REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 3 OF 2018

MICHEAL ROTICH BETT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrates Court at Kithimani delivered on 9.1.2018 by the Resident Magistrate G.O. Shikwe in Kithimani PMCC Criminal Case SO.67 of 2016)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

MICHEAL ROTICH BETT.....ACCUSED

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. G.O Shikwe RM, in Criminal Case S.O.A No. 67 of 2016** delivered on 9.1.2018. The Appellant was charged with the offence of defilement contrary to Section 8(1)(2) 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 22nd and 23rd January, 2018 that was more than 14 days after the judgement that was delivered on 1st September, 2017, in the absence of an application for leave to file the same out of time it ought to be refused. However in the interests of justice, the same is deemed to be properly on record. The appellant's case is seven-fold. Firstly that the conviction was based on contradictory and inconsistent testimony. Secondly that no proper investigations were carried out in this case; Thirdly that crucial witnesses did not testify at trial; Fourthly that allegations were never proved; Fifthly, that his plausible defence was dismissed and Sixthly that the appellant was a minor hence there was prejudice and lastly that he shall raise more reasonable grounds when furnished with court records.

3. Counsel for the appellant submitted on the issue of fairness that the trial magistrate dismissed the appellants plea for an adjournment thus breaching his right to fair trial under Article 50(2)(c) of the Constitution. On the issue of contradictions, Learned Counsel submitted that Pw1 contradicted her evidence as to her name, first she told court that her name was EK then later she told the court that her name was EKI; Secondly the evidence of Pw3 was that Pw1 was called EK1 and not EK or EK2. The third contradiction pointed out was in the judgement that indicated the date of the offence as the night of 10th November, 2016 yet this was not indicated in the charge sheet or the evidence during trial and in this regard counsel submitted that the complainant was not telling the truth and her evidence is not credible. According to counsel, there was no confession in law because what is alleged to be a confession was obtained after the appellant was beaten by a one A and the reliance by the court on the same amounted to a miscarriage of justice as was pointed out in the case of **Republic v Elly Waga Omondi (2015) eKLR.** On the issue of failure to consider the appellant's defence, counsel submitted that the trial court failed to interrogate the fact that the issue between Pw3 and the appellant led to a grudge and Pw1 was used to fix him; counsel cited the case of **Francis Kimani Karanja v R (2016) eKLR.** On failure to call crucial witnesses, counsel relied on the case of **Bukenya v Uganda (1972) EA 549** and submitted that the investigating officer did not testify and added that it could not be verified that Pw3 owed the appellant salary arrears hence could be the reason for the grudge. Further that PW1's father to whom the report was made did not testify and the trial magistrate did not give reasons for departure from Section 124 of the Evidence Act. Counsel urged the court to set aside the conviction, allow the appeal and set aside the sentence of the lower court because the main and alternative count were not proven.

4. The state conceded to the appeal and submitted that Section 186 of the Children Act is mandatorily couched that a child ought to be granted legal representation in cases where a child is accused of infringing any law. In that regard the trial that was conducted when the appellant was unrepresented he being a child vitiated the trial for there was a miscarriage of justice. On the issue of proof of the prosecution case, learned counsel submitted that the trial prosecutor failed to prove penile penetration and that absence of a hymen is not evidence of

penetration as was posited in the case of **PKW v R (2012) eKLR.** To that end, counsel submitted that the court do make a finding that the trial was irregular, the conviction was unsafe and the sentence irregular and because the court failed to follow the procedure the conviction and sentence ought to be quashed.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was EKI who after a voir dire examination was conducted the same revealed that she was a class two pupil who did not know her age. She gave sworn testimony that she was called EKI and on a date she could not remember, she was at home and the appellant asked her for water whilst he was at the store then when she took it, he grabbed her and took her to the store and undressed her and lay on top of her then she felt pain on her private parts and bled and he gave her tissue to wipe. She told the court that she screamed and Stephen found her with clothes and her cousin A came and tied the appellant and they were taken to the hospital and to the police station whereupon she was issued with a P3 form and medical records. On cross-examination, she testified that no one forced her to write a statement.

6. **PW2** was SKI. A voir dire examination revealed that he was a 14 year old class 8 pupil. He was sworn in and he testified that on 10.11.2016 he was at home while the appellant was cooking and later he heard E crying and who told him that the appellant had asked her to enter the store. He told the court that the appellant was beaten and then he confessed to having defiled Pw1. He was taken to Ndithini Police station. On cross-examination, he told the court that he saw Pw1 crying at about 2 pm.

7. **PW3** was MM who told the court that on 10.11.2016 she went to church at 10.00 am and returned at 6 pm when S told her that the appellant had taken Pw1 into the maize store and that Pw1 informed her that this was the second time that the appellant defiled her. She stated that the appellant was thoroughly beaten by A and he was taken to Ndithini Police Station and thereafter to hospital where he and Pw1 were examined and P3 forms were issued. She told the court that Pw1 was born in January, 2008 and she produced the child health card.

8. **Pw4** was Cpl Paul Nduati who told the court that he was the investigating officer and that the appellant was brought to the office by members of the public on 11.12.2016 and found that he had been badly beaten and treatment was organized for him and tests confirmed that the minor was defiled and that she was aged 8 years. He stated that the clinic card revealed that the minor was born on 25.6.2008.

9. **Pw 5** was Edwin Mutembei, clinical officer at Masinga Sub-county hospital. He testified on the examination carried out on 11.11.2016 on a minor EK1 who had a history of defilement on 10.11.2016. He had clinical notes from Ndithini Health Centre and he told the court that the hymen was absent with some tenderness. H told stated that he examined Michael Kiprotich aged18 years.

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 Criminal Procedure Code was explained to the appellant and he opted to give unsworn evidence. He told the court that he was at work when he was arrested and in the judgement, the trial court found that the elements or defilement were proven and Pw1 identified the appellant as the perpetrator and he did not challenge the evidence of the prosecution. Therefore the court found that there was sufficient evidence to convict the appellant of the charge. He was convicted of defilement and sentenced to life imprisonment.

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

a. Whether or not a trial on the basis of an incorrect victim will be vitiated.

b. Whether the Charge Sheet was defective; and whether the same occasioned injustice to the appellant.

c. Whether or not the trial was vitiated by procedural infractions in respect of a juvenile offender.

d. Whether the prosecution had proved its case beyond reasonable doubt.

e. What orders the court may issue.

12. 1 shall combine the 1st and 2nd issue. None of the parties have raised any issue that the charge sheet was defective. However from the record this arises. I note that the name of the victim indicated in the charge sheet and the evidence led before the court differ.

13. Section 134 of the Criminal Procedure Code provides as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

14. From the above section, I am satisfied that the charge sheet was defective because though the appellant was aware of the nature of the charge facing him and according to the record, neither the court nor the appellant raised an application regarding the identity of the complainant/victim. I note that the charge sheet indicated that the victim was EK and this is corroborated by the evidence of Pw5; nevertheless, Pw1 who is the alleged victim was called EKI who is not the named victim. I find that there was injustice occasioned to the appellant because the defect goes to the root of the case and it cannot be remedied under Section 382 of the Criminal Procedure Code Act. The appellant needed to know the real identity of his accuser.

15. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case. The prosecution conceded to the appeal. A perusal of the list of exhibits in the Trial Court showed a health certificate in the names of EK1 as the victim born in 2008, a P3 form as evidence of penetration in the names of EKI as well as a PRC form in the same names, there are no treatment notes though Pw5 referred to them; what is on record are outpatient records in the names of EK1. There is no eye witness account of the incident.

16. The Appellant has not disputed that he was at the scene on the material day and the age of the victim has easily been proven. However the appellant denied commission of the offence and he has imputed that he was framed because there were salary arrears which had not been paid. The trial court relied on the P3 form and PRC forms to prove that there was penetration.

17. 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.

18. 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**).

19. Beyond reasonable doubt is proof that leaves the court firmly convinced that 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.

20. 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 accused put in issue each and every essential ingredient of the offence of defilement which he is charged and the prosecution has 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**).

21. The evidence as narrated by the Pw2 and Pw3 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, the evidence of Pw1 does not clearly state that the appellant penetrated her and this only leaves us with the evidence of Pw5 that is indicative of penetration. However there is doubt as to whether Pw1 is the victim as discussed above since her real names did not come out clearly. Such doubts should be resolved in favour of the appellant.

22. 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**).

23. The circumstantial evidence that is available is that the appellant was left alone with the victim and this was used to pin him. However the appellant cast doubt upon the prosecution's case by testifying that there was a grudge; that he was beaten to confess and indeed there is evidence from the P3 form that the appellant had been beaten.

24. For a finding of fact to be made based on this 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 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. The circumstances are suggestive that Pw1 and the appellant were together within the compound but do not establish it as a fact that there was contact, let alone penetration, between the sexual organs of the appellant and the victim. There would be corroborative evidence too is inconclusive and is hearsay. The absence of a hymen and vaginal tenderness cannot in itself prove penile penetration. 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.

25. In the instant case, there is no direct or cogent circumstantial evidence pointing irresistibly to or showing that it is the appellant that caused the victim to lose her 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 form of the victim, and such evidence cannot stand on its own to sustain a conviction. 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. 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.

26. 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.

27. On the issue of the orders that the court may grant, the respondent has conceded to the appeal and in this regard 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 14th day of October, 2019.

D. K. Kemei

Judge