REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D.K. Kemei – J

CRIMINAL APPEAL NO. 57 OF 2019

BONIFACE MUMO KIBWAU .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence vide judgement delivered on 18.1.2018 at the Senior Principal Magistrates Court at Kangundo by Hon M. Opanga Senior Resident Magistrate in Criminal Case SO 34 of 2017)

BETWEEN

REPUBLIC.....PROSECUTOR

-VERSUS-

BONIFACE MUMO KIBWAU....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of defilement contrary to **section 8(1)** read together with **section (8)(4)** of the **Sexual Offences Act, 2006**. There was also an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars of the main count were that the appellant on the 23rd day of March 2017 at [Particulars withheld] village in Matungulu sub-county within Machakos County defiled NW a child aged 15 years by penetrating his penis into her vagina. The particulars of the alternative charge were that on the 23rd day of March 2017 at [Particulars withheld] village in Matungulu Sub County within Machakos County did an act of indecency with NW a child aged 15 years by touching her vagina.

2. The evidence was as follows; **Pw 1 WNW** in the absence of a voir dire examination tendered a sworn testimony that she was born in 2002. She testified that on 23.3.2017, she met the appellant on the road and they exchanged phone numbers with the appellant promising to call her later in the evening. She told the court that she stayed with her mother's phone and that the appellant called her at 6 pm and they agreed to meet whereupon they met at a thicket where he pounced on her and removed her skirt and pant. She testified that the appellant defiled her and then she got home late where she earned a beating from her mother. She stated that she informed her mother what had happened and this prompted her mother to take her to Kangundo District Hospital where a P3 form was issued as well as treatment notes. She thereafter accompanied her mother to Tala Police post. It was her testimony that she was able to identify the appellant who used to meet her and always claimed that she was his wife. On cross examination, she testified that the appellant had instructed her to take possession of her mother's phone so that they could communicate.

3. Pw 2 FMW testified that Pw1 was her daughter and that on 23.3.2017 she noted at 7 pm that the girl had vanished with her mobile phone. She told the court that she later found Pw1 hiding in the bathroom where she snatched the mobile phone and noted the appellant's phone number on the mobile phone. She stated that Pw1 confessed that the appellant had defiled her and thus she took her to the hospital after reporting to Tala Police post. She stated that the doctor noted that Pw1 had been defiled before and which the girl confirmed was true save only that the earlier defilement was as a result of a certain boy at school. She told the court that the appellant was known to her having taken her number so as to conveniently fetch water from a water tap that was near her gate.

4. Pw 3 Dominic Mbindyo a Clinical Officer at Kangundo level 4 Hospital told the court that he had a P3 form in respect of Pw1 who was said to have had a history of defilement. He told the court that the examination of Pw1 revealed that her hymen had been torn long ago; that her labia majora was reddish on examination; she had a bacterial infection. He stated that after the examination he filled the P3 form and

produced the same as an exhibit together with treatment notes. He added that he filled the PRC form and that he used the P3 form to fill the PRC form. On cross examination, he told the court that Pw1 was brought on 24.3.2017.

5. Pw4, Cpl James Miano from Tala Police Post and the investigating officer told the court that on 24.3.2017, Pw1 came with her mother having reported a case of defilement at the report office. He issued a P3 form and sent them to hospital for examination. He testified that Pw1 was seen at Kangundo level 4 hospital and returned with a filled out P3 form. He stated that he recorded statements and preferred charges against the appellant upon receipt of a baptismal card in regard to the complainant. He stated that the appellant was arrested on 25.3.2017. On cross examination, he testified that the complainant knew the appellant.

6. The court found that a prima facie case had been established against the appellant sufficient to require him to make a defence and he was duly placed on his defence. He tendered an unsworn statement and called two witnesses. **Dw. 1 the appellant** testified that he was a hustler and that on the material day he was not at the crime scene as he was in Kangundo. He told the court that on 27.3.2017 he was arrested by villagers without any reason. He denied committing the offence.

7. Dw2, Georgina Kamene Kilou told the court that on 23.3.2017 she met the appellant at 7pm at the gate on her way out and that she went to the shopping centre. She told the court that on the 24th, she found the appellant drinking tea and that on Saturday 28th she was told that the appellant had been arrested. On cross examination, she told the court that she was unaware that the appellant had told the court that he was at Kangundo and that he did not see the complainant.

8. Dw3, Consolata Mwikali Mwisyo told the court that on 23.3.2017 she went to the appellant's house and did not find him but however she was informed that he had gone to the Shopping Centre at Kaende. She told the court that she later saw him while he was on his way back and that he was with Regina and Kamene. She stated that she remained with the appellant till 11 pm and went to sleep but was later shocked to learn that the appellant had been arrested for having been found with a school girl but she did not see the appellant with a school girl.

9. The trial court found that the offence took place on 23.3.2017 and that the complainant was born on 5.11.2002 as per the baptismal card meaning that she was 14 years and 4 months as at the time the offence took place. The court found that the reddish labia majora pointed to the fact that there was an indecent act and that there was no penetration. The court then found that the prosecution proved their case against the appellant on the alternative count and he was convicted thereof. He was sentenced to 10 years' imprisonment under section 11(1) of the Sexual Offences Act.

10. The appeal was canvassed vide written submissions. The appellant's submissions dwelt on mitigation grounds as the appellant indicated that he sought to amend his earlier grounds; albeit this was done without the requisite leave of the court**.** It was submitted that the appellant was remorseful; that he was a first time offender; that he was a father of 4 children; that he was a resourceful person and urged the court to revise his sentence and give him a lesser term of a non-custodial sentence.

11. The state conceded to the appeal and submitted that the evidence on record raised doubt as to whether the appellant touched the complainant and as such there was sufficient reason to interfere with the decision of the trial court and allow the appeal.

12. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses testify.

13. The court has carefully considered the petition of appeal as amended and submissions presented by both parties. The grounds of appeal may be collapsed into three grounds:

a. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;

b. That the appellant was not properly identified as the perpetrator

c. That the court ought to consider the time that the appellant spent in custody awaiting determination of the case in terms of Section 333(2) of the Criminal Procedure Code Act.

14. Having considered this appeal, the evidence on record and the rival submissions, the issues for determination are firstly whether the prosecution proved its case beyond reasonable doubt; Secondly whether the appellant was identified as the perpetrator; Thirdly whether this court can interfere with the sentence passed by the trial court.

15. In cases of an indecent act with a child the following are to be proven as per section 11(1) as read with section 2 of the Sexual Offences Act:

1. The age of the child.

2. any unlawful intentional act which causes-

(a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;

(b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which

causes penetration; and

3. That the perpetrator is the Appellant

16. The age of the child was proven vide the baptismal card that was tendered in evidence and that the appellant did not object to its production. The said card was to the effect that Pw1 was born on 5.11.2002 and as rightly pointed out by the trial court she was aged about 14 years and four months old as at the time of the commission of the offence on 23.3.2017. From the evidence of Pw1 as corroborated by the evidence of Pw3 who examined her there is direct and circumstantial evidence respectively that proved that there was contact with the sexual organs of Pw1 and that of the appellant. It is commonplace that contact with sexual organs of a person who was not the appellant's wife was unlawful and therefore the first two elements of the offence have easily been proven. Indeed the complainant in her testimony stated that the appellant took her to a nearby thicket where he pushed her to the ground and had sex with her. Her testimony left no doubt that there was some sort of relationship between the two as confirmed by the complainant herself when she stated that the appellant always referred her as his wife. There was contact between the complainant's sexual organ and the body of the appellant on the material date.

17. On the issue of identification of the appellant, the account of Pw1 of the unfortunate happenings of the day as corroborated by the evidence of Pw2 all created circumstances favourable for identification. The only witness to the incident was Pw1 and she was the only eye witness to the incident. I**n Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166** cited with approval **in Roria v. R. (1967) EA 583** the court made a number of observations with regard to the evidence of a single eye witness:

(a) **The testimony of a single witness regarding identification must be tested with the greatest care.**

(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

(d)Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge advises himself to the danger of basing a conviction on such evidence alone and is satisfied that the witness was truthful. The record is clear that the trial court was satisfied with the evidence of Pw1 and I see no reason to interfere with that reasoning.

18. The complainant stated that she met the appellant at their rendezvous having met earlier in the day and agreed to link up in the evening. She later informed her mother (Pw2) about having been with the appellant and what had happened. She was not shaken even on cross examination about the fact that it was the appellant who had sexually assaulted her. The appellant attempted to raise an alibi in defence that he was not at the area on the material date as he was at Kangundo. However, his witnesses contradicted him and maintained that the appellant was at [Particulars withheld] village on the date in question. This then bolstered the prosecution's case that the appellant had been placed at the scene of crime. I am satisfied that the appellant was properly identified. Even though the evidence of identification was made by the complainant alone, I find that the provision of section 124 of the Evidence Act permitted the trial court to hold that the said witness spoke the truth. It is noted that the trial court did not make such a finding and also did not conduct a voir dire examination. However, the same did not occasion any prejudice to the appellant since he was able to cross examine the witnesses and later tendered his defence. The age of the complainant being over 14 years old left no doubt that she was not of tender age and that her evidence could be received by the trial court. Her evidence was subjected to cross-examination by the appellant and hence he did not suffer any prejudice and that if there were any then the same is curable by section 382 of the Criminal Procedure Code in this appeal. In any event it is noted that the appellant in his submissions herein appears not to challenge the conviction but he has presented some form of mitigation seeking a review of sentence. This then implies that he is satisfied by the conviction and only wants the sentence interfered with.

19. The appellant in his grounds of appeal has assailed the trial court for failing to consider that he was framed. Nothing in the evidence of both prosecution and appellant revealed that there was any grudge between the appellant and the complainant's family. The appellant in his defence did not allude to any such a frame up. I see nothing to believe that this case was fabricated. I agree with the trial court's finding because the prosecution evidence as well as the evidence of Dw2 and Dw3 places the appellant at the scene of the crime as at the time that the offence was said to have taken place. Further the complainant's evidence clearly placed the appellant at the scene of crime. The appellant's defence was thus properly rejected by the trial court. The appellant has also not shown the court that he fell within the defence envisaged under Section 11(2) and 11(3) of the Sexual Offences Act as he did not present any evidence to the effect that he had been deceived by the complainant regarding her age and that he had taken steps to establish the complainant's age. Further though I did not see the appellant testify, I am not convinced that he was telling the truth and in this regard I am guided by the case of **Dinkerrai Ramkrishan Pandya v R [1957] EA 336** where the East Africa Court of Appeal cited the case of ***Coughlan v Cumberland (3) (1898) 1 Ch. 704 where Lindly MR, Rigby and Collins L.JJ observed*** that "when the Question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; **and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen**.

20. In light of the foregoing analysis I am satisfied that the prosecution evidence proved their case beyond reasonable doubt; that the appellant's version of events is not credible and I support the finding of the trial court and dismiss the appeal against conviction.

21. The Sexual Offences Act provides under Section 11(1) that "A person who commits an indecent act with a child shall be liable upon conviction to a sentence of a term not less than 10 years. The court convicted the appellant under section 11(1) of the Sexual Offences Act and sentenced him to serve ten years' imprisonment. The appellant's view now is that the sentence ought to be reviewed.

22. Section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that**:**

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

23. I find no error or irregularity or illegality of principle when the trial court sentenced the appellant to 10 years' imprisonment. I have considered the provisions of section 333(2) of the Criminal Procedure Code and the request of the appellant that the period spent in custody seems to have merit. The charge sheet shows that the appellant was arrested on 25.3.2017 and remained in custody throughout the trial. The said period was not factored by the trial court while passing sentence. The appeal therefore succeeds to that extent.

24. In the result the appeal on conviction lacks merit and is dismissed. The appeal on sentence succeeds to the extent that the sentence imposed of ten (10) years imprisonment shall commence from the date of arrest namely 25.3.2017.

It is so ordered.

Dated and delivered at Machakos this 8th day of July,2020.

D. K. Kemei

Judge