REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 104 OF 2018

JAMES WAFULA MLATI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

Being Appeal arising from the judgement and sentence by Hon. A. Kibiru (C.M.) in Machakos Chief's Magistrate's Court in Criminal Case SOA No. 9 of 2017 delivered on 22/02/2018)

JUDGEMENT

1. The appellant was convicted with the offence of defilement contrary to **section 8(1)** read together with **section (8)(2) of** the **Sexual Offences Act, 2006**. There was also an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The appellant was convicted of the main charge and sentenced to life imprisonment.

2. Briefly, the evidence was as follows; **PW 1** was JM. A voire dire examination revealed that she was an 11 year old class five pupil at [Particulars Withheld] Primary School. The court found that the minor was able to understand the nature of an oath and she gave a sworn testimony. She testified that she lives with her mother CW and her father Michael Francis and that her siblings were N, F and N. She recalled that on 11.3.17 at about 9.00a.m she went with her sister N to graze cows when they saw one N bringing goats to the river. They went to one Peter's house to get water to drink as they were thirsty where they found the appellant herein whom they knew as James. The appellant who was a domestic help at that home informed them that there was no water. She testified that the appellant sent her to pick some utensils that had been washed to which she obliged and took them inside the house. The appellant picked sufurias and joined her in the house where he held her hand. It was her testimony that the appellant lifted her and carried her to his bed, removed her skirt and underpants and then removed his trousers upto his feet and defiled her by inserting his penis into her vagina. She testified that she felt pain but could not scream as the appellant had held her mouth. She later went out and called her sister but who did not respond. She stood crying and when her sisters came they went and untethered the cows and proceeded home around 1 p.m. She went to sleep and woke up at 4 pm, showered and returned to sleep. She notified her mother that she was sleeping because she was feeling pain whenever she relieved herself. She did not notify her mother until 15th when they went to Machakos police station and reported to the police who referred her to hospital at Machakos level 5 hospital where she was examined. She produced the following documents that were duly marked; (Treatment notes – Mfi-1, P3 form which was filled on 23.3.17-Mfi 2), (PCRF – MFI 3, Birth certificate showing she was born on 23.4.2006(MFI 4). On cross-examination, she testified that she was the one who suggested to her siblings to go to pick "Ndula" fruits. She confirmed that she went to the appellant's place to ask for water and that the appellant defiled her. She denied being told what to say by her mother and testified that she did not tell her mother on that day of the incident because she feared her.

3. **PW 2** was SN. A voire dire examination conducted on him revealed that he was an 11 year old class five pupil at [Particulars Withheld] Primary school. The court found that the Minor was intelligent enough and understood the nature of an oath and directed that he give a sworn testimony. He testified that he lived with his parents M and M respectively and that he has three siblings. He recalled that on 11.3.17, a weekend he went to graze goats and found M and N (his cousins) grazing. He testified that they decided to go and pick "Ndula" fruits found in the bush and whilst picking the wild fruits, N indicated that she was thirsty and he directed them to go for water at one Peter's home. When they arrived they found one James who told them there was no water but who however sent Pw2 and N to go and pick mangoes and told M to pick utensils and take them to the house. He testified that he saw M pick the utensils and enter the house and when he returned from picking mangoes he found M (PW 1) crying and he did not know what happened inside house. He testified that he knew the appellant before the incident as he used to visit his parent's home and talk to them. On cross-examination, he testified that he was not the one who defiled PW 1. He confirmed that the appellant told him and N to go and pick mangoes and on return found PW 1 at the gate crying but did not ask her why she was crying.

4. PW 3 was Dr. John Mutunga of Machakos Level five hospital. He had a P3 form in respect of JMM aged 11 years old who was alleged to have been sexually assaulted on 11.3.17. He testified that on examination he found that her private parts were tender, hymen was broken and fresh and he found that the weapon that caused the injury was a penile shaft and signed P3 form on 23.3.17. He testified that Pw1 had treatment chits, lab results form, PRCF which was filled at Machakos Level five hospital. He produced the documents that were duly marked as Exh 1, Exh 2 and Exh 3 respectively. On cross-examination, he testified that the injuries on the victim were consistent with sexual assault and he did not ask why the victim was not brought immediately the incident occurred. On re-examination, he testified that as per the treatment chit, the victim was seen on 15.3.17 while the incident took place on 11.3.17.

5. **PW 4** was CWM who testified that on 12.3.17, she had sent her child (Pw1) to graze cattle near a river and she joined another child (Pw2). It was her testimony that Pw1 told her that she and Pw2 went asking for water at one Peter's place, but found the appellant who did not give them water and that the appellant then told her to take some utensils into the house where the appellant followed her and defiled her. Pw1 informed her that she was feeling pain while urinating and the following day she took her to hospital but the bleeding did not stop; it is then that she asked Pw1 what happened and who informed her that the appellant had defiled her. She testified that she reported to the police where she was issued with P3 form which was filled as well as the PRCF form. She testified that Pw1 was aged 10 years as she was born in April, 2006. She testified that she knew the appellant before for about three months. On cross-examination, she testified that she did not witness the incident but noticed that the victim was bleeding. She denied that she forced the child to testify.

6. **PW 5** was No. 47603 Senior Sergeant Margaret Mugo based at Machakos Police Station Women and Children Department. She testified that on 15.3.17 she was at the Police station when a lady called CW together with her daughter called JMM came and reported that on 11.3.17 Pw1 was at home when she and her younger sister went to graze goats and while grazing, a cousin of theirs called N who was grazing cows with them intimated that they go pick some wild fruits and they obliged whereupon Pw1 indicated that she was thirsty and that Pw2 led them to a neighbour's house (Peter) to ask for water. She testified that she was informed that they did not find the owner but found an employee one James Mulati who informed them that there was not water but he told N and the girl N to go and pick mangoes at a farm nearby and asked Pw1 to help him return some utensils in the house and whilst taking the utensils together with the appellant, he followed her to the house and locked the door, held complainant and placed her on the bed and defiled her after undressing her. She was informed that the appellant covered Pw1's mouth but the girl kept calling for help from the other children. She testified that she recorded the report and referred Pw1 and Pw4 to Machakos Level five Hospital for treatment and then arrested the appellant and preferred charges. She testified that she was led by Pw4 to the appellant's place and that Pw1 positively recognized the appellant as the assailant. She testified that she also obtained birth certificate showing child was born on 3.12.06 and she produced a copy of the birth certificate (Exh 4). On cross-examination, she testified that she was the investigating officer and that she visited the scene and Pw4 confirmed the incident.

7. The court was satisfied that a prima facie case had been established and placed the appellant on his defence.

8. The appellant James Wafula Mulati from Kakamega County testified that he was a shamba boy at Vota. He testified that he did not know the allegations. He testified that on 11.3.17 he had gone to Machakos to buy farm items and on 20.3.17 he was arrested around noon and brought to police station and charged. He testified that his employer lives in Nairobi and he lives alone in the boma (compound). On cross-examination, he testified that he did not have a receipt for the items he went to buy in Machakos and used a motor cycle to come to Machakos but did not know it. He testified that he did not know the complainant before but knew the complainant's mother as a neighbor.

9. The trial court found that the appellant made a general denial that did not shake the prosecution case and as such convicted the appellant of the main charge under Section 215 of the Criminal Procedure Code and sentenced him to life imprisonment.

10. Being dissatisfied with the said conviction and sentence, the Appellant filed his Petition of Appeal and amended the same though without the requisite leave, and which raised several grounds as follows:-

> **1. THAT the learned trial judge erred in both law and facts when he convicted the appellant in the present case failing to find that evidence adduced was inconsistent and contradictory.**
>
> **2. THAT the learned trial judge erred in both law and facts when he convicted the appellant in the present case yet failed to find that investigations done in the present case was shoddy and did not exhume the naked truth of the matter.**
>
> **3. THAT the learned trial judge erred in both law and facts when he convicted the appellant in the present case failing to duly comply with the provisions of Section 211 CPC**
>
> **4. THAT the learned trial judge erred both in law and facts when he rejected his plausible defence without according it considerable weight.**

11. The appellant's submissions and closing submissions are on record as well as the Respondent's submissions dated 23.1.2019.

12. The appellant submitted on each of the grounds raised in the appeal. On the 1st and 2nd grounds that were merged, the appellant submitted that there is inconsistency in the date of the alleged incident because Pw1 stated that it occurred on 11.3.2017 whereas Pw3 stated that it occurred on 12.3.2017. He submitted that the victim was received on 15.3.2017 whereas the incident occurred on 11.3.2017 hence there was a 72 hour lapse, there were no blood –stained clothes presented as evidence and that he told the court that he was in Machakos on the date of the alleged incident. On the 3rd and 4th grounds that were merged, the appellant submitted that Section 211 of the Criminal Procedure Code and Article 50(2) (b) of the Constitution were not adhered to hence he urged the court to reanalyze the evidence and find that the conviction was uncalled for and allow the appeal, quash the conviction and set aside the sentence.

13. The respondent in reply framed three issues for consideration. Firstly, whether there were material contradictions on the prosecution case; secondly, whether the appellant's defence was considered during trial and finally whether the appellant's rights were violated during trial. On the first issue, counsel submitted that the court ought to be guided by Section 382 of the Criminal Procedure Code on the magnitude of the inconsistencies. Counsel also relied on the case of **Philip Nzaka Watu v R (2016) eKLR.** According to counsel, the discrepancies in the date of the incident are immaterial as the date was clarified by the evidence of Pw1, Pw3 and Pw5 and therefore that ground of appeal lacked merit. On the 2nd issue, counsel submitted that after the court made a ruling on a case to answer, it put the appellant on his defence and found that the appellant could not exonerate himself from the offence with which he was charged and therefore the said ground had no merit. On the 3rd ground, counsel submitted that the appellate court had no basis to assume that the rights of the appellant under section 211 of the Criminal Procedure Code and Article 50(2) of the Constitution had been infringed and thus this ground had no merit and ought to be dismissed. Counsel concluded by submitting that the appellant had not raised sufficient grounds to warrant interference with the decision of the trial court hence the appeal be dismissed, the conviction and the sentence upheld.

14. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

15. Having looked at the evidence on record, the grounds of appeal and Appellant's and respondent's written submissions, the issues for determination are:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

b. Whether or not the appellant had satisfied the court that Section 211 and Article 50 of the constitution was infringed.

c. Whether there are contradictions in the evidence of the prosecution that will vitiate the conviction against the appellant

d. Whether the appellant's defence was considered

e. Whether the investigations conducted are reasons enough to interfere with the decision of the trial court.

16. The Appellant seems not to have challenged one element of the offence as encapsulated under Section 8(1) and (3) of the Sexual Offences Act, to wit that the victim was aged 11 years and that he was positively identified. He has to a small extent challenged the evidence on penetration. The evidence that is on record that is contained in the evidence of the complainant confirms that the appellant sent the victim to collect utensils and they went into the house together whereupon he defiled her; the evidence of PW2 corroborated the fact that the two were seen together. The appellant was in court and did not counter the said evidence save for an allegation that he was in Machakos, however he admitted that he lived in the subject home alone. The sequence of events as recounted by the prosecution evidence point to the fact that the appellant was together with the complainant and that they went together to the home of the appellant's employer. The medical evidence that was adduced by Pw3 left no doubt that the complainant had a torn hymen. In the terms of Section 2 of the Sexual Offences Act that provides that penetration means insertion of a genital organ into that of another there was indeed evidence of penetration. Because there is evidence of a torn hymen, and the conclusion by Pw3 that it was occasioned by a male organ the issue of penetration had been established. Again because according to the complainant she had sexual intercourse with the appellant, this court agrees with the finding of the trial court and concludes that penetration was proven. The element of identification was easily met because the appellant was recognized as a shamba boy and he himself admitted this in his defence. Further as noted earlier, he admitted that he lived in the employer's home alone. The victim and her siblings had known him before and even knew his name as James who used to visit the victim's parents occasionally. He was seen together with the victim on the material day and was thus placed at the scene of crime. I find the first issue is answered in the affirmative.

17. On the 2nd issue, the record bears witness that the appellant was found to have had a case to answer and his defence was recorded by the trial magistrate. Therefore I am not satisfied that Section 211 and Article 50 of the constitution were infringed by the trial court as he was accorded all his rights.

18. The 3rd issue on contradictions and the only one pointed out related to the date of the incident. As submitted by the respondent, the evidence of Pw1, Pw2, Pw3 and Pw5 all point towards the date of 11.3.2017 and in any event, the contradictions in the date of the event do not shake the prosecution case and are immaterial as per the standard laid down in Section 382 of the Criminal Procedure Code.

19. The appellant's evidence appears to impute a defence of alibi. The law on alibi is now well settled. It is that a prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see) ***Leonard Aniseth v. Republic*** (1963) EA 206. Nevertheless, the appellant did not present any other independent evidence apart from his oral evidence that he was in Machakos and I am satisfied that there was ample evidence to warrant the conviction of the appellant. I find that his alibi was false in view of the overwhelming prosecution evidence of Pw1, Pw2, and Pw4, which put him at the scene of crime at the material time. Therefore this ground of appeal fails.

20. With regard to the last issue, the appellant appears to fault the investigations and seeks that the court use it as a basis to interfere with the decision of the trial court. By dint of Article 157 of the Constitution, the Office of the Director of Public Prosecution is independent in its actions and is at liberty to institute cases without external direction. Similarly the National Police Service Act No 11A of 2011 gave the police powers to investigate and prefer charges. Hence the decision to do so was intra vires and the court can only look at the evidence that was presented before it and not go on a voyage beyond that. In any case the appellant was placed at the scene of the crime by the key witnesses. In this regard this ground of appeal fails.

21. Having analyzed the oral and documentary evidence that was adduced by the Prosecution witnesses, this court is satisfied that the learned trial Magistrate arrived at the correct decision when he found and held that the Prosecution had proved its case on the main count beyond reasonable doubt. The appeal lacks merit and the same is hereby dismissed.

22. As regards the sentence, it is undisputed that the complainant was aged 10 years at the time of commission of the offence and this essentially means that the provisions of Section 8(2) shall apply with full force and the mandatory sentence of life imprisonment as provided for in the section is within the limits of the law. The complainant's age was placed at 11years while the charge sheet stated as 10 years. The discrepancy in the age is not material as the same is curable under section 382 of the Criminal Procedure Code in that the age fell within the ambit of section 8(2) of the Sexual Offences Act for purposes of sentencing. Under the said provision a person found guilty is liable to serve life imprisonment. The appeal against sentence equally fails.

23. For the foregoing reasons, the upshot of this court's decision is that the Appellant's Appeal is not merited and same is hereby dismissed. This court hereby affirms the conviction and sentence of the Trial Court as the same was lawful and warranted.

It is so ordered.

Dated and delivered at Machakos this 22nd day of July, 2019.

D.K. KEMEI

JUDGE