REPUBLC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 85 OF 2019

STEPHEN NGUI KYALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. E.M. Muiru dated 15/05/2019 in Kilungu SRMCR (S.O) No.28 of 2018.)

JUDGEMENT

1. **Stephen Ngui Kyalo** *alias* **Kotua Kyalo** the Appellant herein was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) Sexual Offences Act. Particulars were that the Appellant on the 6th day of May, 2017 in Kilungu sub-county within Makueni county, intentionally caused his penis to penetrate the vagina of **GWM** a child aged 15 years.

2. Upon conviction he was sentenced to serve twenty (20) years imprisonment. Being aggrieved he filed this appeal through Mr. R. M. Matata advocate on the following grounds: -

1) **That,** the learned trial Magistrate erred in both law and facts when she failed to analyze the particulars of the charge sheet and Appellant's arrest regard being had to the charges and the evidence hence erroneously convicted and sentenced the Appellant.

2) **That,** the learned trial Magistrate erred in both law and facts when she heavily relied on the evidence of a witness who had not recorded a statement with the investigating officer seriously disregarding trite criminal Jurisprudence and hence wrongfully convicted and sentenced the Appellant.

3) **That,** the learned trial Magistrate erred in both law and facts when she took into account evidence of persons/person who declined to testify and hence wrongfully convicted and sentenced the Appellant.

4) **That,** the learned trial Magistrate erred in both law and facts when she deliberately ignored and/or refused to critically analyse the medical evidence presented before her which created serious doubts on the credibility of the prosecution's case and hence failed to accord unto the Appellant the benefit of doubt and as such also wrongfully convicted the Appellant.

5) **That,** the learned trial Magistrate erred in both law and facts when she heavily relied on the evidence of witnesses which was irrelevant and of no value and hence wrongfully convicted and sentenced the Appellant.

6) **That,** the learned trial Magistrate erred in both law and facts when she dismissed the Appellant's defence on the face value and hence proceeded to wrongfully convict and sentence the Appellant.

7) **That,** the learned trial Magistrate erred in both law and facts when she failed to consider that the age of the complainant could not be ascertained with precision and hence failed to accord that benefit to the Appellant and so wrongfully convicted and sentenced the Appellant.

3. Pw1 (**GWM**) who said she was 15 years of age testified that on 6th May, 2017 at 8am she went to the Appellants' shop to buy sugar. She had been to that shop severally. While at the shop, the Appellant asked her to enter into the shop and thereafter closed the main door. He told her to remove her clothes which she did while in a room behind the shop. He then had sexual intercourse with her by inserting his penis into her vagina. She never screamed. She was thereafter released to go and she left with her sugar, after being warned not to tell anyone.

4. She got home at about 8:58 am but never informed her mother who had sent her. Thereafter, the District officer of Kyambeke came to her home to ask who had offended her and she mentioned the Appellant. She had been pregnant and had taken a drug for abortion. She neither went to school or to hospital. She said she was born on 10th April, 2010.

5. In cross examination, she admitted having had sex with several other men. In this instance they had done it on the floor. She never told anybody about her other experiences. The 6th May, 2017 was a Saturday and she went to school on the Monday following. One **Nzomo Mangatha** had defiled her severally and is the one who gave her the drug for abortion.

6. She said the District officer came to their home on 11th May 2018 at 2:00 pm. She told him of the 21 men who had defiled her but she could not remember the dates when each defiled her. It is only the Appellant's date of 6th May 2017 which she remembered. She mentioned several hospitals where she had been taken for the abortion.

7. Pw2 **BM** who is Pw1's mother denied any knowledge of this case and so did not give any evidence. Pw3 **No.217996 Sgt. Samuel Kuria** attached to Ilima AP Post confirmed arresting the Appellant after a meeting to discuss defilement cases in the area. A report was made at Kilome Police Station but not at Ilima AP Post.

8. Pw4 **Eric Kasiamani** a clinical officer based at Kilungu sub-County hospital examined Pw1 on 22nd May, 2018 for purposes of filling the P3 form and age assessment. He said the ultra sound showed that Pw1 had a pregnancy which had been aborted. The age assessment report EXB2 showed she was aged between 16-17 years. The P3 was produced as EXB 1. The ultra sound report he used was never produced. He believed Pw1 had been defiled because of the perforated hymen.

9. Pw5 **Vincent Nyakako Otieno** is the assistant county Commissioner Ilima division of Kilungu division. He produced an unsigned copy of his returns of defilement and abortion cases in Ilima. He is the one who had visited Pw1 at her home and was given names of men who had defiled her. He said he recorded a statement at Kilome police station, but the same was missing from the police file.

10. Pw6 **JNM** is the head teacher of [Particulars withheld] primary school. She said Pw1 had been her pupil upto January, 2018 when she left due to pregnancy. She later learnt the girl had undertaken an abortion. She had tried to interrogate her on the pregnancy but she never opened up. She confirmed that the Appellant was in the list of those who had defiled Pw1.

11. In cross examination, she said Pw1 was a special needs girl. She had however not reported to her anything about 2017. She only opened up at the Education office when she gave out names of her defilers in the presence of Pw2 and Pw6.

12. Pw7 **No.236312 Inspector Rama Mwachuo** the OCS Kilome testified that on 21/5/2018 he was at the station when Pw5 came there with Pw1 & Pw2 and reported that Pw1 had been defiled severally. Pw1 mentioned Muoki Kyalo & Nzomo Mangata as persons who had defiled her. That Kyalo Muoki had impregnated her while Nzomo Mangata had given her drugs for abortion. He recorded this in the occurrence book and continued with investigations. He took Pw1 for examination and it was confirmed she had had an abortion.

13. On 7/6/18 the complainant returned to the station and made a report in respect to the Appellant having defiled her on 6/5/17. On the same day, she mentioned names of 19 men who had defiled her and the Appellant was one of them. The Appellant was then arrested by AP officers from Kyambeke. He added that on 6/5/18 Pw5 had brought him a list of 21 men who had defiled Pw1.

14. In cross-examination, he said Pw1 did not mention the Appellant when the report was first made. That the P3 form issued was in respect of all the men who had slept with Pw1. He confirmed the incident which occurred on 6/5/17 but was only reported on 7/6/18. He confirmed receiving a list from the district officer but denied recording any statement from him. The said list was not signed. He also said Pw2 had recorded a detailed statement on the pregnancy and abortion. He confirmed that Nzomo Mangata had given Pw1 drugs for abortion.

15. The Appellant gave a sworn statement of defence. He denied the charge but admitted running a retail shop at Katondoloni trading centre of Ilima. He denied knowledge of Pw1 prior to this incident. He was arrested on 7/6/18 after a political meeting. Prior to that, nobody had looked for him and he had not gone into hiding. He said he was aged 68 years in 2017 and he suffers from diabetes and does not sleep with women. He produced his treatment documents as DEXB1. The prosecution had no questions for him.

16. Mr. Matata submitted on the delay in having the Appellant charged. He also raised issue with the P3 form that was produced and which had nothing to do with the Appellant. He contended that what triggered this case was the report by Pw5 who never recorded any statement. He made mention of Pw1's failure to report the matter to anyone.

17. Mr. Matata in his written submissions echoed what he had submitted before the trial court, which I will not reproduce here. Relying on **Martin Charo vs. R [2016] eKLR** he submits that the conduct of Pw1 left a lot to be desired. She had slept with 21 men as at the time of the Appellant's arrest. He added that from the record of 11th July, 2018 the learned trial Magistrate declined to hear this case as he had already decided two cases in respect of the same complainant (Pw1).

18. He also points out that Pw5 never recorded a statement yet he was allowed to testify. Finally, he submits that the complainant's age was never proved. He refers to the case of **Thomas Kwanya Dzombo vs. R Cr. Appeal No.167 of 2009 (Mombasa)** and **B. M. vs. R Cr. Appeal No.200 of 2014 (High Court Machakos).** He contends that the Appellant's defence was never challenged and he was not cross-examined on it.

19. Learned counsel for the Respondent Mrs. Owenga in her written submissions, opposed the appeal saying the evidence linked the Appellant to the offence. That both Pw1 and the Appellant knew each other. Pw1's evidence was truthful and believable. As for the P3 form she submits that the act of defilement is an individual liability and so it did not matter whether the P3 form referred to 21 others. She dismissed the Appellants' claim that he no longer engages in sexual intercourse.

20. Coming to the sentence she submits that though the sentence is lawful the court may vary it downwards owing to the Appellant's age and medication.

Analysis & determination

21. This is a first appeal and this court has a duty to re-examine and reconsider the evidence on record and arrive at its own conclusion. It has also to bear in mind that unlike the trial court, it did not see or hear the witnesses and should therefore give room for that.

22. In the case of **Kiilu & Anor vs. R [2005] 1KLR 174** the Court of Appeal held thus: -

> ***(1) "An Appellant on a first appeal 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.***
>
> ***(2) 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 magistrate's findings should 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."***

23. Later in **David Njuguna Wairimu vs. R [2017] eKLR** the Court of Appeal held that: -

> ***"The duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

24. I have carefully considered the evidence on record, the grounds of appeal, submissions by both parties and the authorities cited. The issue I find falling for determination is whether the case against the Appellant was proved beyond reasonable doubt. In other words, whether the ingredients of the offence of defilement were proved. To prove the offence of defilement the following ingredients must be established;

> ***(i) Age of the complainant.***
>
> ***(ii) Penetration of the complainant's female organ.***
>
> ***(iii) Identification of the perpetrator.***

25. Mr. Matata raised an issue in respect of Pw5 who did not record a witness statement but was allowed to testify. While under cross examination, Pw5 maintained that he had recorded a statement which he forwarded together with the list of the alleged defilers to the then District commissioner and/or the security team that attended the barasa in his area. He expressed shock that his statement was not in the police file.

26. The so called list of defilers produced in the trial court by Pw5 as EXB3 though bearing the letter head of the Ministry of Interior National Government is not signed and is a photocopy. There was no basis laid for the production of the said unsigned photocopy, as provided for under section 77 Evidence Act. It should not have been accepted by the court and I reject its admissibility and expunge it from the record.

27. Pw7 who was the investigating officer testified and said he never recorded any statement from Pw5 who even refused to give him the list of the defilers. So who recorded his statement which was never placed in the police file? How then was he ever allowed by the court to testify without having recorded a statement?

> **Article 50(2)(j) of the Constitution 2010** provides: -
>
> (2) **Every accused person has the right to a fair trial, which includes the right to -**
>
> > **(j) be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**

This is a mandatory requirement to enable the defence prepare its case.

28. In this case I don't understand why Mr. Matata for the defence did not raise an objection in Pw5 testifying since he had not been served with his statement. It even came out through the evidence of Pw7 that the witness Pw5 NEVER recorded a statement. By not raising any objection the defence appeared comfortable with that and proceeded to cross examine the witness. The Appellant is therefore estopped from raising that objection now.

> **(i) Age of the complainant**

29. Section **8(1) and (3) of the Sexual Offences Act 2006** provides as follows: -

"8. Defilement (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

30. The Sexual Offences Act 2006 defines ***"child"*** within the meaning of the Children's Act No.8 of 2001 which defines a child as ***"…. Any human being under the age of eighteen years."***

The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. Sentence for the offence of defilement is pegged on the age of the victim.

31. In the case of **Alfayo Gombe Okello vs. R Cr. Appeal No.203 of 2009 (KSM)** the Court of Appeal stated this: -

"In its wisdom Parliament chose to categorize the gravity of that 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 section 8(1)….."

32. In **Francis Omuroni Uganda Court of Appeal Crimnal Appeal No.2 of 2000** it was held thus: -

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."

33. It is Mr. Matata's submission that Pw1's age had not been determined with precision by the trial court. An age assessment report by Peter Mukeku a dental technologist at Kilungu sub-county hospital was produced as EXB1 by Pw4. It shows that as at 4/6/18 Pw1 was aged 16-17 years. This puts her age at 15-16 years as at the time when the alleged defilement occurred. My finding is that age was proved and Pw1 was confirmed to be a child then.

(ii) Proof of penetration of Pw1's female organ

34. From the evidence on record from majority of the witnesses including Pw1 herself she had indulged in sexual intercourse with 21 men. So it's clear that her female organ had been penetrated, and she had as a result conceived and terminated the pregnancy. The answer to this issue is in the affirmative.

(iii) Whether the Appellant defiled Pw1 on 6/5/17

35. Pw1 testified that she was defiled by the Appellant a shopkeeper at Katondoloni trading centre after willingly getting inside his shop. After the ordeal, she left and went back home with the sugar she had been sent to buy. For a full one year she never told anyone about this encounter, yet she lived with her mother and siblings and she was school going. She claimed that the

Appellant had told her not to tell anyone. She however admitted that he never threatened her.

36. Further evidence shows that she continued indulging in sex with men whose total had by then come to 21. It was not until May 2018 that the administration came to learn that Pw1 was pregnant and had aborted. There is no evidence showing that the Appellant was responsible for the pregnancy or the abortion. So why was the Appellant arrested when no single complaint had been filed at the station for a whole year?

37. Pw3 had tried to tell the court that reports had been made at Kilome police station which was a lie. Pw 7 the investigating officer was very specific that the first time that a report was made at Kilome police station was on 21/5/18.

38. The report was made in the presence of Pw1 and her mother (Pw2) and the District officer Ilima division. On this day Pw1 only mentioned two people i.e. the one who had impregnated her and the one who had given her medicine for abortion.

39. The mother of Pw1 who testified as Pw2 and who was present when the report was being made on 21st May, 2018 at Kilome police station appeared before the trial court and denied knowledge of this case. She was said to have recorded a detailed statement. The prosecution never applied to have her declared a hostile witness and be subjected to cross examination. This court therefore takes it that she knew nothing about this case as stated yet she lived with Pw1.

40. Pw1 returned to the station on 7th June, 2018 though it's not clear whether she was alone or accompanied. This is the day she is said to have mentioned the Appellant's name among 19 others as men who had defiled her. It is not clear whether these 19 people have ever been arrested and charged and if not why.

41. A P3 form (EXB1) was produced by Pw4 who said he examined Pw1 on 22nd May, 2018 and found her hymen to have been perforated and so confirmed that she had been defiled. The simple question is whether this P3 form (EXB1) was in respect of the alleged defilement of 6th May, 2017.

42. The answer is so obvious for three reasons.

(i) Pw4 could not be examining Pw1 on 22/5/18 for a defilement which allegedly occurred on 6/5/17.

(ii) Pw1 admitted having indulged in sex with so many men.

(iii) Just before the examination of 22/5/18 Pw4 had been brought an ultra sound report showing Pw1 had a pregnancy which had aborted. The age of that pregnancy is unknown.

43. The only other evidence left which tends to link the Appellant to this offence is the testimony of Pw1. The Appellant in his sworn defence denied the charge saying his medical condition could not allow him to sexually involve himself with women. There was nothing medical to support that.

44. Section **124 of the Evidence Act** provides that: -

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

45. Under the proviso to section 124 of the Evidence Act the court can convict based on the evidence of the victim alone for good reasons. I have outlined above the shortfalls in Pw1's testimony which would call for further independent evidence to corroborate it and I have found none.

46. The shortfalls range from her conduct, failure to mention the alleged ordeal to her mother, siblings, teachers, fellow pupils etc; the failure to report the incident on 21/5/2018 at Kilome police station, sneaking back on 7/6/2018 and making a complaint against the Appellant plus 19 others. Is this the kind of witness a court would WHOLLY rely on to convict without any other independent evidence? My answer is a big NO.

47. The upshot is that the prosecution did not prove its case to the required standard. I find the appeal to be meritorious and I allow it with orders that the conviction is quashed and sentence set aside.

Orders accordingly.

Delivered, signed & dated this 8th day of May 2020, in open court at Makueni.

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H. I. Ong'udi

Judge