REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MOMBASA

CRIMINAL APPEAL NO 102 OF 2019

CAROLINE ANYANGO OPONDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Kwale Criminal Case No. 54 of 2018 by Hon. T.A Sitati (PM) dated 30th August 2019)

Coram: Hon. Justice J. Nyakundi

Mr. Muthomi for the Respondent present

Appellant in person

JUDGMENT

The appellant herein was originally charged with the offence of defilement as defined in terms if Section 8(1) as read with 8(3) of the Sexual Offences Act No.3 of 2006 (hereinafter "the Act"). He also faced an alternative charge of committing an indecent act with a child defined in terms of Section 11(1) of the Act. In the defilement charge, the particulars of the offence were that the appellant unlawfully and intentionally caused her genital organ to be penetrated by the genital organ of KNF a boy aged 13 years. The offence occurred on the 1st day of February 2018 and 31st day of March 2018 at [particulars withheld] Area, Diani Location, Kwale County within the Coast Region as then it was. In the alternative charge the particulars were that at the same dates, month, year and place, the appellant intentionally and unlawfully caused her genital organ to come into contact with the genital organ of the complainant.

The appellant entered a plea of not guilty and she, therefore, underwent a full trial process after which she was found guilty of the offence of defilement, convicted and sentenced to serve 20 years imprisonment. She was dissatisfied by both conviction and sentence as meted out by the learned trial Magistrate. She, therefore, filed a memorandum of appeal dated 11th September 2019 seeking to overturn the decision of the lower court on the following grounds:

1. ***that no prima facie case was established by the prosecution.***

2. ***that the prosecution failed to prove its case beyond a reasonable doubt.***

3. ***that the learned magistrate formulated non-issues in reaching his conclusion.***

4. ***that the appellant was not accorded the chance to prepare for her defence.***

5. ***that the sentence imposed by the learned magistrate was harsh in the circumstances.***

Brief Facts of the Case on trial are as follows. The prosecution called a total of 5 witnesses in support of its case. PWl, the Clinical Officer Zainab Jembe examined the complainant. She stated ' that the minor was 13 at the time of examination. She observed no visible injuries on whose complaint was that he was made to insert his fingers and genital organs into a female genital organ of an adult and he was also made to suck on her breasts. PWl produced the complainant's treatment notes, P3 form and Age Assessment report marked as P. Exhibit 2, l & 3, respectively. PWl also made a finding that she had no sexually transmitted disease and that she was not pregnant. She had some pus cells which were indicative of a bacterial infection. She also had yeast cells which were indications of a fungal infection.

PW2 - ZIPPORAH NYA WIRA GATERU a human right defender with Diani Kwimirira Child rights told the court that on 01/02/2018 the boy's mother went to her offices crying asking for advice following her discovery of that her son had been defilement. PW2 advised her to report to the police. She made his recommendation after summoning and hearing the suspect who pleaded for their forgiveness.

PW3 KN gave sworn testimony in which he stated that the accused person was their house help for some years. He recalled that when he left school between O1/02/2018 and 30/3/2018, in the appellant would ask him to assist her in the domestic chores. All this time the father would be away on day time job at a hotel and his mother was working in Saudi Arabia. When she called him in for the chores she would invite him to the bed and ask him to suck her breasts. At first he resisted but with time she succeeded in convincing him to suck the breasts. Thereafter she asked him to insert his fingers into her genital organ. He agreed and inserted his right middle finger as directed, he did so out of fear. This cycle was repeated many times on different dates. On subsequent dates she escalated the acts to include his insertion of his penis into her vagina. This happened on different dates.

When PWl 's mother returned from overseas, she caught him masturbating behind the sofa set. It was at this point that he revealed that the accused had guided to rub and caress his penis if he felt any sexual urges and while the accused was away from him to satisfy the sexual urges. The mother decided to report the matter to the police. PW4 - JFM, the father to the complainant testified that the discovery was made by his wife who overheard her son making funny sounds while in the sitting room. He stated that PWl after an interrogation, admitted that the house help had coached him to masturbate whenever she was absent but when she was around she would offer him her breasts to suck and her genital organ to insert his fingers and also insert his genital organ. PW4 also stated that the complainant was born on 26/6/2006.

PW5 No. 83612 POLICE SERGEANT MUTUTA EMMA of Diani Police Station testified that on 25/05/2018 she was assigned the instant case for purposes of investigation. She recorded the witness statements and issued the P3 form. She testified that the complainant identified DWl as the perpetrator of the offence. When the accused was arrested, she asked for forgiveness.

The trial court found the prosecution to have mete out a prima facie case. Thus, the appellant had a case to answer and she was placed on her defence. She person was represented by Advocate Mohammed Koja who conducted the defence for the appellant. She denied the charges and gave an unsworn statement. DWI **CAROLINE ANYANGO OPONDO** stated that the boy was ill mannered because he was the one who used to go to the bed, lift up her skirt, caress and touch her all over the body. She complained that her brothers also knew that he had bad manners as he used to buy explicit videos and movies to watch. She blamed the boy's father for neglecting fatherly love and care for the boy. She thus, asked the court to dismiss the case.

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 afresh 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 (Shanti/al 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."***

ANALYSIS AND DETERMINATION

Having carefully considered the appellant ' s grounds of appeal, the submissions by the appellant and the opposition to the appeal herein by the prosecution Counsel, the main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence.

The Age of the Complainant

The age of the complainant was settled by the evidence of his father who stated that he was born on the 26th of June 2006. The same was supported by the age assessment report produced by PWl and marked as P. Exhibit 3. This evidence was not challenged by the both the appellant and her Advocate. That being so the complainant was then aged around **12 years old** when the alleged sexual act was perpetrated. The complainant was therefore a minor within the meaning of the law.

The question of penetration

Section 2 of the Sexual Offences Act defines penetration as:

> ***'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'***

This point was reinforced in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

> ***'... Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ ' (Emphasis added).***

Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."***

In light if the foregoing, I therefore revert back to the record to determine the issue of penetration in question. The complainant vividly

explained how his ordeal started. He told the trial court that the appellant would invite him to the bed and ask him to suck her breasts. On another accession the ordeal escalated when the appellant asked the minor to insert his fingers and genital organ into her genital organ. They then engaged in sexual acts severally thereafter. The appellant has not denied the existence of sexual relations between her and the minor. She alleged that the boy was ill mannered as he was the one who used to go to the bed, lift up her skirt, caress and touch her all over the body. She lamented that his brothers also knew that the complainant had bad manners as he used to buy explicit videos and movies to watch. She blamed the boy's father for neglecting fatherly love and care for the boy. Thus, the fact of penetration is not in dispute herein.

Whether the appellant is the perpetrator.

The appellant did not deny having engaged in sexual intercourse with the complainant on several occasions. Having sexual intercourse with a child under the age of 18 is an offence in Kenya. The appellant was well aware that he was engaging in an illegal act with a minor. Even the defence contemplated in terms of Section **8(5)** and **(6)** of the **Sexual Offences Act** cannot rescue her. There is therefore no doubt that the appellant was the perpetrator of the offence question. It is my considered view that the appellant's appeal on conviction fails.

Appeal on Sentence

On the appellant's appeal against sentence, the appellant argued that the sentence is harsh and excessive. In the case **R vs. Scott (2005) NSWCCA 152 Howie, Grove** and **Barr JJ** stated:

> ***"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed ... One of the purposes of punishment is to ensure that an offender is adequately punished ... a further purpose of punishment is to denounce the conduct of the offender."***

In a New Zealand case of **R vs. AEM (200)** the court held that

> ***" One of the main purposes of punishment... ls to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."***

As appreciated by the Supreme Court in **Muruatetu Case (supra):**

> ***"Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim." The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:***

"Sentences are imposed to meet the following objectives:

> **1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**
>
> **2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
>
> **3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
>
> **4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.**
>
> **5. Community protection: To protect the community by incapacitating the offender.**
>
> **6. Denunciation: To communicate the community's condemnation of the criminal conduct."**

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

I am also alive to the principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held that:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court.** It **may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"**

In view of the foregoing, the offence of defilement as defined in terms of Section 8(1) as read with 8(3) of the Sexual Offences Act No.3 of 2006 attracts a severe sentence. Sub-section (3) of the Act provides that:

> ***"(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

The learned trial magistrate in the instant case correctly mete out the sentence as prescribed under the Act. The sentence is meant for deterrence and retribution as well as to afford the appellant time for rehabilitation. I am also mindful of the fact that punishment should fit the criminal as well as the crime and be fair to society and be blended with a measure of mercy according to the circumstances. In other words, punishment should be tampered by humanity (Ubuntu) and compassion. I am not supposed therefore to sentence in order to take revenge or destroy the offender. As of now, the principle under Muruatetu (supra) as expanded by the Court of Appeal in **Christopher Ochieng v Republic (2018) eKLR** presupposes that there is no minimum sentence for the offence of defilement. It is therefore my view that a 20 years sentence looks severe for the offence in question and substitute it with 14 years imprisonment.

Judgment delivered, dated and signed at Malindi this 9th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

The Appellant in person

Mwangeka for the Respondent