REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 55 OF 2016

ADAM DAKTARI KONOYE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant was charged with the offence of Defilement contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offences were that on the 1st Day of August 2016 at Vipingoni village in Witu Division Lamu County, jointly with another not before court, Adam Daktari Konoye intentionally and unlawfully caused his penis to penetrate the vagina of AIF a child aged 13.

Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the sexual offences Act. The particulars of the offence were that on the 1st day of August 2016 at about 11.00hrs at Vipingoni in Witu Division, Lamu West District of Lamu County, jointly with another not in court before court, intentionally and unlawfully touched the vagina of AIF a child aged 13.

The Appellant was found guilty as charged, convicted and sentenced to serve fifteen years imprisonment. He was aggrieved with both conviction and sentencing after which he timeously instituted the present appeal. The appeal is based on four grounds which are couched as follows:

1. The trial Court erred in law and in fact by failing to find that the offence of defilement was not proved beyond reasonable doubt.

2. The trial Court erred in law and fact when it ignored to find that crucial pieces of evidence were not presented in court thereby creating gaps and causing reasonable doubt which ought to benefit the appellant.

3. The trial Court erred in law and fact when it failed to find that the age of the Complainant was not properly established and that an age assessment report is not conclusive evidence of age as it has a margin error of 3 years. Further, the procedure for evaluating and/assessment of age was never presented in court.

4. The Trial Judge erred in law and fact by failing to find that there were inconsistencies in the testimonies of the prosecution witness thereby causing reasonable doubt in the evidence as was presented.

A review of the fact of the case as adduced in the trial court is as follows: PW1; A.I.F the complainant in this matter testified that she was 13 years of age when the alleged offence was committed. She stated that on the 1st of August, 2016 she was sent away from school to go home and get some money. While on her way home, she met two men and one of them had his head covered. As she passed where they were, they chased her, caught up with her and dragged her to the bushes where they removed her clothes and had sex with her.

She explained that they laid her on the ground and took turns to sexually abuse her. She cried as they defiled her due to the pain she felt. She further stated that she spent the night with them in the bush, and the following morning the perpetrators left her near her school and threated to kill her in case she tells anyone. She when she reached school she was chased away once again and thereafter went to her uncle's place whom she told of the incident.

The minor was taken to Witu Hospital where she was examined and went to the police where the P3 form was issued. She also gave evidence to the effect that she later saw the accused at W primary school and thereafter called her aunt who then took an initiative to go report the matter to the police. The accused was arrested. She also told the court that the accused persons had a knife which they used to threaten her.

Upon-cross examination by the accused, she stated that she saw the accused well because he did not cover his face during the ordeal and that he had a black spot and beads. Further that they were together from 11 am till midnight and the she struggled to get home due to pain. Upon-re-examination, she stated that she is the one who pointed him out to her aunt and that they were together in the forest up to 6pm.

The second prosecution witness, B G B, confirmed that the complainant narrated to him what transpired to her. He escorted the complainant and her mother to the police to report the matter. PW3; I F, the complainant's father confirmed that he received a call from the complainant's uncle telling them what had happened to her. He also stated that she was 13 years at the time the offence was committed.

PW4; Musyoka Kizilo a clinical officer from witu hospital who examined the complainant testified that the girl was below 14 years. He also found that she had lacerations, her hymen was broken and she had a vulnerable infection. He filled the P3 which he produced at the trial court and marked as Exhibit 1.

PW5; No.91794, PC Henry Simiyu testified that on the 2nd of August 2016 the complainant visited the police station in company of her uncle and reported that on the 1st of August, 2016, she was defiled by two men while on her way from school. On the third of August 2016, the minor spotted the Appellant and reported the same to the police station. The police proceeded where the Appellant was and arrested him thereafter.

From the above prosecution evidence, the court found that the prosecution established a prima facie case and proceeded to put the Appellant on his defense. Further the court complied with section 211 of the Criminal Procedure Code.

The defence case is based on a single witness, the Appellant. He denied having committed the offence. He testified that on the 3rd of August 2016, he went to the shamba to harvest maize with his wife. Shortly after he went to for a football match at Watu. That's where the police found and arrested him.

This being a first appeal, this court is obligated to consider the evidence afresh in order to reach its own independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanor of the witnesses as they testified.

FINDINGS AND DETERMINATION.

In determining this appeal this court shall satisfy itself that the ingredients of the offence of defilement were proved as so required in law; beyond reasonable doubt. I have carefully perused through the proceedings and the judgement of the trial court as well as the evidence on record before this court and

the written submissions. The issues for determination in this appeal are:

> ***a. Whether or not the ingredients of the offence of defilement were proved beyond reasonable doubt.***
>
> ***b. Whether or not the charge sheet is defective.***

The Appellant is represented by Aoko Otieno & Associates and the State by Mrs. Catherine Mwaki. Before I embark on dealing with the issues raised in this appeal, I wish to point out a discrepancy that I have noted regarding the construction of the charge herein. The Appellant herein was charged with an offence of defilement contrary section 8(3) of the Sexual Offences Act no. 3 of 2006. The particulars of the offence as couched in the charge sheet alleges that the accused committed the alleged offence in association of another person whom he acted with, to accomplish the heinous act with common intention.

A perusal of the trial record shows that the evidence adduced by the prosecution on trial refer to the fact that the assailants were more than one. Under section 10 of the Sexual Offences Act aforementioned, it is stated therein that:

> ***Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.***

In view of the above provisions of law, my understanding of the offence of gang rape is that it is committed by more than one assailant who act in association with a common intention and not all of them carry out the actual rape or defilement. A very short summary of the allegations leveled against the Appellant herein are that, the complainant claims to have been forcibly dragged into the bush, got her clothes removed and defiled by the Appellant in association of another person that she claims to have been wearing a veil. These allegations suffice to be classified as gang rape since under the act the word ***"gang"*** is defined as ***"two or more persons."***

In premises, the question to answer therefore is whether the charge sheet is defective, and if so, whether the same is curable. Under section 214(1) of the Criminal Procedure Code a charge sheet is defective where:

> ***a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or***
>
> ***b) it does not, for such reasons, accord with the evidence given at the trial; or***
>
> ***c) it gives a misdescription of the alleged offence in its particulars.***

The answer is yes and this is because a proper reading of section 8(1) and 8(3) of the Act shows that the offence it creates can only be committed by a single person. The said sections stipulate as follows:

Section 8(1)

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"***

Section 8(3)

> ***"A person who commits an offence of defilement with a child a child between the age of twelve***

and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

It is clear that both of the above sections and the rest of other offences criminalized under section 8 of the said act are couched in singular form. Which means that they specifically refer to an offence of defilement which is committed by one person. On the other hand, looking at section 10 cited above, it is clear that it can only be committed by two or more people acting with common intention.

In the instant case, there is evidence of two persons acting in one accord hence it is abundantly clear that Appellant herein ought to have been charged with the offence of gang rape. Furthermore, the charge as cited in the instant case is wrong. It does not conform to the particulars of the offence couched underneath it. The charge refers to an offence of defilement and on the other hand the said particulars of the offence support a whole different charge, to wit, the offence of gang rape contrary to section 10 of the said Act for the reason that it contains the word, ***"jointly".***

Therefore, is the charge sheet herein curable? In my view, whether or not the charge in this matter and circumstances is curable depends on the totality of the evidence on record. In applying the said test, the court ought to address its mind on whether the Appellant was prejudiced by the defect in the charge or is the same likely to cause miscarriage of justice? Firstly, the offence of gang rape under section 10 aforementioned is in the circumstances of this case an extension or aggravated kind of defilement under the provisions of section 8 in general. Thus, it is noteworthy that gang rape may emanate from either defilement of a child or rape. And the difference between the two is the age of the victim which determines capacity of a victim in terms of sexual consent.

Thus, in the instant case, the prosecution is still required to prove the three ingredients of the offence of the defilement beyond reasonable doubt. I shall consider the same bellow. The only exception in the offence of gang rape is the requirement of being in a gang or two or more people. In that regard, it is the Appellant who benefited from the defect since normally gang rape is treated by court as a more serious offence than defilement.

Whether the age of the victim was produced.

On the age of the victim, the counsel for the Appellant contends that the three ingredients for the offence of defilement were not proved to the required standard of proof beyond reasonable doubt.

The essential ingredients of the offence of defilement include the proof of the minority age of the complainant, proof of penetration and proof that the appellant was the assailant of the offence. ***(see CHARLES KARANI VS REPUBLIC, Criminal Appeal No. 72 of 2013).*** I now endeavor to look at each of them.

The age of the complainant is one of the critical ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the Sexual Offences Act a person is deemed to have committed defilement if he or she does an act which causes penetration ***with a child.*** Under Section 2 (1) of the Sexual Offences Act, the definition of a child is the one assigned in the Children Act. This entails any human being of less that eighteen (18) years. The onus of proving age resides with the prosecution.

The significance of proving the ingredient of age in defilement cases was clearly spelt out by ***Mwilu J (as she then was) in the case of HILLARY NYONGESA VS REPUBLIC (Eldoret Criminal Appeal No.123 of 2000)*** stated that:

"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved….And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."

A similar position was taken in **KAINGU ELIAS KASOMO VS REPUBLIC; Malindi Court of**

<u>Appeal Criminal Case No. 504 of 2010</u>, ***the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age*.**

In light of the foregoing, the Counsel for the Appellant contends that the court was left uncertain as regards the actual age of PW1 and therefore this appeal ought to be done. On the other hand the Counsel for the State contends that the age of the minor was well settled at 13 years by the uncontroverted evidence of both the complainant and her biological mother.

According to the evidence on record, PW1 the complainant testified that she was 13 years old but she did not state her year of birth. The age assessment letter dated 02. 08. 2016 which was produced before the trial court as Exhibit 3 states that the age of the complainant is approximately below 18. The first page of the P3 Form, exhibit 2 states that age of the complainant as 13 years, Section C of the P3 Form states that the estimated age of the complainant is below 18 years. PW3, the father to the complainant testified that the daughter is 13 years old but did not mention the date of birth of the minor.

I have perused the Trial Court Judgement and I note that learned trial magistrate did not even attempt to interrogate this issue at all. The age of the complainant dictates the period of sentence. As I have noted above, there is a very clear discrepancy as regards the actual age of the minor. The evidence on record suggest that the minor is between the age of 13 and 18 years.

It must be noted that a birth certificate is conclusive evidence of proof. The Sexual Offences Act promulgated some rules towards the achievement of its objectives which came into force on 11th/07/2014 under legal notice no.101. By dint of Rule 4 of the Sexual Offences (Rules of Court) 2014, it is provided that:

> ***"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a <u>birth certificate, any school documents or in a baptismal card or similar document."</u>***

There is no evidence that efforts were made to ensure any of the above-mentioned documents were brought before the trial court. There are primary documents whose acquisition is mandatory for a child born within the boundaries of Kenya. These primary documents include birth notification which is issued upon birth of every child particularly those born in hospitals. Further, every child is presumed to have a vaccination card since vaccination of children of tender years is mandatory in Kenya. The said two documents contains prima facie evidence of the date of birth of their holders. There was no birth certificate, any school documents or any baptismal card produced to conclusively prove the age of the complainant in the instant case. It was incumbent upon the investigating officer to bring the said documents to court since the same can be easily obtained from the victim or the victim's parents.

In the absence of the above said documentary evidence, the court may resort to medical evidence. Thus, it is trite law that the age of the victim can be determined by medical evidence and other cogent evidence. *In* ***<u>Francis Omuroni –Vs- Uganda, Court of Appeal No.2 of 2000,</u>*** *it was held thus:*

> ***In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense……"***

As I have mentioned earlier, the medical evidence that the prosecution produced before the trial court is at variance with each other. This include the P3 form herein marked as exhibit 2, its first page states that the age of the complainant is 13 years. On the other hand, section C of the same P3 form states that the complainant's estimated age is below 18. In my view the age indicated in the P3 form was given to the clinical officer by the complainant and or her parents. The same was not corroborated by some kind of documentary evidence such as a birth certificate or a birth notification. The complainant is a school going person but she brought no school documents which contain her age.

As regards the age assessment report which estimated the complainant's age at below 18, the same did not state the process used to approximate or evaluate the age of the victim and in my view such a document should be treated with caution. As pointed out in the case of ***EK V Republic (2018) eKLR***, medical evidence would require a disclosure of the procedure applied, and the margin of error by the witness for the court to determine where to place it. It was further stated in that case that an incorrect medical age assessment, where a correct one has a margin of error of 2 years, can if relied upon, give rise to grave consequences against an accused person charged under Sexual Offence Act number 3 of 2006.

After having made the above findings, the actual age of the complainant remains unknown. The evidence on record suggest that the age of the complainant is between 13 and 17 years. The significance of ascertaining the actual age of the complainant in the instant case is to determine whether the Appellant is to be sentenced under section 8(3) or 8(4) of the sexual offences Act.

Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual offences Act. Furthermore, in the case of **Evans Wamalwa Simiyu Vs. R (2016) eKLR,** the Court observed that;

> ***"As whether the complainant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was 12years, she did not explain the source of this information. The complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Doctor Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the doctor does not appear to have carried out a specific age assessment. Nevertheless, we do note that under Part C of the P3 form the age required is estimated age and under Children Act "age" where actual age is not known means apparent age. This means that in the Doctor's opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."***

In light of the foregoing, the Learned Trial Magistrate did not interrogate the issue of age in the lens of apparent age of the complainant. Neither does the trial record of proceedings demonstrate that there was an attempt by the court to ascertain the apparent age of the complainant since it had the privilege to see her demeanor and physical appearance. However, this case is not in a position to make such finding owing to the fact that it had no opportunity to see and hear the complainant testify.

Taking into account the totality of the evidence on record regarding the age of the complainant, I'm convinced that the actual age of the complainant was not proved to the standard required by the law; proof beyond reasonable doubt.

Whether penetration was proved beyond reasonable doubt.

On the issue of penetration, section 2 of the Act defines penetration as follows:

> ***"the partial or complete insertion of the genital organs of a person into the genital organ of another person."***

In dealing with this issue I shall revert to the record. The complainant in her testimony took the court through how she met two men who chased after her, caught her and dragged her into the bushes where they removed her clothes. She stated that they laid her on the ground and took turns to have sexual intercourse with her. The findings of the clinical officer who testified as PW4 support the complaint's testimony that she was defiled. Upon examining the complainant, he found that she had lacerations, her hymen was broken or missing, she had venereal infection which upon cross-examination by the accused clarified that it is a bacterial infection. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

Whether the Appellant was positively identified as the perpetrator.

The courts have set out what constitutes favorable circumstances for correct identification by a sole testifying witness. The same was established in **Maitanyi vs Republic, (1986) eKLR 196** where it was stated that: -

> ***"subject to well-known exceptions it is trite law that a fact maybe proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of the single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error"***

The alleged offence hearing is said to have happened in broad day light, at around 11.am. The complainant narrated how the assailants chased, caught and dragged her into the bushes. Her testimony is that one of the assailants had his face covered by a veil and that she managed to see the accused's face because his face was not covered.

She also explained that the one who had a veil was the first to have sex with her and the other man followed suit. She further told the court that she spent the night with the assailants in the bush and the following morning they escorted her back and left her near the school. Upon cross examination she reiterated that she saw the 2nd accused and further stated that he had a black sport and beads. There is also evidence that the complainant while in company of her auntie pointed out the appellant during a football match at W Primary School.

On whether the Appellants herein were properly identified as the assailant who violently defiled the complainant, the court shall interrogate whether the identification was free from error. In ***Cleophas Otieno Wamunga vs Republic (1989) KLR 424***, this Court stated as follows: -

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification".***

The more reliable mode of identification is recognition, the caution made in the ***Turnbull case*** should be heeded, thus:

> ***"Recognition may be more reliable than identification of a stranger but even when the witness in purporting to recognize someone which he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made……..".***

I'm conscious of the need for careful scrutiny of identification evidence, before basing a conviction on it. It relied on dicta from the case of ***Abdullah Bin Wendo vs Rex 20 EACA 166*** that:

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

In the criminal appeal case of ***Titus Wambua vs Republic Criminal Appeal 23 0f 2014***, the court

observed that we must examine the conditions that existed at the time and scene of the offence and their favourableness or otherwise positive identification or recognition as alleged by the complainant as well as the state of mind of the complainant which would determine whether he or she had capacity to identify the appellant.

The evidence of identification of the perpetrators herein troubles me. Firstly, there is evidence that the complainant narrated her ordeal to her uncle who then took her to the police station to report the matter. The investigating officer in his testimony did not produce any evidence of description of the alleged perpetrators by the complainant. The description that the minor clearly saw the Appellant and described him as having beard and a mark on his forehead could only be classified as dock identification since she only mentioned the same during trial. Such evidence has over and over again considered to be very weak in our jurisdiction in so far as proof of identification is concerned.

On the question of the mark that the complainant alleged to have seen, the trial record does not confirm existence of such mark or beard. This raises doubt as to whether the appellant was positively identified as the perpetrator of the alleged defilement. I have also seen the Appellant in Court and I can aptly confirm that he did posses such mark on the forehead and neither does he have beard.

A further investigation in the prosecution witnesses' testimonies show that the complainant alleged to have been defiled by two men. Taking that into account as well as the medical evidence on record, one would question how a minor who was vandalised by two male adults for such a long period of time would not bruises and some kind of blood on her genitalia. In my view the medical evidence available does not correspond with the testimony of the complainant.

It is for the above reasons that this Court is of the considered view that the evidence on identification was wanting and inadequate to sustain conviction in the circumstances. The available evidence manifest ample risk of mistaken identity. In the premises, the Appellant was not positively identified as the author of the complainant's misfortune.

The upshot is that the instant appeal is meritorious and is hereby allowed. The judgement and sentence of the Hon. Trial Court is hereby quashed. The Appellant is to be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF NOVEMBER, 2019.

.....

R. NYAKUNDI

JUDGE