REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 74 OF 2019

(From Original Conviction and Sentence in Mumias Senior Principal Magistrate's Court Sexual Offences Act Case No. 22 of 2018 by Hon. TA Odera, SPM, of 17th June 2019)

EMMANUEL MACHARIA CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. TS Odera, Senior Principal Magistrate, of defilement contrary to section 8(1), as read with section 8(2), of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya, and was accordingly sentenced to life imprisonment. The particulars of the charge against the appellant were that on 16th July 2018, at about 1.00 PM in Mumias West Sub-County, Kakamega County, he intentionally caused his penis to penetrate the vagina of SAK, a child aged ten (10) years. He pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called six (6) witnesses.

2. FN was the first to take the witness stand, as PW1. She was an aunt of PW2, the complainant child, with whom she was staying, after the child's parents separated. She said that the child was born on 18th May 2007, making her ten years at the time of the testimony. She testified that she had been away on a business trip in Uganda at the time of the alleged incident, and when she came back on 23rd July 2018, she noted that PW2 was walking with a gait. When she enquired from her what had happened, the child told them that she had been pricked by a needle. When she enquired further, the child revealed that she had been defiled by a person she identified as *Mla Chake*, on 16th July 2018, and that he gave her some money after that and told her not to reveal the incident. The witness testified that she knew *Mla Chake* as a neighbor, who used to visit her house, as he used to work for her mother-in-law. He informed the village community policing officer, and she and her husband went to the appellant's house, arrested him, took him to the community policing officer, who took him to Mumias Police Station. She thereafter took the child to the Matungu Sub-County Hospital, where the complainant child was examined and treated. PW2 had a foul smell coming out of her vagina, and had a tear below her vagina.

3. SAK, the complainant, testified as PW2, and she gave a sworn statement, after the court assessed her to be sufficiently intelligent, and to have understood the meaning of an oath. She testified that she was eleven (11) years old, and a Standard Three pupil. She stated that she knew *Mla Chake*. She said that when she went to fetch wood at about 1.00 PM, *Mla Chake* came to where she was, took her by the hand, led her to his house in Mjini, which was near that of PW1, he put her on his beddings, he removed her underwear and then removed his penis and inserted it into her vagina. She felt pain and she screamed, but he told her not to, and promised her money, and told her not to tell anyone after the incident. He gave her Kshs. 20.00, after which she went home. She said that when PW1 came home, she enquired as to why she was walking with difficulty and she informed her what had happened. She identified *Mla Chake*, the person who defiled her, as the appellant who was in the dock at the time of testimony. She said that she did not know his three names.

4. PW3, Swalleh Hamisi Juma, said that the appellant was a neigbour, and so was PW1 and PW2. He testified that on 23rd July 2019, the appellant had been arrested after he had defiled PW2. As a charged crowd had formed, he rushed him to Mumias Police Station. He went with PW1, PW2 and the appellant to the police station. He stated that he knew the appellant by his nickname, *Mla Chake*, and it was at the police station that he got to know that his name was Emmanuel. PW4, AKC, was the biological father of PW2. He said that she was ten years old. He identified the appellant as his neighbour. He stated that on 18th July 2018, when he went to his house, PW1, his sister, came and informed him that the appellant had defiled PW2. He and PW1 went to the house of the appellant and arrested him. They then called PW3, who came and rearrested him. He described the appellant as a neighbour. PW5, Michael Baraza, was the clinical officer, who attended to PW2 at Matungu Sub-County Hospital on 24th July 2018. PW2 had a history of having been defiled on 16th July 2018, by a person known to her. He examined her vagina, and found the perineum torn, and there were visible bruises. The hymen was recently broken. There was discharge on the cervix. Laboratory tests showed that VDRL, HIV and pregnancy were negative. He found urine had some infection. He put her on antibiotics and painkillers. He concluded that the child had been defiled. He filled the P3 form, which he put in evidence, together with the treatment notes. PW6, Number 54786 Police Corporal Maurice Otieno, attached to Mumias Police Station, was the investigating officer. The report of the incident was made to him by PW1, PW2 and PW3. He issued the minor with the P3 form and sent her to hospital for its filling. He gave details of the steps that he took with respect to the investigation of the matter

5. The appellant was put on his defence. He gave a sworn statement, but did not call witnesses. He testified that the week stating 15th July 2018, he was with his friends harvesting maize in Sabatia, and he did not return to Mumias until 23rd July 2018. He said he was surprised to be arrested at his house on the night of 23rd July 2018. He said he was taken to the house of PW1, and interrogated. He denied defiling the child, whereupon he was beaten in an effort to force him to confess. When he stuck to his guns, they called, PW3, the community policing officer, *nyumba kumi*, who came, and rescued him, and took him to the police. He was thereafter taken to court. He said that he did not know PW1 prior to his arrest. He admitted to having been similarly charged with defiling a minor, at Kitale, where the victim was 2 ½ years old. He said he was not able to get the persons he was working with at Sabatia to corroborate his evidence.

6. After reviewing the evidence, the trial court convicted the appellant of the main charge, and sentenced him as stated in paragraph 1 of this judgement.

7. Being dissatisfied with the sentence the appellant filed the appeal herein, and raised several grounds of appeal. He avers that the trial court convicted him to a harsh sentence without considering his *alibi* defence, the evidence of PW2 was not corroborated, the evidence was a farfetched and fabricated, PW2 was taken to hospital five days after the alleged defilement, his age and mitigation were not taken into account, the sentence imposed was harsh, and the trial court convicted him on the basis of testimonies of persons who were not eyewitnesses.

8. The appeal was canvassed on 3rd March 2020. The appellant relied on written submissions that he had placed on record, while Ms. Omondi, Prosecution Counsel, appearing for the respondent, made oral submissions.

9. One of the issues raised in the written submissions by the appellant was that some crucial witnesses were not called, such as the minors who were left at home with PW2. It is also argued that there was inconsistency with respect to the position of the house of the appellant relative to that of PW2. It is further submitted that the owner of the house where he was alleged to be staying was not called as a witness, and that the claim that he lived in another person's house contradicted the claim that the incident happened in his house. It is also submitted that the evidence that he defiled PW2 on a bed contradicted the evidence of PW6 that when he visited the house he did not find a bed. On *alibi* defence, it is submitted that he had stated in his defence that he was way from 15th July 2018 to 23rd July 2018, and that was not considered. It is submitted that once he raised that defence, the prosecution should have responded by calling further evidence to contradict it, by virtue of section 309 of the Criminal Procedure Code, Cap 75, Laws of Kenya. It is submitted that the trial court overly relied on section 124 of the Evidence Act, Cap 80, Laws of Kenya. It is further submitted that the trial court relied on the uncorroborated evidence of a minor. It is submitted that the trial court should have summoned the other minors to come and testify to corroborate the testimony of PW2. It is also submitted that the trial court did not take into account that PW2 was medically examined five days after the incident. Finally, it is submitted that the sentence imposed was harsh, and should be mitigated in view of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR and *William Okungu Kitinya vs. Republic* [2013] eKLR.

10. In her oral address, Ms. Omondi raised several issues. She submitted that the prosecution had established its case to the required standard, and the appellant had been convicted on the basis of the available evidence. She submitted that all the three ingredients of the offence of the defilement had been proved. She submitted that the appellant was well known to PW2. She submitted, on the age of PW2, that there was evidence from PW1, PW2, PW4 and PW5. On penetration, she pointed at the testimony of PW5. On whether the appellant himself should have been medically examined, she submitted that PW2 reported three days after the event, and examining the appellant thereafter would not have produced tangible results. On contradictions and inconsistencies, she submitted that none were demonstrated, and if there were any, the same did not go to the substance of the charge. She submitted that PW2 was ten years old, she gave sworn testimony and was extensively cross-examined, but her testimony was not shaken by the appellant. On the *alibi* defence, it was submitted that the same was an afterthought that should be disregarded, for it was not raised throughout the trial, but only came up at the defence hearing.

11. I am sitting as a first appellate court; I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic* (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant 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 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 conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

12. I will first deal with the matters as raised in the petition of appeal. The first issue relates to the defence of *alibi*. The appellant, in his sworn evidence, testified that he was away from the area where the offence was allegedly committed, on 16th July 2018, as he was elsewhere as from 15th July 2018. He did not call any of the persons who were allegedly with him at the other place where he alleged he was.

13. The principle relating to an *alibi* defence, as stated in *Ssentale vs. Uganda* [1968] EA 36 *and Wangómbe vs. Republic* [1976-80] 1 KLR 1683, is that by setting up the defence, the accused person does not assume the burden of proving the *alibi*. The prosecution bears the burden of disproving it and proving the accused person's guilt. However, the accused person is required to raise the defence of *alibi* at the earliest opportunity to enable the prosecution time to check it out to determine its veracity. In the words of the Court of Appeal in *R. vs. Sukha Singh s/o Wazir Singh & others* [1936] 6 EACA 145.:

> *"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at* the *earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."*

14. It was said in *Festo Androa Asenua vs. Uganda*, Cr. App. No. 1 of 1998, that:

> *"We should point out that in experience in this country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."*

15. In *Republic vs. GNK* [2017] eKLR, the High Court, in a murder case, found that the prosecution had not called evidence to disprove an *alibi* defence, and, therefore, chose to weigh the *alibi* against the evidence of the prosecution.

16. In the instant case, the appellant did not raise his *alibi* at the earliest possible time. It would appear that he did not raise it with PW6, who was investigating the matter, and, therefore, PW6 did not include it in his investigations. The appellant did not give notice of it during the trial, and, therefore, denying the prosecution the opportunity to call evidence to disprove it. He raised it at the tail end, when he was put on his defence. I note that that did not give the prosecution a chance to deal with it. The prosecution though still had a chance to call evidence thereafter to address it. It would appear that the prosecution chose not to. I shall accordingly adopt the approach that the court adopted in *Republic vs. GNK* (supra), by looking at the *alibi* defence as against the prosecution's case.

17. PW2 was ten or eleven years old at the time she gave her testimony. The trial court found her fairly intelligent to give a sworn statement. She was subjected to cross-examination by the appellant, and from the record before me, she appeared to withstand the same, and stuck to her guns that it was the appellant who defiled her. Her evidence on what transpired found corroboration from the testimonies and evidence of the other witnesses. I am satisfied, from that evidence, that the *alibi* put forward by the appellant was disproved by the prosecution.

18. The second issue relates to corroboration of the testimony of PW2. Section 124 of the Evidence Act allows the court to convict on the sole evidence of a victim of a sexual offence if it is reliable and truthful. That would mean that the trial court can convict on the evidence of the victim without looking for corroboration where the same appears believable. In the instant case, PW2 gave sworn evidence. She was unshakable at cross-examination. She gave evidence that was straightforward about what befell her in the hands of the appellant, who she clearly identified. That evidence alone, would have been sufficient to sustain a conviction of the appellant, even without corroboration. There was corroboration, however. PW2 narrated to PW1, PW5 and PW6 what had befallen her. The medical evidence adduced by PW5 was consistent with defilement. Therefore, it cannot be said that the trial court fell into any error with respect to the matter of corroboration.

19. The other ground is that the trial court relied on fabricated and far-fetched evidence. It was incumbent upon the appellant to demonstrate that the evidence adduced by the prosecution was fabricated. I have carefully gone through the written submissions that he placed on record herein, and noted that he did not at all address that ground. He did not point at any instances where one might say that the evidence recorded was in any manner fabricated or farfetched. PW2 clearly identified him as the perpetrator of the defilement alleged, and when she was medically examined, the evidence gathered by PW5 was clear that PW2 had been defiled.

20. The other ground is about the manner of the appellant's arrest. Again, looking at the written submissions, I have not found elaboration of this ground. It has not been demonstrated that the manner of the appellant's arrest could have helped the court in one way or other in determining the guilt or otherwise of the appellant. He claims that he surrendered himself to PW1, yet the recorded evidence does not point to him surrendering, but rather to his having been cornered at his house, arrested and handed over to PW3. The question of his surrender did not arise, and even if he had surrendered voluntarily, the mere fact of it would not be adequate to absolve him, for that fact or act would have to be taken against the totality of the evidence adduced. In the instant case, even if he had surrendered himself to PW1, of which I am not persuaded by the facts before me, the other evidence on record, does not point to his innocence.

21. The appellant has also averred that PW2 was medically examined five days after the event, to argue that the medical evidence was questionable. PW5 is the person who medically examined PW2, quite sometime after the incident happened. He is a professional in his field. He examined PW2 and was able to get evidence of defilement from that examination. I have no reason to doubt him. It was up to the appellant to challenge PW5's testimony and evidence through cross-examination. He did cross-examine him, but nothing came out of it, by way of undermining that testimony or evidence. He also had opportunity to call a medical officer of his own choice to give an opinion on that testimony, he did not avail himself of that opportunity.

22. The prosecution submitted on the lack of medical examination of the appellant to connect him to the offence. However, the appellant did not raise that matter, both in his petition of appeal nor in his written submissions. Consequently, I shall not train my mind to those arguments by the prosecution.

23. The appellant has argued that the trial court convicted him on the basis of evidence of persons who were not eyewitnesses. It is not exactly clear what he means by this. PW2, was the victim. It happened to her. She gave a straightforward narration of what happened to her. As stated above, the trial court could convict on the basis of that evidence alone. There is no requirement that the trial court should convict only on the basis of evidence or testimonies of eyewitnesses. In any event, I have already held elsewhere that the testimony of PW2, which was based on firsthand experience, was corroborated. So nothing should turn on this.

24. Finally, the appellant has averred that his age and his mitigation were not considered at mitigation. The issue of the age of the appellant does not appear to have arisen in the course of the proceedings. The charge sheet identifies him as a juvenile, whose apparent age was put at ten (10) as at the date of arraignment. When he testified on 13th March 2019, the court recorded that he was an adult. When he gave his statement in mitigation he did not state how old he was. I have seen on record a police form dated 27th July 2018 which indicates that the appellant had been born in 1991.

25. Regarding age, it would be well to point out that the age of the offender is a critical factor in sentencing, for children enjoy special protection under the Children Act, Cap 144, Laws of Kenya. Younger persons too should be treated differently from more mature offenders when it comes to sentencing. These are critical factors, and if the appellant was a child at the time of commission of the offence that should have been a factor for the court to take into account in sentencing. If he was a young person, similarly, that was also critical.

26. On mitigation, I note that he said that his mother was disabled and was dependent on him for upkeep. He also said that there was a child of his sister, who was abroad, that he was also taking care. He did not express remorse, nor ask for leniency. There is, therefore, little in the mitigation that the trial court could be said to have had ignored or failed to take into account.

27. I have noted from the written submissions that the appellant has raised the issue of contradictions and inconsistencies in the testimonies of some of the witnesses. The testimony of PW2 was clear on the events, and so is that of PW2. Some of the other testimonies do contain some inconsistencies. However, I note that those testimonies were recitations of the narrations that they received from PW2. These inconsistencies do not go to the core of the matter, and they are of little consequence. I say so, bearing in mind what the court in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, said on inconsistencies and contradictions, which decision I find persuasive. The court said:

> *'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 to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."*

28. The offence of defilement was established to the extent that the state proved the age of the complainant, the fact of penetration and the appellant was identified as the perpetrator of the crime. I agree with the respondent that all these ingredients were positive in the instant case. What needs to be proved for the purposes of defilement was stated in *Dominic Kibet Mwareng vs. Republic* [2013] eKLR in the following terms that -

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

29. Overall, I am not persuaded, on conviction, that the trial court fell into any error. I shall, therefore, uphold the conviction.

30. On the sentence, the appellant has argued that the same is harsh. The child victim was a minor of ten. The provision under which the appellant was charged provides for a mandatory sentence of life imprisonment. It cannot be said that the trial court fell into error, in the circumstances, in awarding the sentence that it did.

31. Recent developments in jurisprudence on minimum and maximum sentences, however, would require me to give the same a second look. According to the Court of Appeal and the Supreme Court, the trial court should have some discretion to impose such sentences as it considers appropriate in the given circumstances, without being constrained by the ceilings imposed by statute, and in particular the lower one. I am conscious of the fact that the Sexual Offences Act was passed to protect underage girls from predators who prey on them, whether the predator use their physical strength to force sexual connection, or takes advantage of their immaturity to lure them into consensual sex, bearing in mind that legally, an underage person is deemed to be incapable to consenting to sexual activity, and any purported consent to such activity should be a matter of little consequence.

32. From the material before me, the age of the appellant is not disclosed, and from the material on record it is not clear whether he was a child or an adult at the time of commission of the offence. The complainant was a minor of very young age, ten or eleven at the material time, barely out of tender age. She was literally a baby, and any sort of sexual connection between her and an adult can only be described as inhuman and violation of her. It would leave her with lifelong psychological trauma. Any adult who preys on such young children should not be extended any form of mercy. A deterrent sentence is, no doubt, apt, to make the offender payback and to give him sufficient time in jail to learn a lesson. However, in this case, it is not clear whether the perpetrator was an adult or not. Before I make a definite determination on whether to interfere with the sentence one way or the other the age of the appellant ought to be assessed and determined.

33. In view of everything that I have said above, these are the final orders:

(a) That the aspect of the appeal on conviction is dismissed and the conviction is upheld;

(b) That determination of the appeal on sentence is hereby suspended to await determination of the age of the appellant;

(c) That I hereby direct that the appellant be presented before the Medical Superintendent of Health responsible for the Kakamega County Referral Hospital for the purpose of assessment of his age, particularly as at 16th July 2018, and to thereafter prepare a report to be submitted in court;

(d) That the matter shall be mentioned in court after thirty (30) days on a date to be allocated at the date of delivery of this judgement; and

(e) That final orders on the sentence to be made thereafter.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF MAY, 2020

W. MUSYOKA

JUDGE