REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL CASE NO. 60 OF 2018

MALIK MOHAMED MUSA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from original conviction and sentence in lower court criminal case no. 2 of 2017 in the Principal Magistrates Court at Hola before Hon. A. P. Ndege (SRM) in chambers dated 4th September 2018)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the respondent

JUDGMENT

The appellant was charged before Senior Resident Magistrate sitting at Hola with the offence of defilement contrary to Section 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge averred that the appellant on or about the month of August and September 2016 in Tana River sub-county, intentionally and unlawfully caused his penis to penetrate the vagina of ZI a child aged 16 years old.

The appellant who denied the charge was tried, convicted and sentenced to serve 18 years imprisonment. Being dissatisfied with the Judgment of the Lower Court, the appellant filed the following amended four grounds of appeal:

> ***(1). That the Learned trial Magistrate grossly erred in both Law and facts by failing to consider that there was no cogent and credible evidence to connect him to the commission of the alleged offence and also failing to consider sharp contradictions contrary to Section 163 of the Evidence Act.***
>
> ***(2). That the Learned trial Magistrate erred in both Law and facts by failing to consider that the sentences imposed to the appellant was manifestly harsh and excessive in all the circumstances.***
>
> ***(3). That the Learned trial Magistrate erred in Law and facts by failing to adequately consider his defence.***
>
> ***(4). That the Learned trial Magistrate erred in both Law and facts by failing to consider that the legal prosecution for a mandatory sentence under Section 8 (4) of the Act conflicts with Article 27 (1) (2) (4) of the Constitution of Kenya 2010.***

Analysis and determination

In criminal cases before a trial Court one of the fundamental duty of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence. In **R v Subordinate Court of the First Class Magistrate at City Hall {2006} EA 330** it was held that:

> ***"When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person."***

The general provisions on the legal and evidential burden is to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence

framed against an accused to create a doubt in the mind of the Court that he cannot be entitled a right of presumption to innocence. In **Woolmington v DPP {1935} AC 462 Lord Sankey** stated in the following terms:

> ***"But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty."***

It is only in exceptional cases the trial Court can ask the accused person to proof certain matters within his knowledge on a balance of probability. But even in those circumstances the burden of proof never shifts to the accused person. In **Miller v Minister of Pensions {1947} 2 ALL ER 372 Lord Denning** held as follows:

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of court it is possible, but not in the least probable. The case is proved beyond reasonable doubt but nothing short of that will suffice."***

This doctrine on the burden and standard of proof would be applicable in respect of this appeal.

Ground 1 & 2

The appellant in his submissions stated that crux of the appeal revolves around the elements of the offence of defilement and the variance of the DNA profile result which negatived the testimony of the victim **(PW5).** The appellant further submitted that part of the corroborative evidence of the victim was as in connection with the pregnancy and that the born child was a result of the act of defilement committed between the month of August/September 2016. His first grievance for that matter was to the effect of the prosecution failed to prove penetration of the victim and the trial Court was duly bound to resolve the benefit of doubt in his favour. He relied on the dictum in **Ogweno v R (HCCRA No. 45 of 2015).**

In light of the DNA test the appellant paused the questions on the falsity of the victims evidence which he contended were never answered by the prosecution. Who penetrated the victim in order for her to conceive the child. The appellant contended that at least for him the DNA test exonerates him from the act.

In view of the variance of the DNA test with the testimony of the victim, should the Court have found the contradictions to be material to warrant vitiating the cogency and credibility of her evidence. On contradictions and discrepancies which go to the root of the victim testimony, appellant placed reliance in the case of **Kazungu Mramba Mweni v R CR Appeal No. 220 of 2007, Rose Auma v R{2011} eKLR.** Based on that the appellant contention was still the appeal has merit. In answer to this ground Learned prosecution counsel **Mr. Mwangi,** conceded that the record clearly shows disregard of the DNA test by the Learned trial Magistrate in his analysis and findings of fact on the matter. Further, Learned prosecution counsel submitted that in view of the fact that the trial Court requested for the DNA test and samples duly collected from the appellant and the victim, it was incumbent for a positive finding to be made on the issue and the kind of weight given to it.

According to Learned prosecution counsel, whether the offence did not require DNA test to be proven beyond reasonable doubt it became a prerequisite evidence to establish the *actus reus* of the appellant to conclude that he was responsible for the pregnancy.

Looking at the evidence, this Court is entitled to make its own independent evaluation and come to its own conclusions. **(See Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates {2013} eklr, Pandya v R {1957} EA).**

In dealing with the DNA Section 48 of the Evidence Act provides interalia, that:

> ***"any scientific report or opinion is admissible in any criminal proceedings for the Court to form an opinion on such matters as to prove the existence or non-existence of the facts in issue contained in it. The scientific report though not conclusive provides primafacie evidence. On the disputed facts in the proceedings under adjudication by the Court."***

The essence of DNA test is to encode the genetic configuration of human beings and other living organisms to detect variances, correlations and or matches from one individual to another. Where two parties are in dispute on paternity the DNA test is considered the most accurate and reliable evidence to render the decision as to who is the father of a child whether born out of legal union or the unlawful sexual intercourse as it happened in the instant case.

From the submissions of the appellant and the record on the face of it the DNA results showed that the appellant was excluded as the biological father of the child and therefore the charge of defilement could also be set aside and have the appellant acquitted altogether.

In **Williamson Sowa Mbwanya v R {2016} eKLR the Court of Appeal** held interalia that:

> ***"a DNA test of the appellant would at most determine whether he was the father of the victim's child, which is a different question from whether the appellant had defiled (Z.I)."***

Further, the Court in **Evans Wanjala Wanyonyi v R {2019} eKLR** held:

"An essential ingredient in the offence of defilement is penetration and not impregnation." (see also Twehangane v Uganda CR Appeal No. 139 of 2001 "In the sexual offence of defilement the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured."

For an appreciation of the matters raised on appeal to this Court its necessary to briefly summarize the evidence of the star witness **(PW5)** concerning penetration, **(PW5),** the victim gave graphic details that she started having consensual relationship with the appellant way back in 2014 but it was not until August 2016 when the intentional and unlawful act of penetration resulted in a pregnancy. That however did not stop them from engaging in sex until 2017 when the appellant could not be reached on phone. The matter drew the attention of her parents **(PW1) G**, her uncle who testified as **(PW2) (M),** the younger sister **(O) (PW3)** also gave evidence with regard to the offence and the confirmed pregnancy by the doctor at Chardende Dispensary. The appellant had vehemently denied having any sexual intercourse with the victim **(PW5)** as alleged on diverse dates of 2014, 2016 and 2017 respectively.

It is also pertinent at this stage to observe the clinical findings by **(PW8) Maro** of Bura sub-county hospital. In particular, both the physical and medical examination carried out revealed (PW5) was six months pregnant and her age was assessed on 26.4.2017 to be seventeen years old. The trial Court accepted the victims evidence that she had known the appellant and her evidence was credible and fruitful worthy of believe to connect the appellant without reference to any other independent witness statement.

I shall therefore examine the evidence of the victim to see to it if in the absence of the pregnancy and the negative DNA test, her testimony standing alone or corroborated in any other way could support the conviction beyond reasonable doubt. On the critical question of recognition the Learned trial Magistrate directed himself as to the victims cogent and credible evidence and ruled out any possibility of error or mistake. That the defence the appellant gave was difficult to believe to exonerate him from culpability.

From the assessment of this part of the case, it is evident the victim did not exactly come out as to the time and date the offence was committed. There has been no doubt on the Law on identification and the weight to be given to the testimony of a single identifying witness to a criminal charge. In the well-known cases of **Abdallah Bin Wendo v R 20 EACA 166 and R v Turnbull {1976} 3 ALL ER 551,** the obligation on the part of the trial Court to assess and analyze the evidence of identification with meticulous care is well laid down. The Learned trial Magistrate spoke to all these issues in his detailed Judgment to unhesitantly rule that the victim was honest, truthful and credible in all the dimensions of her evidence.

In this particular case, the appellant complains that there were material discrepancies on the part of the victim's evidence which was not considered by the trial Court. In the case at bar the victims story covers the fact that she had been in sexual relationship with the appellant since 2014. That he tricked her in the course of their relationship to engage in sexual intercourse. In her own testimony she describes the events in the following words:

"In 2014 he inserted his male organ into mine (female organ) till I became pregnant. I am not sure of the exact date. It was however in August 2016. We started pushing in 2014. He was seducing me at the time. I resisted till 2016 when I gave in and immediately became pregnant, I felt that he lured me truly in 2016 and I therefore gave in. he penetrated me in a thicket. We agreed that we were to meet again there. I told the people at home I was going to fetch firewood. I then went with a rope for firewood. I removed my clothes. He also removed his and did the act on me. He removed his male organ and inserted it into mine without any protection, in January 2017 I realized that I was pregnant."

The medical evidence of **(PW8)** supports the victim evidence at one time or another between 2014 and 2016 as she alludes to her genitals being penetrated by a male organ in terms of the definition under Section 2 of the Sexual Offences Act.

In this case I have given due weight to the testimony of (PW5). The danger is there are very clear indicators that he might have been coached taking all the discrepancies and likely errors of her memory to recollect events to support her sexual relationship with the appellant. Indeed her timetable of events in adherence to the referenced calendar with effect from 2014 – August 2016 demonstrates primafacie evidence of inconsistencies and contradictions which impeaches the findings on her velacity and credibility on account relied upon by the Learned trial Magistrate. It is beyond belief without any scientific evidence to the contrary that the victim was first penetrated in 2014 without any protection but she had to conceive from the sex act in August 2016. It is clear from the charge sheet the offence took place between the month of August and September 2016 and that the clinical officer **(PW8)** examined the victim. On 27.3.2017, when the pregnancy of 24 weeks was confirmed. From August 2016 to 27.3.2017 when the examination of the victim took place at Chardende Hospital, that is little over 32 weeks later since the last missed periods averred to in her evidence. I bear in mind that when the clinical officer (PW8) estimated the time, he was not of course speaking exactly to the first sexual act, but making an estimate with a tolerance of the period since conception. That period of 24 weeks and the countdown of 32 weeks appropriated from the evidence of (PW5) would not be within that tolerance to speak of a penetration which occurred in August 2016. The evidence of the victim is that since 2014 – 2016 she had not known any other man sexually except the appellant. There is then the analyst DNA report which put forward a case of a negative DNA match on the profiled samples of paternity of the child claimed to have been fathered by the appellant. That being so, there was evidence before the trial Court which it could accept on these medical facts to question whether the victim is a witness of truth and honest. Under this ground I do not think that the question of identification and penetration was clearly investigated.

In my view when there is a series of incidents of defilement committed on different dates, each act should be the subject of a separate charge. A specific information can properly be framed when an account of evidence the act is said to be for a short period of time as transactional and in the circumstances indicate that the appellant is responsible.

In this instant case, the charge drawn did not give the appellant precise information as to the offence alleged against him. This did cause him an embarrassment in his defence given the undisputed fact that the victim had other 'partners' she engaged in sexual intercourse with. That is manifest in the DNA test report.

In my view, the crux of this matter is the purported findings by the Learned trial Magistrate which singled out the victim evidence to be of high quality and remained good both at the close of the prosecution case and at time of the defence answer to the charge. In my Judgment

the victim evidence did not come within a mile of the test laid down in the case of **Kyiafi v Woro {1967} GLR 463 AT 467** the Court held:

> ***"It must be observed that the questions of impressiveness, or convincingness are products of credibity and veracity, a Court becomes convinced or unconvinced, impressed or unimpressed with oral evidence according to the opinions it forms of the veracity of witnesses. However a Court has to test its impression as to the veracity or truthfulness of oral testimony of a witness against the whole of the evidence of that witness and other evidence on record."*** **(See also Ackom v R 1975 GLR 419).**

The only question before us as regards this Court is whether there was indeed sufficient valid evidence on which to base conviction of the appellant. It is true that a Court in any criminal case may convict on the evidence of one single identifying witness and if the Court has duly cautioned itself as the trial Magistrate did in the case before the Court. The rule is that an appellate Court will not interfere **(See Reuben Karari c/o Karanja v R {1956} 7 EACA 146).** Unless an exceptional circumstances. In this appeal, the reason and justification for interference lies in the unique circumstances which exist regarding the offence committed by the appellant against the victim **(PW5).** Let me say, that I cast no doubt on the integrity of the victim. The trial Magistrate saw and heard her and was deeply impressed by her sincerity and honest and least from the subjective view point of the witness, completely truthful. But it seems to me that the Court did not weigh the probative value of this evidence not just from the point of view of its credibility in itself but as one link in the chain of all other evidence, brought before the Court and accepted by it as being credible, regarding the events of that period between the year 2014 and August 2016, when the alleged offences took place.

In those circumstances, the place and the character and actions of the victim was inconsistent with the existence of the other evidence, even if that other evidence did not corroborate it, in the technical sense on the conviction of the appellant. This is not the case where the credible testimony of a single witness is exceptional and the other evidence raises doubts, but the testimony is of a nature that there was likelihood of misapprehension and recollection of the many different set episodes which the witness experienced during the questioned period or shortly thereafter, when she found she was pregnant.

In this instance one cannot say that this seventeenth year old testimony given in Court had the express purpose of spilling the beans about the deeds of the appellant but out of pure caution to hint to the guardian that someone known to them was responsible for the pregnancy.

I can see no alternative but to give the appellant the benefit of the serious doubt which I feel characterized his trial and lessening the burden and standard of proof of beyond reasonable doubt. In my view the evidence did not go far enough in establishing a link, a connecting factor between the appellant and the offence he faced at the trial.

In the result this appeal is allowed, the conviction and sentence set aside. Subsequently, the appellant is hereby set free unless, otherwise lawfully held. That is the order of this Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF OCTOBER, 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for the state