REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 62 OF 2018

ALEX WAMBUA NZENGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by Hon. C. A. Ocharo, PM) in Machakos

Chief Magistrate's Court (in Criminal Case SOA No. 1200 OF 2015 vide judgement delivered on 11.7.2018)

BETWEEN

REPUBLIC.....PROSECUTOR

-VERSUS-

ALEX WAMBUA NZENGI.....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. C.A. Ocharo, Principal Magistrate in Criminal Case SOA No. 1200 of 2015 on 11.7.2018. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "On diverse dates between 21st day of July, 2015 and 1st August, 2015 at Mumbuni Location in Machakos District within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **FM** a child aged 14 years. 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.

2. When the matter came up for trial, the appellant pleaded not guilty hence warranting a trial. In this regard the prosecution presented four witnesses in a bid to establish the guilt of the appellant. Pw1 was FMM. No voir dire was conducted and she told the court that she was a 15 year old who did her KCPE in 2015 and that on 21.7.2015 the Appellant came at about 4 pm and asked her to accompany him into a taxi and she obliged whereupon they went to Desert Rose Restaurant and bar and then to his house where they stayed for a week. She told the court that they had sex every night and later she went to her grandmother's house and later she was placed in a rescue centre whereupon she went to the police station with her mother and then to hospital.

3. Pw2 was Dr Mutunga, a medical officer at Machakos Level 5 Hospital who testified of an examination that was carried out on the FMM who was alleged to have been defiled as from 21.7.2015 to 1.8.2015 and who was noted to have a broken hymen. He told the court that the P3 form was filled on 13.8.2015 and that reliance was placed on the PRC form that was filled on 4.8.2015 by Dr Mbatha Wambua and treatment notes from Machakos Level 5 Hospital. The victim was examined by Dr Njane for an age assessment that was given as 14 years and the PRC form, the P3 form, the age assessment and treatment notes were tendered in evidence.

4. Pw3 was FM who told the court that FM was her child who was born in 2001 and it was her testimony that F was away from home for two weeks and she made a report to the police and on 2.8.2015 F informed her that she was living with the appellant as husband and wife and she organized to have her taken to hospital on 3.8.2015.

5. Pw4 was No. 235677 IP Cress Atieno who testified that she was assigned to investigate the instant case and that the victim informed her that the appellant had taken her to his house from 21.7.2015 to 2.8.2015 when she managed to escape and she was escorted to Machakos Level 5 Hospital where a P3 form was filled and further that an age assessment was done and she was found to be 14 years. The court found

that the appellant had a case to answer and he was put on his defence.

6. The appellant opted to give a sworn statement and did not call a witness. The appellant stated that in August, 2015 he was at work and he got information that a customer had carried his phone and later he was arrested for charges he did not know. The trial court found that there was sufficient evidence that established that the complainant was aged below 18 years and placed reliance on the case of **Dominic Kibet Mwareng v R (2011) eKLR** that concerned non-reliance on an age assessment. The court found that the broken hymen of Pw1 and her account of what happened between 21.7.2015 and 3.8.2015 is evidence of sex between the appellant and Pw1; that she believed the testimony of Pw1 and placed reliance on the case of **Mohammed v R (2006) 2KLR** and Section 124 of the Evidence act. She convicted the appellant under Section 8(4) of the Sexual Offences Act and sentenced him to 15 years imprisonment.

7. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. That age was not proven and reliance was placed on the case of **Kimngetich Rono v R (2016) eKLR.** It is also the appellant's case that penetration was not proven and reliance was placed on the case of **Dominic Kibet Mwareng v R (2013) eKLR** and submitted that the trial court did not rely on the appellant's evidence. Though the grounds of appeal challenged the prosecution's evidence as being contradictory, no submission was made on the same. However the appellant's counsel submitted that the appellant's conviction be quashed and the sentence set aside.

8. The state submitted that age was proven vide the age assessment report; penetration proven vide the P3 form and identification of the appellant was proven vide the account of the complainant and reliance was placed on the case of **Anjononi & Others v R (1981) eKLR**.

9. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

10. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into two grounds:

1. ***That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;***

2. ***That the trial magistrate erred in convicting the Appellant and yet the evidence of the prosecution was full of contradictions;***

11. In cases of defilement the following are to be proven:

1. ***The age of the child.***

2. ***The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and***

3. ***That the perpetrator is the Appellant.***

12. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years as she was aged 14 years as per the age assessment report that was tendered and not controverted or challenged. It is also undisputed that there was penetration because the evidence on record points towards penetration and this was indicated on the P3 form and the PRC form that was uncontroverted by the appellant as well as the account of Pw1. There is however contention on the issue of identification of the appellant as the perpetrator. Pw1 stated that she lived with the appellant for a week. The evidence of the complainant placed the appellant at the scene of crime. From the evidence on record, the court is satisfied that the appellant was properly identified as the perpetrator.

13. I did not have the benefit of seeing the witnesses testify. However from the proceedings and the court record, the trial court seemed satisfied of the evidence against the appellant. The learned Trial Magistrate relied on Section 124 of the Evidence Act and the case of **Mohamed v R (2006) 2 KLR 138** in believing the evidence of the complainant and having considered the surrounding circumstances that the appellant lived with the complainant for a week and I agree with her decision.

14. The law has set a standard of proof in criminal cases. 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 Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); 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**).

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

16. It is indicated in the PRC form and the P3 form that Dr Mbatha Wambua and Dr Mutunga found the victim's hymen was broken. The PRC form that was relied upon to fill the P3 form confirmed the same. Since the P3 form does not indicate that the rapture was recent, the

account of Pw1 alludes to her having had sex with the appellant and lived with him for a week the prosecution's case rests on what is essentially circumstantial evidence.

17. 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 **Shubadin Merali and another v. Uganda [1963] EA 647; Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

18. There is no evidence that the appellant was seen together with Pw1. What is there is the account of the victim and there is no other evidence on the part of the prosecution. There is evidence that the complainant was missing from home for weeks and she alluded to living as husband and wife with the appellant. The defence evidence in this case is that the appellant was at work and he got information that a customer had carried his phone and later he was arrested and he did not know the charges. The day the victim was medically examined by PW2 who testified that he found that Pw1's hymen was broken. The doctor gave the opinion that there was defilement. The nagging issue is whether these pieces of evidence prove beyond reasonable doubt that an act of sexual intercourse took place. In his defence, the appellant denied this element.

19. For a finding of fact to be made based on circumstantial evidence, the court must be satisfied that there are no other co-existing circumstances which would weaken or destroy the inference. I find that the testimony of P.W.1 proves that sexual intercourse as defined by section 2 of the Sexual Offences Act occurred. The circumstances do establish that the two were together for a week. The evidence considered as a whole creates a real possibility that the sexual acts did take place.

20. The appellant has also raised the issue of contradiction and I am unable to agree that there are contradictions. In any event if such few contradictions occurred then the same were not that material as to dent the prosecution's case. It is a fact that no two witnesses will give exact testimonies regarding a fact in issue and thus some allowance has to be appreciated. In any event such minor discrepancies are curable under section 382 of the Criminal Procedure Code.

21. From the evidence on record, I am satisfied that the same is sufficient to sustain a conviction against the appellant who due to the evidence on record has been placed at the scene of the crime on the material date; the evidence of the complainant elucidates that a sexual act took place. The evidence of penetration came from Pw1 as corroborated by Pw2 which is reliable. I also find that there is no inconsistency that goes to the root of the case and if any, the same is curable under Section 382 of the Criminal Procedure Code. The conviction of the appellant was therefore safe.

22. On sentence I note that the appellant had been charged under section 8(1) as read with section 8(3) of the Sexual Offences Act No.3 of 2006 whose minimum sentence is 15 years imprisonment. The appellant was indeed sentenced to 15 years which I find to be the minimum possible in law and hence the same was neither excessive nor harsh in the circumstances.

23. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal has no merit and is dismissed. The conviction and sentence is hereby upheld.

It is so ordered.

Dated and delivered at Machakos this 11th day of November, 2019.

D. K. Kemei

Judge