REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.21 OF 2019

ABDI ROBA JILLO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an Appeal from the original conviction and Sentence of Hon. E.K. TOO Senior Resident Magistrate Moyale in Cr. Case (SOA) No.16 of 2017)

J U D G M E N T

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 offence are that the appellant on the 28th day of August, 2017 within Wajir County caused his genital organ namely penis to penetrate the genital organ namely vagina of AHA, a girl aged 10 years.

The appellant faced an alternative charge of committing an indecent act to a child Contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 28th August, 2017 within Wajir County caused his genital organ namely penis to cause contact with genital organ namely vagina of AHA a girl aged 10 years.

The trial Court convicted the appellant on the main count of defilement and sentenced him to serve 20 years imprisonment. There are seventeen grounds of appeal namely:-

1. **The learned Magistrate erred in law and fact in holding that the prosecution had proved the case beyond reasonable doubt against the appellant whilst there was no such evidence to so prove thereby deciding the case against the weight of the evidence.**

2. **The learned trial Magistrate erred in law and fact in ignoring a cardinal principal in criminal law and procedure that the burden of proof lies on the prosecution and that they must prove each and every ingredient of the charge beyond reasonable doubt.**

3. **That the trial Magistrate erred in law and fact in basing the appellant's conviction evidence, which fell short of the standard required for proof of the offence of defilement.**

4. **The learned Magistrate failed to make a finding that there existed some doubts in the prosecution case, and further failed to make a finding thereof that the benefit aforesaid was to be given to the appellant and erred in law in failing to acquit the appellant a result thereof.**

5. **The learned magistrate fatally erred in law in failing to find that enough doubt was created to secure an acquittal of the appellant.**

6. **The learned trial Magistrate gravely misdirected himself and misapprehended the application of Section 124 of the Evidence Act while relying on the single witness evidence of PW1 the complainant, while evidence was not truthful and logical.**

7. **The learned trial Magistrate erred in law in failing to consider the defense case adequately and failed in making a finding thereof.**

8. The learned trial magistrate erred in law and fact in failing to believe the appellant's defence and further failed to give proper or any reasonable grounds of rejecting the appellant's defence from the evidence adduced.

9. The learned trial Magistrate erred in law and fact in failing to find that there was no reason for not believing the appellant and therefore make a finding in favour of the appellant after his defence, which covered facts which were weighty and cogent.

10. The learned trial magistrate failed to make a finding that the prosecution had a duty to prove the offence and that the onus to prove remained on the prosecution throughout the trial.

11. The learned trial Magistrate erred in law and fact in failing to make a finding that the appellant's defence was not shaken by any evidence and therefore reached a wrong decision causing a miscarriage of justice.

12. The learned Magistrate erred in law and fact in failing to give due regard to the material contradictions, discrepancies and inconsistences in the prosecution case thereby reaching a wrong decision and resulting in miscarriage of justice.

13. The learned Magistrate erred in law in failing to make a proper point for determination in the judgment and the reasons thereof upon considering the evidence and thereby failed to make a proper finding about the appellant's defense, its rejection thereof and proper reasons or rejection if any.

14. The learned Trial Magistrate was biased in his judgment, which omitted, misstated and misapprehended the evidence on and off the record and hereby wrongly convict the appellant.

15. The learned Magistrate erred in failing to consider the evidence as a whole before making a guilty finding against the appellant.

16. The learned Magistrate erred in his appreciation of the law applicable and the evidence adduced against the appellant in the circumstance of the case.

17. The learned Magistrate erred in his genral approach to the whole case.

Mr. Nyandieka appeared for the appellant. Counsel relied on his written submissions filed on 18th June, 2020. It is contended that the trial Magistrate erred in law by failing to order for DNA test as provided under Section 36 of the Sexual Offences Act. It was important that DNA was to be conducted since the P3 form indicate that no spermatozoa was noted. The test would have proved that any act of penetration could have been caused by a male organ. The medical officer apart from noting the absence of spermatozoa also stated that there was no other evidence after examining PW1. The act of the trial Court of failing to order for DNA test amounts to derelection of duty which resulted to injustice.

It is further submitted that the trial court failed to consider and weigh the appellant's defence against the prosecution evidence and thereby make a decision on its impact before rejecting it. The defence was simply dismissed since the trial court concluded that there was defilement even before analyzing the evidence. The judgment shows that the trial magistrate made certain conclusions pointing towards proof of ingredients of the offence without considering the entire evidence. In his defence the appellant stated that he was taken for medical examination before being taken to the Police. There was nothing that linked the appellant to the offence. The defence was made under oath and he was not cross examined. No cogent reasons were given for the dismissal of the appellant's defence. A conclusion of guilt was reached before weighing the defence.

It is further submitted that the trial Court relied on the evidence of a single witness's testimony to convict. The trial court was biased and the trial was not fair. Counsel appreciates that section 124 of the Evidence Act permits the Court to convict on the evidence of the complainant if such evidence is found believable. It is submitted that at times it is dangerous to convict on the evidence of the complainant alone as sometimes the complainant may give an entirely false story. The trial Court in its judgment relied on the complainant's evidence and concluded that her demeanour appeared to be okay. The evidence of PW1 is misstated and also couched.

Counsel further contend that the prosecution did not prove its case beyond reasonable doubt. The ingredients of the offence were not established. There was material contradiction in the prosecution evidence. PW1 testified that she was living with her grandmother yet PW2 alleged that he was living with his daughter. It is not clear between PW2 and PW4 as to who received PW1 first. The appellant complained that he was assaulted and PW2 denied that yet the evidence of the investigation officer confirms the appellant's complaints. PW2 avoided to confirm that the appellant used to work for him yet the complainant stated that the appellant used to herd their goats. PW1 had an injury on the right eye as per the P3 form and there is no explanation to that. It could be possible that she was beaten by her parents. The investigation officer did not conduct proper investigation. The appellant was beaten and injured and this confirms that he was framed. A P3 form was produced to confirm that he had injuries on the right arm in his defence under oath the appellants stated that he was not aware of the case. He was examined and nothing was noted on his genitalia.

It is also submitted that should the court find that the appeal lacks merit the court has discretion to reduce the twenty (20) years imprisonment sentence. Counsel relies on the case of **Benson Njoroge Ngugi V Republic Nakuru Criminal Appeal No.189 of 2015 (2019)ekLR** where J.N. Mulwa reduced a 20 years imprisonment sentence that was given on 10.8.2015 to the period already served where the appellant had been convicted on defiling a 13 years old victim and the conviction was upheld.

The state opposed the appeal. Mr. Kihara, prosecution counsel, submitted that the complainant was a minor aged 10 years and is a believable witness. Counsel maintain that in cases of defilement or rape a DNA test is not mandatory. Under the Sexual Offences Act it is not required that DNA test be conducted to prove penetration. Section 36 of the Sexual Offences Act states that DNA test is a discretional application

that can be made suo moto by the Court or after an application is made. No such application was made. All the ingredients of defilement were proved namely the age of the victim, penetration and identification. PW1 and PW2 corroborated the evidence of PW1 that the complainant was bleeding from her genitalia. Medical evidence also confirmed that there was defilement. An age assessment report gave the victims age between 11 and 12 years. The appellant was sentenced to 20 years and the sentence is lawful. The appeal lacks merit and should be dismissed.

This is a first appeal and the Court has to evaluate and assess the evidence afresh before drawing its own conclusion. **PW1** was the complainant. She testified under oath after the trial Court conducted vore dire. She left going to school after class two. On 28.8.2017 at 2.00pm she was herding her father's goats. The appellant held her hands and put her on the ground. He removed her pantie and defiled her. She bleed and she felt pain. She started screaming. It is her evidence that the appellant penis did not get in. She knew the appellant as he used to herd their goats. She went home and notified her parents. The appellant was also herding goats.

PW2 HA is PW1's father. On the 28.8.2017 PW1 was herding his animals. She returned home in the evening at 6.00pm while crying and bleeding from her vagina. He told her mother(PW4) to check on her. PW1 told them that it is the appellant who had defiled her. They notified the Police. He knows the appellant. **PW3 Sergeant Abdirashid Haji** was based at the Buna town AP Camp. On 28.8.2017 he was at the station and got a report of the defilement. Together with APC Hussein they went to the scene and they arrested the appellant. The appellant was pointed out by PW2.

PW4 FA is PW1's mother. On 28.8.2017 at 6.00pm PW1 returned home while bleeding from her private parts. Her clothes had blood. She told them that it was the appellant who had defiled her.

PW5 PC James Momanyi was based at the Buna Police station. On 28.8.2017 at around 10.00pm he was at the station when a report was made about the incident. They referred PW1 to Buna sub county hospital where she was treated and discharged. The appellant was later arrested and charged with the offence. PW1's age was assessed and found to be between 10 and 12 years old.

PW6 Joseph Ndunho is a clinical officer who was based at Buna sub county hospital in Wajir county. He examined PW1 on 29.8.2017. PW1's genitalia had blood clot and swelling. Her hymen was broken other tests were normal.

The appellant tendered sworn defence. He informed the Court that he didn't know anything about the case. He was assaulted by the Police on 29.8.2017 who took his money and identification card. He was taken to the doctor and later to the Police station. He was framed. He had been employed by the complainant's family to herd goats and there was an issue relating to his pay.

The issue for determination is whether PW1 was defiled. PW1's evidence is that she was defiled. It is her evidence that she was defiled for two hours. Part of her evidence states that the appellant removed his penis and put it into her vagina. She adds, "**it did not get in."**

The medical evidence is to the effect that laboratory tests including vaginal swab were done but nothing unusual was detected. Ordinarily this would include whether there were epithelial or pus cells in PW1's genital. Other evidence include bruises and cuts since PW1 was around twelve years. Both the handwritten and typed proceedings indicate that PW1 had sustained "PS" bleeding. It is not clear whether the intention was to indicate that PW1 had her monthly periods or not. The conclusion that PW1's hymen was broken cannot make the Court conclude that the broken hymen was as a result of defilement. It is not clear how PW1 could be defiled for two hours without anything being detected in her genitalia. The blood clot noted on her external genitalia as per the P3 could be as a result of her monthly period as it is indicated she had "PS" bleeding. The clinical officer who produced the medical report could have explained whether the bleeding was as a result of forced sexual intercourse or it was due to the monthly period. Apart from the blood clot, PW6 did not testify that PW1 was still bleeding from her vagina as he examined her.

It is not mandatory that DNA test be conducted whenever there is absence of spermatozoa. Defilement is committed whether the penetration is partial or full. One need not release his sperms for defilement to be proved. At times the defilers use condoms. Sometimes they do not eject their sperms. The contention by counsel for the appellant that the trial Court abandoned its duty by not ordering for DNA test cannot be true. Under Sedition 36 of the Sexual Offences Act, DNA is a discretionary option. In most cases it is ordered when the victim conceive as a result of the defilement and there is need to confirm the paternity of the child.

The appellant denied committing the offence. It is his position that no such incident occurred and that the complainant was with another male person at the grazing field. He was not paid his salary for herding cattle and that is why he was framed. He reiterated this position when being interviewed by the Probation officer. He was to under any obligation to tender any evidence in his defence. It is the duty of the prosecution to prove its case beyond reasonable doubt.

Given the evidence on record, it is doubtful that a defilement incident did occur. PW1 testified that the appellant's penis did not enter her vagina. If that was the case then there was no defilement. The blood which is alledged to have come from her genitalia could not have been caused by penetration. There is mention of bleeding due to "PS" which I conclude to be monthly periods. The evidence raised doubt on whether indeed there was defilement. It is equally doubtful if there was any indecent act committed. The evidence of PW1 is not believable. If the appellant intended to penetrate PW1 and the two were all alone at the grazing field, he could have done it. Its not explained in the evidence how PW1 did not manage to get in as PW1 testified that PW1's penis did not get in. Therefore, the appellant did not manage to penetrate the complainant.

I am satisfied that the complainant's evidence is not very conclusive. Even if PW2 and PW4 noted that PW1 was bleeding, the evidence on record raises doubt as to whether the alledged bleeding was due to defilement or monthly periods. Nothing unusual was noted on PW1's genitalia. The medial evidence raises doubt as to whether indeed there was penetration or not. Further, the complainant's evidence raises doubt as to whether she was penetrated or not. If she was defiled for two hours, how come the appellant was not able to penetrate her. The trial Court is the one which recorded the original evidence. It is part of the record that PW1 testified that the appellant tried to defile her but "**it did not enter**." The literal meaning of this evidence is that there was no partial or full penetration and therefore no defilement occurred. Once there is no penetration then the other evidence on bleeding cannot be the reason to reach a conclusion that PW1 was defiled. She stated

that she was not entered.

Sexual offences cases under the Sexual Offences Act mainly involve minors. Trial Court should be carefully analyze the evidence in totality before reaching the final conclusion. Such cases normally trigger inherent sympathy on the part of the trial Magistrate. The picture presented in Court is that of a helpless minor who was violently held by the accused, had her clothes removed and subsequently defiled. This is normally the general picture in defilement cases. Usually the incident is followed with threats by the perpetrator on the victim. Such threats include the prospect of one losing her life. The situation becomes pathetic and depending on how the evidence is explained by the victim to the Court, there is always the likelihood of sympathy on the part of the victim by the trial Court and at times such feeling leads to a prior opinion of guilt being made by the Court on the part of the accused without considering the totality of the evidence.

It is true that the society has become violent. Innocent children are being defiled and there is ahue cry from the public as such incidents sometimes lead to teenage pregnancies. Be that as it may, the Court is as required by the constitution expected to be a neutral arbiter and return an objective verdict which is drawn from proper analysis of the evidence on record as opposed to the inherent sympathy triggered by the general picture presented by the alledged victim. Sometimes the minor concludes that she was defiled even if no penetration occurred because at her age she may not know what is the components of defilement. It therefore behoves the Court to be extremely careful when analyzing the evidence. A good example is instances where minors below eleven years are alledged to have been defiled by adults yet the medical evidence including vaginal swab, urinary analysis and physical examination does not reveal anything unusual. Such instances should raise doubt in the mind of the trial Magistrate otherwise anyone who appears in Court and alledge that she was defiled will be held to be telling the truth and an automatic conviction will be the result.

I do find that the prosecution did not prove its case beyond reasonable doubt. The evidence for both the main count of defilement and that of the alternative count is doubtful. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Marsabit this 20th day of July, 2020

S. CHITEMBWE

JUDGE