REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 110 OF 2018

AMOS WANJAU ALIAS SAMUEL MWANGI WANJAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal on conviction and sentence from the judgment and/or decree of Honourable E. SOITA Resident Magistrate in Molo S.O No. 95 of 2017 delivered on 11th December 2018)

JUDGMENT

1. The appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on the 5th day of November 2017 at Casino Estate in [particulars withheld] Town, Molo District within Nakuru County, intentionally did cause his genital organs namely penis to penetrate the genital organ namely vagina of **MWM** a girl aged 15 years.

2. The alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on the 5th day of November 2017 at Casino Estate in [particulars withheld] town, Molo District within Nakuru County, unlawfully and intentionally did cause his genital organ namely penis get into contact with the genital organ namely the vagina of **MWM**.

3. The appellant denied the charges and the case proceeded for hearing with the prosecution calling 4 witnesses in support of their case while the appellant in his defence gave sworn statement without calling any witness. By the judgment delivered on 11th December 2018 the lower Court found the appellant guilty of the main charge convicted and sentenced to 15 years' imprisonment.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, he filed this appeal through a Petition of Appeal dated 18th of December 2018 challenging sentence and conviction on the following grounds: -

i. The learned trial magistrate erred both in law and in fact by failing to appreciate the complainant's age was not substantially proved as required by the law;

ii. The learned trial magistrate erred both in law and in facts by basing the conviction on an misapprehension and presumption without circumspect that the prosecution never proved the appellant had prior knowledge that the subject was under age given that there was no age assessment that was done;

iii. The learned trial magistrate erred in law and in facts by failing to appreciate that the case was a mere fabrication by the close relatives of the complainant whom we had differed with and there existed a grave acrimony between the appellant and the close relatives;

iv. That the learned trial magistrate erred in law and in fact by relying on the medical evidence adduced by the prosecution yet the same did not corroborate the charges in that it indicated the hymen was not broken and the prosecution theory failed to prove penetration;

v. That the learned trial magistrate erred in law and in facts by overlooking the appellant's defence without offering a cogent reason yet the same was remarkably comprehensive and casted considerable doubts to the strength of the prosecution case

5. The appellant filed further amended grounds of appeal as follows: -

i. The trial magistrate erred in law and in facts by not according the appellant sufficient time to prepare for his defence; the prosecution's evidence was supplied to him in parts;

ii. The trial magistrate erred in law and in facts in failing to consider the contradictions and inconsistences in the prosecution's case;

iii. The trial magistrate erred in law and in facts by convicting the appellant while penetration had not been proved;

iv. The trial magistrate erred in law and in facts in considering the appellant was positively identified as the perpetrator.

APPELLANT'S SUBMISSIONS

6. The appellant submitted that he was not identified as a perpetrator in the defilement case, he was only identified as a person who knew the complainant.

7. On ground 2 that the doctor who testified in Court is not the same one who examined the complainant and filed the P3 form and the evidence he adduced in Court did not tally with that of the doctor who examined the complainant as regard the date of examination and level of injuries. The prosecution evidence of defilement was not corroborated by the medical evidence produced in Court.

PROSECUTION'S CASE

8. On behalf of the state **Ms. Rita Rotich** in respected of age of the complainant, submitted she testified to be 16 years' old which was corroborated by age assessment. On identification, she submitted that PW1 testified that the appellant took her to his house and he put on the lights which enabled her to see him and she also positively identified him in Court. Further that PW1 led the police to the appellant's house during the time of arrest and identified the appellant to the police. PW2 identified the appellant as the person who brought the appellant to his house. Investigating officer also identified the appellant as the person who was identified to him by PW1 and Pw2. In his defence the appellant testified knowing the appellant very well and having taken her to his house.

9. On penetration, she submitted that PW1 gave evidence of being defiled by the appellant; PW3 the doctor stated that on observing the complainant, that there were no injuries to the genitalia as she was taken to the facility after 2 days and the probability of healing is common. In his defence the appellant did not challenge the evidence of the doctor in his defence.

ANALYSIS AND DETERMINATION

10. This being the first Appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first Appellate Court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"The first Appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function 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, [1958] EA 424.)"**

11. And in **Pandya -Vs- Republic [1957] EA 336** the Court held as follows: -

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

12. In view of the above, I have considered evidence adduced before the trial court and find the following as issues for determination: -

i. Whether the prosecution proved their case beyond any reasonable doubt

ii. Whether the sentence imposed is manifestly harsh and excessive

(i)Whether the prosecution proved their case beyond any reasonable doubt

13. Each of the three ingredients being; the age of the complainants, penetration, identification of the perpetrator of the offence have to be proved for an offence of defilement to be proved beyond reasonable doubt. In respect to age, PW1 testified she was 16 years of age and PW4 produced an age assessment report dated 9th January 2018 produced as exhibit 3 which confirmed that PW1 was 16 years. Further the complainant was able to interact with and see the complainant and conclude that she was under the age of majority.

14. In **Francis Omuroni –Vs- Uganda, Court of Appeal No.2 of 2000,** the Court held as follows:-

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense……"**

15. In this appeal the prosecution relied on the age assessment of the complainant to establish she was about 16 years at the time of the defilement. The age assessment report was not challenged. There is therefore no doubt that age was proved beyond reasonable doubt.

16. On penetration the appellant's argument is that of PW1 was not corroborated by any medical evidence. **Penetration** is defined under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006 as follows:-**

> **"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

10. PW1 testified the appellant took her to his house, he undressed and removed PW1's panty and lay on top of her and removed his "*sehemu yake ya siri, ya kuenda haja ndogo*" meaning penis and placed it on PW1's "*sehemu yake ya siri ama ya kuenda haja ndogo*" meaning vagina, she said after removing his genital organ the appellant gave her a towel and asked her to wipe herself.

11. From the testimony of PW3, on observation of PW1's genitalia there were no injuries observed. And on re-examination he stated there was a possibility of mild injuries which would have healed since she was observed after two days and the blood could not be seen.

12. The trial magistrate concluded the prosecution proved penetration. **Section 124 of the Evidence Act** provides that the Court can convict a perpetrator of sexual offences without corroboration of the evidence as long as the Court has all the reason to believe the testimony of the victim.

13. I agree with the trial magistrate in believing the complainant's evidence on penetration as the above quote appear truthful for a Court to believe.

14. In respect to identification of perpetrator, the appellant confirmed that he knew complainant and on cross examination he said he had known her for a month as she used to go to his place with her aunt to wash clothes. He also confirmed having taken the complainant to PW2's house that night as stated by PW2 who said the complainant was brought at night in his house by the appellant and another man. From the foregoing there is no doubt on identification.

15. As to whether the appellant's defence was considered, I note that the trial court in its judgment considered the appellant's defence and the same was not overlooked. He found that the appellant's defence is inconsistent with cross examination thus poking holes in his defence.

16. From the foregoing all the three ingredients for the offence of defilement were proved. Appeal on conviction cannot therefore stand.

(ii)Whether the sentence imposed is manifestly harsh and excessive.

17. The appellant was sentenced to the minimum sentence of 15 years. The Supreme Court however in the case of **Muruatetu** declared the minimum nature of sentences unconstitutional for taking away the discretion of the judicial officers to impose sentence as per circumstances of the case. The minimum sentences renders mitigating factors superfluous.

18. In view of the above, I have considered circumstances in this case. I also note that the appellant in mitigation indicated that he had a young wife and a child and was remorseful; and find it appropriate to reduce the sentence to 10 years' imprisonment.

19. FINAL ORDERS

1. Appeal on conviction is dismissed.

2. Appeal on sentence is allowed and sentence reduced to 10 years.

3. Sentence to start from the date the appellant was sentenced by the lower court.

Judgment dated, read and delivered at Nakuru via zoom This 9th December, 2020

RACHEL NGETICH

JUDGE

In the Presence of:

Court Assistant – Jeniffer

State Counsel – Rita

Accused in person