REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 78 OF 2017

ERNEST ASHINDU NAMOYI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(from the original conviction and sentence by M. I. Shimega, RM in Butere SRMC Criminal Case No. 70 of 2016 dated 17/7/2017)

JUDGEMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:-

1. The trial magistrate erred in law and fact in failing to make a finding that the case was not proved beyond doubt despite glaringly contradictory evidence.

2. The learned magistrate erred in law and fact in finding that the appellant had defiled the minor without evidence corroborating the complainant's testimony.

3. The learned trial magistrate erred in law and fact by dismissing the evidence tendered in by the appellant.

4. The earned trial magistrate erred in law and in fact by failing to interrogate manifestly contradictory testimony by the complainant and other prosecution witnesses.

5. The trial magistrate erred in law and fact by failing to interrogate testimonies by prosecution witnesses potentially exculpating to the appellant.

6. The learned trial magistrate misdirected herself in fact and law by concluding that the appellant defiled the complainant probably because he separated from his wife.

7. The learned magistrate erred in fact and law by failing to make a finding that the prosecution deliberately avoided to avail some key witnesses and evidence.

8. The findings of the learned trial magistrate were against the weight of the available evidence on record.

2. The State through the prosecution counsel **Mr. Ng'etich** conceeded to the appeal on the grounds that it was not safe to convict on the evidence that was in record.

Case for Prosecution -

3. The particulars of the offence against the appellant were that on the 11th February, 2016 at Ebushetswi Village in Eshirali Sub-location, Khwishero Sub-County within Kakamega County he intentionally caused his penis to penetrate the vagina of C. A. (herein referred to as the complainant), a girl aged 15 years.

4. The case for the prosecution was that at the material time the complainant was a 15 year old Std. 4 pupil at [particulars withheld]Primary School. She was living with her mother PW2. That on the material day at 1.30 p.m. she was on her way to school from her home when she passed outside the compound of the appellant. The appellant grabbed her from behind and dragged her into his house while covering her mouth with his hand. On getting to his house he dropped her on to the floor. He removed her clothes. He removed his clothes and defiled

her on the floor. That while doing so a certain lady entered into the house and found the complainant on the floor. After the appellant finished he gave her Ksh. 20/= and told her to buy whatever she wanted. She went out of the house. She picked her school colleagues on the way and they went to school. She informed her teacher. She used the money to buy a pen.

5. That on going back home at 4 p.m. her mother PW2 noticed that she was walking with difficulty. She inquired what had happened but she did not tell her. PW2 took the girl to her grandmother. They went to Khwishero hospital where she was examined by a clinical officer PW3. The clinical officer found her with a broken hymen. There were presence of epithelial cells. On the following day the matter was reported at Khwisero Police Station. PC Omar PW4 issued a P3 form to her. She was taken back to hospital. PW3 completed the P3 form and Post Rape Care form. PC Omar investigated the case. On 17/2/16 he went to the home of the accused. He found him and arrested him. He charged him with the offence. During the hearing the clinical officer PW3 produced the treatment notes, the P3 form and the Post Rape Care form as exhibits – P.Ex.1-3 respectively. The complainant's mother PW2 produced the girl's baptismal card as exhibit, P.Ex.4. It showed that she was born on 1/12/2000.

Case for the appellant –

6. When placed to his defence the appellant gave a sworn statement and called one witness. He stated in his defence that he was at home on 11/12/2016. That his wife was also at home. She prepared lunch. That at 4 p.m. he received information that he had defiled a child. He went to ask the headmaster of the child's school about it but he said he was not aware of it. Later he was arrested by policemen who were in the company of the complainant.

The appellant further said that he had undergone surgery in the year 2005 and that he is not sexually active.

7. The appellant's witness DW2 testified that the appellant had engaged him to build a chicken house for him. That he was working on the house on 11/12/2016. That at lunch hour an old lady invited him and the appellant into the appellant's house for lunch. He then worked upto 4 pm and left. He left the appellant's wife sleeping on the ground. On the following day he went to finish the work. The appellant told him that he was being suspected of defiling a child. He said that he knows that the appellant suffers from *hernia*.

Submissions -

8. The appellant submitted that there was no medical evidence to support the charge. That Section 36 of the Sexual Offences Act requires medical investigations to be conducted on the victim and the perpetrator which was not done. That the trial court convicted the appellant in reliance of the evidence of the complainant which was evidence from a single witness.

9. That the clinical officer who examined the complainant did not find anything to support defilement. That the presence of epithelial cells only meant that there was friction between the vaginal walls. That there was no presence of spermatozoa or bruises. That his witness DW2 confirmed that he suffers from erectile dysfunction. That the evidence on penetration was not sufficiently proved to support a conviction.

10. Further that the prosecution did not call other witnesses who were mentioned in the case – the complainant's school mates, the teacher (H) whom the complainant is said to have reported to and a lady who had entered into the appellant's house and found the complainant on the floor after the appellant had defiled her and the complainant's grandmother to whom the incident is said to have been reported to. The appellant submitted that the prosecution left yawning gaps in its case that created doubt as to whether he had committed the offence. The appellant urged the court to allow the appeal.

11. The prosecution counsel submitted that there was no evidence of the age of the minor. That the clinical officer PW3 only gave generalized remarks of penetration but did not give any details. That there were some witnesses who were not called in the case. That it was not safe to convict on the evidence that was tendered in court.

Analysis and Determination -

12. This is a first appeal. It is the duty of a first appellate court to re-consider the evidence adduced at the lower court, analyze it and draw its own conclusions while bearing in mind that it did not see or hear the witnesses testify – see **Okero –Vs- Republic (1972) EA 32**.

13. The appellant challenges the conviction on the grounds that there was no medical evidence to support the charge. In the case against the appellant the clinical officer did not say that the hymen was recently broken. There was no evidence of presence of spermatozoa. The presence of epithelial cells did not by itself proof that there was sexual intercourse. There was thereby no medical evidence to support a charge of defilement.

14. However the position of the law in respect to medical evidence in cases of defilement and rape is as was held by the Court of Appeal in **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010 (**cited in **Dennis Osoro Obiri Vs Republic (2014)eKLR)** where the Court of Appeal held that :-

> ***"Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person …under proviso to section 124 of the Evidence Act Cap 80 Laws, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief."***

15. In **AML Vs Republic 201 eKLR** the Court of Appeal stated that:

> ***"the fact of rape or defilement is not proved by a DNA (read medical) test but by way of evidence."***

16. The court upheld the same **in Kassim Ali Vs Republic in Mombasa Criminal Appeal No. 84 of 2005** where it stated that:

> ***"(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."***

17. Section 36 (1) of the Sexual Offences Act allows a court to order a DNA test to be undertaken on an accused person. However the provisions of the section are discretionally and are not couched in mandatory terms – See **Hadson Ali Mwachungo –Vs- Republic (2016) eKLR**.

18. In view of the foregoing, a court can convict on a charge of defilement in reliance of credibility of witnesses and circumstantial evidence. It is not mandatory that a charge of defilement be supported by medical evidence. The question in the appellant's case was whether even without medical evidence there was sufficient evidence to sustain the charge.

19. The complainant stated that she had reported to her fellow pupils that the appellant had defiled her. That she reported the same to her teacher called H who in turn reported to the headteacher. That her grandmother was summoned to the school and she was informed of the defilement. None of these people were called to testify in the case.

20. Though the complainant said that her grandmother was summoned to her school and informed of the defilement, her mother PW2 stated in her evidence that she is the one who took the complainant to her grandmother who advised PW2 to take the complainant to hospital. It appears from the evidence of the complainant's mother that it is her, PW2, who made the report to the complainant's grandmother. Was then the complainant's grandmother summoned to the complainant's school or she learnt of the incident from the mother to the complainant?

21. The complainant stated in her evidence that the house of the appellant was a single room. The investigating officer PW5 said that the house was two-roomed. Was then the house where the complainant was defiled a single room or two-roomed?

22. The prosecution case depended on the credibility of its witnesses. The indiscrepancies in the evidence of the prosecution witnesses tended to cast doubt into the credibility of its witnesses. In **Kimani Ndungu –Vs- Republic (1979) I KLR 282**, the Court of Appeal stated that:-

> ***"The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his truthworthness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."***

The trial court in the appellant's case did not attempt to consider the discrepancies in the prosecution case. I doubt that the witnesses were truthful.

23. The prosecution also failed to call a number of witnesses who would have gone to support its case. There was no explanation as to why they were not called. There was no indication that the investigating officer had even tried to record statements from them. In **Donald Majiwa Achilwa & 2 Others –Vs- Republic (2009) eKLR** the Court of Appeal held that:-

> ***"The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however , the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution*** *case- see* ***Bukenya & Others Vs Uganda (1972) EA 549.***

The evidence adduced by the prosecution was not sufficient. That the prosecution failed to call some crucial witnesses in the case led to the inference that had the said witnesses been called their evidence would have tended to be adverse to the prosecution case.

24. Upon considering the evidence tendered before the lower court I am of the view that the evidence was not sufficient to sustain the charge against the appellant. It was not safe to convict the appellant on the evidence that was in record. The upshot is that the appeal is upheld. The conviction is accordingly quashed and the sentence set aside. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 10th day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma for state

Appellant - present

Court Assistant - George

14 days right of appeal.