REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 56 OF 2018

SAID BAGALA KABWERE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 371 of 2013 of the Senior Principal Magistrate's Court at Mariakani – L.K. Gatheru, RM)

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for DPP

Appellant in person

JUDGEMENT

This is an appeal by **Saidi Bagala Kabwere** hereinafter referred as the appellant who was tried before the lower court for the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006.

The particulars of the charge as framed by the prosecution were that on diverse dates between 6th July, 2012 and 25th August, 2013 at Fulugani Village within Kwale County intentionally and unlawfully caused his penis to penetrate the vagina of **MT** a child aged 14 years old.

During the trial appellant pleaded not guilty and the prosecution was put on notice to proof their case beyond reasonable doubt. Thereafter the trial proceed in earnest by four witnesses testifying on behalf of the State.

At the conclusion of the trial the learned magistrate entered a verdict of guilty, convicted the appellant and sentenced him to serve 20 years imprisonment.

Aggrieved by the judgement of the trial court the appellant lodged an appeal based on the following grounds: -

1. That, the learned trial magistrate did not consider that the present charge sheet was defective as it omitted the "WORD UN-LAWFULLY".

2. That, the learned trial magistrate erred in law and fact sin failing to see that the victim herein was not a straight forward person hence the admission of her evidence in accordance with section 124 of the evidence act was bad in law.

3. That, the learned trial magistrate erred in law and in failing to consider that D.N.A. test in this case was useful to ascertain the paternity of the child.

4. That, the learned trial magistrate erred in law and fact by not considering that the prosecution did not prove their case beyond reasonable doubt.

5. That the learned trial magistrate erred in law and fact by not considering that my defense was reasonable to set me free.

Procedural history and background

In this case **PW1 – MT** aged 15 years as per the immunization card was a daughter to **PW2 TR**. The complainant **(PW1)** testified in that she has had a service mentorship with the appellant since 2012 which resulted in her becoming pregnant in August, 2013. According to (PW1) the sexual episodes used to take place monthly around the river when she used to go and fetch water. This latest confrontation from **PW 2** testimony was precipitated due to her delay to return home from the river whereby PW 2 demanded an explanation. PW1 without hesitation informed PW2 about her sexual act with the appellant. According to PW1 and PW2 testimony they reported the matter to the police at Taru. As stated by **PW3 P.C. Benard Mwaura** upon receipt of the report on defilement he embarked on an investigation by having (PW1) examined by a doctor at Taru hospital.

The clinical officer **Rose Mwaki** who testified as PW4 on behalf of **Dr. Othuo** who had examined the complainant (PW1) and filled the P3 Form stated that **PW1** was found to be 14 week old pregnant. It was PW4 evidence that despite the history of previous carnal knowledge the complainant had a ruptured hymen but no lacerations or injuries to her genitalia.

The appellant in his defence denied any acts of defilement with the complainant. The appellant alleged that most of the period in which he was accused of committing the offence he was away either working or searching for work at various places in Kwale or Lamu.

On appeal the appellant filed written submissions challenging the entire judgement of the trial court. The appellant submitted that though the complainant alleged that they had sexual intercourse severally, there was no evidence to place him at the scene. On this ground appellant relied on the principles in the case of **Cleophas Otieno v R 1989 eKLR, Abdalla Bin Wendo & another v R 1953 20 EACA 166** and **Charles Mitayi v R 1986 1 KLR**.

According to the appellant taking into account the number of times they met to have sex with the complainant she failed to positively identify him as the one who committed the offence. The appellant further submitted that there was no proof of age by the prosecution as required in the principles laid down in the case of **Alfayo Gombe Okello v R. 2010 eKLR, Kaingu Elias Kasomo v R CA 504 of 2010** and **Gilbert Miriti Kanampili v R 2013 eKLR.**

Concerning the evidence on pregnancy, appellant submitted that it has no probative value in absence of DNA report from the Government Chemist to connect him with the defilement whose outcome was conception of a child. On this ground he relied on the case of **Evans Simiyu v R 2016 eKLR**. The appellant prayed for the appeal to be allowed and conviction quashed.

Learned counsel **Ms Sombo** for the State in her submissions supported the findings made by the trial court. She submitted that on appraisal of the evidence of the four witnesses the charge of defilement was proved beyond reasonable doubt. With this evidence **Ms Sombo** urged this appellate court to dismiss the appeal for want of merit.

Analysis

I have considered the primary record, the grounds of appeal and submissions by both parties to this appeal. In determining the appeal I am mindful of the principles set out in **Okeno v R 1972 E.A. 32** with regard to the duty of a first appellate court to reconsider and scrutinize the whole evidence and to draw its own conclusions.

The central issue in this appeal is whether the prosecution proved its case beyond reasonable doubt in the court below.

From the charge sheet the appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act. Under this Section there are three main ingredients which must always be proved beyond reasonable doubt by the prosecution.

a) Proof penetration by a male genitalia with that of the female.

b) Proof of age that the victim was at the time below the age of eighteen years

c) Proof that the intention and unlawful act was committed by the appellant (accused person).

The starting point in answering and determining this appeal will be whether the minor was subjected to a voire dire inquiry and directions. Whether she understood the nature of an oath or she was sufficiently knowledgeable and intelligent to give evidence in court even without taking an oath.

Section 19(1) of the Oaths and Statutory Declarations Act provides for the evidence of a child of tender years summoned as a witness in any of the proceedings. The requirements of the law pursuant to this provision is for the trial court first to decide whether the proposed witnesses is a child of tender years. If he or she is not a child of tender years, the section does not apply and the court has to receive and admit the evidence on oath as that of an adult. With regard to this issue Section 2 of the Children's Act defines a child of tender years as a child aged between the age of 10 years.

From the charge sheet and opening statement of the complainant at the time of the trial she was aged 15 years. On the evidence the magistrate was not entitled to hold a voire dire in compliance with Section 19(1) of the Oaths and Statutory Declaration Act. The complainant was competent to give evidence without the Learned Magistrate conducting a voire dire.

Nevertheless, notwithstanding the above provisions on the definition of who is considered a child of tender years, the trial magistrate went ahead to conduct a voire dire to establish that the child understood the nature of an oath and the duty to tell the truth. Even, though (PW1) was regarded as a child of tender years I find that the appellant was not prejudiced with the evidence availed against the charge on the commission of the offence. The complainant (PW1) gave graphic details how she had been defiled by the appellant since 2012 whenever she happens to be around a river where she fetched water.

The evidence on record shows that on the material day, there was a delay for her to return back within a reasonable time which caught the attention of her father PW2.

When considering evidence for the offence of defilement the first duty of the court is to establish whether there was penetration as defined under Section 2 of the Sexual Offences Act.

As stated by the complainant PW1, she had sexual intercourse with the appellant on several occasions. That piece of evidence was corroborated by the medical report produced by **PW4 Rose Mwaki** a clinical officer at Samburu Health Centre on behalf of **Dr. Othuo** pursuant to Section 77(1) as read in conjunction with Section 33 (1) (b) of the Evidence Act.

According to **PW4** the complainant medical examination showed a ruptured hymen and 14 week old pregnancy. Though there was no DNA report with regard to the pregnancy PW4 testimony corroborated the evidence of complainant that she had sexual intercourse which was not controverted by the appellant.

In the case of **Enock Onyango Ondieng v R {2014} eKLR** the court held that:

> ***"The ingredient of penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not even necessary that the hymen be ruptured."***

The other important aspect to consider in this appeal is the fact that defilement of a female is not founded on the outcome of a pregnancy.

The court in **Evans Wanjala Wanyonyi v R {2019} eKLR** reaffirmed the position as follows:

> ***"An essential ingredient in the offence of defilement is penetration and not impregnation."***

As regards paternity and lack of DNA test the court in the case of **Williamson Sewa Mbwanga v R {2016} EKLR** stated:

> ***"It is patiently clear to us that whilst paternity of PM's child may prove that the father of the child had defined PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not matter that the sexual offence has not been connected. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a defilement question from whether the appellant had defiled PM."***

As the Court of Appeal of Uganda rightly stated:

> ***"in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See Twehangane Alfred v Uganda CR Appeal No. 139 of 2001)"***

The link in the chain of events date back in 2012 when she had contact with the appellant creating an opportunity whenever she went to the river to fetch some water. From the above legal principles it is undisputed that the ground raised by the appellant on this element have no force of the Law.

The next issue to be proved is whether the complainant was aged 14 or 15 years. It is trite law that proof of age of the victim of defilement is necessary in view of the importance it plays in determining the appropriate sentence.

In the case of **Hadson Ali Mwachungo v R 2016 eKLR**: -

> ***"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."***

At the trial the complainant testified that she did not know her age but her father PW2 produced exhibit 2 to demonstrate that she was born on 15th April, 1998. The P3 form also assessed her age at 15 years which corroborated PW2's testimony.

It is clear therefore the complainant was aged 15 years old. Referring to the record the complainant age was proved by documentary evidence and that of her father PW2. The actual age of the complainant was therefore proved beyond reasonable doubt.

The other complaint raised in this appeal was in respect of identification of the appellant. According to the appellant he argued and submitted that the complainant never identified him even during the proceedings before the trial court.

It is trite Law that a single witness is capable of giving cogent and credible evidence on account of identification and recognition of an offender to a crime.

The plausible principles on identification is as established in the several decisions like: **Abdalla Bin Wendo & Sheikh Bin Mwambere v R**

[1953] 20 EACA 166, Roria v R [1967] EA 583 2 v Turnbill & Other v R [1967] 3 ALL ER 549

> ***"Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused special need for caution before convicting in reliance of correctness of the identification is necessary the court should warn itself of the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could be mistaken. The court should further examine closely the circumstances in which the identifications by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition might be more reliable than identification of a stranger, but even the court should remind itself …. That mistakes in recognition of close relatives and friends have been made sometimes.***

In support of her evidence on identification, PW 1 told the trial court that this was along standing romantic relationship accompanied with series of sexual intercourse experience. It is relevant that complainant was not a stranger to the appellant. She had interacted with her before on several occasions.

It is possible to tell from the evidence that the complainant did not seem to mind the fact that she engaged in sexual activity with the appellant even with full knowledge she was under 18 years old.

The objections by the appellant in his defence and on appeal did not challenge the evidence by the complainant. In my respective view, it was consistent and credible in placing him at the scene of the offence. This was not a one off sexual episode. The appellant seemed to have known the complainant's movements which persisted for along time. The complainant apparently accepted the request from the appellant. They reach out to each other at the river whenever she went to fetch water. The appellant did not deny having previous sexual intercourse with the complainant.

Subsequently, to the appellant denial to the offence he raised an alibi defence. This important defence aimed at exonerating the appellant for not being at the scene of crime the threshold to be met has been laid down in the cases of **R v Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145** stated that:

> ***"If a person is accused of anything and his defence is an alibi , he should bring forward that alibi as soon as he can because firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."***

In addition **Festo Androa Asenua v Uganda Cr. Appeal No. 1 of 1998** held:

> ***"We should point out that in our experience in criminal proceedings in this country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above such belated disclosure must go to the credibility of the defence."***

It follows the illustration by the complainant on the opportunity and surrounding evidence forms part of circumstantial evidence to support identification and participation of the appellant in committing the offence. There is nothing in the record to support the alibi allegations made for the first time the appellant was placed on his defence. I bear in mind, that the appellant is perfectly entitled to raise his defence and material appropriate to his case. But as a matter of crucial importance, the credibility of it when tested with the evidence connecting him with the alleged defilement it fails to rebut the standard of proof of beyond reasonable doubt. The totality of the two decisions regrettably on alibi defence is not available to the appellant.

Consequently, in accordance with Section 8 (1) of the Penal Code the appeal on conviction lacks merit and is for dismissal. In the circumstance of this offence there is no legal or factual point to vary or to interfere with the sentence order by the trial court. It is neither punitive nor manifestly excessive.

I have no hesitation therefore in dismissing the appeal on both conviction and sentence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OCTOBER 2019

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R. NYAKUNDI

JUDGE