REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 14 OF 2020

LAMECK OPOSO ONDARI.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. J. M. Nang'ea – CM Thika dated and delivered

on the 19th day of September 2019 in the original Thika Chief Magistrate's Court

Sexual Offence No. 1 of 2019}

JUDGEMENT

The appellant is serving a life sentence for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the offence were that on 30th December 2018 at Riverside area of [Particulars Withheld] Sub-county within Kiambu County the appellant intentionally caused his penis to penetrate the vagina of JK a child aged 10 years.

The appellant has appealed the conviction and sentence on the following grounds: -

"a. THAT the charge was defective, for being framed contrary to Sections 134, 137 (a) and 214 (1) of the Criminal Procedure Code (Cap. 75, Laws of Kenya;

b. THAT the Prosecution evidence particularly that of Pw1, Pw2, Pw3, Pw4 and Pw6 has fundamental variations as to when the incident occurred as well as when it was reported;

c. THAT the trial Court erred in law by failing to give due regard to the material contradictions, discrepancies and inconsistencies in the Prosecution case, thereby reaching a wrong decision and resulting in a miscarriage of justice.

d. THAT, the learned trial Magistrate erred in law and fact by failing to note that the witnesses were all coached and that investigations were done when the Appellant had already been arrested.

e. THAT the learned trial Magistrate erred in law and fact in failing to take into account the provisions of Section 124 of the Evidence Act.

f. THAT the trial court misdirected itself by concluding that the clinical findings were sufficient corroboration when such findings were devoid of any proof;

g. THAT the learned trial magistrate erred in both law and fact by failing to summon essential witnesses for the just determination of the case; in contravention of Sections 1446 (4) and 150 of the CPC.

h.THAT the learned Magistrate erred in law by failing to note that Pw6 (the Investigating Officer) did not do any investigations and that if he did, the same were shoddy.

i. THAT the trial Magistrate erred in law by failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided for under law, thus the guilty

verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice."

The gist of this appeal is that the charge against the appellant was defective as it has omitted the word unlawfully; that the evidence adduced by the prosecution did not prove the charge beyond reasonable doubt and that the appellant's defence was rejected although it was not rebutted.

The appeal was vehemently opposed. Learned Prosecution Counsel Mr. Ongira submitted that all the elements of the offence were proved beyond reasonable doubt and that the trial Magistrate considered the defence. Counsel urged this court to affirm the judgement of the lower court and to uphold the conviction and sentence.

Although the appellant was not represented, his submissions are very detailed and well researched and the cases cited have been very helpful to this court. I have carefully considered his submissions and those of Learned Prosecution Counsel. However, as a first appellate court I am obligated to consider and analyse the evidence in the court below afresh so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses myself **–** ***(See Okeno v Republic [1972] EA 32).***

The offence of defilement can only be said to be proved if the following elements are established beyond reasonable doubt: -

(a) That the victim is a child.

(b) That there was penetration of the genital organ of the perpetrator with the genital organ of the victim.

(c) That the person charged was positively identified as the perpetrator of the offence.

In the instant case I am satisfied that all the above elements were proved against the appellant beyond reasonable doubt. The age of the complainant was proved through a birth certificate. I am satisfied that the certificate is credible and conclusive proof of age.

Penetration was also proved beyond reasonable doubt by the evidence of the complainant herself which was corroborated by medical evidence. I am also satisfied that the appellant was the perpetrator of this offence. The complainant told the court that the appellant dragged her into his house when she went there in search of his wife who was her teacher. The fact of her going there was corroborated by PW (Pw4), who stated that she saw the complainant walking towards that house while she was seated outside her own house. PW (Pw4) and the appellant were neighbours. It was she who alerted the complainant's mother that the complainant was in the appellant's house, a fact which was confirmed by the complainant's mother HM (Pw2) and sister CN (Pw3). The testimonies of P (Pw4), H(Pw2) and C (Pw3) confirm to this court that the complainant was telling the truth. Indeed, these three witnesses also confirmed to have found the complainant in the appellant's house. The dicta in the case of **Henry Manning v Republic 53 CR Appeal Republic 150** cited with approval in the case of **Maina v Republic [1970] EACA 370** and relied upon by the appellant in this case that women and girls are never to be believed was in our jurisdiction overtaken by the provisions of **Section 124 of the Evidence Act** and in sexual offences the courts can now convict solely on the evidence of the victim provided for reasons to be recorded the court believes the victim. Be that as it may I find that the evidence of the complainant was corroborated by eye witnesses and also by medical evidence that she had suffered injuries in her genitalia an indication that penetration had taken place and further that she was seen going into the appellant's house and was indeed present there. The evidence of the prosecution was so cogent and watertight that it rendered the defence of the appellant totally unbelievable. If there were any contradictions, they were not so material as to water down the evidence.

The appellant also contended that the charge as drafted was defective for not including the word **"unlawful"**. I do not agree with him. Sexual intercourse with a child is unlawful whether the word **"unlawful"** is used in the charge or not. Indeed, **Section 8 (1) of the Sexual Offences Act** which is the provision that creates that offence does not use the word unlawful. The same states: -

"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

The offence is one of strict liability. The contention by the appellant cannot therefore hold. Moreover, even were we to find that there was a defect in the charge it is one that is curable under **Section 382 of the Criminal Procedure Code.** From the way he conducted his defence the appellant was clearly not prejudiced by the omission of the word **"unlawful"** and if he was then he should have raised that objection in the trial court. His appeal against conviction has no merit.

The life sentence imposed against him was meted because it was the minimum sentence. In the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** the Court of Appeal imported the ratio in the Supreme Court case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** of unconstitutionality of mandatory sentences and held that persons charged with sexual offences are also entitled to enjoy the same rights as those charged with robbery with violence. Since then the trend has been to move away from minimum (mandatory) sentences and to sentence the accused persons depending on the nature and circumstances of the case. In this case I find that although the victim of the offence was young the circumstances were not such as would warrant a life sentence. Accordingly, I set aside the life sentence and substitute it with one for imprisonment for a term of thirty (30) years from the date the appellant was sentenced by the trial court. The appeal succeeds only to that extent. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE