REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL 19 OF 2017

(From original conviction and sentence in Defilement No. 17 of 2015

of the Principal Magistrate's Court at Gichugu)

SIMON KINYUA MURIUKI.....APPELANT

VERUS

REPUBLIC.....PROSECUTOR

JUDGEMENT

1. The appellant **SIMON KINYUA MURIUKI** was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offences Act and sentenced to serve life imprisonment. He was dissatisfied with the conviction and filed seven grounds of appeal. He however filed amended grounds of appeal and raised only three grounds of appeal which are as follows;

i) That the trial Magistrate erred in law and facts basing my conviction in reliance to Section 124 of evidence act and failed to consider the complainants evidence was contradicted by the clinical officers while further the trial court failed to warn itself with the danger of relying with single identifying witness.

ii) That the trial Magistrate lost direction after being influenced with adduced evidence which the same reveals as charges were being laid down in my respect was not adequately proven, also in the mode of arrest while PW3 clinical officer testified (sic).

iii) That the trial court further lost direction while rejecting my alibi defence without considering the doubts in the adduced evidence while same was not displaced by the whole set of prosecution witnesses as per Section 212 CPC Cap.75 Laws of Kenya and further failed to consider my constitutional rights were violated contravening article 50 (2) of the Kenya Constitution 2010.

2. The appellant prays that the appeal be allowed and the conviction and sentence be set aside.

3. The court gave directions that the appeal be disposed off by way of written submissions. The appellant filed submissions on 20.2.2019.

4. For the state, submissions were filed by Geoffrey Obiri Assistant Director of Public Prosecutions who was the prosecuting Counsel. He prays that appeal be dismissed.

5. The facts of this case are that the complainant MWM is a girl who was aged sixteen years at the time of the incident. On 4.7.2015 she was in the coffee farm weeding when the appellant who is her cousin suddenly touched her from behind. She ran away but the appellant followed her and grabbed her. The appellant removed her shirt, biker and underwear. The appellant removed his trouser and his underwear then inserted his penis in her vagina and defiled her. The complainant felt pain. When the accused released her she picked her clothes and went and informed her grandmother NW (PW1) what the appellant had done. PW1 went and found the appellant in a neighbouring farm picking avocadoes. On being asked why he did that he denied and told PW1 to take PW2 to hospital if she wants.

6. PW1 reported to the block leader who then reported to the Chief. The complainant and PW1 were referred to Mbiri AP post where they were and reported the incident. They also reported at Kianyaga police station. They were referred to Kianyaga Sub-county hospital. She was examined and a P3 form was filled. The Clinical officer Beatrice Wanjiru Kubai (W3) found that the complainant's hymen was freshly broken with minor lacerations on the external genitalia. The high virginal swab revealed presence of red blood cells and spermatozoa. A P3 form was filled the same day. PW3 concluded that the complainant was defiled and that there was evidence of penetration. PW3 filled a P3 form exhibit 2, post rape care form exhibit 3, laboratory request exhibit 1b, treatment notes exhibit 3.

7. The complainant as per a birth notification was born on 23.2.1999 and age assessment report exhibit 5 showed that the complainant was below eighteen (18). Police completed investigations and the accused was arrested and charged.

8. The appellant gave a sworn defence and denied the charge. She alleged a grudge with PW1 who his grandmother. He however stated that he had no grudge with the complainant.

9. The appeal was disposed off by way of written submissions. This being a first appeal, this court has a duty to analyse the evidence and evaluate it then come up with its own independent finding but leave room for the fact that it had no chance to see the witnesses testify and assess their demeanor then leave room for that.

10. I will first consider the grounds of appeal.

[1]. RELIANCE ON SECTION 124 OF EVIDENCE ACT.

It is alleged that the trial Magistrate failed to consider that the complainant's evidence was contradicted by the Clinical officer. ***Section 124 of the Evidence Act*** provides:

> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. 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.***

The proviso to the section allows the court to rely on the evidence of a victim of a sexual offence to convict if she is the only witness if for reasons to be recorded the court is satisfied that the alleged victim is telling the truth.

11. It is not a misdirection or err for the trial Magistrate to convict if she had reason to believe her testimony. The trial Magistrate in her judgement gave reasons for believing the complainant. At page 47 of the record from line 17 to page 48 the trial Magistrate stated,

> ***"The accused and the complainant are cousins who know each other well. This incident occurred in broad daylight. The accused testified that there was no difference between him and the complainant. I am convinced that he is the one who defiled the complainant. I dismiss the evidence of the accused as a mere denial"***

On the issue of a single witness in Sexual offences, there is a legislative background in that **section 19 of Cap. 15 Laws of Kenya** provided for corroboration of the evidence of a child of tender years. However, an amendment to the section omitted the requirement for corroboration. An amendment to the **Evidence Act Cap.80 introduced the proviso to Section 124** which I have cited above.

There is no prohibition on convicting on the evidence of a single identification by a single witness except that the court must take care when replying on the evidence of a single witness to eliminate the possibility of mistake. Such consideration is necessary especially where the witness says that he identified a stranger.

12. In the case of ***R. -V- Turnbull [1976] All E.R.and Abdalla Bin Wendo Vs. R***. The issue considered was that although identification by recognition is more reliable than identification by recognition is more reliable than identification of a stranger, nevertheless the court should keep in mind that mistake in recognition of close relatives do occur some times. The circumstances under which the witness identified the accused come into play. Did they favour a positive identification by recognition. In this case the offence was committed in broad daylight. The appellant was a close relative of the complainant. The manner in which offence was described to have been committed implies that the appellant was facing the complainant for some considerable time. In broad daylight a sixteen year old girl could not have failed to recognize the appellant. The trial Magistrate was right finding that it is the appellant who defiled the complainant.

13. The other consideration is whether identification was the only evidence relied on. The answer to this is that the complainant's evidence was corroborated by other independent evidence. This was from the evidence adduced by PW1 who received the report and immediately went to the scene where she found the appellant in a neighbouring farm. This shows that the appellant was within the vicinity of the scene of crime.

14. Secondly, there was corroboration of the evidence of the complainant firstly by the police officer (PW4) who testified that the allegation by the complainant was that she was defiled by a person well known to her. This was also confirmed by the clinical officer (PW3).

15. Thirdly the medical evidence confirmed that at the time of examination about four hours and thirty minutes later;

- Hymen was freshly broken with minor lacerations on external genitalia
- High virginal swab showed presence of spermatozoa and red blood cells.
- Complainants clothes were dirty
- There was bleeding from the virgina

In cases of defilement, the law requires that there be corroboration of the allegation of defilement by medical evidence. From the analysis of the findings by the Clinical officer, it is clear that medical evidence corroborated the testimony of the complainant and proved the charge against the appellant beyond any reasonable doubts.

16. I should also go further and consider that no particular number of witnesses are required to prove a fact. Section 143 of the Evidence Act Cap. 80 Laws of Kenya provides;

> ***"No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact "***

The prosecution need not call a hode of witnesses to prove a fact. The court of Appeal while applying with approval the finding in ***Bukenya and Others Vs. Uganda [1972] E.A. 549*** stated that the prosecution must only make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. The court has a duty to call witnesses whose evidence appears essential to the just decision of the case. That where evidence is barely enough may infer that the uncalled witnesses would have tendered evidence which is adverse to the prosecution case.

The Court of Appeal made it clear that necessary witnesses and whose evidence appears essential must be called. Adverse inference will only be drawn where the evidence is barely enough.

17. Having evaluated the evidence, I find that the evidence of PW1 was sufficient as it placed the appellant at the scene and her evidence was corroborated by the medical evidence. The trial Magistrate, contrary to the submission by the appellant considered the evidence and arrived at the inevitable conclusion that the appellant is the one who defiled the complainant. The evidence of the complainant was credible, reliable and sufficient to proof of the fact.

18. In view of the analysis above, I have addressed the second ground safe to add that on the amendment of the charge sheet, the prosecution did explain that the age of the complainant had not been assessed. A birth notification was later availed showing that the complainant's date of birth was 23.3.1999. These called for the amendment of the charge. The appellant was informed and after the amendment the charge was read to him. No evidence had been tendered at the time the charge was amended. The law allows the prosecution to amend the charge sheet at any stage before they close their case. ***Section 275 (2) & (3) of the Criminal Procedure Code*** provides:

> (***2) Where, before a trial upon information or at any stage of the trial, it appears to the court that the information is defective, the court shall make an order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and any amendments shall be made upon such terms as to the court shall seem just.***
>
> ***(3) Where an information is so amended, a note of the order for amendment shall be endorsed on the information, and the information Pleading to information shall be treated for the purposes of all proceedings in connexion therewith as having been filed in the amended form.***

The appellant did not object to the amendment. Age of the victim is crucial in sexual offences as it determines the sentence to be meted out. The appellant did not suffer any prejudice. The trial Magistrate did not err when passing the sentence. ***Under Section 8(1) as read with Section 8 (4) of the Sexual offences Act*** a minimum sentence is provided for a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. A minimum sentence connotes that a person convicted under the section is liable to imprisonment for fifteen years and above. Sentencing is the discretion of the trial Magistrate. The sentence meted out was in order as the fifteen years was the bare minimum. The trial Magistrate cannot therefore be faulted for passing a sentence of twenty five years as it was within the law.

19. On penetration, I have pointed out that the complainant gave direct evidence of penetration and this was confirmed by medical evidence adduced by PW3. Penetration was proved beyond any reasonable doubts as well as the identity of the perpetrator.

[3]. DEFENCE OF ALIBI

The appellant did not raise a defence of alibi. The appellant as he rightly submits, in his defence he denied the charge and alleged a frame up. The trial Magistrate did consider the defence and held that it was a mere denial, she dismissed the defence. The allegation that his defence of alibi was not considered is a sham as he never raised such a defence. The defence never raised any new matters requiring the prosecution to reply as provided under ***Section 212 of the Criminal Procedure Code.***

20. With regard to the fact that the complainant was examined by Victoria Kazungu a Clinical officer who was not called to testify, Section 77 (1) (2) & (3) of the Evidence Act, Cap.80 provides:

> (***1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.***

There was no application to call the maker or the Clinical officer who filled the P.3 form. There was no prejudice. Section 77 above allows a person other than the one who prepared the report such as a P3 form to produce it provided the presumption of authenticity is met.

The court may of its own motion or on an application by the accused, call for the maker of such document for cross –examination. In ***Joshua Otieno Oguga Vs. Republic Court of Appeal, CR. Appeal NO.183/2008*** it was held;

> ***"That in short means that if the applicant wanted the medical report to be produced by the doctor who prepared the report he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P.3 form being produced by P.C Ann Wambui as she did"***

The prosecution laid a basis for calling PW3 to produce the P.3 form. She stated that the complainant was attended by a colleague Victoria Kazungu, also a Clinical officer. She had resigned and was no longer working there. PW3 testified and the appellant went ahead to cross examine. There was no basis for the court to call the maker. The evidence of PW3 was admissible under ***Sections 33 of the Evidence*** as the Clinical officer had resigned and her whereabouts were unknown. I find that the medical evidence was reliable and admissible.

21. The appellant also raised the issue of violation of his rights under Article 50 (2) (e) of the Constitution. His claim is that there was a delay of six months before the complainant testified. The case against the appellant was heard and concluded. My view is that the appellant ought to have filed a constitutional petition for the court to determine whether the rights were violated and whether or not he was entitled to damages. This is not a matter which can be considered at this stage.

IN CONLUSION

Having considered the grounds of appeal and also evaluated the evidence, as well as the law. I come to the finding that the ingredients of the charge which were, the age of the victim, penetration and the identity of the perpetrator were proved beyond any reasonable doubts. The appeal is without merits.

I dismiss it.

Dated at Kerugoya this 11th day of October 2019

L. W. GITARI

JUDGE

11.10.2019

Read out in open court, appellant present,

Ms. Muthoni for Republic.

Court Assistant – Gichia.

L.W. GITARI

JUDGE