REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 13 OF 2016

FRANCIS MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case No. 701 of 2015 by Hon. J.W. Onchuru (PM) dated 8th September 2016)

JUDGEMENT

1. The Appellant was charged with 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 offence were that on 6th December 2015 at around 1500hrs at Bomani, Mpeketoni Division in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MW a child of 12years old.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 6th December 2015 at around 1500hrs at Bomani, Mpeketoni Division in Lamu West Sub-County within Lamu County, the Appellant intentionally and unlawfully touched the vagina of MW a child of 13years old with his penis.

3. The prosecution called five witnesses in support of their case. The M.W (PW2), the complainant, told the court that in December the Appellant got hold of her and took her to his home removed her clothes and defiled her by putting his private parts into her and that she felt pain. That when he finished he told her to wear her clothes and not tell anyone what had happened. She told the court that she knew the Appellant as she used to fetch water from his compound and that he had defiled her twice. She told the court that she was taken to hospital where she was treated and that she was hesitant to tell her mother until the doctor told her that she could get help.

4. B.W (PW1), the complainant's mother, told the court that on the said day she was told by PW4, the head of nyumba kumi initiative, that the complainant had been seen at Mtaveta's house with the Appellant. That when she asked the complainant about it, the complainant informed her that she had slept with the Appellant twice. That at the hospital, the doctor told her that the complainant had lost her virginity and that she should report the matter to the police.

5. Jackson Muchina (PW4), the head of nyumba kumi, told the court that a lady informed him on the 6th December, 2015 that the complainant was involved in sexual activities which information he later shared with PW1. Constable Clarice Opiyo (PW6), the investigating officer told the court that she recorded statements and escorted the child to hospital.

6. Stephen Ewoi (PW3) was the clinical officer who examined the complainant at Mpeketoni sub-County Hospital. He told the court that her hymen was missing and concluded that she had been defiled. He produced the P3 form (Exh 1) and the treatment notes (Exh 2).

7. The Appellant in his defence stated that on the 5/12/2015 he went to Lake Amu to visit his father and he stayed there for a week before travelling back on the 12/12/2015. That on the 13/12/2015 he was arrested by two home guards who took him to Mpeketoni police station. He further claimed that he could not have defiled the complainant as he suffered from erectile dysfunction.

8. Paul Changari Mwangi (D.W2), the Appellant's father, told the court that the Appellant visited him on the 5/12/2102 though he did not remember when he left to go back home.

9. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to imprisonment for 20 years.

10. The Appellant being aggrieved by the conviction and sentence lodged his homemade petition of appeal. His three grounds of appeal were that the case was never proved to the required standard; that there were contradictions and variances in the prosecution case and; that his defence was not considered.

11. The Appellant filed written submissions on the 12th June 2019 in support of his appeal. His submissions were to the effect that the prosecution failed to prove its case beyond reasonable doubt as the evidence by the witnesses had contradictions and inconsistencies. It was his submission that the witnesses were of doubtful integrity and therefore their evidence was unsafe. He relied on the case of **Ndungu Kimani vs Republic (1979) KLR 282.**

12. The Appellant further argued that the complainant failed to reveal when she was defiled and that the clinical officer never gave his opinion as to when the defilement took place. In addition, he submitted that one Mtaveta, who was a crucial witness, was not called to testify rendering the proceedings null and void. He relied on the case of **Bukenya vs Uganda 1972; Burunyi vs Uganda 1968 E.A.C.A 123.**

13. Finally, the Appellant submitted that he had raised a strong alibi, which was corroborated by DW2 that he had travelled and was not therefore at the scene of the crime. He urged that his defence was unchallenged.

14. The Respondent opposed the appeal in its entirety through its submissions dated 12th March 2019. It was submitted that all the elements of defilement had been proved to the required standard. The Respondent stated that the conviction was safe and asked the court to uphold the conviction and sentence.

15. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

16. I have considered the grounds of appeal, the respective submissions, and the record. The only issue for determination in this appeal is whether the prosecution proved its case beyond reasonable doubt.

17. With respect to the law, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

18. It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

19. On the age of the complainant, the Sexual Offence Rules of Court 2014 **Rule 4** provides 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 birth certificate, any school documents or in a baptismal card or similar document."***

20. In the case of **William Odhiambo Siara -Vs- Republic [2014] E Klr H.C At Kisumu, Criminal Appeal No. 77 Of 2012** Muchelule J held that:-

> ***"It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and, unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence. An age assessment by a doctor would be useful, but it should be borne in mind that any such assessment is a medical approximation. I am satisfied that PW3 was 12 going to 13."***

21. In this case, B.W (PW1), the complainant's mother produced the complainant's Child Health Card (Exh 3) which showed her date of birth to be 19/7/2003. It is abundantly clear that at the time of the offence on 5th December, 2015 the victim was only 13years of age and therefore the age of the victim was satisfactorily proved.

22. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

> ***"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."***

23. In this case, the victim (PW2) gave evidence that in December the Appellant took her to his house and removed her clothes then went on to remove his clothes and proceeded to defile her by putting his private part in her and that she felt pain. Her testimony was corroborated by the clinical officer, Stephen Ewoi, PW3. He produced a P3 (Exh 1) which indicated that the victim's hymen was broken and that the approximate age of the injuries was 3 days and he concluded that there was penetration and therefore the victim was defiled.

24. It is also well established that a court can convict on the sole evidence of a victim of sexual assault under section 124 of the Evidence Act as long as the court is convinced the victim is telling the truth and records reasons for such belief. See **Arthur Mshila Manga v Republic Criminal Appeal No. 24 Of 2014 [2016] eKLR.**

25. In his judgement, the trial magistrate observed that during cross-examination the victim was overwhelmed by emotions as her voice wavered and eyes turned red before she broke down. The trial magistrate additionally held that the victim and the Appellant knew each other well and there was no grudge between them to make her to implicate him. He therefore found the victim as credible, consistent and honest. In

the premise, I have found no reason to disbelieve the testimony of the complainant. I find that penetration was conclusively proved.

26. On the issue of identification, it is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in **Francis Muchiri Joseph – V- Republic [2014] eKLR** where it stated that:-

> ***"In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…."***

27. This was a clear case of identification by way of recognition. It was the victim's evidence that the Appellant was her neighbour and she knew as she used to go and fetch water in his compound. This was corroborated by her mother PW1 and the Appellant who said that there was a well at his house. I find that the Appellant was positively identified and that there was no risk of mistaken identity.

28. The Appellant contended that his defence was not considered. It was his defence was that he left home on the 5/12/2015 to visit his father at Lake Amu and returned on the 12/12/2015 and was subsequently arrested by two home guards on the 13/12/2015. The Appellant's father (DW2), partially corroborated the Appellant's evidence when he told the court that the Appellant arrived on the 5/12/2015 but he did not know the exact date when the Appellant left.

29. It was also the Appellant's defence that he had been diagnosed with erectile dysfunction and therefore could not have committed the offence.

30. The trial magistrate in his judgment considered the Appellant's defence that he suffered from erectile dysfunction. He relied on the results of tests done on the Appellant at Lamu District Hospital and Coast General Hospital and found that the Appellant had no abnormality and could therefore sustain an erection capable of penetration.

31. On the defence that the Appellant had travelled, the trial magistrate considered the defence and found that the Appellant had failed to state the time he travelled to Lake Amu. He took judicial notice of the fact that it takes only 30 minutes to travel from Sinambio to Lake Amu and found that it was possible that he travelled after committing the offence. He therefore found that the defence was not convincing and disregarded it. I have looked at the evidence on record and I agree with the trial magistrate. Indeed the Appellant's defence did not raise doubt in the prosecution's case.

32. On the issue of contradictions, the Appellant claims that there was contradiction though he did not highlight the said contradictions. I have looked at the trial court's proceedings and the only contradiction that I find is whether the offence happened in Mtaveta's house or in the Appellant's house. It was PW1's evidence that she was told that the victim was seen at Mtaveta's house while the victim testified that she was not in Mtaveta's house. The victim (PW2) was very categorical that she was in the Appellant's house, which position she affirmed when cross-examined by the Appellant. As earlier stated the victim was the Appellant's neighbour and she used to fetch water from the well at his house, which has not been disputed. I find it hard to believe that the victim would not be able to tell if she was in the Appellant's house. I do not find the contradiction material as PW1 stated what she was told while the complainant stated where she was and whom she was with. After examining the record, I find no other contradictions as claimed by the Appellant and this ground fails.

33. The Appellant also contended that Mtaveta was not called as a crucial witness in this case. The court is alive to the provisions of section 143 of the Evidence Act which states that:-

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

34. In the case of **Keter V Republic [2007] 1 EA 135** the court held inter alia that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

35. Guided by the above principle, I find that the evidence by the prosecution witnesses was sufficient to establish the charge and there was no need to call the said Mtaveta as a witness.

36. In the final analysis, I find no merit in the appeal. I uphold both the conviction and sentence. The appeal is dismissed.

37. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 5th day of November, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Mwangi for the Respondent