reported to her on 30.5.2015 that she had been defiled and she was taken to hospital after three days.

11. **Pw5 Cpl Jane Ngige** the investigating officer testified that she received a report on 1.6.2015 that Pw1 had been defiled on 29.5.2015. She testified that it was established in the hospital that Pw1 had been defiled and she identified the appellant who admitted that he committed the offence. On cross examination, she testified that it was reported that Pw1 came to borrow a matchbox from the appellant on 29.5.2015 and that was when the offence occurred.

12. The court was satisfied that a prima facie case had been established against the appellant who was placed on his own defence. Section 211 Criminal Procedure Code was explained to the appellant and he opted to give sworn evidence. He testified that on 29.5.2015 he was watching movies at his house and then a pastor came to his house and asked him questions he could not understand and was later arrested and charged with the instant offence. He denied commission of the offence.

13. The court invoked Section 150 of the CPC and directed that Pastor Amunga be called to give evidence. The appellant did not object to the same and Geoffrey Amunga testified as Pw6. He told court that on 30.6.2015 the appellant admitted to him that he had defiled Pw1 and that Pw1 informed him that she had been defiled two to three times.

14. The court found that penetration was proven vide medical evidence of the PRC and P3 form; that age was proven vide the birth certificate; the court placed reliance on Section 124 of the Evidence Act and believed the evidence of Pw1 and also found that the fact of penetration was corroborated by other evidence. The court found that the evidence of the appellant was unbelievable. The court was satisfied that the appellant was identified as the person who repeatedly defiled Pw1 who gave a vivid account of the events. It also noted the importance of calling witnesses who shall assist the court to establish the truth. The court dismissed the appellant's defence and who was convicted of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act. After the prosecution stated that there were no previous records and the appellant stated in mitigation that he was a sole bread winner, he was sentenced to 20 years' imprisonment.

15. Having looked at the Appellant's and State's written submissions, the grounds of appeal and the evidence on the court record, the following are the issues for determination:

a. **Whether or not the prosecution had proved its case beyond reasonable doubt.**

b. **Whether there were material inconsistencies in the prosecution case**

c. **Whether the court rightly rejected the appellant's defence (if any).**

d. **Whether court had jurisdiction to pass the sentence in this matter.**

e. **What orders the court may issue?**

16. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a) That the victim was below 18 years of age.

b) That a sexual act was performed on the victim.

c) That it is the accused who performed the sexual act on the victim.

17. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See **Ssekitoleko v Uganda [1967] EA 531**). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence of defilement which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

18. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case. The prosecution conceded to the appeal and submitted that the prosecution had not proved penile penetration. A perusal of the list of exhibits presented to the trial showed a birth certificate in the names of complainant as the victim born on 12.1.2002, a P3 form dated 3.6.2015 as evidence of penetration in the names of **Pw1** that reported that the victim had a torn hymen as well as a PRC form on 31.5.2015 in the same names and with the same findings. There is an eye witness account of the incident from the victim who was PW2. In the case of **Mshila Manga v R (2016) eKLR** the court observed that under the proviso to Section 124 of the Evidence Act for a conviction to be made the court ought to be satisfied that the witness was truthful and record reasons thereof. From the evidence on record it was established that the appellant was at the scene of crime from the account of Pw2 as he was a neighbour.

19. The appellant denied commission of the offence. The trial court rejected the appellant's defence. The evidence of the investigating officer corroborated the fact that there was repeated defilement of Pw1 vide the medical evidence. The appellant's version of events did not cast any doubt upon that of the complainant and her witnesses regarding the incident. I am convinced that indeed he was at the scene on the material day since I believe the account of Pw1 as I am satisfied that she was telling the truth.

20. The evidence as listed above is direct and cogent evidence pointing irresistibly to the appellant as the defiler. From the record, the birth certificate is sufficient proof of age meaning the evidence with regard to age has met the test.

21. It is the direct evidence of Pw1 that gives details of the event and I see no reason to disbelieve her and I am satisfied that her account of events was free from error. I am satisfied that she was telling the truth and I disbelieve the appellant's version of events of the day meaning that the appellant was correctly identified as the perpetrator. In any event it did not transpire that the complainant and her family had any grudges so as to suggest a frame up against him. The complainant clearly stated that she used to join the appellant in his house to watch movies together and was thus well known to her.

22. The P3 form and the PRC form as well as evidence of Pw2 and Pw3 is indicative of penetration. I find that there is no inconsistency with regard to the elements of the offence and this ground raised by the appellant has no merit. The inconsistency as to what Pw1 came to collect from the appellant is not material as it has no effect on proof of the elements of the offence. In any event, Pw1 narrated two different incidents that occurred on two different days.

23. The appellant in his memorandum of appeal has assailed the trial court for failing to consider his defence. However, since he did not set up any then the rejection by the trial court was in order and hence this ground raised by the appellant is of no merit.

24. The evidence on record is satisfactory to sustain a charge against the appellant.

25. On the issue of the orders that the court may grant, this court agrees with the conviction and sentence that was meted upon the Appellant by the trial court. The prosecution proved its case to the required standard; the trial court rightly rejected the appellant's defence of alibi and there are no material inconsistencies to the prosecution case. The ground of appeal on this aspect must fail.

26. The appellant challenged the jurisdiction of the court to pass sentence and to try the instant offence. However, the Sexual Offences Act gives criminal jurisdiction to magistrates and where a statute creates an offence but does not specify the court, then the Kenyan subordinate courts presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate, have jurisdiction to try the offence. See **Attorney General v Mohamud Mohammed Hashi & 8 others [2012] eKLR and** section 5 of the CPC that states:

> "(1) *Any offence under any law other than the Penal Code shall, when a court is mentioned in that behalf in that law, be tried by that court.*
>
> *(2) When no court is mentioned, it may, subject to this Code, be tried by the High Court, or by a subordinate court by which the offence is shown in the fifth column of the First Schedule to this Code to be triable."*

27. The trial court was clothed with the requisite jurisdiction to handle the subject offence and the allegations by the appellant to the contrary have no merit.

28. The conviction having been found to be sound, the next issue for consideration is on the sentence. The sentence imposed by the trial court is noted to be twenty years' imprisonment pursuant to section 8(3) of the Sexual Offences Act. I see no reason to interfere with it as it is the possible minimum in law.

29. In the result it is my finding that the appellant's appeal is devoid of merit. The same is dismissed. The conviction and sentence is hereby upheld.

30. In the result it is my finding that the appeal lacks merit and is hereby dismissed. The conviction and sentence by the trial court is upheld.

It is so ordered.

Dated and delivered at Machakos this 13th of May, 2020.

D. K. Kemei

Judge