REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 4 OF 2018

(From original conviction and sentence in Criminal Case No. 484 of 2010 of the Principal Magistrate's Court at Wangu'ru).

JOSPHAT GITARI KABUE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant Josphat Gitari Kabue was charged before the Principal Magistrate's Court at Wang'uru with the offence of defilement contrary to **Section 8(3) of the Sexual Offences Act** in Criminal Case No. 484/2010. It was alleged that on diverse dates of 19th December 2008 and 29/5/2010 in Kirinyaga South District intentionally and unlawfully cause his penis to penetrate the vagina of IW a child aged 14 years.

2. After a full trial he was convicted and sentenced to serve twenty years imprisonment.

3. He filed this appeal and raised four grounds. He however filed amended grounds which are as follows:-

a) THAT, the learned trial Magistrate erred in both law and fact by failing to consider that the age of the minor was not proved beyond any reasonable doubt.

b) THAT, the learned trial Magistrate erred in both law and fact when he admitted a doubt-ridden evidence of PW4, Clinical Officer who had not attained the required qualifications.

c) THAT, the learned trial Magistrate erred in both law and fact by failing to consider that crucial witnesses were not called to testify.

d) THAT, the learned trial Magistrate erred in both law and fact by failing to consider the existing grudge between I, the appellant and the complainant's parent.

e) THAT, the learned trial Magistrate erred in both law and fact by failing to consider that the investigations in respect to my case was not properly conducted.

f) THAT, the learned trial Magistrate erred in both law and fact by dismissing my defense which would have exonerated me from the offence and gave no cogent reason for doing so.

4. He prays that the appeal be allowed, conviction be quashed, sentence be set aside and he be set at liberty.

5. The State opposed the appeal and filed submissions. The appellant also filed submissions.

6. The brief facts of the case are that the complainant IW was a girl aged Fourteen years in 2009 and was a student in class 8. Sometimes in December 2009 she was at the river near the shamba of appellant when the appellant approached her and told her he wanted her to be his girlfriend. The complainant went to where the appellant was. The appellant undressed her and he had sex with her. They parted and agreed to meet the following Saturday. They met as agreed and the appellant had penetrative sex with her. The appellant gave her Kshs 150/=. After that the two would meet routinely and engage in sex on Saturdays and Sundays.

7. Later in March 2010 the appellant told the complainant that he suspected that she was pregnant. The appellant took her to a clinic where abortion was procured. Later the appellant gave her Kshs 100/- and told her to go to the same clinic and get a family planning injection. The

complainant went to the clinic and was given an injection. After that she did not have sex with appellant.

8. Later in May 2010 the complainant's mother FNW (PW-2-) came to know that the appellant had defiled the complainant. She declined to inform the wife of the appellant who in turn told her she had disagreed with the appellant after she found clinic card in his pocket which had no name. The PW-2- went and reported to the Chief on 30/5/10. The appellant was summoned. He offered to pay some money and pleaded with PW-2- to withdraw the case. The appellant gave Kshs 20,000/- and an agreement was written. The money was kept as exhibit. The appellant was arrested. The money Kshs 20,000/- and the agreement were kept as exhibits. The complainant was issued with a P3 form and it was filled at the hospital after the complainant was examined. The Clinical Officer found that the hymen had been broken, she had a whitish discharge from her private parts. The original swab found there was a lot of pus and bacteria. She was not pregnant. The breasts were discharging a whitish substance suggestive that she had carried a pregnancy before. The complainant was treated and P3 form was filled by PW-4- a Clinical Officer.

9. This is a 1st appeal and this court has a duty to analyse the evidence, consider it and evaluate it then make a finding but keeping in mind that it had no opportunity to see the witnesses when they testified and leave room for that. This was so held in the **Okeno –v- R(1972) E. A. 32.**

I will deal with the grounds of appeal and the submissions.

1. Age of complainant not proved

The charge sheet read that that PW 1 was aged 14 years old and she confirmed the same during voire dire examination. No proof of the age was adduced.

However, PW 4 the clinical officer stated her age to be 14 years.

10. The trial court noted that no direct evidence led by prosecution to confirm the age of PW 1. That PW 4 did not state whether he conducted an age assessment test. That going by the physical evidence of PW 1, her mother and PW 4 he had no doubt PW 1 was a minor and found that she was actually 14 years based on the P3 form.

11. The appellant submits that neither a Birth Certificate, a birth notification or age assessment report was produced before the trial Magistrate to prove the age of the complainant. He refers court to Page 49 Line 24-26 of the record where in the Judgment of the trial Magistrate. He submits that the examination was based on speculations because neither the wrist, bone nor teeth were examined before the complainant was conclusively termed as a minor aged 14 years. The appellant cites the of **Kaingu Elias Kasom –v- Republic C.A 504/2010** where the court stated:-

> ***"Age of victim of sexual offences is a critical component. It forms part of the charge which must be proved as the same way as penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible evidence for the statement to be imposed will depend on the age of the witness".***

12. The appellant submits that PW-1- and PW-2- totally disclosed the age leaving the matter entirely to the Clinical Officer who then concluded the age be 14 years.

13. For the State, it is submitted that PW-2- the complainants mother testified that PW-1- was aged 14 years. This evidence was corroborated with the age assessment in the P3 form which indicated that PW-1- was 14 years of age at the time that she was defiled.

14. I have considered the submissions. Prove of the age of a victim of defilement is crucial as it determines the section and the subjection which an accused person is to be charged as well as the sentence to be imposed. The issue which this court has to determine is whether the prosecution laid before the court sufficient evidence to prove the age of the complainant. The trial Magistrate in her Judgment from **Page 49 Line 24 to Page 50 Line -7-** of the record stated as follows:-

> ***"However PW4 Simon Kariuki a Clinical Officer at Kimbimbi Sub District Hospital testified that the complainant was assessed and was accompanied by her mother at the time of examination though he did not state whether he did an age assessment test the fact that he referred to her as a minor after examination confirms that he was satisfied that she was a minor. The P3 form which he produced as P.Exh No. 1 also confirmed that the age of the complainant was 14 years going by the physical evidence of the complainant whom appeared before me and the evidence of the complainants mother and the Clinical Officer I have no doubt that the complainant was a minor at the time of the alleged offence and it is my finding that he was actually 14 years boing by the P3 form."***

15. I find that there was sufficient evidence tendered to prove the age of the complainant. The trial Magistrate had the opportunity to see the complainant and assess her demeanor and appearance. Based on the assessment by the Clinical Officer she was satisfied that the complainant was aged 14 years. I find that the prosecution tendered well corroborated evidence which proved that the complainant was aged 14 years at the time she defiled.

Section 8 of the Sexual Offences Act No. 3 of 2006 states;

> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon***

conviction to imprisonment for a term of not less than twenty years.

The complainant was within the age bracket under which the appellant was charged. Based on the evidence tendered, the age of the complainant was proved to the required standards.

2. **The prosecution adduced doubt ridden evidence of PW-4- the Clinical Officer.**

The appellant submits that the Clinical Officer had not attained the required qualifications. That the officer failed to reveal his reference number. That the Clinical said "we" meaning they were more. That the Clinical Officer did not prove that she is specially skilled. He relies on the case of **Mutengi –v- Republic(1982) KLR 203.** It is also submitted that the Clinical Officer did not give her experience.

16. I have considered the submissions. The appellant did not challenge the qualifications of the Clinical Officer when she testified. It is in cross-examination that the matters which the appellant is raising would have been cleared **Section 154 of the Evidence Act Cap 80** provides:-

> ***"When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend–***
>
> ***(a) to test his accuracy, veracity or credibility;***
>
> ***(b) to discover who he is and what is his position in life;***
>
> ***(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."***

I find that the credibility of the PW-4- was not challenged. The court was therefore entitled as it did rely on the evidence of the Clinical Officer. This court stated in **James Kariuki Mwai v Republic [2017] eKLR**

> **From the record, the clinical officer John Mwangi(P.W. VI) testified and stated that he is a clinical officer attached to Kerugoya County hospital. The appellant cross-examined him at length but he did not dispute that he was a qualified clinical officer. The appellant was given a chance to interrogate his credentials when he was given a chance to cross-examine. It is now too late to dispute his qualifications.**
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> **The Court in the case of *Kyalo Kiswii -V- Republic [2015] eKLR* when addressing the issue of competence of clinical officer had this to say:**
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> ***The issue of whether or not a clinical officer is a competent person to give medical evidence was settled by this Court in Raphael Kavoi Kiilu v Republic [2010]eKLR (Criminal Appeal No. 198 of 2008). In that appeal, it was alleged that a clinical officer was not qualified under the Evidence Act to give evidence in matters relating to sexual offences. The Court held that a clinical officer was in fact, authorized under the Clinical Officers (Training, Registration and Licensing) Act and therefore is fit to give medical evidence……..***
>
> ***We agree with this proposition. A clinical officer, being authorized under the Clinical Officers Act is an authorized person who can render medical services, and further can give medical evidence under section 77 of the Evidence Act. Nothing therefore turns on this ground of appeal as well.***

17. The evidence of the Clinical Officer was not interrogated on the matters raised by the appellant. His evidence is intact that he was a Clinical Officer who was qualified and experienced to examine the complainant and give his opinion. The ground must fail.

1. Crucial witnesses not called

The area chief was not called to testify on the alleged agreement of Kshs. 20,000/=. Francis Wachira Muriithi and Mchezo were also not called.

The Court of Appeal held in the case of **Erick Onyango Ondeng' v Republic [2014] eKLR** as follows;

> **In the present case, the proviso *to section 124 of the Evidence Act* and the medical evidence must be borne in mind as well *Section 143 of the Evidence Act (Cap 80)* which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact.**

18. The proviso to **Section 124** of the **Evidence Act** therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

19. In addition, the above witnesses who were not called were not eye witnesses to the defilement therefore failure to call them does not have a great impact on the evidence adduced.

Section 143 of the Evidence Act provides:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

There was no requirement to call the witnesses stated to prove the fact. This is not a case where the evidence adduced was barely enough. The evidence tendered in support of the allegation was sufficient and cogent. This ground is therefore not sound and must fail.

4. Existing Grudge.

The appellant submits that he had a grudge with the complainant's mother over a dispute involving money Kshs 9,000/-. These matters were only raised when the appellant gave his statutory statement of his defence. The issue of grudge was not put to PW-2- when she was cross-examined. The evidence of PW-2- is that the appellant pleaded with her to withdraw the case but she refused. The appellant pleaded that he could pay some money and he paid Kshs 20,000/- to the OCS and wrote an agreement. The money Kshs 20,000/- was produced in court as Exhibit-2-. Though the agreement was marked as MFI-1- it does not seem to have been produced as exhibit.

The allegation of existing grudge is a mere allegation and an afterthought which cannot possibly be true. The ground must fail.

5**. Appellant's defence not considered.**

The appellant submits that the trial Magistrate dismissed his defence without exonerating him from the offence and gave no cogent reasons for doing so. The trial Magistrate at Page 53 of the record considered the defence of the appellant and gave reasons for dismissing the defence. It is therefore not correct for the appellant to state that his defence was not considered. The ground is without merits.

6. **The appellant faults the Investigations which he submits were shoddy.**

The appellant submits that he was not interrogated and that he therefore has in mind that the Investigating Officer did not investigate the matter fully.

An arrested person has no obligation to assist with investigations. He is protected from adducing incriminating evidence and has a right to remain silence**.** ***Article 49 (1)(a)(ii) (d) of the Constitution*** provides:-

> ***"An arrested person has the right –***
>
> ***The right to remain silent.***
>
> ***Not to be compelled to make any confession or admission that could be used in evidence against him."***

20. Failure by the Investigating Officer to interrogate him cannot be faulted as he properly complied with the Constitution in regard to the rights of the appellant. Investigations were conducted and that is the reason why he was arrested and charged in court. I find that the ground is a sham.

6. Whether the prosecution prove its case beyond reasonable doubt

Having considered the entire evidence adduced, the prosecution proved its case beyond all reasonable doubts. PW 1 was able to narrate the occurrence of the incident and what the appellant did to her. The medical evidence also collaborated the evidence that PW 1 had been defiled, her hymen was broken and had whitish discharge from her private parts. That her breast was discharging whitish substance suggestive that she had carried pregnancy before.

21. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion, that of guilt of the appellant.

I find that the appeal is without merits and dismissed.

Dated at Kerugoya this 9th day of July 2019.

L. W. GITARI

JUDGE