REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 5 OF 2015

IDARIUS JILO ABDALLA…....................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Hola Criminal Case No. 329 of 2014 by Hon. M. D. Kiprono (SRM) dated 12th August 2015)

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 diverse dates between 28th November 2014 and 4th December 2014 in Tana River Sub-County within Tana River County, the Appellant intentionally caused his penis to penetrate the vagina of KMS a child of 13 years.

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 of the offence were that on diverse dates between 28th November 2014 and 4th December 2014 in Tana River Sub-County within Tana River County, the Appellant intentionally touched the vagina of KMS a child of 13years old with his penis.

3. The prosecution called seven witnesses in support of their case. PW1 KMS, the victim, told the court that one day the Appellant went to her home and asked her to marry him but she declined as she did not know him and she was a school-going child. That on the night of 27th November, 2014 she went to relieve herself outside the house when the Appellant caught her and told her to follow him. She picked her clothes and they went him to a lodging in Hola where they slept but did not engage in sex. The next morning they went to Garsen by bus and stayed in a lodging. That the next day they went for a walk in the town and when they returned to the lodging in the evening the Appellant undressed her, fondled her breast and proceeded to have sex twice without protection. That they had sex on two other nights.

4. PW1 further stated that on 2nd December, 2014 at around noon they returned to Hola and slept in a lodging where PW1 said that the Appellant told her that he wanted to marry her. They did not engage in sex that night. The next day they took tea then proceeded to the riverbank at Miembeni. They were arrested by the chief who was accompanied by police officers. PW1 further said that they were taken to the DO's offices and thereafter they were taken to the police station. She was later taken to hospital for examination and a P3form was filled.

5. Dr John Mwangi (PW2) was the medical superintendent

at Hola District Hospital. He informed the court that the examination of PW1 revealed an old hymen tear and that there was no discharge seen. He produced the P3 (Exh 1) and the treatment notes (Exh 2) which he used to fill the P3 form.

6. SSF (PW3) was PW1's father. He told the court that PW1 was born in the year 2001 and that she was 13 years old. He produced her birth certificate (Exh 3). He told the court that on 28th November, 2014 PW1 went missing and they informed the village and looked for her without success. That on 3rd December, 2014 he reported to the police station on the advice of the chief. Later that day he was informed by the chief that PW1 had been arrested at Miembeni in Laza with a man who had taken her away. He went to the police station where he recorded his statement.

7. His testimony was corroborated by ZHS PW4, who was PW1's mother. She told the court that the girl was 13 years old and that on the 28th November, 2014 PW1 had gone missing for some days. That on 3rd December, 2014 PW3 reported the matter to the police and that PW1 was found together with the man she had gone with.

8. PW5, Athman Mtolee was the chief of Chewani Location. He told the court that on 3rd December, 2014, PW3 reported that PW1 was

missing and he advised that he report to the police station. That the next day he was informed by a boy that the girl had been seen at Miembeni. That he proceeded to the area with AP officers from Galole where he found PW1 together with the Appellant. That they took them to the police station and he (PW5) recorded his statement.

9. PW6, APC Vincent Nyabuto of Galole AP was the arresting officer. He told the court that on 4/12/2014 he was directed by Cpl Mohammed Manga to go and arrest a man who had eloped with a school going girl. He proceeded with PW5. They found the Appellant and PW1 sitting under a mango tree and arrested him. PW7, PC Leah Kamau of Hola Police Station was the investigating officer. She told the court that on 4/12/2014 she received PW1 and the Appellant and she interrogated them and recorded their statements. She later escorted PW1 to Hola District Hospital for examination and she preferred the charges against the Appellant.

10. The trial court found that the Appellant had a case to answer and the Appellant was put on his defence. The Appellant gave an unsworn statement that he was a tailor based at Laza Shopping Centre. That on the 3rd of December, 2014 his friend Salim Ndege asked him to meet him at Miembeni so he could make school uniforms for his children. The Appellant said that he went to Miembeni where his friend called his children and he took their measurements. The next day on 4th December, 2014 he went to see his friend at Miembeni. On his way back home, he met officers and the chief on three bodabodas who took him to the DO's office where he found PW1 being interrogated. He was later taken to the police station and charged with the offence. He denied knowing the victim or anything to do with the charge.

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

12. The Appellant being aggrieved by the conviction and sentence lodged his homemade amended petition of appeal on the 10th July 2019. His four grounds of appeal were that the charge sheet was defective; the case was never proved to the required standard; that the age of the victim was not proved and; that his defence was not considered.

13. During hearing on the 10th July 2019, the Appellant relied on his written submissions filed on the same date in support of his appeal. His submissions were to the effect that the term unlawful was not in the charge sheet and therefore it was defective. He placed reliance on the case of **Albert Oyondi v Rep CRA 4040 of 2010.** Secondly, it was his submission that the trial magistrate relied on the evidence of the victim who was a suspicious and doubtful witness as she never screamed when she was taken at night; he relied on the case of **Ndungu Kimani v R (1979) KLR 282.** He further submitted that it was not proved that he committed the offence and that the doctor gave evidence that the victim had tear on the hymen was old and that there was no prove that the Appellant was responsible. He relied on the case of **Arthur Mshila Manga vs R CRA 24 of 2014**.

14. Further, the Appellant submitted that the age of the victim was not proved as the copy of the birth certificate relied on was not certified as required under section 66 of the Evidence Act. Finally, it was Appellant submission that he had a strong defence which was not considered.

15. The Respondent opposed the appeal in its entirety through oral submissions. Mr. Kasyoka, learned counsel for the Respondent, submitted that the charge sheet was not defective; that the standard of proof was beyond reasonable doubt and all the elements of defilement had been proved to the required standard during trial and; that the Appellant's defence did not shake the prosecution's case. He submitted that the sentence was legal and asked the court to uphold the conviction and sentence.

16. 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.**

17. I have considered the grounds of appeal, the respective submissions, and the record. The only issues for determination in this appeal are whether the charge sheet was defective and if the prosecution proved its case beyond reasonable doubt.

18. The first issue is whether the charge sheet was defective for failure to include the term unlawfully.

19. Section 134 of the Criminal Procedure Code provides that:-

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

20. The Court of Appeal in **Benard Ombuna v Republic [2019] eKLR** addressed the issue of a defective charge sheet in the following terms:-

> ***"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."***

21. Dealing with the issue of the omission of the term unlawful in the charge sheet in **Daniel Oduya Oloo v Republic [2018] eKLR** Ngenye-Macharia J held that:-

> ***"On the same issue the Appellant submitted that the particulars of the offence were fatally defective as they failed to disclose that***

the act of defilement was unlawful. It is true that the word unlawful was not included in the particulars of the offence. The offence of defilement represents a situation in which the key elements requiring proof are age of the victim, identification of the perpetrator and penetration. It is an offence perpetrated to children. Given the fact that children cannot consent to the acts that form the basis of the offence implies that as long as the elements of the offence are proved, the offence itself is deemed unlawful. Therefore, the mere omission of the word "unlawful" does not, in the circumstances, render the charge sheet defective."

22. I am guided by the test in Bernard Ombuna *(supra)* and persuaded by the above case. I find that the Appellant was not prejudiced by the omission of the term unlawful from the charge sheet as he was aware of the charges against him and was able to put an appropriate defence. An unlawful act cannot cease to be so through the omission of the worn 'unlawfully' in the charge sheet. This ground therefore fails.

23. 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 (2014) eKLR.**

24. 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**.

25. 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."

26. In the case of in **Thomas Mwambu Wenyi v Republic Criminal Appeal NO. 21 OF 2015 [2017] eKLR** the Court of Appeal cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that:-

"…Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."(Emphasis mine)

27. In the present case, PW3, SSK the complainant's father produced the victim's birth certificate (Exh 3) which indicated her date of birth to be 2/1/2001. Both PW3 and PW4 the victim's parents told the court that PW1 was 13 years old. It is abundantly clear that at the time of the offence the victim was only 13 years of age and therefore the age of the victim was satisfactorily proved.

28. 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..."

29. In this case, the victim (PW1) gave evidence that in November the Appellant took her from their house one night and went to Garsen town where they stayed in a lodging for four nights. During three of the four nights that they were in Garsen, the Appellant fondled the victim's breast and had unprotected sex with her.

30. However, the medical evidence adduced during trial was not conclusive on recent penetration. PW2, Dr. John Mwangi, the medical superintendent produced the victim's P3 (Exh 1) which indicated that the victim's hymen had an old tear and he concluded that the victim was not a virgin. Further, during cross-examination by the Appellant he said that he could not ascertain the age of the tears on the hymen.

31. To my mind however, the medical evidence did not rule penetration by the appellant but rather confirmed that the victim was sexually active and therefore nothing could show whether or not she had sex with the Appellant 2 or 3 days prior to the examination.

32. It is trite however that the court can convict on the sole evidence of the victim of sexual offence under section 124 of the Evidence Act but the court must believe that the complainant is telling the truth and records its reasons for such belief. See **Arthur Mshila Manga v Republic Criminal Appeal No. 24 of 2014 [2016] eKLR.**

33. In his judgement, the trial magistrate found that the victim was telling truth and stated that:-

"I have had the opportunity of hearing the alleged victim testify on oath… She was candid that she engaged in sexual intercourse with the accused a number of times while at a lodge in Garsen… Her testimony was tested in cross-examination by the accused…

…I am satisfied that the alleged victim told the truth. Her credibility was beyond doubt."

34. I have looked at the record and the evidence of PW1 (victim). She gave evidence of how on the first night at the lodging in Garsen, the Appellant put off the lights, undressed himself before he undressed her and fondled with her breast before proceeding to have sex with her by inserting his penis in her private parts without a condom. She said that they had sex twice on that night and for the next two nights before they returned to Hola. During cross-examination by the Appellant, PW1 remained steadfast that she was telling the truth.

35. The Appellant in his submissions attacked the credibility of the victim on the ground that she did not scream when she was taken away. Whether the victim went on her own volition or whether "some medicine" was used on her to make her obedient to her abductor's whims, in my view, does not affect the fact that she was defiled by her abductor. I find no reason to disbelieve her testimony. Besides, the evidence that they spent several days in lodging would provide circumstantial evidence for a sexual encounter. One would wonder why a 60 year old man would whisk away a 13 year old girl to a lodging far away from home.

36. 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…."***

37. In the present case, PW1 stayed with the Appellant for six nights in lodgings in Hola and Garsen and the Appellant introduced himself to her by his name. There was no risk of mistaken identity due to the amount of time that the victim spent with the Appellant and that he was positively identified.

38. In addition, there was circumstantial evidence linking the Appellant to the victim. The Appellant was arrested when he was with the victim siting under a mango near the river at Miembeni. No one else was with them when they were found by PW5 and PW6.

39. The law on circumstantial evidence was well laid down in the case of **Sawe v Republic (2003) KLR 364** the Court of Appeal held that:

> ***"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on."***

40. Flowing from the above decision, the Appellant was the one found with the victim after she disappeared from her home for approximately a week. There has been no explanation offered by the Appellant on why he was found with the victim. In the premise, I find that the the Appellant was positively identified and that there was no risk of mistaken identity.

41. Finally, the Appellant contended that his defence was not considered. The trial magistrate in his judgment considered the Appellant's defence and found it to be an afterthought and dubious and it never rebutted the prosecution's case. I have looked at the evidence on record and I agree with the trial magistrate that the defence was a mere denial and it did not shake the prosecution's case. I find that this ground also fails.

42. In the final analysis, I uphold the conviction.

43. On sentence however, I have taken into consideration the circumstances of the case. It is apparent that the Appellant lured the complainant who then picked her clothes and willingly sneaked out of her home to go away with him. She said that in the course of her stay with the Appellant, he promised her marriage. I consider that15 year prison sentence would suffice for the Appellant's lack of good judgment in attempting to marry a 13 year old.

44. The Appellant shall serve while 15 years imprisonment from the date of conviction and sentence.

45. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 13th day of November, 2019.

R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Mwangi for the Respondent