REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 35 OF 2019

DANIEL ONYANGO OCHAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence by Hon S. Mathenge,

Resident Magistrate at Bondo in Bondo Principal Magistrate's Court

SOA Case No. 44 of 2018 delivered on 24/5/2019)

JUDGMENT

1. The Appellant **DANIEL ONYANGO OCHAR** was charged before the Principal Magistrate's Court in Siaya with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 the particulars of the offence being that on the 3rd day of August, 2018 in [particulars withheld] Sub-County within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of EAO a child aged 14 years old.

2. The appellant also faced the alternative charge of Committing an Indecent Act with the child contrary to Section 11 (1) of the Sexual offences Act No. 3 of 2006**.**

3. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.

4. The trial magistrate, Hon. S. Mathenge, after hearing the five prosecution witnesses and testimony of the appellant found that the prosecution had proved its case beyond reasonable doubt and proceeded to find the accused guilty of the offence of Defilement Contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 and proceeded to sentence the appellant to serve 20 years imprisonment.

5. Aggrieved by the said conviction and sentence, the appellant filed his initial petition of appeal based on three grounds as follows:

a) ***That he pleaded not guilty to the charge.***

b) ***That the learned trial magistrate erred in facts and in law by failing to consider the appellant's defence.***

c) ***That the learned trial magistrate failed to consider that the alleged age of the complainant was reduced from 17 to 14 years.***

d) ***That the learned trial magistrate erred in law and fact by not considering the inconsistencies in the prosecution witnesses.***

e) ***That the learned trial magistrate erred in law and facts by failing to observe that the medical examination fell flatly short of the required standard of proof.***

6. The appellant subsequently filed an amended petition of appeal in which he sought mitigation and intervention on the sentence imposed. The amended petition was based on the following grounds:

a) ***That the appellant pleaded NOT guilty due to disorientation.***

b) ***That the appellant is a first offender who came into conflict with the law for the very first time.***

c) ***That the appellant was not reasonably acknowledged about the dire consequences of the vice.***

d) ***That the appellant is a layman and a law pauper.***

e) ***That the appellant was not accorded adequate plea bargaining.***

f) ***That the appellant is willing and ready to adhere by the condition, aspect, prospect and positive attribution set forth with which does not occasion prejudice.***

g) ***That this court has powers vested on it by a dint of Section 361[1][a] of the Criminal Procedure Code to deal with matters of facts and the SERENITY of the sentence imposed.***

7. The above ammednded grounds presuppose that the appellant does not wish to challenge the appeal against conviction and is only challenging sentence. I shall however assess both the evidence leading to the appellant's conviction and sentence of 20 years imprisonment as imposed by the trial magistrate.

Submissions

8. The appeal was canvassed by way of written submissions. The appellant, submitted clarifying that his submissions were only on the severity of his sentence which he submitted ought to be reduced. He however ventured into the soundness of his conviction.

9. He submitted that the court should have given him the benefit of the doubt because the crown had failed to satisfy itself of the appellant's guilt beyond reasonable doubt. He further submitted that the trial court in sentencing ought to have considered the fact that he was actively and positively remorseful.

10. He further submitted that it was not clear where the complainant EAO was defiled as the complainant had stated that she was defiled in the forest whereas the complainant's mother stated that EAO was defiled when the appellant came to look for change.

11. The appellant further submitted that he was a first offender who came into conflict with the law for the very first time and hence a law pauper and a stranger to court proceedings who was not aware of the dire consequence of the vice.

12. The appellant submitted that he was the sole bread-winner in the extended family with school going kids and that he had since reformed, reintegrated and rehabilitated and now a law abiding citizen.

13. The appellant further submitted that by virtue of Articles 165 of the Constitution of Kenya he was rightly placed before this court guided by the provisions of Section 361(1)(a) of the Criminal Procedure Code has the capacity to deal with matters of severity of the sentence based on the reduction.

14. He further submitted that by dint of Section 364(1)(b)(2)(3) and 354(3)(1) of the Criminal Procedure Code and Article 23(f) of the Constitution of Kenya this court to exercise leniency in sentencing.

15. His further submission was that by virtue of Article 50 (2)(p) of the Constitution, he had a right to enjoy the benefit of the least severe of the prescribed punishment for an offence. Reliance on this proposition was placed on the case of **Hamisi Bakari v Republic (1987) eKLR.**

16. The appellant further submitted that the period spent in custody should also be taken into consideration in computing his sentence.

17. The Respondent represented by the Office of Director of Public Prosecutions Siaya filed written submissions opposing this appeal and contending that the prosecution proved its case against the appellant beyond reasonable doubt, that the appellant used to work for the mother of the victim, that the offence took place in broad daylight hence there was no mistaken identity and that PW5 confirmed that the complainant was defiled. It was submitted that the defence proffered by the appellant was not satisfactory hence this court should uphold the decision of the subordinate court.

Analysis

18. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 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 (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction 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, see (Peters V Sunday Post 1978) E.A. 424."***

19. Revisiting the evidence before the trial court, the prosecution evidence as laid out in the trial Court was that complainant, EAO testified on oath as PW1 after voire dire examination and stated that on the 3rd August, 2018 at 1.00 p.m. whilst alone, she had gone to fetch firewood during which time, Apiche went and told her to go with him so he could give her groundnuts which she declined.

20. EAO further testified that Apiche caught her and pushed her to the ground and caught her neck preventing her from screaming after which he removed her pant and lay on her had sex with her. EAO testified that Apiche did not use any protection and that she experienced pain after which Apiche ran away.

21. EAO testified that she went back home and sent her brother to go and call her mother to whom she explained what had happened to her. EAO then stated that her mother called Apiche and questioned him on what had happened which Apiche denied after which her mother took her to Naya Dispensary where she was examined and treated and subsequently they went to Luanda Kotiende AP Post and later to Madiany hospital where she was examined.

22. EAO further testified that that she knew Apiche well as he used to go to their home to work for her mother. She stated that it was her first sexual encounter and in cross examination, the witness reiterated her evidence in chief adding that Apiche was wearing a pink cap, a white shirt and a black trouser. She said that she did not know if Apiche owed her mother any money. Sh alos stated that she was telling the truth.

23. Vivian Akumu, the complainant's mother testified as PW2 and recalled that on 3rd August 2018 her daughter had gone to fetch firewood in the forest and that when she returned, she went and lay behind the home and told Eliud to call PW2. That when PW2 went to where PW1 was, PW1told PW2 that she was not feeling well and revealed that Apiche had defiled her when she was fetching firewood.

24. PW2 further testified that she took EAO to Naya Dispensary and to Luanda Kotieno Patrol Base where she made a report after which she took EAO to Madiany and in the process, she received information that Apiche had been arrested. Her daughter was issued with a P3 form which was filled at Madiany

25. The witness further testified that she knew Apiche well as they lived in the same village. She further testified that EAO was 14 years old and stated that she had no grudge with Apiche.

26. Leonard Onyango Maranda testified as PW3 and stated that he was the Assistant Chief Naya Sub-Location and that on the 3rd August, 2.00 p.m. he was on a chang'aa raid when he received a call from one of his villagers that a girl had been defiled. He then proceeded to the home where he found when the girl had already taken to the hospital.

27. Mr. Maranda further testified that he then looked for Daniel Onyango Ochar and arrested him at a chang'aa den and took him to Luanda Kotieno Police Post. Mr. Maranda testified that he was told by PW2 that Daniel had defiled the girl.

28. PC Enock Orama testified as PW4 and stated that he was the investigating officer in the matter. He stated that on 3rd August 2018 a reportee Vivian Akinyi Odhiambo went to the station with her daughter EAO who had been defiled by a person well known to her, one Daniel Onyango Ochar Alias Apiche. PC Orama further testified that the girl had gone to Naya Health Centre where she was then referred to Madiany Sub-County Hospital for further treatment.

29. PC Orama further testified that Mr. Ochar was brought to the station by the Assistant Chief and clan elder and that as the investigation officer, he recorded statements and issued the complainant with a P3 form which was duly filled.

30. PC Orama testified that he spoke with the complainant who told him that the accused tried to lure her with groundnuts but when she refused the accused got hold of her and defiled her then ran away. PC Orama said that he did not know the accused before the complaint.

31. Gilbert Omondi testified as PW5 and stated that he was a Clinical Officer from Madiany Sub-County Hospital. Mr. Omondi said that EAO had presented with a history of defilement by a person known to her. He stated hat at the time of examination, the complainant had dry blood stains on her underpants, whitish discharge and lacerations on labia majora and minora with a torn hymen. He further testified that the VDRL test came back negative and urinalysis test did not show any abnormality and that the complainant was given anti-biotics and PEP.

32. Mr. Omondi concluded that penetration was confirmed and that he did not examine the accused person. Mr. Omondi confirmed that menstruation starts in different times for different people.

33. At the close of the prosecution's case, the appellant gave a sworn statement and recalled that on the 3rd August, 2018, he was with the mother of the complainant together with 3 other persons in the said mother's house where they stayed for an hour. The appellant further testified that at 1.00p.m, the complainant entered the house and upon her mother probing her, she stated that he had defiled her shocking everyone in the house as they could not understand how and when he had done it.

34. The appellant further testified that the next day, he was arrested and taken to be charged before court. He stated that he was a neighbour to the complainant and that Apiche was his nickname and that he could not explain how the girl was defiled.

35. In her judgment, the trial magistrate, Hon. S.W. Mathenge proceeded to find that the prosecution had been able to prove its case beyond reasonable doubt and proceeded to convict the appellant of the offence of defilement. After considering the mitigation of the appellant, she sentenced the appellant to serve 20 years imprisonment pursuant to **Section 8(3) Sexual Offences Act No. 3 of 2006.**

Determination

36. Having carefully considered the appellant's grounds of appeal, the main issues for determination in this appeal are:

1) Whether there were material inconsistencies in the prosecution witnesses

37. The appellant submitted that there was material inconsistency that the court ought to have considered prior to convicting him specifically that it was not clear where the complainant EAO was defiled as the complainant had stated that she was defiled in the forest whereas the complainant's mother stated that EAO was defiled when the appellant came to look for change.

38. Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

39. The Court of Appeal whilst sitting in Nyeri in the case of **Richard Munene v Republic [2018] eKLR** stated as follows:

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

40. Further, the Court of Appeal in **Erick Onyango Ondeng' v. Republic [2014] eKLR** held:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

41. It is my considered opinion that the inconsistencies identified by the appellant in relation to the place where EAO was defiled is a matter which the trial court satisfactorily reconciled by finding that in as far as it constituted the appellant's defence, it was insufficient to set aside the prosecution case against the appellant in view of the overwhelming evidence adduced against him.

2) Whether the prosecution proved its case beyond reasonable doubt

42. The appellant was charged with defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. Section 8(3)** contemplates that the age of the child between 12 and 15 years and gives a penalty of a term of imprisonment of not less than twenty years.

43. The age of the complainant was determined from the Baptismal Certificate produced as prosecution exhibit 2 that showed the date of birth of the complainant EAO as 25th May 2004 and taking into consideration that the incident occurred on 3rd August, 2018 thus placing the age of the complainant at the time of the offence at 14 years.

44. One of the appellant's grounds of appeal was that the medical evidence was not sufficient to convict him. PW5 Mr. Omondi, a Clinical Officer from Madiany Sub-County Hospital testified that on examining the complainant, she had lacerations on labia minora and majora, a torn hymen and whitish discharge from her genitalia and also noted that she had dry blood stains on her underpants. The Clinical Officer concluded that penetration had taken place.

45. It is noteworthy that the complainant EAO positively identified the appellant and she was firm and resolute in her testimony that it was the appellant who defiled her.

46. Section 124 of the Evidence Act Laws of Kenya provides that

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where 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, where 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 reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

47. **Thus it is clear from a reading of section 124 of the Evidence Act** that a trial Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (***See George Kioyi V R Cr. App. No. 270/2012 (Nyeri) and Jacob Odhiambo Omumbo V. R. Cr. App No. 80 of 200 (Kisumu).***

48. The appellant's defence was to the effect that at the time and the date of the offence he was with the mother of the complainant and 3 other people in the house when the complainant came to the house and accused him of defilement.

49. I am alive to the principle that by setting up an alibi defense, the accused does not assume the burden of proving the alibi (***Ssentale v. Uganda [1968] EA 36).*** The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt ***(Wang'ombe v. Republic [1976-80) 1 KLR 1683).*** **However t**he Court of Appeal has stated over and over that it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise.

50. The said Court of Appeal has also held that nevertheless, even when the defence is raised late in the day, it must still be addressed. See (**Ganzi & 2 Others vs. R [2005] 1 KLR 52**.) However, in the present case, and as already observed above, the appellant's belated alibi defence weighed against the evidence adduced by the prosecution witnesses which was accepted by the trial court and which I wholly concur with, the conclusion I make is that the alibi defence is and was effectively displaced.

3) Whether the sentence imposed upon the appellant was harsh

51. The appellant has impugned the judgment of the trial court in imposing a sentence of 20 years imprisonment. He argues that the sentence is manifestly harsh. The role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in **Wanjema v Republic [1971]EA 494** that:

> ***'An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case"***

52. Section 8(3) contemplates that the age of the child between 12 and 15 years and gives a penalty of a term of imprisonment of not less than twenty years. The trial court had the discretion to sentence the appellant to a period in excess of twenty years but she considered his mitigations and the fact that he was a first offender and sentenced him to a minimum of twenty years. The complainant was found to be a 14 year old child. Accordingly the learned Magistrate was entitled and obliged to mete out the sentence given. However, the mandatoriness of minimum sentences has since been successfully challenged in **Jared Koita Injiri v Republic [2019]** where the Court of Appeal reduced the mandatory sentence imposed on the appellant defiler. It follows that minimum mandatory sentences are no longer mandatory as they deprive the trial court of the discretion in sentencing.

53. For the above reasons, I find that whereas the sentence imposed on the appellant was lawful and not excessive, nonetheless, as the sentence meted out on the appellant was minimum provided for in law, it is clear that the trial magistrate never exercised any discretion but imposed the very minimum sentence. I would therefore, while appreciating the heinousness of the offence of defilement and the remorsefulness shown by the appellant in this appeal which focussed mainly on sentence, would exercise discretion and reduce the 20 years imprisonment to fifteen years imprisonment taking into account the period the appellant had served in remand custody upon his arrest.

54. To that extent, the appeal against conviction is dismissed. The appeal against sentence succeeds to the extent that the minimum mandatory twenty years imprisonment is set aside and substituted with fifteen years imprisonment to be calculated from the date of arrest of the appellant on 3rd August 2018.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 20th Day of July 2020

via Microsoft teams appellant in prison custody but present online.

R.E. ABURILI

JUDGE

Mr Okachi SPPC present for Respondent

CA: ISHMAEL AND MODESTAR