REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 70 OF 2018

DT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. A. Ndung'u, Resident Magistrate, delivered in Shanzu Senior Principal Magistrate's Court Criminal Case No. 728 of 2015).

JUDGMENT

1. On 22nd June, 2015 the appellant 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. The particulars of the charge were that on the 13th day of June, 2015 in Kisauni Sub-County within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the vagina of SK [name withheld] a child aged 8 years.

2. He was also charged with an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.The particulars of the charge were that on the 13th day of June, 2015 in Kisauni Sub-County, within Mombasa County, he unlawfully and intentionally caused his penis to touch the vagina of SSK [name withheld] a girl aged 8 years. The appellant was found guilty of the main charge and sentenced to life imprisonment.

3. He was aggrieved by the decision of the lower court and filed a petition of appeal. He amended the same on 3rd October, 2019, with leave of the court. He raised the following grounds of appeal:-

> (i) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering that the circumstances at the scene of the incident were not favourable for positive identification;
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> (ii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering that the prosecution evidence was full of massive contradictions hence was not reliable to sustain a conviction;
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> (iii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering that the medical evidence as presented before the court during the trial totally failed to prove the case against him beyond reasonable doubt as required by the law;
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> (iv) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering that the general prosecution evidence as presented had many unresolved questions regarding the incident, which made the same not to be credible; and
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> (v) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering that he gave sworn evidence which created a reasonable doubt in the prosecution case, whereby the benefit of doubt ought to have been given to him.

4. In his written submissions, the appellant contended that PW1 did not disclose the nature of the light in the room where the offence was allegedly committed. He stated that from the evidence, it was dark which made the circumstances difficult for positive identification. He said that theevidenceby the prosecution was not credible to form the basis of a conviction. Making reference to the evidence, he said that it was claimed that there were 2 more occupants in the room during the alleged incident but they never heard anything. The appellant wondered why PW1didnot scream.

5. The appellant indicated that PW1 gave contradictory evidence and ended up saying that she couldnot remember what transpired. That she

had even forgotten whether he did the act on her. The appellant stated that PW1could not remember the side of the bed on which she slept.

6. He submitted that there was contradiction on the date when the PRC form was filled as the Investigating Officer, PW3, said it was filled on the 20th of June, 2015 while the Doctor, PW4, said it was filled on 17th June, 2015.

7. The appellant also pointed out that PW2 said that her children were picked up from Chaani on13th June, 2015 which was the same date the offence was said to have been committed as per the charge sheet.He also submitted that PW2 gave evidence that the PRC form was filledon 17th June, 2015. The appellant stated that the Investigating Officer testified that the incident happened on 14thJanuary, 2015 and 16th January, 2015.

8. The appellant submitted that a woman by the name Grace who was mentioned by PW2 was not called to testify. He further submitted that Saida Mwinyi who filled the PRC never testified. He indicated that the persons who filled the P3 and PRC forms were not the ones who presented the evidence in court. In addition, he submitted that the Doctor, PW4, contradicted her examination-in-chief when he cross-examined her, as she indicated that the P3 form was filled on 27th June, 2015, whereas it was actually filled on 17th of June, 2015.He wondered how lacerations could be still visible on PW1 a month after the alleged incident.

9. The appellant contended that the charge against him was a frame up by PW1's parents because of a grudge arisingfrom his non-payment of dowry for his wife, to his mother-in law. He stated that PW1 was his niece as his wife and her mother are sisters. He claimed that PW2's family was not happy with him since he refused topay dowry and that he had separated with his wife who was PW2's kin. He submitted that although he raised the said issue in his defence, the Trial Magistrate did not consider it. He prayed for his appeal to be allowed.

10. On 8th October, 2019 Ms Mwangeka, Prosecution Counsel, filed written submissions to opposethe appeal. She indicated that the appellant was convicted and sentenced for the offence of defilement contrary to Section 8(2) of the Sexual Offences Act and sentenced to life imprisonment.

11. On the issue of PW1's age, the Prosecution Counsel submitted that PW2 testified that PW1 was born on 15th July, 2006. She relied on the birth certificate which was produced by PW3 as proof of PW1's age.

12. In responding to the issue of identification which was raised by the appellant, the Prosecution Counsel submitted that the appellant was not a stranger to PW1 as he was her uncle, whom she knew as Baba K. It was submitted that PW1 testified that when she went to the appellant's house at Bamburi, she, the appellant and his 2 children slept on one bed. That at night the appellant defiled her. It was indicated that PW1 was categorical that she was not defiled by either B or K but by the appellant who had promised to take her to the beach. It was pointed out that in his defence,the appellant admitted having been with his children and PW1 from Saturday toSunday. Ms Mwangeka submitted that the appellant also admitted that his children and PW1 spent the night at his home.The Prosecution Counsel was of the view that the issue of mistaken identity did not arise.

13. In regard to the production of the P3 and PRC forms by PW4 who was not the author of the same, it was submitted that Section77 and 33 of the Evidence Act allow the presumption of the genuineness of medical documents. Further, that the said provisionsdo not require the makers of the same to produce them, in instances where they cannot be readily procured to attend court. She submitted that PW4 indicated that she was familiar with the handwriting of Doctor Otieno who filled the P3 form and that he had been moved to a different department. Ms Mwangeka submitted that PW4 explained that it was her duty to fill P3 forms and testify in court. She was of the view that a proper basis was laid as to the reason why PW4 produced the P3 and PRC forms.

14. It was argued by the prosecution that the contradictions pointed out by the appellant were minor and that the Trial Magistrate after evaluating the evidence adduced by the prosecutionheld it wasconsistent. It was submitted that under the provisions of Section 124 of the Evidence Act,the said Magistrate found PW1 to be a truthful witness who gave clear and consistent evidence. She also found that PW1 had no reason to lieagainst the appellant.

15. On the prosecution's failure to call one Grace as a witness, Ms Mwangeka urged this court not to draw a negative inference. She relied on the provisions of Section 143 of the Evidence Act which provides that no particular number of witnesses are required to prove a certain fact.

16. It was submitted that the Trial Court considered the defence raised by the appellant that the case against him was a frame up by PW2, but found that the evidence adduced by the prosecution was not controverted.

17. On the issue of the sentence imposed on the appellant, Ms Mwangeka cited the case of **Jared KoitaInjiri v Republic** [2019] eKLR and prayed for a definite sentence of 30 years. She prayed for the appeal on conviction to be dismissed.

18. In his submissions filed on 20th November, 2019 in response to the DPP's submissions, the appellant relied on the decision in **Shadrack Kipchoge Kogo v Republic**, Eldoret Criminal Appeal No. 253 of 2003 and **Thomas MwambuWenyi v Republic**, Nyeri Criminal Appeal No. 21 of 2015 to demonstrate the circumstances in which an appellate court can interfere with the sentence imposed by the Trial Court. He urged this court to vary the sentence of life imprisonment by allowing his appeal.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

19. The hearing of the lower court case commenced on 12th April, 2016. PW1 was KK [name withheld]. She was the complainant in this case. She was taken through *voir dire* examination and gave unsworn evidence. She testified that on 13th June, 2015 she went to the appellant's house in Bamburi. His two sons, K and B were with them. She referred to the appellant as Baba K and said that by another name he is known as T. It was the evidence of PW1 that after they had dinner at the appellant's house, she, the appellant, K and B all slept on one bed. She stated that they switched off the light and then slept.

20. She indicated that she slept while wearing ¾ of a biker and nothing on top. She recounted that as they slept, the appellant disturbed her by removing the clothes she was wearing and that he removed his. She stated that it was dark and that it was neither B nor K who undressed her.She testifiedthat the appellant asked her to sleep next to him and did bad manners to her. She indicated that she had forgotten what he then did.The Prosecution Counsel at that juncture asked the Trial Courtto stand down PW1 as she could not recall had what happened. The case was adjourned 13th May, 2016.

21. Onthe said date, PW1 gave evidence thatonthe day she went to the appellant's house, he did*tabiambaya*. Shestatedthat *"alichukua mdudu wake akaeka hapa kwangu kwakukojo"*, which the Trial Court interpreted to mean that the appellant inserted his *"mdudu"* penis in PW1's vagina. His*"mdudu"* is used to urinate.The lower court proceedings indicate that PW1 further said *"mdudu wakukojoa uko hapa"*as she pointed at her vagina.She further said that theywere on the bed when he inserted his penis in her vagina.

22. PW1 further adduced evidence that *"Alikuwa amelala ameniangalia"* which the Trial Court interpreted to mean that the appellant was lying on top of PW1 when he inserted his penis in her vagina. PW1 clarified that what she meant was that the appellant inserted his penis from behind her as she was lying on her side and as he lay on his side facing her back. Her exact words were that *"aliweka mdudu nyuma ikatokezea huku mbele"*. She indicated that he told her that he would take her to the beach. She testified that she was in pain *"hukumbele"* in her vagina. She did not tell anyone in Baba K's home but she told her mother when she went home that she was in pain *"sehemu yangu ya kukojoa"*, and she was taken to Coast Province General Hospital (CPGH) the following day. She also said that they reported the matter to the police atChangamwe and Bamburi.

23. PW2 was RK [name withheld] a resident of Chaani, Changamwe. She was PW1's mother. She testified of how she allowed PW1 to accompany the appellant together with his sons K and B to his house on 13th June, 2015, as she wanted to go with them to the beach the following day. PW2 stated that the appellant did not take the children back to her home the following day as planned but he instead asked one Mutie to escort them back to Chaani, Changamwe. She noted that PW1 looked weak when she returned from Bamburi.

24. PW2's evidence was that on Monday the children went to school and when they returned they bathed and took supper. On Tuesday the children went to school. PW2 indicated that she decided to give PW1 a bath but she refused. That she did not even want to remove her clothes. PW2 furtherindicated that when she wanted to discipline her for refusing to be bathed, she said that she had been injured. That she said *"Babake K alinifanyia tabia mbaya"*. PW2 looked at PW1's private parts and saw a wound which appeared to be white. PW2 said that she called a woman by the name Grace, a neighbour, who checked PW1 and confirmed what PW2 had seen.

25. PW2 further testified that PW1 told them that *"Babake K alifanya tabia mbaya na akaniambia nisiambie mtu yeyote na kwamba atanipeleka beach"*, which was interpreted by the Trial Courtto mean that the appellant defiled her and told her not to tell the mother or anyone else and promised to take her to the beach. PW2 testified that a woman by the name Mary took her to Changamwe Police Station where they made a report and then they met at CPGH where PW1was examined and given medication. A PRC form was filled. A P3 form was filled later.

26. PW2 indicated that PW1 was born on 15th July, 2006 and was 9 years old as at 13th May, 2016,when she testified. PW2 stated that the appellant had married her daughter by the name PB who was the mother of B and K. That P B was living with PW2 after she left the appellant. PW2 indicated that the appellant was her son-in-law. She further said that K (appellant's son) was interrogated at Bamburi Police Station and said he knew nothingabout what had happened, as he was asleep.

27. PW3, No. 62566 Corporal BeatriceMagotiinvestigated the case and arrested the appellant. She also recorded statements from PW1 and PW2. She produced PW1's birth certificate. PW3 stated that PW1 told her that she was defiled by Baba K.

28. PW4 Doctor Tima Nassir, a Medical Officer from CPGH produced the P3 form on behalf of Doctor Otieno whose hand writing and signature she was familiar with. She also produced a PRC form for PW1. It washer evidence that based on the two documents, PW1 was defiled.

ANALYSIS AND DETERMINATION

29. The duty of the 1st appellatecourt is to analyze and re-evaluate the evidence adduced before the lower court and cometo its own independent conclusion. The 1st appellate court must however bear in mind that it neither saw nor heard the witnesses testify and make an allowance for the said fact.

30. The issues for determination in this appeal are:-

(i) If the appellant was positively identified as the perpetrator of the offence of defilement;

(ii) If the contradictions and/or inconsistencies on record rendered a fatal blow to the prosecution case;

(iii) If failure to call some witnessesweakened the prosecution case;

(iv) If the defence by the appellant was considered; and

(v) Whether the sentence was harsh or excessive.

If the appellantwas positively identified.

31. PW1 knew the appellant as Baba K or T. She accompanied him and his 2 sons to his house in Bamburi on 13th June, 2015 after her mother, PW2, allowed her to go there. According to PW2's evidence, the appellant had been married to her daughter PB but they had separated. The said daughter was by then living with her. PW2 was therefore a mother-in-law to the appellant and a brother-in-law to PW1.

32. PW1 was categorical that the personwho inserted his penisin her vagina at night as theywere sleeping, was the appellant herein. She put it in her own words as follows:-

> *"Babake K had removed my biker and costume (panty). Babake K also removed his trouser (shorts) I was sleeping on my side. Babake K was also lying on his side facing me. Babake K was not lying on top of me when he inserted his penis in my vagina. I was lying on my side. Babake K was lying on his side next to me. My was back(sic) was facing him.He was facing my back he then took his penis and inserted it in my vagina. Aliweka mdudu yake nyuma ikatokelezea huko mbele. He told me he would take me to the beach. I then wore my clothes. I cried when he inserted his penis in my vagina....."*

33. Theappellant in his submissions wasof the view that PW1 could have been mistaken about his identity because she said the offenceoccurred at night and there were two more occupants in the room.This court's finding from the evidence adduced was that PW1 was not mistaken about the identity of her defiler. She gave a very clear account of how the offence was committed and who the perpetrator was. It cannot be said that at the time that she went to sleep she did not know the identity of the person who was sleeping next to her. She gave a vivid account of how she and the appellant lay on the bed and how he inserted his penis in her vagina, as the two lay side by side on the bed.

34. She explained that the appellant was the one who was lying behind her on the bed. PW1 also stated when the appellant inserted her penis in her vagina from behind, he told her that he would take her to the beach. The foregoing evidence of PW1 indicates that apart from physical identification, there was the element of identification of the appellant by voice. Further, PW1's evidence was that she wanted to be (sleep) at the end of the bed but the appellant asked her to sleep next to him, and then did bad manners to her.

35. PW2's mother stated that was the 3rd time the children had gone to visit the appellant. There is no evidence on record to show that PW1 was defiled by either K or B as the appellant would like this court to believe. According to PW2, K was interrogated by the police and he indicated that he knew nothing about the offence as he was fast asleep. In the said circumstances and based on the evidence pertaining to the identity of PW1's defiler, it is this court's finding that the identification of the appellant was free from the possibility of error and the issue of mistaken identity does not arise.

If the contradictions and or inconsistences rendered a fatal blow to the prosecution case.

36. The alleged inconsistency pointed out in the typed proceedings was to the effect that PW3 said that the offence occurred on 14th January, 2015. This court referred to the original handwritten proceedings which reveal that the incident happened on 14th June, 2015 butPW1 did not talk about it until 16th June, 2015. The charge sheet reads that the offence occurred on the 13th of June, 2015. The second inconsistency pointed out in PW3's evidence is that the P3 form was filled on 20th June, 2015 whereas the Doctor, PW4, said it was filled on 17th June, 2015. The correct position as per the P3 form is that it was filled on 27th June, 2015 and the Doctor did not contradict herself in that aspect. Onthe issue of the PRC form, it was filled on 17th June, 2015 and that is what the Doctor said in her examination-in-chief.This court's finding is that the contradictions brought about by the evidence of PW3, the Investigating Officer, are not material so as to render a fatal blow to the prosecution case.

37. In **Twehangane Alfred v Uganda[2003] UGCA 6,** the Uganda Court of Appeal held thus on the issue of contradictions:-

> ***"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point out deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".***

38. Apart from the evidence of PW3 and PW4, the evidence of PW1 renders credence to the date when the offence reflected on the charge sheet was committed. The evidence of PW2 was to the effect that the PRC form for PW1 was filled on 17th June, 2015 which was the same date which was given by the Doctor, PW4, in her evidence.It is this court's finding that there is other evidence available on record which is cogent andconsistent. Inthe said circumstances, the contradictions in the evidence of witnesses do not vitiate the prosecution's case, more so, as the dates when the medical documents were filed are discernible from them.

If the prosecution's failure to call somewitnesses weakened the prosecution case.

39. As was submitted by Ms Mwangeka, the Doctor, PW4, who testified on behalf of Dr. Otieno was familiar with his signature. PW4 laid a proper foundation to the production of the P3 form on Dr. Otieno's behalf. The provisions ofSection 77 of the Evidence Act came to play and they were complied with.

40. With regard to the failure bythe prosecution to call the person who filled the PRC, Saida Mwinyi, it is apparent from the sub-heading of the 1stpage ofthe PRC that the findings on the said form are supposed to be used as clinical notes to guide in thefilling of the P3 form. It therefore follows that whatever iscaptured on the P3 form is derived from the PRC form. Inthe said circumstances, it was not mandatory tocall the person who examined PW1 on 17th June, 2015 since PW4 produced the P3 form which captured the findings on the PRC form. In any event, if the appellant felt strongly during trial that Saida Mwinyi should have been called to produce the PRC form, he could have informed the Trial Court that he wanted the said witness to be either availed to court by the prosecution or summoned to testify by the said court.

41. The appellant also submitted that one Grace who was mentioned by PW2 was not called as a witness by the prosecution. From the evidence of PW2, it is apparent that Grace did not play any important role in this case. PW2 stated that aftershe saw the wound on PW1's private parts, she called Grace who also examined PW1 and made the same observation.

42. In regard to the issue of discretion on the part of the prosecution on the witnesses to call to court, in **Mwangi v R [1984] KLR 595,** the Court of Appeal held that:

> ***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."***

43. In this case, this court cannot draw anadverse inferencefrom failure by the prosecution to call Grace totestify in court. Just like PW2, Grace was not a medical expert and that is the reason why PW1 was taken to CPGH hospital for medical examination. Even if Grace had come to court to say that she saw a wound on PW1's vagina, more evidence would still be required to establish how the injury came about.

If the appellant'sdefence was considered.

44. The Trial Courtconsidered the defence raised by the appellant and found that the it was proved that he did not separate withhis wife because of a dowry dispute but because there was a time when she went to take care of her mother, PW2, and when she went back to her house, the appellant told her not to return to the home he shared with her. In this court'sview,the Trial Court correctly found that the allegation of a frame up due to unpaid dowry was farfetched. This courtholds a similar position and is of the finding that the appellant'sdefencecannot hold inthe face of the evidenceagainst him. A child such as PW1 could not have made up such a serious offenceagainst the appellantbecause of things thatshe was not a party to, such as the outstanding dowry for her sister PB. The bad relationship between the appellant and his wife had nothing to do with the 8 year old victim who was defiled. It is the finding of this court that the allegation of a frame up against the appellant by PW2 andher family was not believable and flies in the face of the evidence adduced against him.

If the prosecution provedits case beyond reasonable doubt.

45. On the issue raised by the appellant that PW1 had forgotten what happened to her on the night of the incident, this court holds that there was nothing untoward about PW1 being allowed to refresh her memory. PW1 was 8 years old when shewas defiled by the appellant. Herclaim that she was defiled was corroboratedby the findings captured on the PRC formthat she hadlacerationson her labia majora and slight lacerations at the fourchette and vestibule. Her hymen was partially broken. She also had lacerations onher anus at the 12 o'clock and 10 past 12 o'clock. She also had a vaginal discharge. The Doctor who filled the P3 form captured the abovefindings and assessed the degree of injuryas maim. Page 2 of the said report indicates that the Doctor relied on the records of 17th June, 2015 in approximating the age of the injuries. It is thefinding of this court that the prosecution proved its case beyond reasonable doubt. This court upholds the conviction against the appellant.

Whether the sentence was harsh or excessive.

46. The appellant was sentenced to life imprisonmentunder the provisions of Section 8(2) of the SexualOffences Act. When called upon to mitigate, the he said he had nothingto say.

47. The prosecutionrelied on the case of **Jared KoitaInjiri v Republic** [2019] eKLR and urged this court to consider reviewing the appellant'ssentence from life imprisonment to a definite term of 30 years imprisonment.

48. It isnot in doubtthat the appellant committed a heinous crime by preying on his estranged wife's younger sister who was only 8 years old, after her mother allowed her to accompany him and his sons, to his house at Bamburi. He turned a predator at night after ensuring that his sons were asleep. Such an act is an abomination which makes the appellant an offender who deserves a deterrentsentence for a long time behind the walls and gates of prison, to keep young girls safe from his hideous ways. Having said so, this court takes into account the **KoitaInjiri** case (supra) and hereby reviews the sentence of life imprisonment imposed on the appellant and substitutes it with a sentence of 30 years in prison from the date he was sentenced by the lower court. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 12thday of May, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Valerie Ongeti - Prosecution Counsel for the DPP

Mr. Mohamed Mohamud- Court Assistant