REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 48 OF 2018

(*Against the original conviction and sentence in Narok CMCCRC No. 7 of 2017 by Hon. H. Ngángá, SRM on 2.3.2018*)

BETWEEN

EMMANUEL KILEIYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] This appeal is on conviction and sentence. From the Amended Grounds of Appeal filed, the Appellant's gravamen is that: -

i) The trial court did not consider his mitigation and circumstances of the case in sentencing;

ii) The trial court convicted him yet prosecution had not proved their case; and

iii) The trial court did not give a fair and objective analysis of his defence.

[2] Reasons wherefore; he seeks the court to quash the conviction and set aside the sentence.

Duty of court

[3] As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. I will give due allowance for that. See**: R vs. OKENO [1977] EALR 32**. In this exercise, the court is not beholden or compelled to adopt any particular style. Care should, however, be take not merely rehash evidence or try to look for a point or two which may or may not support the finding of the trial court. Of greater concern is employing judicious emphasis and alertness, having an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable. I shall so proceed.

Proof beyond reasonable doubt

Elements of crime

[5] In a charge of defilement, the prosecution ought to prove beyond reasonable doubt: -

a. The fact that the victim is a child; and the age thereof;

b. Penetration; and

c. The appellant was the perpetrator of the crime.

Age

[5] Under the Sexual Offences Act, the offence of defilement is committed against a child. Therefore, proof of age to show that the victim is

a child. Accordingly, age is essential element of the offence of defilement. Age is also relevant in sentencing; as sentence is pegged on the age of the victim. The appellant, in his submissions, correctly emphasized the importance of proof of age in defilement cases. Be that as it may, I will dig the wells of evidence for proof or otherwise of age.

[6] PW1, the victim herein testified that age assessment was carried out and she was told she is 13 years old. PW2, PW3, PW4 and PW5 all stated that PW1 was a child. However, the appellant seems to suggest that the evidence by PW2 that the child was born on 12 th February 2003 negate the fact that the victim was 13 years old. This is an attempt to create some doubt or confusion of sort, yet, the age assessment report which was produced as exhibit 2 shows that the minor victim was 13 years old. I am aware that the appellant has raised some challenge to the admissibility of the age assessment report for two reasons: (1) that the maker did not produce it; and (2) there was no ascertainment as to how the age assessment was arrived at. He cited the case of DICKSON ALIAS DICKY VS. REPUBLIC CR. APPEAL NO 83 OF 2018 to support his challenge.

[6] Amidst the submissions by the appellant on age, I note quite apt argument; that the law on sexual offences provides that:-

> ***While determining the age of a person, the court may take into account evidence of the age of a person that may be contained in a birth certificate, any school document, baptismal card or similar documents''.***

[7] True it is. The P3 Form also indicated that the age of the victim was 13 years. PW1 confirmed that age assessment was conducted upon her and she was informed she was 13 years. These pieces of evidence augments proof that the victim was 13 years old. The Investigations Officer also testified that he took PW1 for age assessment. The assessment report was prepared by qualified person and nothing really detracts from its integrity or legitimacy. But, before I close on this point, I wish to state that proof of age does not mean certificates; it may be proved through other evidence. Therefore, the evidence adduced proved beyond reasonable doubt that the age of the complainant was 13 years. Thus, the victim is a child.

Penetration

[6] According to section 2 of Sexual Offences Act: -

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

[7] The appellant submitted that the conviction and sentence herein was premised on the evidence of PW1 and PW6 which was not conclusive. He argued that in the absence of express evidence it was wrong for the trial court to imply penetration from the evidence of PW1. He cited the case of JULIUS KIOKO VS. REPUBLIC [2015] KLR to stress need for specificity in the details of how penetration occurred in the evidence by the victim. Accordingly, it was his view that nothing in PW1's evidence provides such specificity on how penetration occurred. He submitted that the phrase ''Put his thing on me'' means nothing.

[9] The appellant submitted further that tearing or absence of hymen is not proof of penetration as it could be lost in varied circumstances other than sexual intercourse. He cited the case of MICHAEL ODHIAMBO VS. REPUBLIC [2005] KLR to support this assertion. According to him, tearing of hymen was not proof of penetration. Also, the doctor did not state the nature of weapon used to inflict the bruise on the *labia majora* of PW1. He concluded that penetration was not proved.

[10] What does the evidence portend?

[8] PW1 narrated that the appellant took her to some house where they found a man. The appellant asked the other man to leave. The man left. The appellant remained in the house with PW1. The appellant then asked her to remove her clothes but she refused. He then removed her panty. And, did *tabia mbaya* to her. The words recorded are that *''alitoa kitu yake akaweka kwa yangu''* meaning he removed his thing and put it into mine. She pointed the skirt to show what she meant by ''her thing''. The trial magistrate observed the witness and the pointing her thing. Out of this demonstration by PW1, the trial magistrate concluded ''her thing'' to be her genitalia. Such visual observations are best spoken to by the trial court. There is nothing to suggest any delusion in the analysis thereof, or incongruence between the evidence by PW1 and the observation by the trial magistrate that PW1 pointed at and meant her genitalia. From the evidence adduced, PW1 meant the appellant inserted his genitalia into her genitalia. Her evidence proves penetration. I am aware that the court may convict on the sole evidence of the victim as long as reason for believing the victim is telling the truth are recorded by the court. See the provision of section 124 of the evidence Act.

> ***124. Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
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> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

[9] Nonetheless, there are pieces of evidence which reinforce the fact of penetration of PW1.

[10] PW6, the clinical officer, examined the girl on 30th January, 2017 and established that the hymen was freshly broken. He also noted bruises on labia menorah. He concluded after due examination that the broken hymen and bruises on the labia menorah was evidence of penetration. He was careful to state during cross-examination that the hymen was broken between 1 to 5 days. The P3 Form gave details of

the findings. Therefore, whereas hymen may be broken due to varied circumstances, the evidence herein show that it was broken through penetration. Accordingly, there was penetration of PW1.

Was the appellant the perpetrator?

[12] Was the appellant the person who caused penetration with PW1? In evaluating the evidence by the prosecution, I will also consider the defence offered by the appellant as the most trusted method of judicial decision is to consider both accounts so as to come to a just and unshakeable determination on whether the prosecution proved beyond reasonable doubt that the appellant caused penetration with PW1.

Appellant's defence

[13] The appellant submitted that his defence was not considered by the trial court. According to him, his defence raised reasonable doubt that he may not have caused penetration of PW1. His defence was that on 28th January, 2017 he carried PW1 as pillion passenger to her home at an agreed fare of Kshs. 300. She could not pay the fare and so he decided to retain her luggage. PW1 then walked away crying only to come back later with a crowd which was wielding rungus and baying for his blood. He fled the scene to Aitong centre where they caught up with him. The crowd was accusing him of trying to rape PW1. He was then arrested by police who had been called by the crowd. He stated that the problem was non-payment of fare.

Account by prosecution witness

[14] The account by PW1 was that the appellant took her home on his motorbike. Upon reaching home the appellant lured her to go back with him. She refused but the appellant promised to give her work. She agreed to go with him on that promise. He took her to a house at Itiong where she found some other man. The appellant asked the man to leave. The man left leaving the appellant and PW1 in the house. He locked the house and asked her to remove her clothes. She refused. The appellant then removed her panty and defiled her. He went away and came back in the evening and opened the door. He asked her to sleep. She refused but later agreed to sleep. As she slept, the police officers arrived and arrested him.

[15] PW1 gave a vivid account complete with details of the penetration and the person who did it; the appellant removed her panty; the appellant removed his genitalia and inserted it into her genitalia. See the analysis on penetration above on this account by PW1. The appellant lured her into going with him to Itiong on the promise that he will give her work. It is clear he took advantage of PW1. Her evidence is corroborated by PW3 and PW4 who found PW1 in the house with the appellant. Two things are clear from the evidence by prosecution witnesses; (1) that the appellant lured PW1 to go back with him on the promise that he will give her work; and (2) that the appellant was found in the house with PW1 where he was arrested by the police officers. These facts completely dislodge and unravels the defence by the appellant that PW1 went away crying only to come back with a crowd which pursued him to Itiong. His defence falls flat in the face of the overwhelming prosecution evidence.

[15] PW4 confirmed that PW1 told him that the appellant had defiled her. Also relevant is the evidence by PW2, that PW1 did not sleep at home on the material day. These pieces of evidence place the appellant at the scene with PW1 on the material day and also show the rapid sequence of events as narrated by PW1.

[16] In sum, the prosecution proved beyond reasonable doubt that the appellant is the person who caused penetration with PW1. His conviction for defilement under section 8(1) of the Sexual Offences Act was proper.

Of sentence

[17] The appellant argued that the trial court did not exercise discretion in sentencing him to 20 years' imprisonment contrary to the decision of the Supreme Court in the Muruatetu Case. According to him, the sentence was excessive and should be re-evaluated

[18] According to section 8(3) of the SOA: -

> ***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.***

[18] The trial court sentenced the appellant to serve a jail term of 20 years. I do note that the trial court stated that: -

> ***''The offence the accused is charged with attracts a minimum mandatory sentence''.***

[19] When taken alone, this statement may be mistaken to mean that the trial court did not avail itself of discretion in sentencing the appellant due to the fetter placed in section 8(3) of SOA. All courts are deemed to be aware of the decision of the Supreme Court in the now famous Muruatetu Case, and, except the Supreme, they are bound by the decision under the doctrine of precedent. See article 163(7) of the Constitution that: -

> ***(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court***

[20] Needless to state also that the principle of law enunciated in the Muruatetu case also applies to provisions in SOA in so far as they purport to eliminate or fetter the discretion of the court in sentencing. See the Court of Appeal in the case of **GEOFFREY MUTAI VS. R [2018] eKLR.**

[21] Be that as it may, I do note that the trial court was categorical that it has taken into account the mitigation offered and that the accused is first offender. It also succinctly stated; (1) that the appellant lured a young girl and forced her into a sexual act; and (2) that the sexual violation will traumatise her forever. The trial court was alive to the severity of the offence in imposing the sentence. I am aware for purposes of debate and building jurisprudence in this area of law, that, some pundits posit that minimum sentences provided in SOA should be seen as merely emphasizing or indicative of the severity of the offence rather than as a fetter on court's discretion in sentencing. And architects of SOA as well as lawmakers are still wrestling with these provisions. Having said that, I should be clear that, after taking the foregoing factors and circumstances of the case into account, I find a sentence of 20 years' imprisonment to be appropriate sentence. I therefore sentence him to 20 years' imprisonment.

[22] In the upshot, the appeal on conviction and sentence fails and is dismissed. Right of appeal explained.

Judgment delivered through Teams applications this 8th day of December, 2020. Appeal dismissed.

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F. GIKONYO

JUDGE

IN THE PRESENCE OF: -

1. The appellant

2. Mr. Karanja for the state

3. Court Assistant – Kasaso