REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CRIMINAL APPEAL 160 OF 2012

JACKSON AMULWESE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the original Conviction and Sentence in Kapsabet Chief

Magistrate's Court Criminal Case Number 397 of 2012 by Hon. Gladys Adhiambo (Principal Magistrate)

J U D G M E N T

1. The Appellant Jackson Amulwese was charged in **Kapsabet PMCRC no.397 of 2012** with defilement under **Section 8(1) as read with 8(2) of the Sexual Offences Act No 3 of 2006**. *It was alleged that on diverse dates between 5th & 6th February 2012 in Nandi County he unlawfully and intentionally caused his penis to penetrate the vagina of JK a girl aged 14 years old.*

In the alternative he was charged with indecent act with a child under **section 11(1) of the same Act**. *That on the same dates, time and place he caused his penis to come into contact with the vagina of JK a girl aged 14 years old.*

2. On 25/9/2012 the learned trial magistrate found him guilty of defilement under section 8(1) as read with 8(2) of the Sexual Offences Act.

3. On 26/9/12 having heard the appellant' mitigation, and having found that the complainant was aged between 12-15 years, the learned trail magistrate sentenced the appellant to 35 years' imprisonment under section 8(3) of the same Act.

4. Aggrieved by the conviction and sentence, the appellant filed this appeal on 4/10/2012. The grounds were:

a. THAT the trial magistrate erred both in law and fact by failing to consider that the prosecution evidence was insufficient to sustain a safe conviction e.g. all the particulars of evidence were not proved beyond reasonable doubts.

b. THAT the trial magistrate erred both in law and fact in convicting me on the basis of inconsistent and contradictory evidence from the prosecution witness.

c. THAT the trial magistrate erred in both law and fact by failing to put into account that PW 1's testimony in chief was doubtful and without credibility.

d. THAT the trial magistrate erred both in law and fact when she failed to note the motive behind the great delayance (sic)of my arrest i.e. 10 days after the alleged incident.

e. THAT the trial magistrate erred in both law and fact by failing to consider that the doctor's testimony and report did not meet exhaustive and confirmatory ingredients to verify my involvement in the said offence e.g. No DNA was done on PW 1 nor any medical examination on I the appellant.

f. THAT the trial magistrate failed to consider that the essential witnesses in this instant case were not availed to testify in court to clear doubts.

g. THAT the trial magistrate erred both in law and fact by failing to note that there were no incriminating exhibits to connect me to the said offence e.g. clothing of PW 1.

h. THAT the learned trial magistrate erred in passing a harsh and disproportionate sentence against I the appellant being a first offender.

i. THAT the trial court denied me the rights to a fair trial hearing e.g. my defence witness were not given chance to testify hence locked out new and compelling evidence crucial to the defence case.

j. THAT the trial magistrate erred in rejecting my defence in its totality without giving concise reasons for doing so hence contravening section 169(1) of the CPC.

5. Before the hearing of the appeal took off, the appellant complained that his appeal had taken too long for no apparent reason; that even as we were about to proceed, he had not been supplied with the charge sheet and the proceedings (the file) and consequently had not been able to file submissions to support his grounds.

6. Noting this opportunity to be heard opted to argue his appeal orally proceed and urged the court to consider the grounds of appeal he had filed.

7. His complaint was not vain. The record before me is does not contain the original file from the subordinate court. What was vailed is labelled "Skeleton file". This skeleton file does not even contain the charge sheet or the handwritten proceedings of the subordinate court but contains only the subordinate court's certified copy the typed proceedings and judgment.

8. The right to fair trial protected by Article 50 of the Constitution, and to have the trial ***begin and conclude without unreasonable delay*** must equally apply to an appeal. Twelve years is not reasonable. It is a Constitutional edict at Article 159 that Justice shall not be delayed. Considering that this appeal was filed in 2012 and has never been heard, and that the passage of time has not produced the original file from wherever it went, it was my view that interests of justice demanded that the appeal be heard.

9. This being a 1st appeal the appellant is entitled to a REVISIT to the evidence rendered in the subordinate court in terms of the guidelines in **Okeno vs Republic (1972) EA 372** where it was stated

> *"The first appellate court must itself weigh conflicting evidence and draw its own conclusion* **(SHANTITLAL M RUWALA V R, [1957] EA 57)**. *It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."*

10. In his oral arguments, the appellant raised issues with t**he** sentence of 35 years' imprisonment. That it was contrary to the provisions of Section 8(2) of the Sexual Offences Act under which he was charged and even s. 8(3) under which he was sentenced. He felt disadvantaged as he did not have the charge sheet. He argued that under the Sexual Offences Act sentences are determined by the age of the complainant and in his case, the sentence was way above what the law provided. He submitted further that he felt there were ill motives with respect to his appeal. That the proceedings were issued on 12th November 2018 but were supplied to him on 2nd September when the appeal was for hearing on 8th, without the Charge sheet or the P3, making it difficult for him to properly argue his appeal. He urged the court in arriving at its decision, to consider all the grounds he had filed and set him free.

11. Mr. Masisa prosecuting counsel also conceded that he did not have the complete record from subordinate court. He too opted to proceed with the record of appeal as is.

12. On the issue of sentence, he argued that the sentence was based on the proven age of the complainant. Referring to the judgment he submitted that the trial court formed the opinion that the age of the complainant was between 12 and 15 years old and that the learned trial magistrate exercised her discretion in sentencing the appellant to 35 years' imprisonment. That even if the appellant was charged or convicted under the wrong section this court had the jurisdiction to correct the same in the interests of justice.

13. He did not respond to the other issue, or the other grounds of appeal.

14. In response to the prosecution's submissions the appellant urged the court to find that the sentence was harsh, excessive and to apply the *Muruatetu case* to his case**.** He pointed out that he was 36 years when he was imprisoned and after 35 years in prison he will be of no use to the society. He submitted that the period spent in prison was not in vain because the purpose of imprisonment was to rehabilitate and he had been rehabilitated in the 8 years he had been in prison.

15. Although the appellant did not argue all the grounds as filed, this court has the obligation to relook at the evidence on record and draw its own conclusions. To do so I consider the totality of the grounds of appeal which disclose the following as the issues for determination: -

- *Whether the prosecution proved the ingredients of the offence beyond a reasonable doubt.*

- *Whether the case for prosecution was based on inconsistent, contradictory and incredible evidence.*

- *Whether the medical evidence supported the charge.*

- *Whether prosecution failed to call essential witnesses.*

- *Whether the sentence passed was harsh, and disproportionate.*

- *Whether the appellant's defence was rejected without reason and*

- *Whether his witnesses were denied the opportunity to testify*.

16. The case for the prosecution was that the family of the appellant and the complainant's family were neighbours. On 5/2/2012 about 6.00 pm the complainant 14-year-old JK left her home at [particulars withheld] village for her grandmother's at Kaptio. On her way there she met the appellant who requested her to go back to his home. She went back and lived with him for two days. In her own words: -

> ***"..., we stayed at his house. He did not do anything. I stayed at his house for 2 days. I lived with him for 2 days but he used to be in the house for short intervals. I slept with Jackson in one bed. I had sex with him once. He had sex with me on 5/2/2012. I also had sex with him on 6/2/2012. On 6/2/2012 we only had sex once. I never took a step. My mother came with the village elder and found me at the said house. They then took me home. They found me at Jackson's house and by then Jackson was at his parent's home.***

17. On cross examination she said that when she was found at Jackson's house the appellant was not present and she did not know where he had gone to. She said that the appellant's house was in his parent's homestead. That the appellant's brother would come to the house when she was there. She said the appellant never forced her to accompany him.

18. According to JK's mother PW 2 – GK the complainant was about to join form 1 and she had sent her to her grandmother's to collect come items for joining Form 1. That the complainant went to her grandmother's then returned home. She then told her that she was going to spend the night at her grandmother's so that the following day she would go to her former primary school to collect her results slip. She left again apparently for her grandmother's place.

19. By Monday the complainant had not returned. GK went to the grandmother's place to look for her only to learn that she had not been there. She began a search for her in the nearby homesteads including the appellant's home, where she asked appellant whether he had seen her and he told her had not. She testified that on her way back home she overheard some young men talking about her as 'the mother of that girl'. She testified that had the young men interrogated but they said they did not know her daughter's whereabouts. She proceeded to report to the village elder. The village elder then proceeded to the home of the appellant and came back with JK. For some reason the appellant was not arrested. The village elder told her that the appellant had escaped.

20. GK testified further that when JK was brought by the village elder she told her that on the material evening she met appellant who told her that there was someone at the appellant's house wanted to see her. That on this, she accompanied him to his home where he locked her up in the house and raped her. The complainant was taken to hospital, and the matter reported to police.

21. The complainant's mother further testified on cross examination that when she was at the appellant's home asking for her daughter, she never heard her daughter raise any alarm, that JK was found inside appellant's house; that JK was friends with appellant's sisters. That appellant disappeared from the area and only returned when his mother fell ill.

22. The village elder was PW 3 Ajivai Inyara. He received GK's report that JK was missing on 7/2/2012 at 7.00 am. About 1.00 pm. GK rang him and told him she had found the whereabouts of her daughter. She directed him to a homestead where he found the Mzee of the home who told him he knew nothing about a girl in his homestead. PW3 testified that he then called the appellant. That the appellant came and admitted to him that the girl was in his house. That he told the appellant to take him to his house which he did. That he PW3 then called out the girl's name and she came out. That he then called her mother. That when her mother came she JK told them she had not been forced into the appellant's home but "admitted" to being in a relationship with the appellant. On cross examination PW3 said that the appellant and the girl were neighbours.

23. PW 5 No 56664 CPL Scholastica Mwagale's testimony was that she received JK accompanied by her mother GK at Kaimosi Police Station. They reported a case of defilement. The report was that the complainant met the appellant while on her way to her grandmother's, and went with him to his house where they had sex for 2 days. That the girl was locked in appellant's house, and that it was the appellant who had opened the door for her to come out. According to PW 5 the appellant went underground after the defilement and only showed up after his mother died. She wrote an arrest order to be executed by the two community policing leader PW 4 Abdalla Ibrahim Khameli.

24. PW5 also produced the complainant's clinic card showing that she was born on 5/3/1997.

25. Abdalla Ibrahim Khameli testified that the received the arrest order on 16/2/2012 and arrested the appellant on 17/2/2012 on allegations of defilement. He took him to Kaimosi police station.

26. PW 6 Benard Kevin Lagat the clinical officer at Kapsabet District Hospital received the complainant on 12/2/12. On examination he found that her external genitalia was normal, and her hymen was broken. She had a whitish discharge on her vulva. The HVS test revealed numerous epithelial cells. He completed the P3 on 13/12/2012 and noted that the hymen was not freshly broken as there were "no symptoms of fresh wounds". He also concluded that the presence of the epithelial cells was evidence of recent penetration. He produced the P3 form as evidence.

27. On cross examination PW6 testified that the complainant was examined on 8/2/2012, three days after the incident; that he indicated the age of injuries to be 8 days and that his view was that the complainant had been defiled but he did not know for how long.

28. On this note the prosecution closed its case and the appellant was put on his defence.

29. In his defence that appellant made an unsworn statement and at first said he would not call any witness. The first part of his defence was really submissions, filling the gap of what ought to have happened after the prosecution had closed its case. He submitted on the frailty of the case for prosecution pointing out its failures in establishing a prima facie case against him. Then he testified that he was home on 5/2/2012, which was a Sunday. He was with the family the whole day. He stayed home until he went to sleep. The following day 6/2/12 was a Monday. He went to the farm with his brother Morfat from morning till lunch time when they went home for lunch. After lunch, they went back to the farm till 4.00 pm. He when they came home. It was his testimony that he never left the compound until the time he went to sleep.

30. On 7/2/2012 he was still home. His mother was unwell; his grandmother had come to visit. He went to the farm from 10.00 to 4.00 pm. After that he was in his father's house with his grandmother, together with his siblings Noel, Violer and his brother Morfat. His other sister Eunice was sleeping. That is when the village elder PW 3 came with other 2 elders and GK. They spoke to his father, then the village elder told him that JK had disappeared and asked him whether he might he know her whereabouts. He said no. That is when his sister came and said she had seen the complainant passing the other side of the homestead, and entered his house whose door had been left open to allow the recent cow dung smeared on the floor to dry. JK was called and asked where she had been and that her response was that she had slept at the shops. She left with her mother and the elders.

31. On 14/2/2012 his mother died. She was buried on 17/2/2012. That same day he was arrested on the guise that the OCS who was known to his now deceased mother wanted to see him. He thought she wanted to say pole to him. However, when he arrived at the police station he realised he had been arrested as he was placed in cells where he stayed on 17th, 18th, 19th and was taken to court on 20/2/2012 with these charges which he denied.

32. In analyzing the evidence, I bear in mind the issues raised by the appellant not necessarily in that order.

33. **On his defence** it is not true that the learned trial court shut out his witnesses. The record shows that he indeed asked for time to call them, the time was granted, but on the scheduled day, none showed up and he closed his defence. Hence it is not true that his witnesses were shut out/denied the opportunities to testify.

34. On proof of the ingredients of the offence of defilement; the onus was on the prosecution to prove the same beyond a reasonable doubt, and to ensure that the circumstances of the case as presented supported the charge.

Age of the complainant was proved to be 14 years at the time of the offence on the evidence on her date of birth, her testimony and that of her mothers.

Penetration.

PW 1's testimony was self-contradictory. In the same breath she said that the appellant did nothing, that she had sex with him once, that she had sex with him twice, once on 5th, then on 6th. The medical evidence was neither supportive nor conclusive. The complainant was examined 8 days after the alleged defilement. The clinical officer drew conclusion of recent sexual intercourse, but could not say how recent so as to place the appellant with the complainant. He did produce the treatment chit for 8th February 2012 but did not testify as to its contents with relation to the fact of defilement, but only stated that the same indicated that the complainant was treated and given medicine.

The trial court drew the conclusion that the treatment sheet showed that the complainant was taken to Kapsabet hospital for treatment on account of defilement on the 8th February 2012. That on the 12th February 2012 she was examined by the clinical officer who assessed age of injuries to be 8 days hence placing the defilement on the 5th February 2012. The trial court found this evidence to be corroborated by that of the complainant's mother and PW5.

An analysis of this evidence shows that the complainant was taken to hospital on 8th but the findings of that hospital visit are not on record. What is on record is what the PW6 found on 12th. How does the discharge, and the epithelial cells found on 12th connect to the alleged defilement of 5th? He opined that approximate age of injuries was 8 days but in the same breath stated that except for the broken hymen, the external genitalia was normal and there were no injuries. It is now settled that a broken hymen per se is not proof of defilement.

The evidence of the circumstances surrounding the alleged defilement did not help matters either.

On how the complainant got to the appellant's home, her mother testified that the complainant lied to her that she was going to spent the night at her grandmother's place. She also testified that the complainant told her that the appellant tricked her into accompanying him to his home, then locked her up in his house, and raped her, yet the complainant testified that appellant simply asked her to go with him to his home, and she went with him without any coercion.

The Court of Appeal in **Gabriel Kamau Kinuthia v Republic [2003] eKLR** had this to say:

> *In our view and upon a proper consideration of the evidence on record we hold that the evidence of the mother of the complainant (PW2) is untrustworthy. She has failed to explain the role of N in the first charge and so many other relevant aspects of the case. Her evidence cannot found a conviction. In the case of* **Ndungu Kimanji v Republic [1979] KLR 282** *this Court said: -*
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> *"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.*

The complainant's self-contradictory testimony, her lying to her mother, and the village elders and her mother's inconsistent evidence create

the impression that their evidence with regard to the circumstances of the offence ought to too be relied upon to found a conviction.

Even the manner in which she was allegedly traced to the appellant's home is suspect. Her mother is the one who reported to the village elder that her daughter was in appellant's home. The village elder alleges he went, found the girl in the presence of the appellant. His evidence contradicted that of the complainant, who testified that when she was rescued, the appellant had disappeared from home. But, at the same time the village elder's testimony corroborated the appellant's defence that he was at home when the elders came.

This also created an inconsistency as to the reason why appellant was not arrested on the date she was rescued. Complainant and her mother testified that he had disappeared. But the village elder testified that he was at home with his parents. It is not believable that the elders would have found the girl there and left the person who had abducted her behind.

It is the appellants' testimony the complainant went to his home on 7/2/2012 when she was already being looked for and had not spent 2 days and nights at his home.

The investigating officer never visited his home. The appellants house was within the same compound as the house of his parents and siblings. These people's statements needed to be recorded as those of nearby neighbours to place the complainant in that home for 2 days and 2 nights.

Except for the complainant's word and that of the appellant there is no other evidence to support the allegations that complainant was in that home.

The complainant's mother GK never testified as to how she found out that her daughter was at the appellants' house. She did not explain how she knew yet according to her, the 2 young men she overheard speaking about "that girl" told her they did not know where ''that girl''. She did not also explain how she arrived at the conclusion that the unnamed young men were speaking about her daughter. Of greater concern is that gap in her evidence as to how she found out that her daughter was at the appellants' house. Is it believable that the complainant would be locked up against her will, hear her mother's voice in the compound and not raise alarm?

The other bit of the evidence that does not add up, is the allegation that the appellant disappeared from his home after the incident. The prosecution did not avail any evidence to support that fact. No evidence that the village elder went to his home to arrest him and did not find him. No evidence that the police upon receiving the report went looking for him and he was missing from home.

The upshot of this is that the complainant may have been saying the truth when she testified that nothing happened and also when she testified that she said something happened. The prosecution could not have put both statements in evidence and expect a safe conviction.

All this speaks to the provisions of s. **Section 33 of the Sexual Offences Act which states:**

> ***"Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove - (a) whether a sexual offence is likely to have been committed-***
>
> ***(i) towards or in connection with the person concerned;***
>
> ***(ii) under coercive circumstances referred to in section 43; and***
>
> ***(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.***

35. The appellant gave his defence. He was home with his parents and siblings. The Investigating officer did not visit the home to establish the possibility that what the appellant was saying could not be true. Clearly his defence may have been true he even put it to the complainant that she was passing by his homestead on the material date. The trial court shifted the burden of proof on the appellant stating that he failed to call any of the persons he said he was with at home at the material time. However, the village elder testified that he found the appellant with his family and even spoke to the appellant's father.

36. No investigations were carried out by the investigation officer. It was upon the investigating officer to visit the scene and establish the circumstances of the offence, and in particular whether the complainant was locked up in the appellant's house as alleged and if so whether there were witnesses. This was an opportunity to gather evidence to prove a crucial disputed fact that was crucial to the case: whether or not the complainant was in the appellant's home on the two nights she was missing from home.

37. From the foregoing it is apparent that the evidence surrounding the alleged penetration is unreliable and could not have founded a conviction

38. Regarding the sentence; while it was within the trial court's discretion, there was need to justify the sentence beyond the recommended minimum of twenty (20) years under Section 8(3) of the Sexual Offences Act. What was the basis for the 35 years' imprisonment? Discretion must be exercised judiciously. Sentences must also be justified.

39. Having considered the skeleton record before me, and the submissions by both prosecution and the appellant, I find that the prosecution indeed established the age of the complainant and that her family and that of the appellant were neighbours. However, the rest of the evidence was contradictory, inconsistent and unreliable.

40. The appeal therefor succeeds. The conviction is quashed. The sentence set aside. The appellant to be set at liberty unless otherwise legally held.

Delivered, dated and signed virtually this 9th day of November, 2020

Mumbua T. Matheka

Judge

In the presence of:

CA Koech

Appellant in Eldoret GK Prison