REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 61 OF 2018

HASSAN ANNATA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Principal Magistrates Court at Mavoko delivered on 12.7.2018 by the Senior Principal Magistrate P. L. Kassan in Mavoko SPMCC Criminal Case S.O.A.9 of 2015)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

HASSAN ANNATA.....ACCUSED

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. L.P. Kassan SPM,** in Criminal Case SOA No. 9 of 2015 delivered on 12.7.2018. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty to both charges.

2. The appeal was lodged on 25th July 2018 that was 13 days after the judgement that was delivered on 12th July, 2018, hence filed within time and the same is deemed to be properly on record. The appellant's case is three-fold. Firstly that the conviction was based on uncorroborated evidence. Secondly that that the medical examination and the report to the police was made four days after the alleged incident. Thirdly that the conviction of the appellant was based on inconsistencies in the medical evidence of the doctors.

3. Counsel for the appellant submitted on the issue of inconsistencies of the medical evidence that Pw3 testified that he could not tell when the hymen was broken whereas Pw4 testified that he could not tell whether the breakage was fresh. Learned Counsel placed reliance on the case of **Mshila Manga v R (2016) eKLR** where the court observed that under the proviso to Section 124 of the Evidence Act for a conviction to be made the court ought to be satisfied that the witness was truthful and record reasons thereof. It was the strong argument of counsel that it was not established that the appellant was at the scene of crime and placed reliance in the case of **John Mutua Munyoki v R (2017) eKLR**

4. The state opposed the appeal vide unsigned and undated submissions filed on 23rd July, 2019. Learned counsel addressed three points, that is whether the prosecution proved their case beyond reasonable doubt, failure to call crucial witnesses and inconsistencies in medical evidence. On the issue of proof of the prosecution case, learned counsel submitted that all the elements of the offence were proven. On the issue of failure to call crucial witnesses, counsel cited Section 143 of the Evidence Act and the case of **Bukenya & Others v Uganda (1972) EA 549** and submitted that the prosecution was not obligated to call any number of witnesses. On the issue of inconsistencies, counsel submitted that the same are minor and curable under Section 382 of the Criminal Procedure Code Act**.** To that the end, counsel submitted that the court should dismiss the appeal and uphold conviction and sentence of the trial court.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was FMM and a voir dire revealed that she was a twelve year old class six pupil. When the court was satisfied that she possessed sufficient intelligence to give sworn evidence, she was sworn in. She testified that on 14.4.2015 she was at home and they had closed school and she was washing dishes when the appellant told her to help him chase chicken to his house and she obliged and when she went into his house, he came and pulled out a knife and threatened to stab her and immediately took a cloth and put it on her mouth then he put her on the bed and removed his clothes then removed her pantie and biker and put his penis in her vagina and later told her to go. It was her testimony that she went home and washed her

clothes, showered and changed her clothes and slept. Her mother came at 8 pm but she informed her on Friday of the same week and she was taken to Hospital at Kinanie where she recorded a statement. On cross-examination, she testified that she informed her mother about the incident on Friday at 4 pm and that she did not indicate in her statement that the appellant threatened her with a knife and that the appellant defiled her twice.

6. **PW2** was CN who presented the birth certificate in respect of Pw1. It was her testimony that on 17.4.15 Pw1 told her that she had been raped by the appellant and she took her to Kinanie Private clinic and then to Athi River Hospital. She reported the matter on Saturday and took her to Machakos level 5 hospital where she was treated and given a PRC form and a P3 form and later she took her to Nairobi Women's Hospital.

7. **PW3** was Chris Makau Mutoko who testified that he is a clinical officer at Athi River Health Centre and that he was familiar with the handwriting of Dr. Njoroge who filled the P3 form in respect of Pw1 on 18.4.2015. The form was tendered with no objection from counsel for the appellant and Pw3 testified that the injury to the complainant was six days and the probable weapon was a penis. Examination revealed a broken hymen and the P3 form was signed on 24.4.2015 by Dr. Njoroge. On cross examination, he told court that Pw1 came to the hospital on 18.4.2015 and the incident was alleged to have taken place on 18.4.2015 and confirmed that Pw1 had a torn hymen.

8. **Pw 4** was Michael Mutisya, clinical officer Machakos Level 5 hospital. He testified that he filled the P3 form on 18.4.2015 concerning the examination carried out on Pw1 who had a history of defilement He found that the hymen was broken and had a birth notification indicative that complainant was born on 21.4.2003. On cross-examination, he testified that the examination was done after four days and he could not tell when the hymen was broken and it was detrimental to establish penetration if somebody had washed the private parts.

9. **Pw5** was Pc Sophie Muthoni, the investigating officer who testified that on 17.4.2015 a defilement case was reported and she recorded statements and issued a P3 form that was filled at Athi River health center. She told the court that the incident was reported on 17.4.2015 and the appellant was arrested by AP's and that the victim was aged 12years as per the birth certificate. On cross-examination, she testified that she did not go to the appellant's house as she relied on the evidence of Pw1.

10. The court was satisfied that a prima facie case had been established against the appellant who was placed on his own defence. Section 211 of the Criminal Procedure Code was explained to the appellant who opted to give unsworn evidence. He denied committing the offence and that at 6 pm he was at home when he was arrested; that he was remanded for 3 days and charged. The court found that the appellant was Pw1's neighbor and was therefore properly identified and found that the prosecution proved its case against the appellant and convicted him with the main count of defilement and sentenced him to 20 years imprisonment.

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

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

b. ***What orders the court may issue.***

12. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case; that the medical evidence was riddled with inconsistency. The prosecution opposed the appeal and submitted that the prosecution proved its case. A perusal of the list of exhibits in the lower court record showed a birth notification in the names of **FLK** as the victim born on 20.04.2003, a P3 form as evidence of penetration in the names of **FM** as well as a PRC in the names of **FMM**; there is a birth certificate in the names of **FL** that was issued on 30th April, 2015. There is an affidavit of names deponed on 18th August, 2015 indicating that FL and FMM refer to the same person. There is no eye witness account of the incident.

13. The appellant has neither disputed nor admitted that he was at the scene on the material day. However he is reportedly a neighbor of the victim. The identity of the victim who is going by different names appears not to have been proven, nevertheless there is evidence of a victim aged below 18 years. The appellant denied commission of the offence and he has imputed that he was framed. The trial court relied on the P3 form and PRC forms to prove that there was penetration. The forms were filled in about four days after the incident.

14. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a) That the victim was below 18 years of age.

b) That a sexual act was performed on the victim.

c) That it is the accused who performed the sexual act on the victim.

15. This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see **Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918**).

16. Beyond reasonable doubt is proof that leaves the court firmly convinced the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that

the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

17. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See ***Ssekitoleko v Uganda [1967] EA 531***). By his plea of not guilty, the appellant put in issue each and every essential ingredient of the offence of defilement which he is charged and the prosecution had the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

18. The evidence as narrated by the Pw2 and Pw5 is largely hearsay and violates the provisions of section 63 of the *Evidence Act* which requires that oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. In ***Junga v R*** **[1952] AC 480** (PC) it was held that the trial magistrate had before him hearsay evidence of a very damaging kind. Without the hearsay evidence the court below could not have found the necessary intent to commit a felony and that being the case the Court of Appeal allowed the appeal against conviction. I find that the evidence relied on by the trial court is not evidence capable of sustaining a conviction and such evidence can only corroborate other credible evidence. There is no other direct and cogent evidence pointing irresistibly to the appellant as the defiler. From the record, it is the only evidence of Pw1 that tells of the events that the appellant penetrated her and there is the evidence of Pw3 and Pw4 that is indicative of penetration. However there is doubt as to whether Pw1 is the victim as discussed above in paragraph 12 and find that there is inconsistency with regard to the identity of the victim. I find that the same is material because it goes to the root of the case in that it touches on the identity of the victim. The P3 form is in respect of **FM** which name is not on the charge sheet and not on the birth certificate and birth notification that was presented in court.

19. Section 143 of the Evidence Act provides that: "**Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.**"(emphasis added). A conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. From the evidence on record, the court is not sure who exactly the victim is and is not able to rely on her evidence alone hence the need for corroborative evidence. A person who reports an incident four days after its occurrence cannot be reliable. The trial court did not satisfy itself of the danger of a conviction based on evidence of a single witness and the need for corroboration as well as did not satisfy itself that the single witness was telling the truth. The Proviso to Section 124 of the Evidence Act is that "***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth***."

20. Be that as it may, there is circumstantial evidence that the prosecution seemed to have relied upon. In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

21. The circumstantial evidence that is available is that the appellant is the neighbour of the victim and this was used to pin the said appellant. However the evidence on record casts doubt in the prosecution's case. There was no burden upon the appellant to prove his innocence. If there is doubt created on the prosecution's case the benefit of such doubt must be resolved in favour of the appellant. The burden of proof upon the prosecution is high and that any scintilla of doubt must be in favour of the appellant.

22. For a finding of fact to be made based on circumstantial evidence, this court must be satisfied that there are no other co-existing circumstances which would weaken or destroy the inference. I find that neither in the testimony of Pw1 nor that of P.W.2, Pw3 and Pw4 is there an element that conclusively proves that sexual intercourse or any other sexual act as defined by section 2 of the Sexual Offences Act occurred between the appellant and Pw1. The circumstances are suggestive that the complainant and the appellant are neighbours but do not establish it as a fact that there was any meeting, any sexual contact, let alone penetration between the sexual organs of the appellant and the victim. The intended corroborative evidence too is inconclusive and is hearsay. The absence of a hymen cannot in itself prove penile penetration and in any event PW3 could not tell when the act was done and could not even establish that the injury was four days old which was near the date when the offence was committed so as to enable the court find that indeed the appellant committed the offence. The evidence considered as a whole causes such doubt as would lead a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon. It causes a real and substantial uncertainty with respect to the elements of penetration and the involvement of the appellant in the offence charged and a real possibility that the unlawful sexual act did not take place.

23. In the instant case, there is no direct or cogent circumstantial evidence pointing irresistibly to or showing that it is the appellant was responsible for the absent hymen. I am faced rather with weak evidence of reports made to Pw4, Pw5 and Pw3 by Pw1 which evidence is sought to be corroborated by the P3 form and PRC forms of the victim, whose discrepancy in identity has not been satisfactorily explained and such evidence cannot stand on its own to sustain a conviction. It is trite law that in cases of doubt in the prosecution case, the same should be found for the benefit or in favour of the accused. In the absence of substantive evidence, reliance on what was presented in the trial court would be an affront on the integrity of administration of criminal justice. It is unsafe to convict on the basis of such evidence as presented in the instant case. The evidence available is incapable of proving the ingredient of penetration occasioned by the appellant, his participation and that the complainant was the victim beyond reasonable doubt.

24. In addressing the question as to whether or not the Prosecution proved its case to the required standard, being proof beyond reasonable doubt, I find that the evidence on record is not satisfactory to convince this court that the offence was committed by the appellant.

25. On the issue of the orders that the court may grant, this court disagrees with the conviction and sentence that was meted upon the Appellant by the trial court and I hereby set aside the conviction for the offence of defilement and quash the sentence. The appellant should be set free forthwith unless he is being held for other lawful reasons.

It is so ordered.

Dated and delivered at Machakos this 16th day of October, 2019.

D. K. Kemei

Judge