REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 90 OF 2018

BENSON WAMBUA MUKONGE.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court (Hon. A Lorot, SPM), in Criminal Case S.O.A No. 770 of 2011 and judgement delivered on 27.9.2018)

JUDGEMENT

1. The appellant was convicted on a charge of defilement contrary to **section 8(1)** read together with **section (8)(3) 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 sentenced to 15 years imprisonment.

2. Briefly, the evidence was as follows; **PW 1** was VMM and a voire dire examination revealed that she was a 15 year old class 7 pupil at *[Particulars Withheld]* Primary School. The court made no finding that the minor was able to understand the nature of an oath however she gave a sworn statement. She testified that the appellant is her cousin. She recalled that on 13.5.2011 she was in her father's house sleeping alone when she saw the appellant suddenly standing next to her bed and who pulled down her biker and then pulled down his trouser and climbed on her and inserted his penis into her vagina. She screamed and Ngangi came to her rescue who took her to their house where she slept. She told the court that she informed her father the following day and they reported to the chief by the name Peninah Kamene and she was referred to Wamunyu Police Post by her brother then she was taken to the hospital. On cross-examination, she testified that she was able to identify the appellant via the light from his mobile phone, and remembered that he had a scar on his forehead. She testified that she was treated on 17.5.2011.

3. **PW 2** was MK who testified that on 14.5.2011 he arrived home and noticed his door was open and he called out for his daughter (Pw1) but she was not there. He testified that he saw a mobile phone and noted that it belonged to the appellant so when he went to the appellant's brother's house he found Pw1 who told him that the appellant had defiled her and had been rescued by Bernard Mukonge. He then made a report at Masii Police Station. On cross-examination, he testified that he arrived home at 5 pm and that Pw1 was taken to hospital by her brother.

4. **PW 3** was AM who told the court that on 14.5.2011 she was informed that Pw1 had been defiled.

5. **Pw4** was MKM who told the court that on 14.5.2011 she was informed that the appellant defiled Pw1.

6. Pw5 was PK who told the court that on 16.5.2011 she saw Pw1 who informed her that the appellant had defiled her on 13.5.2011.

7. **Pw6** was Duncan Musyoka a clinical officer in Masii Health Centre. He had a P3 form in respect of Pw1 aged 14 years old who had been seen on 19.5.2011 by her colleague who indicated that Pw1 had reported that she had been defiled and that there was a struggle in which she sustained injuries on her face when trying to defend herself. Examination revealed facial abrasions on her forehead and face; her thorax and abdomen were normal, she had normal genitalia and the doctor concluded that she had been sexually assaulted. On re-examination, she testified that the probable weapon was blows by hands.

8. **PW 7** was No. 85363 Pc Ibrahim Gedi who was based at Machakos Police Station and stated that on 18.5.2011 he was at Masii police station when Pw1, the appellant together with Penina Kamene came and reported that on 13.5.2011 the complainant was defiled by the appellant and that had she cut him with a panga whereupon the appellant switched on his phone to determine the extent of the injury and she then identified the appellant as her cousin Wambua Mukonge. He testified that the complainant reported having screamed while exiting the house and was taken to a safe house by the brother of the appellant. The age of Pw1 was confirmed as 14 years vide an age assessment that was tendered in evidence. On cross examination, he testified that the appellant was arrested on 18.5.2011

9. The court was satisfied that a prima facie case had been established and placed the appellant on his defence. He opted to give a sworn

statement and called two witnesses.

10. The appellant testified that on 13.5.2011 he woke up at 6.00 am and went to work and returned at 8.00 am where he did his chores then at 1 pm, Pw2 came with his phone and did his daily chores and that the following day he heard Pw1 had been raped and on 18th he was arrested. On cross examination, he told the court that the area chief could have been compromised.

11. **DW2-** John Kamuthi Mbiti told the court that he was shocked to hear the allegations against the appellant**.** The trial court found that the appellant's evidence was evasive but that the prosecution evidence was clear that the complainant was defiled and as such convicted the appellant of the main charge and sentenced him to 15 years imprisonment.

12. Being dissatisfied with the said conviction and sentence, the Appellant filed his Petition of Appeal and amended the same though without the requisite leave. The grounds were summarized as follows:-

> **1.** ***THAT the learned trial judge erred in both law and facts when he convicted the appellant yet the offence was not proven beyond reasonable doubt.***
>
> ***2. THAT the learned trial judge erred in both law and facts when he failed to record the reasons that he was satisfied that Pw1 was ready to take oath.***

13. The appellant's written submissions are on record while the State's Written Submissions dated 8.7.2019 were filed on 9.7.2019.

14. The appellant submitted that the prosecution did not discharge its burden of proof and urged the court to allow the appeal, quash the conviction and set aside the sentence.

15. The state in reply framed three issues for consideration. Firstly, whether the prosecution case was proven; secondly, whether the court followed the process on the voir dire examination and finally whether the conviction was safe. On the first issue, counsel submitted that the age and identification of the appellant were proven. However the medical examination proved that the genitalia of the complainant were normal. On the 2nd issue, counsel submitted that the process of voir dire was not necessary because Pw1 was aged about 15 years where as a child of tender years is defined as one aged 10 years and below. On the 3rd ground, counsel submitted that he conceded to the appeal and urged the court to convict the appellant on the alternative charge.

16. This being a first appeal, this court is mandated to analyze 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".***

17. Having looked at the evidence on record, the grounds of appeal and Appellant's and State'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 the evidence of Pw1 was not properly taken.***
>
> ***c. Whether there are reasons enough to interfere with the decision of the trial court.***

18. 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 14 years. The same was proven vide the age assessment report. He has challenged the evidence on penetration as well as identification. The evidence that is on record that is contained in the evidence of the complainant confirms that the appellant came to the house where the complainant slept and attempted to have sex with her but a struggle ensued whereupon the appellant was injured; the evidence of Pw1 is corroborated by the fact that she screamed and she saw the appellant using the phone light. The appellant was in court and did not counter the said evidence save for an allegation that he was a busy man who did many chores on the material day. The sequence of events as recounted by the prosecution evidence point to the fact that the appellant and the complainant were together in the same compound. The medical evidence that was adduced by Pw6 confirmed to the court that the complainant had a normal genitalia. In terms of Section 2 of the Sexual Offences Act that provides that penetration means the complete or partial insertion of a genital organ of a person into the genital organ of another. Because there is no evidence of a torn hymen despite the complainant telling the court that the appellant had sexual intercourse with her this court disagrees with the finding of the trial court and concludes that penetration was not proven. The element of identification was easily met because the appellant was recognized as a relative, he admitted that he lived in the said home near that of the complainant.

19. On the 2nd issue, when a court is faced with a child which is stated to be 14 years and below, according to case law (**Kibageny Arap Korir v R [1959] EA 92-93** the court must first establish whether the child is possessed of sufficient intelligence to justify the reception of that evidence and understands the duty of speaking the truth. In case the child is intelligent enough to give evidence but does not understand the duty of speaking the truth, his or her evidence may be taken without taking the oath but no conviction can follow unless, such evidence is corroborated by some other material evidence in support of it implicating the accused ***(Section 19 of the Oaths and Statutory Declarations Act).*** But if the child understands the duty to speak the truth, then the oath is administered before taking evidence from him or her. The record shows that questions were put to Pw1 to test her intelligence and therefore I am not satisfied that the trial magistrate erred in taking the evidence of Pw1 for he was satisfied of her intelligence and the fact that she knew the duty of speaking the truth. Even though the trial

court did not indicate on the record about the findings it is evident that the trial magistrate had no doubt about the complainant's ability to give sworn testimony.

20. The 3rd issue, though the evidence does not indicate penile penetration, but the evidence is that Pw1 had observed the perpetrator remove his pair of trousers and insert them in her vagina. It is at that point that the complainant injured him in an ensuing struggle and later screamed and escaped whereupon she was rescued. The activity she observed had gone beyond mere preparation but had not reached the point of contact between the sexual organs of the perpetrator and that of the victim. I find that the conduct she observed constitutes an indecent act, but for her interruption or interference, would have resulted in the commission of the offence. The same is reflective of an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. In **Achoki v. Republic [2000] 2 EA 283**, an accused charged with attempted rape was instead convicted of an alternative count of indecent assault. In that case, the appellant accosted the complainant, knocked her down, tore away her knickers and lay on top of her. He was at the same time lowering his own trousers and he tried to get in between her thighs. The complainant was all the time screaming and her screams brought along a witness who confirmed finding the appellant lying on top of the complainant. The court found that these facts, apart from supporting a charge of attempted rape, which charge was incurably defective, also supported the alternative charge of indecent assault. He was thus convicted of the minor and cognate offence in the alternative count of indecent assault.

21. The appellant's evidence imputes 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.

22. To counter this defence, the prosecution was required to adduce direct or circumstantial evidence proving that the appellant was the perpetrator of the unlawful sexual act. Usually this aspect is proved by the testimony of the victim, eye-witness accounts, confessions of accused persons, medical and other scientific or forensic evidence. In this case, the prosecution largely rests on the accounts of P.W.1 and that of Pw2 that placed him at the scene of the crime. I have examined closely the identification evidence of the two witnesses and found it to be free from the possibility of mistake or error since both witnesses knew the appellant before, saw and spoke to him on the fateful day and thus were in close proximity to him, the events they narrated occurred during day time and over such a duration that enabled them to correctly identify the him. Further the complainant had no difficulty in recognizing the appellant who was a cousin with whom they lived in the same compound. In light of that evidence, I reject the appellant's denial of having seen the victim on that day. I am satisfied that there was ample evidence which put him at the scene of crime.

23. Having discounted the only defence suggested by the defence before me, I find that the admission by the appellant that he was at home on that day in his house doing chores, placed him squarely at the scene of the crime as perpetrator of the crime. This admission supports the otherwise credible, strong identification evidence of Pw1 and Pw2. For that reason, I find that the prosecution has proved beyond reasonable doubt that the appellant indecently assaulted Pw1 and he is accordingly convicted of the offence of an indecent act with a child and sentenced to 10 years mandatory sentence as provided for under the Sexual Offences Act.

24. In the result the appeal partly succeeds to the extent that the conviction and sentence that was meted upon the Appellant by the Trial Court is set side and substituted with a conviction for the offence of committing an indecent act with a child and ordered to serve ten (10) years imprisonment from 27.9.2018.

It is so ordered

Dated and delivered at Machakos this 15th day of October, 2019.

D. K. Kemei

Judge