REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 33 OF 2018

PETER OTIENO OBONYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case No. 23 of 2016 by Hon. J.W. Onchuru (PM) dated 5th September 2016)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 7th January, 2016 at 2100hrs in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of GW a child of 15 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on the 7th January, 2016 at 2100hrs in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully touched the vagina of GW a child of 15years old by use of his penis.

3. The Appellant pleaded not guilty and at the conclusion of the trial, he was convicted and sentenced to imprisonment for 15 years.

4. The Appellant being aggrieved by the conviction and sentence lodged his appeal on the following amended grounds reproduced verbatim:-

> i. "That the learned trial Magistrate erred in law and fact by admitting the prosecution evidence that the victim was mentally challenged without considering that no proper document was produced to confirm the same.
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> ii. That the learned trial Magistrate erred in law and fact by considering that I was denied to cross examine the victim hence bad in law.
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> iii. That the learned trial Magistrate did not consider that the medical evidence adduced was worthless to be considered hence unreliable.
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> iv. That the learned trial erred in law and fact in failing to see that the prosecution side did not prove their case beyond reasonable doubt.
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> v. That the learned trial Magistrate erred in law and fact in not considering that my defence was reliable to award me the benefit of doubt."

5. The Appellant filed written submissions on the 26th February 2019 in support of his appeal. His submissions were to the effect that there was no proof adduced to show that the complainant was mentally challenged and that he was denied an opportunity to cross-examine her. He further submitted that the medical evidence submitted was worthless as no spermatozoa was found therefore, there was no evidence of penetration. He submitted that the prosecution had failed to prove its case beyond reasonable doubt.

6. The Prosecution opposed the appeal in its entirety. Mr. Kasyoka learned counsel for the Respondent in his written submissions filed on the 26th February 2017, submitted that all the elements of defilement had been proved to the required standard during trial. He submitted that the age of the complainant was established by an age assessment report, while penetration was established through medical evidence contained in the treatment notes and the P3, and; that the Appellant had been positively identified by the complainant and placed at the scene of the crime. Counsel urged the court to reject the grounds of appeal by the Appellant, as they did not shake the credibility of the trial or the prosecution's case, which was consistent. He prayed that the court upholds the finding of the lower court and dismisses the appeal.

7. This being a first appeal, this court has a duty to re-evaluate and analyze the evidence that was before the trial court, and come to its own conclusions. See **Okeno v R (1972) EA 32.** See also **Eric Onyango Odeng' v R [2014] eKLR.** Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and I can only rely on the evidence that is on record.

8. I have considered the grounds of appeal, the respective submissions, and the record. The only issue for determination is whether the prosecution proved its case beyond reasonable doubt.

9. To prove its case the prosecution must prove the 3 elements of the offence being; penetration, the age of the victim and the positive identification of the Accused. In **Joseph Makau Katana v Republic Criminal Appeal No. 47 of 2015 [2018]** where Odunga J stated that:-

> ***"48. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:***
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> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

10. Proof of the age of the victim serves a dual purpose. Firstly, by definition defilement is the sexual intercourse with a child and a child is one under the age of 18. Secondly, the Sexual Offence Act sets graduated penalties depending on the age of the victim. Prove of age is therefore a prerequisite to correct sentencing.

11. On the age of the complainant, the prosecution relied on the age assessment report dated 16.6.16 and prepared by Lucas M. Chome, a dentist/ oral health officer who examined the complainant and found her to be 15 years. The said report was produced in court by PW7, PC Claris Opiyo No. 96682.

12. It is trite that an expert report can only be tendered by an expert as was held in **Emmanuel Mwadime vs. Republic [2016] eKLR,** where Kamau J stated that:

> ***"…However, a P3 Form, being an expert report can only be tendered in evidence by a skilled expert as provided in Section 48 of the Evidence Act…….. In the case of Julius Karisa Charo vs Republic (Supra), Ouko J also expressed similar reservations about police officers tendering in evidence P 3 Forms because they should only restrain themselves to tendering documents that would fall in their docket. He stated as follows:-***
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> ***"To my mind police officers role in the production of documentary evidence ought to be restricted to police abstracts and other non-technical documents. For the reasons stated I find and direct that PC Sang cannot produce the post-mortem report on behalf of Dr. Olumbe who has relocated at Australia and the efforts made in trying to procure his attendance, from what I have stated above, there must be pathologists who are conversant with his writing and signature."***

13. In the case of **Joseph Makau Katana v Republic (Supra)** Odunga J held:

> ***"59. In this case the age assessment report was similarly produced by a police officer without any reason being afforded for not calling the maker or even another medical officer to do so. In the premises, I am unable to rely on the said document as evidence of the age of the appellant."***

14. From the foregoing, it is clear that age assessment report was inadmissible as it was produced by PC Opiyo who was not an expert in medical matters and therefore the court cannot rely on it.

15. However, this was not the only evidence tendered by the prosecution on the age of the victim. The Court of Appeal in **Thomas Mwambu Wenyi v Republic Criminal Appeal NO. 21 OF 2015** [2017] eKLR cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that:-

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."***

16. In this case, PW2, the mother of the G.W., gave a sworn statement wherein she stated that the Complainant was 15 years old. Her testimony was supported by PW1, Stephen Ewoi, a clinical officer at Mpeketoni Sub-County Hospital who examined the complainant. He adduced a P3, which indicated that the complainant was 15 years old.

17. I find that the age of the complainant was satisfactorily proved.

18. On the element of penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where

"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."

19. After conducting a *voire dire* examination, the complainant, G.W, testified as P.W 4 and gave her unsworn statement that the accused took her to a lodge and removed her clothes. She stated that she was later taken to the police and the hospital. The complainant never stated what transpired between her and the accused when she was at the lodge.

20. However, the complainant seemed to be mentally challenged as the trial magistrate took judicial notice of the complainant's medical condition and that she appeared mentally challenged. This was further supported during the *voire dire* examination, P.W.3 stated that she did not know where she was.

21. Even where the evidence of the complainant is not reliable nothing prevents the court from relying on circumstantial evidence to prove a sexual offence. **Section 33** of the **Sexual Offence Act No. 3 of 2006** provides that:-

"Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove—

(a) whether a sexual offence is likely to have been committed—

(i) towards or in connection with the person concerned;

(ii) under coercive circumstances referred to in section 43; and

(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned."

22. In **Mark Oiruri Mose v R Criminal Appeal No. 295 Of 2012 [2013] eKLR** the Court of Appeal held that:-

"However, having said as above, we still think, even if the evidence of the complainant was expunged because of that omission the trial court still had the evidence of her mother, the evidence of her grandmother, and the evidence of Victor, the clinical officer upon which the appellant could still have been convicted as there was clearly evidence of penetration of the victim's vagina with the appellant's penis and the evidence of her age being six years was not challenged."

23. PW1, the clinical officer who examined the complainant and the accused presented undisputed medical evidence that the complainant had been defiled. He produced a P3 (Exhibit 1) that showed that the hymen was missing and that the labia minora and introitus was bruised and tender. This was coupled with the surrounding evidence that the Appellant was found together with GW in the lodge while naked, rendering credibility to the finding that the complainant was defiled.

24. On the issue of identification, the Appellant was found naked together with GW at the scene of the crime by both PW4 and PW5, which fact the Appellant did not deny in his defence. Further, GW, the complainant, testified that the Appellant was the one who took her to the lodge and removed her clothes. GW's evidence was corroborated by that of PW5, Rael Mkaya Abida, who testified that she knew the Appellant and that the Appellant was with GW when he went to her stall and bought "kangumu". She further testified that when she inquired what the Appellant was doing with GW., he stated that he had been given by GW's mother. It is not in dispute that the Appellant was the person who was found with the complainant.

25. In his appeal the Appellant claimed that he had been denied a chance to cross-examine the complainant. This is not the true position. The record shows that the Appellant chose not to cross-examine the complainant in his own volition and informed the court that ***"I can't ask anything taking into account her condition."***

26. In the upshot, having evaluated all the evidence on record, it is my finding that the main charge was proved beyond reasonable doubt that the Appellant was the one who defiled the minor. I uphold both the conviction and the sentence.

27. I find no merit in the appeal. It is dismissed. The Appellant has 14 days right of appeal.

Orders accordingly.

Judgment delivered, dated and signed at Garsen this 22nd day of May, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:-

S. Pacho Court Assistant

The Appellant

Mr. Kasyoka for Respondent