REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 59 OF 2015

HILLARY NYAKOE AMUOMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the subordinate court dated 30th June 2015 in Criminal Case No. 409 of 2015 at Kisii Law Courts before Hon. L. Kaittany (SRM).

JUDGMENT

1. The appellant, Hillary Nyakoe Amuoma, was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The particulars were that on 26th September, 2014 in Marani District within Kisii County, he intentionally and unlawfully penetrated the vagina of MKA a child aged 16 years using his penis. He also faced an alternative charge of committing an indecent act contrary to Section 11 (1) of the Sexual Offences Act on the same facts.

2. In his petition of appeal, the appellant raised the following grounds of appeal:

a. That no birth certificate or age assessment was conducted to ascertain the complainant's age;

b. That the trial magistrate erred in basing the conviction on the prosecution witnesses who were mistaken on identity;

c. That the trial magistrate conducted the proceedings in a manner that violated the appellant's constitutional rights;

d. That the trial magistrate erred when he overlooked and objected to the appellant's defence without cogent reasons yet the same was remarkably comprehensive and cast considerable doubts on the strength of the prosecution's case.

3. The prosecution opposed the appeal. It was the prosecution's submissions that the age of the complainant had been sufficiently proved. Documents were produced to ascertain the victim's age. Counsel submitted that PW2 had been taken through *voir dire* examination and he had explained that his name was V.A but his father referred to him as CM.

4. On identification, the prosecution submitted that there were eyewitnesses who knew the appellant. PW2 had seen the appellant at the scene. Members of the public also saw the appellant run away after the crime. The prosecution also submitted that medical evidence had been tendered to prove that the girl was defiled though this had not been central to the decision of the trial court which also relied on the evidence given by the witnesses and had occasion to observe their demeanour. Counsel urged the court to dismiss the appeal as it was unmerited.

5. As the first appellate court, I am required to re-evaluate the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (***see Okeno v Republic [1972] EA 32***).

6. The complainant, MKA testified that on 26th September 2014 at about 6 p.m. she was leaving Sombanga area and was headed home in the company of her brother PW2. She met the appellant on the road who greeted them. Her brother responded but she did not. The appellant asked PW1 why she did not want to greet him and wondered whether she thought she was the only girl in the world. When PW2 asked him to leave her alone chased him away. The appellant grabbed PW1 by the arm and took her to a bush where he ordered her to remove her skirt and underwear. PW1 testified that the appellant had a knife. He threatened her not to make any noise lest he killed her. He placed her on the ground then removed PW1's skirt and underwear himself and opened her legs. PW1 tried to stop him from pulling off her underwear but the appellant hit her on the eye which began swelling. She testified that the appellant unzipped his black trousers, removed his penis and inserted it into her vagina.

7. After an hour, she heard a noise and the appellant stopped. The appellant asserted that she was sure of the time as she had her mother's phone which she had picked up earlier where it had been left for charging. The appellant ordered her not to make a sound lest he kills her the

next time he saw her before he ran off.

8. The complainant recalled that she had no strength to stand and was coughing up blood when her parents and her brother found her. PW1's mother took her to Marani hospital at about 8 p.m. She was examined and given medicine. The following day she reported the matter at Rioma Police Station. PW1 stated that on that day she had on her uniform which got soiled by blood and mud. She was asked to wash it as she still needed it to go to school. She did not know the appellant and only saw him that evening. She positively identified him as the person that had accosted her.

9. PW2 V also told the court his version of what had happened that evening. The court conducted voire dire examination and after ascertaining that he knew the meaning of an oath, proceeded to put him on oath. PW2 was stood down when he stated that his name was C.M. He later on clarified that this was the name his father called him at home. He recalled that on the material day at about 6 p.m., he had gone to get some money from Sambona area. He was in the company of his sister PW1 when he met the appellant on the road. The appellant asked PW2 to greet him and he did but PW1 did not. The appellant held PW1 by the hand and pulled her towards sugar cane plantation pulled out a knife and held her by the neck. PW2 screamed but no one came to his aid. He rushed home and reported the matter to his parents. They found PW1 lying in a ditch bleeding. His parents took PW1 to hospital and asked him to go back home.

10. PW3 RNK testified that her daughter left for the town centre in the company of her brother on the material day. She was to collect some money from someone who owed them to pay for her tuition then she was to collect a phone that had been left to charge. When it began getting dark she went to find out what was happening. She met PW2 running home saying that PW1 was being beaten. The person had drawn a knife and threatened to kill PW2 before he could kill his sister. PW3 called her husband and ran to where PW1 was. She found her daughter on the ground and undressed. She had swellings on her face. She stated that she heard a voice and when she went towards it she saw the appellant leaving but did not see his face. PW3 and her husband took PW1 to Marani hospital and asked PW2 to go home and lock the door. She also stated that PW1 was 16 years of age.

11. PW4 Alice Ombae testified that she worked at Marani Hospital. She stated that PW1 went to their facility and reported that she had been assaulted. PW4 filled in the P3 form two days after the act. She observed that PW1's eye was swollen and looked hyperbolic. She had bruises on her upper limb and her neck and knees were swollen. PW1 had hyperlens labia majora. There was blood on her external vagina and upon testing her urine, she found traces of blood. The vaginal swab revealed numerous red blood cells and marked epithelial cells. The conclusion was that PW1 had been defiled. She also noted that the hymen was torn. On cross examination, PW4 confirmed that PW1 was on menstruation. No spermatozoa were seen and it could not be confirmed from medical examination that the appellant was the perpetrator. She confirmed PW1's age as 16.

12. Pw5 the investigation officer testified that on 27th September, 2014 she was at Rioma Police station, when she received a complaint concerning PW1's defilement. She narrated the complaint as reported by PW1 and stated that she had issued an order for the arrest of the appellant. When he was taken to the station he was identified as Hilary who had defiled the complainant.

13. The trial court found that the prosecution had established a *prima facie* case against the appellant and placed him on his defence. He stated that the charges levelled against him had been instigated by a land dispute. He testified that he was arrested on his way from a club with others who were released the following day. He knew nothing of the charges facing him.

14. The appellant was charged with defilement contrary to **Section 8 (1)** as read with **Section 8 (4) of the Sexual Offences Act.** The Act provides as follows:

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

8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

15. As rightly put by the trial court, three ingredients needed to be proved beyond reasonable doubt for a safe conviction. The age of the complainant had to be ascertained; proof of penetration of the complainant should have been presented by the prosecution and the appellant should have been positively identified as the perpetrator of the offence.

16. On the first ingredient, I am satisfied that the age of the complainant was sufficiently proved. PW1 testified that she was 16 years old. This was confirmed by her mother PW3 and further corroborated by the medical officer. A copy of the complainant's clinical and baptismal card further buttressed the fact that the complainant was born on 4th October 1997 and was aged 16 years at the time.

17. The prosecution adduced medical evidence in support of PW1's evidence that she had been defiled by the appellant. The appellant complained that the medical evidence presented did not implicate him of the offence. He stated that the complainant was on her periods and therefore the cause of her bleeding had not been ascertained.

18. PW5 a sub county medical officer of Marani Sub County filled the complainant's P3 form which she produced. **Section 77** of the Evidence Act entitles the court to admit in evidence a report or document prepared by a medical practitioner in criminal proceedings. Though the appellant was not directly linked to the penetration of the complainant by the medical evidence, the same affirmed her evidence of what had happened that evening. PW1 testified in great detail the manner in which the appellant dragged her to a bush and defiled her. She described the colour of his trousers and narrated how he had hit her on the eye when she tried to resist him. The provision to **Section 124** of the **Evidence Act** empowers to the court to proceed and convict the accused solely on the evidence of the alleged victim if the court is satisfied by reasons to be stated that the alleged victim is telling the truth.

19. In this instance, the trial court had in mind the provisions of Section 124 of the Evidence Act when it stated that it was satisfied that PW1 gave truthful evidence on the fact that the appellant forcefully penetrated her.

20. The Court of Appeal in the case of **J.W.A v Republic [2014]eKLR** held**:**

> **"***We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate***."**

21. I find that the prosecution sufficiently proved there was evidence of penetration of the complainant. The trial court sufficiently cautioned itself in placing relying on PW1's evidence and stated the reasons it believed her as required by law.

22. I now turn to the third ingredient which is identification of the appellant as the perpetrator of the offence. The appellant submitted that the prosecution did not eliminate the likelihood of mistaken identity. The trial court found PW1 had positively identified her assailant. PW1 testified that the offence occurred at 6 p.m. She described the colour of the appellant's trousers as black and was categorical that she had spent an hour with the appellant which she had confirmed as she had the phone she had been sent to charge. Her evidence was corroborated by PW2 who saw the appellant grab her by the arm and drag her into a plantation.

23. However the record shows that the witnesses had no knowledge of the appellant prior to the commission of the offence. From the evidence of PW5, it is also clear that the police did not conduct an identification parade to ascertain the identity of the appellant. The identification of the appellant was based on dock identification.

24. The Court of Appeal discussed this issue in the case of **Nathan Kamau Mugwe versus Republic (2009) eKLR** and delivered itself thus:

> "*But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo versus Republic (1953) 20 EACA 166, Roria versus Republic (1967) EA 583 and Charles Maitanyi versus Republic (1986) 2KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasised the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification (emphasis mine)"*

25. The appellant in this case was identified by PW1 and PW2 both of who testified in support of the prosecution's case. I find that the conditions prevailing at the time were sufficient to identify the appellant. Though his identification was based on dock identification, the evidence given was of two witnesses and the trial court did not need to warn itself on reliance on this evidence. Guided by the above authority, I find that the appellant's identity as the perpetrator of the offence was proved beyond reasonable doubt. The trial court found that there was no link between the defence given by the appellant and the crime he had been charged with. I find no reason to depart from this reasoning.

26. I find that the prosecution proved its case beyond reasonable doubt .This appeal lacks merit and is dismissed. Accordingly I uphold the conviction and sentence of the appellant

Dated and delivered at Kisii on this 8th day of January 2019.

R.E.OUGO

JUDGE

In the presence of;

Appellant **In person**

Mr. Otieno **Senior Prosecution counsel**

Ms Rael **Court clerk**