REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 73 OF 2019

RS..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(from the original conviction and sentence by H. Wandere, SPM, in Kakamega

CMC Sexual Offence Case No. 51 of 2015 delivered on 24/6/2019)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 15 years imprisonment. He was dissatisfied with the conviction and the sentence and filed this appeal. The grounds of appeal are:-

(1) That the learned trial magistrate grossly erred in law and fact in convicting the appellant in a trial that did not meet the thresh-hold and standards of a fair trial as set under article 50 (2) of the Constitution of Kenya.

(2) That the trial magistrate erred in law and fact in convicting the appellant on evidence that she never heard or saw the witnesses testifying before her.

(3) That the trial court erroneously offended section 200 of the Criminal Procedure Code.

(4) That the learned trial magistrate grossly erred in law and fact in failing to note that the prosecution had failed to call a crucial witness in the case i.e. the investigating officer.

(5) That the learned trial magistrate grossly erred in law and fact by failing to observe that the prosecution case was full of contradictory uncorroborated and inadequate evidence which was not safe to sustain a conviction.

(6) That the learned trial magistrate grossly erred in law and fact in failing to observe that the appellant was not subjected to medical examination as underlined under Section 36 of Sexual Offences Act No. 3 of 2006.

(7) That the learned trial magistrate grossly erred in law and fact in finding that penetration was proved to the required standard even in the wake of flimsy and inadequate evidence by the prosecution.

(8) That the learned trial magistrate grossly erred in law and fact in raising the issue of pregnancy during judgment which issue was not raised during the trial.

(9) That the trial court erroneously convicted the appellant without giving due consideration to his defence but instead shifted the burden of proof to him.

2. Further supplementary grounds of appeal were filed by the advocate for the appellant, Mr. Munyendo contending that the prosecution did not prove penetration by the appellant; that there was no corroboration of the prosecution’s case and that the fact that the complainant was two months pregnant at the time of the alleged offence was consistent with being an adult. Further that the sentence imposed was unconstitutional in view of the Supreme Court decision on mandatory sentences.

3. The grounds of appeal were expounded by oral submissions of **Mr. Munyendo**. The state through the prosecution counsel **Mr. Mutua** opposed the appeal through oral submissions.

4. The particulars of the offence against the appellant were that on the 6th day of July, 2015 at around 1700 hours at [particulars withheld] Shopping Centre in Shibuye Location of Kakamega Central District within Kakamega County intentionally and unlawfully caused his penis to penetrate the vagina of JM (herein referred to as the complainant), a child aged 16 years.

5. The case for the prosecution was that the complainant was staying with her grandmother at [particulars withheld]. That on the material day at 7 p.m. she and her younger sister were heading to Bukura Shopping Centre to buy some vegetables. The appellant came along on a motor cycle. He offered to give them a lift. They agreed. On getting to the Shopping Centre the appellant did not stop. He instead went ahead and stopped at Matioli Primary School. He bought a soda for the complainant's sister. He then talked to a lady and called the complainant to a lodging. The complainant and her sister went to the place. The appellant sent away the complainant's sister. He pulled the complainant into a lodging room and closed the door. He pushed her onto a bed and started to remove her clothes. She resisted. He forcibly removed her clothes and forcibly had sexual intercourse with her. After he finished with her someone knocked the door. The appellant opened the door. Two men confronted the appellant and demanded to know what he was doing with the girl. The appellant denied having done anything to the complainant. The people locked the door from outside. APC Victor Odudo PW2 then of Matioli AP Camp received the report. He went to the place and found the complainant and the appellant locked up in a lodging room. He ordered them to open the door. The appellant opened the door. The complainant told him that she was a standard 7 pupil at [particulars withheld] Primary School. He arrested the two of them and took them to Kakamega Police Station.

6. On the following day the complainant was taken to Kakamega County Referral Hospital for examination. She was examined by a Dr. Kibet who found her to be two months pregnant. The genetalia was normal. Her age was assessed at 16 years. The appellant was charged with the offence. During the hearing a clinical officer Ng'anga Karanja, PW3 produced the treatment notes, the Post Rape Care form, the P3 form and the age assessment report as exhibits, Ex 1-4 respectively.

7. When placed to his defence the appellant gave an unsworn statement in which he denied defiling the complainant. He stated that the complainant was his relative and that the matter was out of a family dispute.

8. When convicting the appellant of the offence the trial magistrate stated that the evidence of the complainant was corroborated by the evidence of the police officer PW2 who found the complainant and the appellant locked up in a lodging room. That medical evidence indicated that the complainant was two months' pregnant which was proof that she had engaged in sexual activity. That medical documents produced in the case amounted to corroboration of the evidence. That there was penetration on the complainant by the appellant. That the age assessment report proved the age of the complainant at 16 years. Therefore that the case against the appellant was proved beyond all reasonable doubt.

9. Mr. Munyendo submitted that the case was not proved beyond all reasonable doubt. That the age of the complainant was not proved. That her estimated age as per the doctor who completed the P3 form was 19 years. That the Post Rape Care form indicates that she was born in 1996. That the age assessment indicated her age as 16 years. That the person who conducted the age assessment did not testify in the case. That the trial magistrate did not consider the age indicated in the other documents other than the one stated in the age assessment report.

10. Counsel further submitted that penetration was not proved. That on examination the complainant was found to be two months pregnant. That it was not indicated who was responsible for the pregnancy. That there was no presence of spermatozoa. That the trial court did not consider the appellant's defence. Further that the appellant was sentenced to the minimum sentence. Counsel urged the court to allow the appeal.

11. Mr. Mutua on his part submitted that the complainant testified that she was aged 16 years. That her age was assessed at 16 years as per the age assessment report. That there was no need to call the maker of the document to testify in court as it was assumed that the document was genuine. That penetration was proved through the P3 form and Post Rape Care form. That the complainant pointed out the appellant as the perpetrator. Further that the appellant did not bring forth any evidence to support the issue of dispute. That the trial court had the discretion to impose the minimum sentence.

12. This being a first appeal the duty of the court is to analyse and re-evaluate afresh the evidence adduced before the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1973) EA 32.**

13. The case was initially heard by Hon. S. M. Wahome SPM who took the evidence of the complainant (PW1). He went on transfer and the case was taken over by Hon. Wandere.

14. The appellant contends in his grounds of appeal that the trial magistrate did not comply with the provisions of Section 200 of the Criminal Procedure Code. That he was thereby convicted on evidence which the trial magistrate never heard nor seen the prosecution witnesses as they testified before court.

15. Section 200 (3) of the CPC provides as follows:-

> ***"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

16. The court record of 29/5/2017 indicates that when Hon. Wandere took over the matter she indicated that:-

"Provision of Section 200 (3) CPC complied."

The appellant then stated in Kiswahili:-

"I will be praying that PW1 be recalled for further cross-examination."

17. Later on 31/7/2017 the appellant addressed the court as follows:-

"I wish to be supplied with copies of witness statements including that of PW1. No need to recall her. I can continue with other witnesses."

18. It is then clear that the trial court duly complied with the provisions of section 200 (3) of the CPC. The appellant is the one who dispensed with PW1 being recalled for further cross-examination. The referred to Section allows a trial court to proceed with the evidence of a witness taken by a magistrate who has ceased to exercise jurisdiction. There is no basis on the allegation that section 200 (3) of the CPC was not complied with. That ground of appeal does not stand.

19. The investigating officer was not called as a witness in the case. However the mere failure to call the investigating officer in a case does not call for an automatic acquittal. Each case has to be decided on its own merit on whether the evidence of the investigating officer was crucial in the case. In **Kiriungi –Vs- Republic (2009) KLR 638** it was held that:-

"It was good practice for prosecuting authorities to comply with the requirement to call investigating officers as witnesses but the mere failure to comply with it could not automatically result in an acquittal."

The court further held that it was not mandatory for an investigating officer to be called unless there was an allegation that he would have something adverse to the prosecution case. In the case against the appellant, there was no allegation that the evidence of the investigating officer would have been adverse to the prosecution. In the premises failure to call the investigating officer was not fatal to the prosecution case.

20. There was no doubt that the appellant had sexual intercourse with the complainant on the material day. APC Odudo PW2 found both the appellant and the complainant locked up in a lodging room. The complainant testified that the appellant lured her into the lodging room where he had sexual intercourse with her. There is no reason to doubt this evidence. The fact of APC Odudo finding the two of them in a lodging room puts credence to the evidence of the complainant that the appellant had sexual intercourse with her. Though there was no medical evidence to support sexual intercourse the same can be deduced from the circumstances. The Court of appeal in **Kassim Ali –Vs- Republic, Mombasa Criminal Appeal No. 84 of 2005** held that the fact of rape can be proved by oral or circumstantial evidence. The circumstantial evidence in the case proved that the appellant had sexual intercourse with the complainant. The only reason why the appellant could have taken the complainant into a lodging room is for purposes of having sex with her. Penetration was thereby proved.

21. The appellant submitted that it was not proved that the complainant was aged below the age of 18 years. It is of utmost importance for the prosecution to prove the age of the victim in a case of defilement. This is because the sentence to be meted out on an accused person is dependent on the age of the victim. This was emphasized by the Court of Appeal in **Hudson Ali Mwachongo –Vs- Republic (2016) eKLR** where the court held that:-

"It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In *Alfayo Gombe Okello –Vs- Republic (2010) eKLR* ***this court stated as follows:-***

'in its wisdom parliament chose to categorize the gravity of the offence on the basis of the age of the victim and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under S. 8 (1)'."

22. The age of a person can be proved in various ways including medical and oral evidence. In **Mwolongo Chichoro Mwanyembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR) (**cited in **Edwin Nyambaso Onsongo –Vs- Republic (2016) eKLR)** the Court of Appeal held that:-

"…the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "..we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

23. The complainant in her evidence stated that she was aged 16 years. However her year of birth indicated in the Post Rape Care Form and in the Laboratory Request form was 1996 which would put her age in 2015 at 19 years. The doctor who filled the P3 form estimated her age in section "C" of the P3 form at 19 years. According to the age assessment report, P.Ex4, the complainant's age was assessed at 16 years on the basis that all second molars were fully erupted and the mandibular wisdom teeth partially erupted.

24. The age assessment report appears to have been signed by a certain person on behalf of Dr. Khakina, the medical superintendent, Kakamega County General Hospital. The qualifications of the person who conducted the age assessment is not indicated in the report. The

maker of the document did not testify in court. It is trite law that before such a document is admitted in court, the qualifications of the maker of the document must be disclosed. The document is required to be produced in court either by the maker or in his absence a person familiar with his hand writing and signature. In this case this procedure was not complied with. The document was therefore unprocedurally produced in court. It is neither credible nor reliable.

25. It is most likely that it is the complainant who gave her year of birth to Dr. Kibet as 1996, otherwise where would the doctor have gotten the information from? A question then remained whether the complainant was aged 19 years as she told Dr. Kibet or 16 years as she stated in her evidence in court. There is a possibility that the complainant was aged 19 years.

26. The trial magistrate did not consider the possibility that the complainant was aged 19 years as per the documents that were before court. There was no reason for the trial magistrate to rely on the age assessment report to determine the age of the complainant and not the age indicated in the Post Rape Care form and the P3 form. According to the complainant she had already quit school when the incident occurred. The benefit of doubt on the age of the complainant should have been accorded to the appellant.

27. The upshot is that it was not proved that the complainant was a person aged below the age 18 years. The conviction was not safe. The conviction is quashed and the sentence imposed by the lower court set aside. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed at Kakamega this 14th day of May, 2020.

J. N. NJAGI

<u>JUDGE</u>

In the presence of:

No appearance for Appellant

Mutua for State/Respondent

Appellant – present through video link to Kisumu Maximum Prison

Court Assistant - Polycap

14 days right of appeal