REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 47 OF 2018

NGOME NGOMBO CHEMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in lower court Mariakani Criminal Case No. 620 of 2015 as presided over by Hon. Gatheru dated 15th December 2016)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGEMENT

Background

The appellant, **Ngome Chembe** was charged with the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (4) of the Sexual Offences Act No. 5 of 2006*. Having pleaded not guilty to the offence, he went through a full trial where he was convicted of the offence and sentenced to serve 15 years imprisonment. Being aggrieved with both conviction and sentence, he preferred an appeal to this court.

> ***a) That, the Learned trial Magistrate erred in Law and in fact by finding my conviction and sentence without considering that the charge of defilement was not proven.***
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> ***b) That, the Learned trial Magistrate erred in Law and in fact by finding my conviction and sentence without considering that the AGE of the complainant being the material factor in sexual offences ACT was not proved to the standard required by law.***
>
> ***c) That the Learned trial Magistrate erred in law and in fact by finding my conviction and sentence without considering that the prosecution did not prove their case beyond any reasonable doubt hence unsafe.***
>
> ***d) That the Learned trial Magistrate erred in Law and fact by finding my conviction and sentence without considering my reasonable defence statement which was never challenged by the prosecution's case.***

Background and procedural history

Prosecution case at the trial by the complainant testified that she was aged 17 years old and lives in Malindi Sub-County. On account of his testimony she told this court that on 6.6.2015, while walking home from school, she met the appellant who lured her into the forest where they had sexual intercourse. She parted ways with the appellant but in the course of the month of July, she noted her periods were not forthcoming and this made her to suspect she might have conceived from the sexual act with the appellant. She therefore made a decision to visit the hospital where a medical examination carried out confirmed she was 5 months pregnant. She alluded to the fact that it was her first time to have a sexual experience with a male who in this case was the appellant.

In the testimony of **PW 2** it occurred to them that the complainant was no longer attending school anymore as required by the regulations. It was therefore decided that the complainant be escorted to visit a doctor who on examination apparently informed them that she was pregnant. The matter was reported to the police where **PW4 P. C. Joseph Kaloki** issued them with a P3 Form. According to PW4 the P3 form was filled by **Chris Athmani (PW 3)** a clinical officer attached to Samburu Health Center. In his opinion PW3 gave evidence that the complainant had twenty weeks old pregnancy and the hymen was broken. In conclusion, he opined that there was penetration. At conclusion of the prosecution case the appellant was placed on his defence where he gave unsworn statement denying the offence or being at the scene

of the crime. It was his defence that the fabrication of this offence was as a result of prior grudge his mother and brother had with the complainant. It is against this backdrop the appellant was convicted and sentenced by the Learned trial Magistrate.

Appellant submissions

The appellant argued his appeal by way of written submissions. He contended that the charge as established by the trial court was founded on evidence of a single witness which failed to comply with the legal principles in the case of **Ogeto –v- R CR Appeal No. 1 of 2014.** The appellant further submitted that the evidence of PW 1 was not tested with the caution and before reliance being placed on it by the Learned trial Magistrate. The appellant further submitted that there was no Forensic DNA evidence to link him with the pregnancy or penetration of the complainant. That the evidence of twenty (20) weeks pregnancy confirmed by PW 3 on medical examination of (PW 1) was too general has to who was the culprit of the pregnancy. In absence of corroboration from the prosecution witnesses, the appellant argued and submitted that there was no cogent or credible evidence to positively identify him as the perpetrator. He therefore challenged the trial court findings that the legal threshold involving **WOOLMINGTON –V- DPP 1935 AC** on the standard of proof was discharged by the prosecution. Further, the appellant contention was that the prosecution should have ordered for a DNA test to establish whether she had positively had carnal knowledge with the complainant. He cited the case of **Rose Ouma Otawa –v- R 2011 eKLR, Evans Wamalwa Simiyu –v- R 2016 eKLR.**

On the part of the respondent counsel, she submitted and relied on the evidence and findings by the Learned trial Magistrate. Learned prosecution counsel opposed the appeal on both conviction and sentence and it lacked merit on all the grounds advanced by the appellant.

Analysis and determination

This being a first appeal the duty to examine, re-evaluate and need to re-hear the case a fresh so as to come to my own inferences and conclusion is well settled as laid out the case of **Okeno –v- R 1972 EA 32.** The only caution to bear in mind is that an appellate court has no advantage on the demeanor of witnesses as to their credibility in comparison with the trial court.

When therefore it counts as to which witness to be believed or not any such consideration shall be resolved in favour of the findings by the Learned Magistrate.

It would be convenience to consider and deal with each of the grounds raised separately. Starting with the first ground the appellant contention that the offence of defilement was never proved beyond reasonable doubt. In the framed charge of defilement under Section 8 (2) of the Sexual Offences Act, the duty of the prosecution in terms of Section 107 (1) of the Evidence was to proof the following elements:

> ***(a). That the female victim suffered sexual penetration by the appellant.***
>
> ***(b). Second, because of the nature of sentence to be passed the victim's age must be ascertained.***
>
> ***(c). Thirdly, just like in proving other offences, the prosecution is expected to place the defendant or appellant at the scene of crime.***

On the first element, the Sexual Offences Act under Section 2 defines what constitutes penetration to include both partial or full penetration of the female genitalia with that of the male presumed to have committed the act of sexual intercourse. The complainant on this ingredient testified of having sexual intercourse with the appellant on 6.6.2015 while on her way from school. Though she does not remember the time the incident occurred but given that it was when she was leaving school. It may be presumed to be during the day. In this regard I take the queue from Section 119 of the Evidence Act. After the intercourse the complainant did not deem fit to inform her guardians/parents about the sexual act with the appellant. The decision to report the matter to the police came about when PW 2 realized on 4.11.2015, the complainant (PW 1) was no longer going to school for the last several days without any explanation. As the reasons for failure to attend school were not available from (PW 1) he became suspicious and shared the concerns with her mother. According to PW 2 he speculated from the visual observations that PW 1 may be pregnant. This necessitated PW 2 to escort PW 1 to a private clinic where an examination on pregnancy turned positive. Further PW 4 PC Kaloki of Samburu Police Station testified and confirmed that the P3 Form issued was filled by PW 3 – Athuman Chris. The evidence given by PW 3 proved that on medical examination of PW 1 she was five months pregnant (20 weeks) for that matter. PW 3 therefore opined that there was sufficient evidence that PW 1 had penetration sex unless there is any other evidence to the contrary. Though nobody saw PW 1 have sexual intercourse with the appellant on the diverse dates between 4th and 16th of April 2016 circumstantial evidence strongly proves to the placing him at the scene. The experience of PW 1, if carnal knowledge with the appellant was in her evidence given on oath. There are no discrepancies that such a narrative by PW 1 was a fabricated story to fix the appellant with a crime he never committed.

Curiously, when PW 2 and his family started to pursue the matter on 4.11.2015 to establish why PW 1 no longer goes to school she took flight from the home pursuant to the following. The mission to bring the culprits to book, PW 2 told the court that they started to spy within the neighborhood as to the whereabouts of the complainant (PW 1). According to PW 2, through an informer he traced the complainant to the house of the appellant. There is where PW 2 narrated substantially how he took the complainant to a private clinic which confirmed her 5 (five) months pregnancy. It was PW 2 evidence that the matter became a police case aimed at arresting the perpetrator of the defilement whose outcome was the pregnancy confirmed by medical examination.

The appraisal of evidence of PW 1 serves by itself to be sufficient to establish penetration to connect the appellant with the commission of defilement. Delay in lodging the complaint with the police and PW 2 has been clearly explained by PW 1 in her testimony. There is no evidence that PW 1 or her family had formed a grudge towards the appellant to fabricate an allegation of carnal knowledge. It is also trite to state that the scope of such evidence by (PW 1) was believed by the trial court to proof elements of the offense.

The testimony of PW 1 inspired confidence and could be relied upon by the trial court as provided for under the proviso in Section 124 of the

Evidence Act. Absenteeism of the complainant from her home on 14.11.2015 and non-attendance of school is admissible a circumstantial evidence with the accumulative effect in support of her testimony as to her whereabouts during the period she was out of the home and school.

The chain of circumstantial evidence has corroborative value enough to place the appellant at the scene of the offence prior to the complainant conceiving to the child. See the principles in the case of **R –v- Simon Musoke, R –v- Kipsang Arap Koske** that such evidence of inculpatory facts proved are incompatible with innocence of the appellant.

The prosecution evidence of PW1 and that of PW2 point out the sexual act took place and the appellant who was well known to PW 1 committed the offence on diverse dates as framed in the charge sheet. I also accept the medical evidence by PW 3 – Athuman Chris which corroborated PW 1 testimony that she had sexual intercourse which gave rise to a pregnancy. The absence of DNA test is not a defence to the offence of defilement. I consider the prosecution testimony of PW 1 as the trial court did to be both quantitative and qualitative to link the appellant with the offence. The complaint by the appellant on DNA test as a ground to cast doubt on the prosecution evidence remains unpersuasive to say the very least.

The question on the complainant's failure to report the offence and its implication on fair trial rights under Article 50 of the constitution was answered in the persuasive accordingly of **P. C. –v- DPP 1999 21 r. 25** where the court held that:

> ***"The fact that the offence charged is of a sexual nature is not of itself a factor which would justify the court in disregarding the delay. However, in some cases, the disparity in age between the complainant and the accused is such that the possibility arises that the failure to report the offence is explicable, having regard to the reluctance of young children to accuse adults of improper behavior. Feelings of guilt and shame experienced by the child of his or her participation …….. unwillingly in what he or she sees as wrong doing would also explain a failure to complain sooner. In addition the oral of threats, actual or …. of persuasive if the alleged offences are reported looked also be enough to convince the court that the lapse of time was reasonable.*** **In this case and in other cases, the courts have held that the exercise of dominion by the applicant over the complainant would be enough to explain the delay in a particular case. Dominion in this context involves some external of threats or discouragement coming from someone in a position of power and authority over the complainant not to disclose the leisure to other persons."**

Indeed, applying the entire principles to the facts of this case it is the issue of delay by a victim to report the incident on sexual carnal knowledge should not justify an adverse inference that the offence allegedly committed abated by virtue of length of time to lodge a complaint to the police.

In view of the evidence adduced by the prosecution, the appellant intentionally and unlawfully had carnal knowledge with the complainant.

The next issue that the prosecution is under the obligation to proof beyond reasonable doubt is that of the age of the victim. The first aspect as to why age is important in defilement cases was discussed in the case of **Karigu Elias Kasombo v R 2016 eKLR** Where the Court of Appeal held:

> ***"Age of the victim of the sexual assault under the Sexual Offences Act is a critical complaint, it forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon commotion will be dependent on the age of the victim."***

The ingredient of age being central to the sentencing of an accused person charged of defilement must be properly grounded by evidence from the prosecution side. This has been emphasized none other than the court of appeal in the cases of **Edwin Nyambaso Onsingo –v- R 2016 eKLR and Muohungo M. Waeyembe –v- R CR Appeal No. 24 of 2015 OR**

The holding in these two cases is that the evidence on age can be proved by documentary evidence such as birth certificate, medical evidence, baptism card or by oral evidence of the said guardian/ parent among other credible forms of proof."

In the instant case the prosecution placed before court evidence from PW 1 and PW 2 that proved the age to be 17 years old as the time of commission of the offence. There was further birth certificate produced as exhibit 2 to show that the complainant was aged 17 years old. What was the actual age of the complainant therefore remains uncontroverted by the appellant.

There is therefore sufficient evidence that age was proved by the prosecution beyond reasonable doubt.

Aside from the question of age the eye witness evidence of the complainant placed the appellant at the scene. As was stated in the case of **R –v- Turnbull and Abdalla Bin Wendo –v- R** on assessing the evidence of a single witness the following factors on identification or recognition of an assailant are key in determining admissibility.

> ***(a). The time and opportunity the witness had to view the assailant. The degree of the witness visual observation to recognize the appellant. The time taken with the assailant and the prevailing circumstances.***
>
> ***(b). The accuracy of the witness on whether he or she had prior knowledge or contact of the accused.***
>
> ***(c). How long ago was their last encounter, the circumstances at the crime scene.***
>
> ***(d). Whether there were any obstructions to impair or obstruct the single witness identification of the appellant.***

In the present appeal I have considered the testimony of (PW 1) and it's credibility as reviewed by the trial court in the same way as any other witness, whether she had the capacity and opportunity to positively recognize the appellant. That upon review of the testimony of the complainant I am satisfied there was no error on identification and placing the appellant at the scene of crime.

I therefore find that there was no miss direction by the trial court which made a finding on the ingredients of the offence in the context of the Sexual Offences Act and the male offender who had carnal knowledge with the complainant.

It is a fundamental principle of our criminal law system that an offence as particularized in the charge sheet are proved beyond reasonable doubt as is passed in the case of **WOOLMINGTON v DPP 1935 AC.**

Being conscious of this principle and the Judgement of the trial court there is no doubt that the appeal on both conviction and sentence has no merit. Accordingly, the appeal is lost and I do confirm the Judgment of the trial court delivered on 15th December 2016.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE