REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 32 OF 2018

SK.....APPELLANT

VESRSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from the original Criminal Case No. 324 of 2016 in a judgment delivered on 17.11.2016 by Hon. N. S. Lutta (SPM))

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Accused present in person

JUDGEMENT

SK, hereinafter referred as the appellant was charged with two counts and one alternative charge framed in the following manner:

Count: Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act

The particulars were that on the 13.5.2016 at in Changoni Location, intentionally caused his penis to penetrate the vagina of **R.S.** a female child aged 15 years old.

Count 2: Incest by male contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006

The brief particulars being that on the said 13th May 2016 at, Kwale County being a male person caused his penis to penetrate the vagina of **R.S.** a female aged 15 years to his knowledge was his daughter.

Alternative charge: Indecent Act contrary to Section 11(1) of the Sexual Offences Act

The brief facts: That on the same day of 13th May 2016 at, in Changoni Location intentionally caused his penis to touch the vagina of **R.S.** a female aged 15 years old. The appellant pleaded not guilty to all charges; of having carnal knowledge with the complainant. As a result, the prosecution was under a duty to prove the case beyond reasonable doubt against the appellant. Thereafter, the trial Magistrate in consideration of the charges convicted the appellant of the offence of defilement and incest as charged by the state.

As a consequence of the conviction the appellant was sentenced to 20 years imprisonment in respect of the two counts. The sentences were to run concurrently.

Being aggrieved and dissatisfied with the decision of the subordinate court, he appealed to this court on the following grounds:

(1) That the Learned trial Magistrate erred in law and fact by finding on conviction and sentence without noticing that the charge sheet was defective.

(2) That the Learned trial Magistrate erred in law and fact that crucial witnesses were never called to testify to clear the doubt.

(3) That the Learned trial Magistrate erred in law and fact by finding that the prosecution proved its case beyond reasonable doubt.

(4) That the Learned trial Magistrate erred in law and fact that failing to take into account the appellant defence.

He prayed that both conviction and sentence be set aside.

The factual matrix of the evidence on record

The complainant R.S testified as **PW 1** and told the court that on 13th May 2016 her mother **PW 2 – S.M.** had stepped out of their home to go and attend a funeral function within the neighbourhood. PW 2 confirmed that she spent a night at that funeral home. In the meantime, PW 1 was left at their homestead together with other siblings. According to PW 1 she served the appellant, her father with evening meal, who left the house soon thereafter but returned soon to demand sexual intercourse from PW 1. Thereafter, PW 1 told the court that appellant entered her room, started undressing her underwear which got torn in the process. He removed his penis and had sexual intercourse while holding her neck to restrict any screams coming out to avoid any rescue mission.

When PW 2 came in the morning she was informed of the incident. That is when PW 2 took a step to have the matter reported to the police station as confirmed by **PW 4 – PC Joseph Kaloki.**

PW 1 and PW 2 stated that at the police station they were issued with a P3 Form which was taken to Mariakani Sub-County hospital. The clinical officer **Mwangolo Chigulu PW 5** who examined the complainant PW 1 certified that the clothes were torn and blood stained. Further, on examination PW 1 had scratch marks on her hands, pain on the waist and right leg. PW 5 further gave evidence that PW 1 had a discharge from the private parts and her hymen was ruptured. PW 5 therefore on examination formed an opinion that sexual intercourse had taken place as it was also corroborated with the presence of live spermatozoa in the genitalia of (PW 1).

The prosecution also summoned the evidence of **PW 3 Salim Munao Matu** who apparently testified that he was informed of the incident on or about 11.00 p.m., on the 15.5.2016. PW 3 told the trial court that in conjunction with other elders they went for the suspect who had been identified by the complainant (PW 1).

In his defence at the trial, the appellant denied anything to do with the defilement of the complainant. He was only aware of the elders effecting arrest for an offence he never committed.

On appeal the appellant submitted the conviction on ground that it was based on a defective charge sheet. He contended that the charge sheet contained two offences being that of defilement contrary to Section 8 (1) of the Sexual Offences and also incest charge contrary to Section 20 (1) of the Act. In challenging the findings of the trial court appellant argued that in both counts the words unlawfully a crucial element of the act was missing in the particulars of the offence.

In the said charges, appellant submitted that no amendment was done by the prosecution under the provisions of Section 214 of the Criminal Procedure Code. Consequently, the appellant submitted that the charge sheet did not comply with the principles in the cases of **Yongo v R Case No. 1 of 1993 KLR, Harrison Mirunga v R EA. 90.**

On ground 2 dealing with uncalled witnesses, the appellant contended and faulted the prosecution omission not to call the brothers to the complainant. He relied on the Landmark case of **Bukenya v Uganda 1972 EA**

> ***"on the legal proposition that the prosecution has a duty to make available all the witnesses necessary to establish the truth even if the evidence may be inconsistent to its case"***

On the issue of medical evidence, appellant submitted that no positive findings were made with respect to defilement having occurred on the previous day.

Following that finding appellant relying on the case of **Bernard Kabeba v R Criminal Appeal No. 104 of 2000** urged this court to find that conviction for the offence of defilement and incest was reached by the trial court without corroboration. In conclusion appellant submitted that there is merit on his appeal to warrant interference by this court to allow the appeal on both conviction and sentence.

In support of the conviction, the Learned prosecution counsel **Ms. Sombo** for the state submitted and vehemently opposed the appeal on all grounds as argued by the appellant. Learned counsel's contention was that from the evidence of all five witnesses the ingredients of the offence were proved beyond reasonable doubt.

Additionally, the Learned prosecution counsel submitted that it is trite that no particular number of witnesses shall in absence of any provision of Law to the contrary be required for the proof of any fact, Section 143 of the Evidence Act. According to counsel, the appeal as framed and argued by the appellant lacks merit and its for dismissal.

The Law, Analysis and Resolution

In dealing with the principles in **Okeno v R [1972] EA** on the duty of the first appellate court to re-evaluate and subject the entire record to fresh scrutiny in order to draw its own conclusions on the matter.

In this appeal though the appellant put down four grounds of appeal they can be reformulated into two fundamental issue.

Whether the prosecution proved its case beyond reasonable doubt with respect of the two offences in which he was convicted and sentenced to serve 20 years imprisonment for each one of them. In conjunction with the above issue whether the charge sheet as framed was fatally

defective to render it void and annulity.

In proving the charges against the appellant in terms of Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act the prosecution is duly bound under Section 107 (1) (2) of the Evidence Act to proof that he committed an act which causes penetration. **That the penetration must be against a female child aged below 18 years old.**

The act of penetration as defined in Section 2 of the Sexual Offences Act means the partial or complete insertion of the genital organ of a person into the genital organs of another person.

The offence of defilement is committed where anyone of the circumstances manifested under Section 43 of the Act on intentional and unlawful acts are proved by the prosecution.

On account of defilement contrary to Section 8 (1) of the Sexual Offences Act in comparison with incest under Section 20 (1) of the Act the variance is on the element and test of relationship between the offender and the victim of sexual carnal knowledge. The fact of the matter is that in both offences the main thrust of the offence is an intentional and unlawful act of penetration by use of the genital organ into the female organ who is aged below 18 years old.

It is common knowledge that it matters not whether the act of penetration of the victim was against a stranger or one who falls within the familial relationship with the offender. The actual circumstances of the offence defilement in my view is for the prosecution to proof partial or complete penetration of male organ to that of the victim in this case. It must follow therefore that penetrating act, daughter, sister, mother, shall not lessen culpability for the offence on sexual assault for it to attract a lenient sentence.

From the testimony of PW 1, the appellant was within the vicinity of the scene of crime when PW 2 went to attend a funeral at a neighbours house. According to PW 1 the appellant got an opportunity to engage in sexual intercourse thereafter in absence of PW 2 who had spent a night at a neighbour's house. When the complainant got examined by the clinical officer **PW 5** positive findings on live spermatozoa, ruptured hymen were signs of fresh penetration.

The complainant in this case was at the time of the offence aged 15 years. In terms of Section 124 of the Evidence Act her testimony was corroborated with that of PW 5 in some material fact which proves penetration.

The prosecution through the evidence of the appellant (PW 1) who on her first contact with PW 2 expressed the concerns on the incident that while she was away the appellant had carnal knowledge with her in the house.

Further, the medical evidence by **PW 5** – **Mwangolo**, the clinical officer at Mariakani Hospital established that the complainant had suffered pain to the neck, chest and stomach, scratch marks on her hands, pain in the waist and right leg. The clinical officer in his examination found live spermatozoa and a ruptured hymen.

As held in the case of **Simon Musoke v R [1958] EA** the medical evidence fits the fit of circumstantial evidence adduced by PW 5 to show that inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The question by PW 1 and PW 5 proved beyond reasonable doubt that an act of sexual intercourse involving a human genitalia – making entry to that of the complainant. The entailed examination and presence of live spermatozoa was an element of a male organ to penetration from a man in full control of it.

In the case of **Bassita Hussein v Uganda Cr Appeal No. 35 of 1995** the Supreme Court stated and affirmed the following principles

> ***"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.***

According to the evidence to see to prove penetration PW 1, PW 2 and PW 5 taken together establishes unlawful acts of penetration against the complainant beyond reasonable doubt.

Furthermore, the material evidence on age assessment determined that the complainant was 15 years old as at 17.5.2016 when the medical examination was carried out by the doctor at Mariakani Sub-District Hospital.

The appellant has not denied that he was not within the crime scene as stated by PW 1. The fact of the matter that his other children were not called as witnesses does not aid his defence that he defiled PW 1. The appellant in the trial court was convicted on the strength of the prosecution case as stated by PW 1 – PW 5 and not on the weakness of his defence (See the principles in **Woolmington v DPP [1935] AC 462** Section 107 (1) (2) of the Evidence Act).

It is also a principle of law that the prosecution must positively identify the accused person (appellant) as the perpetrator of the crime. The case before the trial court was that of recognition. I take guidance from the decisions in the cases of **Wamunga v R [1989] KLR 424** and **Anjononi & Others v r [1976 – 80] IKLR** where in the latter the court held:

> ***"Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it***

depends on the personal knowledge of the assailant in some form or another."

It is true in the instant case appellant was known to the complainant being her biological father it has not been disputed that they both of them stayed in the same house. It is also clearly stated by the complainant that she was 15 years old. On that strength alone it means complainant has known the appellant for that number of years.

I accept the submissions and evidence by the prosecution that there were no circumstances to impede a positive recognition of the appellant on the material day of the offence. I have no reason to doubt the testimony of PW 1 that are factors and circumstances following a proper recognition of her father as the assailant were available to her on 13.5.2016.

The other issue which requires attention from this court as raised by the appellant relates with his conviction for the offence of incest contrary to Section 20 (1) simultaneously with that of defilement in Section 8 (1) of the Sexual Offences Act. The appellant on conviction with both counts was sentenced to 20 years imprisonment.

The question is whether it was prudent for the prosecution to charge the appellant of defilement under Section 8 (1) and at the same time with incest. The point of contention with these two offences was recently addressed by **Musyoka J** in the case of **KS v R 2019 eKLR** concerning the likelihood of confusion in respect to framing the charge of incest under Section 20 (1) of the Sexual Offences Act. The reading of the section shows prominence given to the minimum sentence of 10 years upon conviction of an offender who commits the offence to anyone of the defined consanguinity or familial relationship. Perhaps the proviso to Section 20 (1) of the Act which indicates that in the case of incest involving a child under the age of 18 years rightly stated on conviction the offender would be liable to be sentenced to life imprisonment. It is not in dispute therefore incest as provided for under Section 20 (1) of the Act and defilement in Section 8 (1) of the same Act are inferential and unlawful acts of defilement when involving a minor. It matters not whether the minor was a daughter, sister, niece, nephew, grandchild etc.

Further, in as much as I can agree that the prosecution is at liberty to frame any charge where there is enough evidence to show responsibility for the crime. There is need for caution to avoid duplex charges. The rule against duplicity is well captured under Section 134 of the Criminal Procedure Code which provided:

> ***"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 particulars as may be necessary for giving reasonable information to the nature, of the offence charged."***

See also the principles in the case of **Cherere S/O Gukuhi v R [1955] E.A. 478**

> ***"The law against duplicity and likely prejudice to the accused person is grounded on constitutional doctrine with regard to a right to a fair hearing. That the state in charging the accused should frame the offence in a manner that sets out clearly the ingredients of the offence is alleged to have connected so that he can prepare to answer it."***

In the instant case, the appellant was charged with the offence of defilement of a minor. The prosecution case rests on the ingredients of defilement succinctly stated to be penetration and for purposes of sentencing the age of the complainant when the prosecution advanced their case.

In support of the indictment it happened that the complainant besides being a minor she was also a daughter to the appellant. In my view the evidence against the appellant was that of carnal knowledge of a minor. The additional fact of there being a familial relationship does not reasonably possible occasion prejudice or injustice to constitute a violation of his right to a fair hearing under Article 50 2 (b) of the constitution.

This was a one transaction offence whose distinguishing characteristic was that if it being committed with a member of the family as the victim. The prosecution acquitted themselves for not charging the appellant with one original charge comprising of defilement and incest. Having perused the record inordinate, though unnecessary so, appellant was charged with two distinct counts.

The substantial question in respect to this appeal is whether the second count was fatally defective. It is my considered view that pursuant to the provisions of Section 134, 135 and 136 (a), of the Criminal Procedure Code, the irregularity raised by the appellant is curable by the provisions of Section 382 of the Code.

The splitting of charges in terms of Section 8 (1) and 20 (1) of the Sexual Offences Act and duplication of convictions did not vitiate the whole trial before the Magistrate court.

This was a single act of defilement where appellant intention was to have sexual intercourse with the complainant who happened to be at the same time his daughter. The two counts are in substance the same.

I therefore opine that it was wrong for the Learned trial Magistrate to convict and sentence the appellant with regard to incest under Section 20 (1) of the Sexual Offences Act. It is in conceivable that the court was not able to distinguish the fact of father/daughter relationship essentially construed by the Section (8) (2) of the same Act for the purposes of excluding indictment where knowledge of familial relationships is recognized. Neither of the two sections despite the two provisions can be founded on the same charge.

I would therefore quash the conviction and sentence grounded on the charge of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. In its place have the evidence as led by the prosecution and the whole of it as considered by this court does support appellant evidence of a sexual offence punishable under the proviso of Section 20 (1) of the Act. The imposition of sentences on both

charges was wrong on principle.

In a nutshell, I am satisfied that the prosecution proved its case beyond reasonable doubt because there was sufficient evidence to prove each significant of the offence contrary to Section 20 (1) of the Sexual Offences Act.

I reiterate that the validity of penetration of a male organ with that of a female organ is not dependent on the hymen being ruptured. Where a person commits an act of penetration it may or may not be accompanied by the broken or rupture of a hymen. Applying the fact on rupture of a hymen would depend on the peculiar circumstances of each case.

Accordingly, the appeal on the first count on both conviction and sentence is allowed but with no major benefits being passed to the appellant.

In the result, the appellant convict on 1st count on defilement remain quashed and set aside. The validity of count 2 on incest remain to constitute the substance of the offence both at the primary court and on appeal. Any prospect of an appeal succeeding in count II is hereby dismissed in its entirety.

It is so ordered.

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

R. NYAKUNDI

JUDGE