REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.195 OF 2019

CASPER WAKANZO SHIBIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Boke SPM

delivered on 8th March 2019 in Kibera CM Cr. Case (S/O) No.30 of 2013)

JUDGMENT

The Appellant, Casper Wakanzo Shibia, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between February 2013 and July 2013 within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of K.T., a girl aged 13 years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between February 2013 and July 2013 in Riruta within Nairobi County, the Appellant unlawfully and intentionally caused his penis to touch the vagina of K.T., a child aged thirteen (13) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of defilement and sentenced to twenty (20) years imprisonment.

The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court. In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him based on the uncorroborated evidence of the complainant. He took issue with the fact that the trial magistrate improperly applied Section 124 of the Evidence Act by failing to indicate the reasons why he believed that the complainant was telling the truth. He was aggrieved by his conviction stating that the medical evidence was inconclusive and failed to establish that the Appellant was the perpetrator of the alleged sexual assault. The Appellant was of the view that the trial court failed to properly evaluate his defence in arriving at its decision. He faulted the trial court for improperly admitting a photocopy of the complainant's birth certificate into evidence when no basis for the same had been laid down. He complained that the trial magistrate was biased against him in arriving at the decision. In the premises, the Appellant urged this court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. This court also heard oral submission from Mr. Keyonzo for the Appellant and Mr. Momanyi for the State. Counsel for the Appellant faulted the trial court for convicting the Appellant based on the uncorroborated evidence of a minor. He stated that the trial magistrate improperly applied Section 124 of the Evidence Act by failing to record the reasons why he believed that the complainant was telling the truth. To that end, he relied on the case of Bwayo vs. Republic [2009] eKLR. He was of the view that trial magistrate misdirected himself on the law hence arrived at an erroneous decision. In the premises, Counsel for the Appellant urged the court to allow the Appellant's appeal.

Mr. Momanyi for the State conceded the appeal. He made oral submission to the effect that the prosecution failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt. He submitted that the evidence by the prosecution witnesses was insufficient to sustain a conviction. He was of the view that the trial court shifted the burden of proof to the Appellant. He asserted that the prosecution failed to avail crucial witnesses necessary to prove its case against the Appellant. He stated that the witnesses who allegedly caught the Appellant red handed sexually assaulting the complainant ought to have been availed before the trial court to testify in the case. He therefore urged this court to re-evaluate the evidence and arrive at the appropriate decision.

The facts of the case according to the prosecution are as follows. PW1, K.T.W., is the complainant. She gave sworn evidence. She stated that she was 13 years of age at the time she testified before court. It was her testimony that in the year 2012, she was in class six at Lepic School. The Appellant was her science teacher. During the school's second term, the Appellant told her that he had feelings for her. This went on for some time, until the following year. She stated that she took it as a joke since she did not understand what the Appellant meant.

Sometime in February 2013, as the students were returning to class from having supper, she saw the Appellant standing at the corridor. He called her and took her to his class. There was no one else in the class at that time. He locked the door and undressed her. She stated that she was wearing a track suit. He also removed his trousers and inserted his penis in her vagina. She stated that this was her first sexual experience.

The complainant stated that the Appellant sexually assaulted her on several occasions following that first incident. The subsequent sexual assault incidents happened in the same class six red. The incidents occurred either on Tuesdays or Thursdays when the Appellant came to supervise evening prep sessions. She however did not report him. She stated that he also sent text messages to her phone during the school holidays. He told her that he had big plans for her. When her mother saw the messages, she took her phone away.

On 24th August 2013, the complainant stated that she met the Appellant outside her parents' house. They engaged in sexual intercourse. On cross-examination, the complainant explained that on the stated date, she met the Appellant outside their gate at Embakasi. They walked to a nearby lodging where the Appellant had sex with her. Her mother's friend known as Esther, saw her go into the lodging with the Appellant. She informed her mother who came to the lodging. The complainant stated that she met her mother as she was leaving the lodging. Her mother asked her what she was doing there. She told her mother that the Appellant had been sexually assaulting her. They went to school and reported the matter. They also reported the matter at Riruta Police Station. The following day, her mother took her to Nairobi Women's Hospital for medical examination.

PW2, Dr. Daniel Nguku, was based at Nairobi Women's Hospital. He adduced evidence on behalf of his colleague, Dr. Kisia, who had since left employment at the said hospital. PW2 told the court that the complainant was seen at the said hospital on 25th August 2013. She was alleged to have been sexually assaulted. Upon examination, her external genitalia was found to be normal. Her hymen was torn with old tears. Her anal region was normal. PW2 produced the complainant's Post Rape Care Form into evidence. Upon cross examination, PW2 stated that the medical report did not point to the fact that the complainant had engaged in recent sexual activity.

PW3, Cpl. Elizabeth Wambui, from Shauri Moyo Police Station was the investigating officer in this case. At the material time, she was attached to Riruta Police Station. She was assigned the case on 26th August 2013. She interrogated the witnesses and recorded their statements. She also escorted the complainant to the police doctor for medical examination. After her investigations, she arrested the Appellant and preferred the present charges against him. She produced a copy of the complainant's birth certificate in evidence. The same indicated that the complainant was born on 13th March 2000. She also produced into evidence the complainant's P3 Form.

The Appellant was put on his defence. He testified that he was employed as a teacher at L School from January 2009 to July 2013. He stated that the complainant and her mother L were known to him. He however stated that he did not personally teach the complainant's class at the said school. It was his testimony that the complainant's mother requested him to tutor the complainant at home during the school holidays. He stated that he tutored about five students at N Estate where the complainant lived. He taught them as a group. He stated that he and the complainant's mother had a disagreement since she was unable to pay him pending tuition fees amounting to Ksh.27,000.

The Appellant testified that he received a call from a colleague, who asked him to go to the office to pick up a report. He was then arrested and taken to Riruta Police Station. He asserted that he was framed of the present charges by the complainant's mother. He denied sending the complainant any text messages. He told the court that police confiscated his phone upon his arrest. He denied sexually assaulting the complainant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses (See David Agwata Achira vs Republic [2003] eKLR). In the present appeal, the issue for determination by this court is whether the prosecution established the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. Section 8(1) of the **Sexual Offences Act** provides that:-

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

The prosecution is required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator. With regard to the age of the complainant, the Appellant contended that the uncertified copy of the complainant's birth certificate was produced into evidence contrary to the provisions of **Section 68** of the **Evidence Act**. The copy of the birth certificate indicated that the complainant was born on 13th March 2000, and was therefore 13 years of age at the time of the alleged sexual assault. Under **Section 68(1)** of the **Evidence Act**, proof of documents by secondary evidence maybe given of the existence, condition or contents of a document in the following cases:

> ***a) when the original is shown to appear to be in possession or power of***
>
> ***i. the person against whom the document is sought to be proved***
>
> ***ii. a person out of reach of or not subject to the process of the court or***
>
> ***iii. any person legally bound to produce it***
>
> ….

c) When the original has been destroyed or lost or when the party offering evidence of the contents cannot for any other reason not arising from his own default it neglect, produce it in a reasonable time when the original is of such nature as not to be easily movable.

This court is in agreement with the Appellant that the uncertified copy of the complainant's birth certificate was improperly admitted in evidence. The investigating officer who produced the said copy told the court that the original birth certificate was in the possession of the complainant's mother. There was therefore no valid basis laid as to why the uncertified copy of birth certificate was admitted in evidence if the original document was available and in the possession of the complainant's mother.

That being said, the complainant testified that she was thirteen (13) years old. She stated that she was in class eight at Lepic School. The Post Rape Care Form and P3 Form produced in evidence also indicated that the complainant was 13 years of age at the time of the alleged sexual assault incident. **The trial magistrate, who had the benefit of seeing the complainant testify,** assessed her age to be that of a child of tender years. This is evident since the trial magistrate deemed it necessary to conduct a *voire dire* examination on the complainant before proceeding to take her evidence. **This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act. Her age was established to the required standard of proof beyond any reasonable doubt.**

This court now turns to the ingredient of penetration. Section 2(1) of the Sexual Offences Act defines penetration as:

"the partial or complete insertion of the genital organ of a person into the genital organs of another person."

In the present appeal, it was the complainant's testimony that the Appellant was her teacher at L School. In year 2012, during the school's second term, the Appellant told her that he had feelings for her. This was went on for a while until the following year. She stated that she took as a joke since she did not understand what the Appellant meant. Sometime in February 2013, as the students were returning to class from having supper, she saw the Appellant standing at a corridor in the school. He called her and took her to his class. There was no one in the class at that time. He locked the door and undressed her. She was wearing a track suit. He also removed his trousers and inserted his penis in her vagina. She stated that this was her first sexual experience.

The complainant further stated that the Appellant sexually assaulted her on several occasions following that first incident. The sexual intercourse incidents occurred either on Tuesdays or Thursdays when the Appellant came to supervise evening prep sessions. She however did not report him to any person in authority. She stated that he also sent text messages to her phone during the school holidays. When her mother saw the text messages, she took her phone away.

The complainant stated that the last sexual assault incident occurred on 24th August 2013. She was at home. She told the court that she met the Appellant outside their gate [*particulars withheld*]. The Appellant took her to a nearby lodging and had sex with her. Her mother's friend known as Esther, saw her go into the lodging with the Appellant. She informed her mother who came to the lodging. The complainant stated that she met her mother as she was leaving the lodging. Her mother asked her what she was doing there. That's when she came clean and informed her mother that the Appellant had been sexually assaulting her.

The complainant's evidence was to the effect that she was sexually assaulted by the Appellant between the months of February 2013 and August 2013. The complainant was categorical that the Appellant sexually assaulted her on 24th August 2013, which is the date of the last sexual assault incident. She was examined the following day on 25th August 2013, at Nairobi Women's Hospital. PW2 testified that upon examination, the complainant's external genitalia was found to be normal. Her hymen was torn with old tears. Her anal region was normal. He produced the complainant's Post Rape Care Form in evidence. Upon cross examination, PW2 stated that the medical report did not indicate that the complainant had engaged in recent sexual activity. The complainant was also examined by the police doctor, Dr. Maundu, on 28th March 2013. The P3 Form produced in evidence by the investigating officer indicated that the complainant's hymen was broken with old tears.

This court is of the view that the medical evidence adduced was inconclusive with regard to the element of penetration. Though the evidence of the old hymen tears could mean that the complainant had been sexually assaulted before as alleged in her testimony, this court notes that the medical evidence failed to establish any recent sexual activity that was also alleged by the complainant. The complainant stated that the last sexual assault incident occurred on 24th August 2013. She was examined at Nairobi Women's Hospital the following day. There was no evidence of any fresh tears, injuries, lacerations or hyperemic vaginal walls that would corroborate her assertion of a recent sexual activity. PW2 testified that the evidence of the Post Rape Care Form did not point to any recent sexual activity. This puts in question the credibility of the complainant as a truthful witness. The medical evidence failed to corroborate the complainant's testimony to the extent that she was sexually assaulted by the Appellant on 24th August 2013.

The complainant was the only witness to the alleged defilement. Her mother, who allegedly witnessed the complainant leaving the lodging where the Appellant had sexually assaulted her did not appear before the trial court to adduce evidence. In addition, her mother's friend, Esther, who the complainant stated saw her enter the lodging with the Appellant on 24th August 2013, was also a crucial witness necessary to prove the prosecution case against the Appellant. She did not appear before the court to give her testimony. Their testimonies would have corroborated the complainant's assertion that she was with the Appellant on the stated date.

The complainant further testified that the Appellant used to send text messages to her phone while she was on school holidays. She stated that her mother saw the text messages and confiscated her phone. If the complainant's mother was aware that the Appellant was being inappropriate towards the complainant, *why did she not take any action against him?*

The court can convict on the evidence of children of young and tender age in sexual offences if it is convinced that they are telling the truth. The description given by the complainant in regard to the circumstances in which the alleged sexual assault occurred, does not give this court

confidence that she was telling the truth or at least the entire truth. Section 124 of the Evidence Act states thus:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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."***

In the present appeal, the Learned Magistrate Hon. Boke took over conduct of the case after the complainant had already testified before the previous magistrate. The previous magistrate who had the opportunity to observe the complainant's demeanour did not indicate in the court record whether or not he believed that the complainant was telling the truth, and the reasons thereof. The trial magistrate in her judgment applied Section 124 of the Evidence Act, and convicted the Appellant based on the uncorroborated evidence of the complainant. He failed to record the reasons why she believed the complainant was telling the truth, which is a requirement under Section 124 of the Evidence Act.

The Appellant in his defence denied sexually assaulting the complainant. He stated that there was an existing grudge between him and the complainant's mother since she owed him Ksh.27,000 in tuition fees arrears. In absence of any other evidence connecting the Appellant to the alleged sexual assault incidents, this court is of the opinion that the prosecution failed to establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt. The Appellant will benefit from the doubts raised.

In the premises therefore, this court holds that the prosecution failed to prove the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act to the required standard of proof beyond any reasonable doubt. The Appellant's conviction was unsafe. The Appellant's appeal therefore has merit. It is hereby allowed. His conviction is hereby quashed. The Appellant is acquitted of the charge. The custodial sentence imposed upon him is set aside. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2020

L. KIMARU

JUDGE