REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 64 OF 2018

OBED GWAKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Nakuru Chief Magistrate's***

Criminal Case No. 164 of 2014** imposed by **Hon. E. Kelly (R.M.)** on **13th day of June, 2018.)

J U D G M E N T

INTRODUCTION

1. The appellant was charged with the offence of **Defilement of a child contrary to Section 8 (1) as read with section 8 (2) of the sexual offences Act No.3 of 2006.** Particulars are that on the 6th day of July 2014 at [particulars withheld] Farm in Njoro District within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of **HW** a child aged 11 years which caused penetration. He was also charged with alternative charge of **Indecent Act with a child contrary to section 11 (1) of the sexual offences Act No.3 of 2006**. Particulars are that on the 6th day of July 2014 at [particulars withheld] Farm in Njoro District within Nakuru County, unlawfully and intentionally committed an act to a child namely **HW** a child aged 11 years by touching her genital organ namely vagina with your genital organ namely penis. The trial magistrate found him guilty of the main charge, convicted and sentenced to life imprisonment.

2. The appellant being dissatisfied with the decision of the trial court filed this appeal on the following grounds:-

a) The learned trial magistrate erred in law in ignoring a cardinal principal in criminal procedure that the burden of proof lies on the prosecution to every ingredient of the charge beyond any reasonable doubt and erroneously found that prosecution had proved the case beyond reasonable doubt against the appellant while deciding the case against the weight of the evidence.

b) The learned trial magistrate misdirected himself in law and fact in relying on discredited evidence thereby; which misstated the evidence on record wrongly convicted the appellant and was therefore biased in her judgment.

c) The learned trial magistrate erred in fact and law in failing to give due regard to the material contradiction, discrepancies and inconsistencies in the prosecution's case thereby reaching a wrong decision and resulting in miscarriage of justice.

d) The learned trial magistrate erred in law in failing to consider the defence case adequately and failed therefore in making a finding in favour of the appellant thereof.

e) The learned trial magistrate erred in law and fact in failing to believe the appellant's defense and failed in giving proper or any reasonable grounds for rejecting the appellant defence, which covered facts, which were weighty and cogent.

f) The learned magistrate wrongly approached the principle on failure to produce certain evidence which included evidence by the investigation officer by failing to make presumption that the withholding of the evidence would have been unfavorable.

APPELLANT'S SUBMISSIONS

3. The appellant restated grounds of appeal. He submitted that he was not in court when the charges were read and plea of guilty entered

thus was denied a right to fair trial which require his presence when being tried unless he makes it impossible for trial to proceed. The appellant submits that the exclusion denied him the proper blueprint of the trial in his favour.

4. Appellant further submitted that the trial magistrate caused an injustice by relying on misdirected evidence, failing to give due regard to the material contradiction, discrepancies and inconsistencies in the prosecution's case thereby reaching a wrong decision.

5. Further counsel submitted that the minor complainant contradicted herself during cross-examination. She said she reported to her mother who then called her uncle while during cross-examination she states that she actually did not tell her mother, she again at page 13 paragraph 3, she states that she told her mother and later on taken to hospital. There is more contradiction at page 12 paragraph 2 with page 13 paragraph 2, therefore proving that PW1 was an incredible witness and capable of telling lies.

6. The appellant further submitted that 6th July, 2014 a date PW2 alleged to have been called by a teacher of DEB Njoro to discuss about the complainant was a Sunday. That there is contradiction on the day of arrest as PW2 states appellant was arrested on 6th July, 2014 yet the appellant was arrested on 15th July, 2014. That PW1 adduced inconsistent evidence by saying she told the mother of defilement and later said she never told her. On the other hand, her mother said the complainant informed her of the defilement leaving doubt as to who was telling the truth.

7. The appellant further submits that age being a salient ingredient the learned trial magistrate at paragraph 3 page 5 held that the age of the complainant was not proved in evidence. He said the magistrate went ahead to make her deductions and arrived at 11 years; that no criteria was shown as having been used to arrive at that age. He submitted that use of common sense to estimate age cannot give exact age but a range of years. He submitted that the learned trial magistrate erred in relying on her observation. He urged the court to find that the age of complainant was not proved and appellant was therefore convicted over fictitious age.

8. On penetration counsel submitted that the complainant testified that prior to defilement herein; she had sexual intercourse four times. He submitted that the medical officer confirmed penetration but it is not linked to the appellant. He argued that the complainant's evidence is not therefore corroborated. He submitted that defilement is alleged to have occurred on 6th July 2014 but examination was done on 15th July 2014. He added that the trial magistrate disregarded the testimony of the appellant.

9. Appellant further submitted that the Aunt of the complainant who was said to have been in the vicinity was not availed to testify. He submitted that the appellant was not at the scene of the offence and no investigations were done to link him to the offence.

RESPONDENTS SUBMISSIONS

10. Respondent submitted the appellant was present during plea taking contrary to his submissions that he was absent. On age the respondent submitted that the victims age was indicated in the p3 form which was confirmed by the child's mother; that the court noted the demeanor of the witness (complainant).

11. On penetration, the respondent submitted that the appellant had defiled the complainant 4 times; that she stated the appellant had carnal knowledge of her for four consecutive days. That the doctor corroborated the child's evidence. On identification, the respondent submitted that the appellant was well known to the complainant, as they were neighbors.

12. On failure to avail the investigating officer, the state counsel submitted that the offence of defilement was proved and inadvertence by failing to avail investigating officer should not be visited on the complainant. He cited section 143 of the evidence Act which provide that no particular number of witnesses, shall in the absence of any provisions to the contrary, be required to proof any fact.

13. Respondent further relied on the court of appeal decision in **P.M & 2 Others V Republic(2014) eKLR** where the court held:-

> **"Failure to call witness can only be construed against the prosecution if it can be demonstrated that had such witness been called, he or she would been against the prosecution. The question that ponders our minds is whether the evidence of the investigating officer would prejudicial to the appellants. We think not, the investigating officer would collect, collate and repeat what PW1, PW2, PW3, PW4, PW5 and PW6 as well as all other prosecution witnesses stated. We are of the view that failure to call the investigating officer and other witnesses was not fatal to prosecution case…the evidence of eye witness was sufficient to convict the appellant**"

ANALYSIS AND DETERMINATION

14. This being first appellate court, I am required to reevaluate evidence adduced in the trial court and arrive at an independent determination. I am however minded of the fact that unlike the trial court, I have not had the opportunity to take evidence first hand and observe the demeanour. I will therefore give due allowance.

15. On argument that the appellant was absent in court at the time of plea, I have perused the handwritten proceedings in the original lower court file and confirmed that the appellant was recorded as present. The word absent has been marked as cancelled and what remained is present. The typed proceedings are therefore misleading and the correct position is as indicated in the handwritten proceedings. Appellant respondent to the main charge and alternative charge by saying "not true. Ground of being denied fair trial based on absence therefore fail.

16. Having found that plea was properly taken, I now wish to address the issue of age of the complainant. The importance of age in sexual offences was alluded by court of appeal in **Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo vs Republic** the court held as follows:-

> **"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge, which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

17. From record, the trial magistrate noted that apart from p3 form no other document was produced in court to prove the complainant's age. She recorded that immunization card was marked for identification but was not produced in court as exhibit and the court could not therefore rely on it to establish the age of the complainant. The trial magistrate however went further to estimate the complainant's age basing her assessment on observations she made when the complainant testified in court. She indicated that she was able to see and estimate the age of the complainant at 12 years. She added that the appellant never challenged complainant's age at the hearing.

18. In her judgment, the trial magistrate after finding that age was not proved went further to indicate that the p3 detailed her age as 11 years.. I have perusal of section c of P3 form produced and note that the doctor estimated complaint's age at 11 years; in outpatient card also produced in court as exhibit indicate age of complainant as 11 years. There is consistency in estimated age in the P3 form, outpatient card and estimation by trial magistrate.

19. The court of appeal has however pronounced itself on the issue of complainant's age in a case of defilement. It has underscored the importance of age and therefore need to prove beyond estimation in p3 form.

20. In the case of **Patrick Mutwiri Gikonyo Vs Republic[2018]eKLR (Nyeri Criminal Appeal No. 43 of 2015),** the court of appeal had this to say:-

> **"It is clear that the age factor reverberates in every provision in section 8 of the Act. In almost every criminal appeal I have heard concerning convictions under this provision of the law no other issue has been litigated upon so repeatedly and vigorously so as the question of the age of the victim. Whether the age of the victim was proved to the required standard has been a recurrent question in appeals such as the present one. My consistent answer has always been that proof of age must be must be subjected to the same standard of proof as any other component of a sexual offence under section 8 of the Sexual offences Act; that it must be proved beyond reasonable doubt. This standard of proof is, of course, the general and mandatory standard of proof in all criminal cases; however, when one considers the severity of the sentences prescribed in section 8 of the Act, the requirement that age, as a component of any of the offences under this provision of the law, must be proved beyond reasonable doubt need not be over-emphasized"**

21. Further, in the case of **Denis Abuya Vs Republic C.A. No. 164 OF 2009** the court held as follows:-

> **"An estimated age indicated by a clinical officer in p3 form cannot be held to be sufficient proof of one's age held that estimate of age in P3 Form is not by any means conclusive proof of one's age."**

The court allowed appeal and remitted the case to the High court with the direction that the court calls for evidence establishing appellant's age.

From the foregoing, it is evident that prove of age of victim is crucial and must be proved beyond reasonable doubt in material particulars failing which the offence will not have been proved.

22. It is unfortunate that immunization card which had been shown by the child's mother to the court was not produced to assist the court in finding the complainants age due to failure by prosecution to avail the investigating officer who I believe was meant to produce document collected from the complainant's mother was occasioned by failure by the investigating officer to testify. The complainant's mother identified the clinic card and it was marked MFI1. The complainant never mentioned complainant's age but only showed court the clinic card. The court also never recorded age in the clinic card marked for identification.

23. In view of the court of appeal decisions and above findings in respect of record of the trial court, there is no doubt that age was not proved beyond reasonable doubt.

24. There is need to subject this matter to retrial to establish age. In view of the fact that the trial magistrate made some findings on age, it would be appropriate to direct this matter for trial before another magistrate.

25. In view of need for retrial by another judicial officer, I do not find it appropriate to deal with the other grounds of appeal. I will not limit the retrial to determination of age only but retrial in respect all other ingredients.

26. <u>FINAL ORDERS</u>

1. Appeal is hereby allowed

2. Conviction and sentence imposed are hereby set aside

3. Appellant to be retried before magistrate of competent jurisdiction other than Hon. E. Kelly.

Judgment Dated, signed and delivered at Nakuru this 13th day of May, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jared Court Assistant

Mr. Matoke for Nyagaka Counsel for Appellant

Mr. Chigiti for State