REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 3 OF 2018

JULIUS WAITERO KIPOKEO.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. J. O. Alambo, Resident Magistrate in Kehancha Senior Principal Magistrate's Criminal Case No. 77 of 2017 delivered on 31/01/2018)

JUDGMENT

1. The Appellant herein, **Julius Waitero Kipokeo,** was charged, tried, convicted and sentenced on two counts of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** No. 3 of 2006. He also faced two alternative charges of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006.

2. Six witnesses testified in support of the prosecution's case. They are the two victims **FM** who testified as **PW1** and **BK** who testified as **PW2** being the complainant's in respect to counts one and two respectively. PW1 was a boy and PW2 was a girl and they were siblings. The complainants' mother and father testified as **PW3** and **PW4.** A Clinical Officer from Isebania Sub-County Hospital who testified as **PW5** and **No. 86730 PC Edwin Cheritoch** attached at Isebania Police Station who was the investigating officer testified as **PW6**. I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

3. It was the prosecution's case that on 27/01/2017 at around 08:30pm PW1 and PW2 were with their mother PW3 at their mother's shop in Isebania town. That, as they played nearby amid a power blackout PW1 and PW2 were called by someone whom they knew well into the rear side of a video café and were sexually assaulted in turns. That, the two later joined PW3 and returned home. On 29/01/2017 PW4 learnt from a friend to PW1 and PW2 that PW1 had been sexually assaulted some two days ago. PW4 interrogated and canned PW1 who revealed that indeed he and PW2 had been sexually assaulted by the watchman who used to guard a video café just next to PW3's shop. PW3 also interrogated both PW1 and PW2 and reaffirmed what PW4 had been informed. PW1 and PW2 were taken to hospital and later the matter was reported to the police. Investigations were commenced and P3 Forms were filled. The Appellant was then arrested and charged.

4. At the close of the prosecution's case, the trial court placed the Appellant on his defense where the Appellant opted to and gave unsworn defense in denying the offences. He prayed that the charges be dropped.

5. In a judgment rendered on 31/01/2018 the trial court found the Appellant guilty of the offences of defilement and convicted him. The appellant was then sentenced to life imprisonment on each count.

6. Being dissatisfied with the conviction and sentence, the Appellant timeously lodged an appeal where he challenged the conviction and sentence. Later, the Appellant instructed the firm of **Messrs. Kerario Marwa & Co. Advocates** who filed a *Supplementary Memorandum of Appeal* and raised the four grounds as under: -

> ***1. The learned Magistrate erred in law and fact when she held that there was positive identification of the Appellant by the two minor complainants.***
>
> ***2. The learned Magistrate erred in law and in fact when she failed to find that there could be no proper and positive identification of the Appellant in the circumstances of this case.***
>
> ***3. The learned Magistrate erred in law and in fact when she failed to find that there was no corroboration of the evidence of the two minors.***
>
> ***4, The learned Magistrate erred in law and in fact when she failed to hold that the medical evidence produced was unreliable and of no probative value.***

7. The appeal was heard by way of written submissions where Counsel for the Appellant filed elaborate submissions and highlighted on. He also relied on several decisions in urging this Court to allow the appeal. The State opposed the appeal and prayed that the same be dismissed.

8. This is the Appellant's first appeal. The role of this Court is now well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law that is beyond any reasonable doubt.

10. I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and the parties' submissions.

11. 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. On looking at those aspects in this judgment, this Court shall consider each of them singly.

(a) On the age of the complainant: -

12. In sexual offences like the instant one, the age of the complainant remains very cardinal and must be strictly proved as the sentence on conviction vary with age. In this appeal, the ages of PW1 and PW2 were not contested. PW5 produced Child Immunization Cards for PW1 and PW2 confirming that PW1 was born on 16/01/2010 and PW2 was born on 28/08/2008. As the offences were allegedly committed in January 2017 then PW1 was about 7 years old while PW2 was aged around 9 years. They were hence children of tender ages in law.

13. I find that the ages of the complainants were properly settled.

(b) On the issue of penetration: -

14. **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.'***

15. This position was fortified 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).

16. 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."***

17. PW1 and PW2 narrated the events as they unfolded between themselves and the assailant. They stated that the assailant whom they knew well called them as they were playing and took them to the rear of a video café. That, he removed PW1's pant and inserted his penis into PW1's anus. After a while PW1 was released and PW2 followed. The assailant removed her dress and inserted his penis into her vagina. The two were sternly warned from disclosing to anyone and they went back to where their mother was.

18. Two days later when PW3 and PW4 knew of the incident they took them to hospital where they were examined and treated and PW5 produced the treatment notes and P3 Form as exhibits. PW5 confirmed that PW1 had bruises on the anal region and PW2 had bruises and lacerations on her labia, but the hymen was intact. The trial court observed the demeanors of the witnesses as they testified and believed them. She gave reasons as to why she believed them in her judgment which reasons have not been challenged. I must therefore give allowance to that findings.

19. From the above analysis and on evaluation of the evidence of the PW1 and PW2 and that of PW5, the relevant exhibits thereto and the legal definition of '*penetration*', this Court is satisfied that there was a penile penetration into PW1's anus and a penile penetration into PW2's vagina. Penetration was hence proved in both counts of defilement.

c) On whether the Appellant was the perpetrator:

20. The Appellant vehemently denied any involvement in the alleged offence. From the record, the evidence touching on the Appellant was mainly by PW1 and PW2. They knew the assailant as the one who used to work as a watchman at the neighboring video café. They referred

to him as 'Soldier'. They explained how the soldier called them and how he took each in turns to the rear of the café and did the unthinkable. When PW3 looked for PW1 and PW2 so as to leave for home she stated as follows: -

> ***…….I searched for the children [PW1 and PW2] and they came from the place the accused [Appellant] was. They told me that they had come from soldier. There were no people……***

21. Although there was a blackout and the place was deserted PW1 and PW2 were able to know whom they were dealing with. They even so easily gave his name and identified the 'Soldier' before court as the Appellant. I have carefully considered the evidence of PW1 and PW2 on the issue. It is legally-settled that evidence of identification must be well scrutinized especially if the circumstances are difficult to easily favor a positive identification or recognition even by close relatives. The decisions in **Wamunga vs Republic (1989) KLR 426, Nzaro vs Republic (1991) KAR 212**, **Kiarie vs Republic (1984) KLR 739, R –vs- Turnbull & others (1973) 3 ALL ER 549** among many others add emphasis to the legal requirement.

22. On an equal footing it is paramount that the defense be considered. The Appellant denied the offences and also denied knowing any of the complainants or the witnesses. PW1 and PW2 stated that knew the Appellant and even identified him. PW3 also knew the Appellant and described him as follows: -

> ***……I know the accused. He was being referred to as Soldier. He was guarding a video that was 10 meters from my shop…..***

23. By juxtaposing the prosecution's evidence against that of the Appellant and in strict guidance of the principles developed by case law. I find that PW1, PW2 and PW3 knew the Appellant who was a watchman near PW3's shop. Further, PW1 and PW2 were not mistaken in stating that they had an encounter with the Appellant since they were consistent in their evidence and they readily gave the name of 'Soldier' as the one they had been with immediately PW3 found them. (See the Court of Appeal cases of **Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987, Juma Ngodia – v- R, Criminal Appeal No. 13 of 1983, Peter Njogu Kihika & Another – v- R, Criminal Appeal No. 141 of 1986, Lesarau – v- R, 1988 KLR 783** and recently in the case of **Simiyu & Another vs. Republic (2005) 1 KLR 192**).

24. There is the submission by the Appellant's Counsel that the scene was dark and there was no evidence of the period the complainants' knew the Appellant. The scene was in Isebania town; a place with many businesses including the PW3's shop and the video café. Although PW3 stated that there was a blackout hence dark, this Court is alive to the fact that one can recognize someone known to him or her with precision even in darkness. In such a case a Court must accordingly warn itself. As to the duration, although the evidence was silent on it, the fact that PW1, PW2 and PW3 knew the Appellant was buttressed by the evidence of PW6 who investigated the case and confirmed that the Appellant was on duty on the material day at the video café. PW6 also arrested the Appellant at the video café just next to PW3's shop. Although the duration is a material aspect this Court finds that the lapse to address it in the totality of the evidence and the circumstances of this case did not create any reasonable doubt on the prosecution's case.

25. I hence return the finding and so hold that the identification of the Appellant in the circumstances of this case was not in error. The Appellant was rightly identified by recognition as the assailant and as such there was no need of conducting an identification parade.

26. In response to the submission that the evidence of the complainants was not corroborated, I must state that a conviction in sexual offences can still stand even without any corroboration as long as the trial court complies with **Section 124** of the **Evidence Act** which provides that: -

> ***"124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, 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.***
>
> ***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, he court is satisfied that the alleged victim is telling the truth."***

27. In this case there was the medical evidence which was adequate corroboration of the complainants' testimony. Further, since the complainants' were two that in itself amounted to corroboration since each of them was an independent witness to the other. I reiterate that the trial court had the advantage of seeing the witnesses testify and noted their demeanors. The court made elaborate finding on the way the complainants testified and in explaining why it treated them her as truthful and credible witnesses. As said there is nothing placed before this Court to make me depart from the erudite finding of the trial court. The trial court in its judgment complied with the *proviso* to **Section 124.**

28. This Court therefore finds that the Appellant was properly found guilty and convicted of the two counts of defilement.

29. On sentence, as the complainants were both aged below 11 years, the Appellant was handed the only sentence prescribed under **Section 8(2)** of the Sexual Offences Act. That sentence is legal.

30.This Court now finds that none of the grounds of appeal put forth and supported by the submissions is successful. The decision of the trial court is hereby affirmed and the appeal is accordingly dismissed.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Mwita Kerario Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyn Nyauke – Court Assistant