REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 18 OF 2019

FESTUS KANDU NGOME.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original conviction and sentence in Kilifi Criminal Case No. 808 of 2014 as presided over by Hon. L. N. Wasige (SRM) at Kilifi Law Courts dated 10th February 2016)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act.

The brief particulars of the offence allege that on 23.7.2011 at Mwangea, in Kilifi County, the appellant intentionally and unlawfully caused penetration of his genital organ, namely (penis) into the vagina of **KKK** a girl at the time aged 16 years.

The trial Magistrate received evidence of the five witnesses in support of the charge and the appellant defence. At the conclusion of the case the appellant was convicted and sentenced to 20 years imprisonment. Aggrieved with both conviction and sentence, the appellant lodged an appeal.

The evidence at the trial

The **complainant (PW1)** testified that on the fateful specified to be 21.7.2011 she came across the appellant while walking from school who made some attempt to commit a sexual act. However, it did not happen but on 23.7.2011 when the appellant went to their home he drunk (mnazi) and was allowed to spend the night in the same house with the complainant. In the course of the night, the appellant left his room for the complainant's and did have carnal knowledge with her that same night. The complainant after a while was called by **PW3** who had prior information about the defilement from her son.

On interrogation PW3 stated in court that the complainant alleged that on the night, appellant spent a night at their home he managed to have sexual intercourse but left soon thereafter.

PW2 – Dr. Rashid of Kilifi Hospital testified on behalf of **Dr. Adonani** who filled the P3 report on examination of the complainant stated to have been defiled by someone known to her.

The positive findings made in the P3 by the medical officer was the fact of a missing hymen.

PW4 – HSK who is an elder brother to the complainant confirmed that on 23.7.2011 the appellant had on the night at his house. In the course of investigations **PW6 CPL Machoka** of Kilifi police station caused the complainant's age to be assessed by **PW5 – Dr. Mwachai.** According PW5 evidence upon examination of the complainant he arrived at an assessment of 15 years. At the close of the prosecution case, appellant was placed on his defence, in which he denied defiling the complainant.

The appellant contention and dissatisfaction revolved around the following grounds:

1. That the Learned trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the voire dire examination herein was not conducted hence contrary to Section 19 of oath statutory and declaration act.

2. That the Learned trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the medical evidence made by the medical doctor in support of the prosecution case was contradictory with that of the complainant and thus does not support the offence of defilement.

3. That the Learned trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the case at hand was due to fabrications.

4. That the Learned trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the source of my arrest was not established to have had any connection with this offence in question, for the alleged chief who whom purported to have arrested me was not called to testify and clear the doubt of my arrest.

5. That the Learned trial Magistrate erred in Law and fact by finding my conviction and sentence without considering my reasonable defence stated.

In his submissions, appellant pointed out that he was denied vital information on the charge before taking plea in contradiction of Article 50 (2), (3) of the Constitution. Further, the appellant contended that during the trial, the court lacked an interpreter and as a result he was denied the right to follow proceedings for lack of a qualified translator.

The appellant relied on the authorities of **Adam v R [1973] EACA, Amos Kamali v R Criminal Case No. 12 of 2006, Njeru v R [2007] eKLR** on interpretation and unequivocal plea of guilty.

The appellant argued and submitted the case was based on visual recognition, the incident was stated to have taken place at night and no source of light described by the complainant which asserted her to identify the appellant.

On this legal proposition, appellant cited the case of **Abdallah Bin Wendo v R [1953] EACA 166, Maitanyi v R [1986] eKLR, r V Turnbull [1976] 3 ALL ER 540.** As regards proof of elements of the defilement, appellant challenged the efficacy of the medical evidence tendered by PW2 on behalf of **Dr. Adonani.**

The major concerns appellant had with the testimony of PW2 was the failure to comply with Section 77 of the Evidence Act. That the findings made on impugned hymen were not conclusive of penetration or defilement of the complainant. On this appellant relied on the principles in the case of **P.K.W v R Criminal Appeal No. 186 of 2010**.

According to the appellant contention, the Learned trial Magistrate further failed to comply with Section 124 of the Evidence Act on corroboration or the proviso thereof on reliance of a single witness in convicting the offender.

The Learned prosecution counsel on the other hand submitted that from the evidence all the elements as pertaining to the offence of defilement were proved beyond reasonable doubt.

In his contention Learned prosecution submitted that proof of the charge was a direct evidence of the complainant. On this aspect Learned prosecution counsel relied on the principles in the case of **AML v R [2012] eKLR, Kassim Ali v R, Mombasa Criminal Appeal No. 84 of 2005, Basil Okaroni v R [2016] eKLR, Francis Omuroni v Uganda, Court of Appeal No. 2 of 2000.**

Learned prosecution counsel also contended that the alibi defence came in too late a time and could not be able to dislodge the overwhelming evidence by the prosecution, he cited the case of **Kennedy Odengo v R [2015] eKLR.**

On the whole, I have before me the evidence at the trial, grounds of appeal and submissions by both the appellant and prosecution counsel.

Analysis and resolution

It is trite that on first appeal as stated in the case of **Njoroge v R [1987] eKLR.** The appeal lies on matters of fact and law. It is also the duty of the court to evaluate and scrutinize the evidence a fresh. With a view to draw my own conclusions in the matter. In this appeal the appellant has raised a number of grounds to impeach the findings by the Learned trial Magistrate. In my view of the grounds, at the heart of it is the question whether the prosecution discharged the burden of proof in respect of the charge beyond reasonable doubt.

It can as well be stated from the outset that the burden of proof as expressed in Section 107 (1) of the Evidence Act can be discharged if the issues on medical evidence, reliability of the complainant testimony are in doubt.

It is trite that according to the dictum in the cases of **Woolmington v DPP [1935] AC 462 and Miller v Minister of Penisions [1947] 2 ALL ER 372.** The standard of proof in a criminal case of this nature is proof of beyond reasonable doubt. The test in **Woolmington** is clear proposition of the Law on this concept, where the court held:

"Throughout the web of the English Criminal Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guild, subject to the qualification involving the defence of insanity and to any statutory exception. If at the end of the whole case, there is a reasonable doubt, created by the evidence given either by the prosecution or by the prisoner as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter that the

charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law and no defeat to whittle it down."

From the charge of defilement as found against the appellant, the prosecution was under a duty of proof the following elements:

1. A sexual act of penetration.

2. The age of the complainant to be below 18 years.

3. That the appellant was the one who defined the complainant.

A person is guilty of an offence of defilement under Section 8(1) as read with Subsection 4 which the time of the offence he penetrates the victim. Under Section 2 of the Act, the act of penetration is deemed to be completed when it's established by way of sufficient evidence that the person so charged partially or completely inserted his male genitals with that of the female.

As a general principle of Law under Section 124 of the Evidence Act. It is desirable to look for corroboration, although in the same proviso the accused person can be properly convicted on uncorroborated evidence.

Its also trite as held by the Court of Appeal in **AML v R {2012} eKLR**:

"The fact of rape and defilement is not proved by a DNA test but by way of evidence that sexual intercourse with the complainant did take place on the material time arising back to the facts of the case."

The complainant told the court that the initial incident of 27.7.2011 the appellant only managed to violently grab her hand with demands of sexual intercourse but only raising an alarm, he abandoned the unlawful act. However, of significant was the second incident of 23.7.2011 when the appellant had social Mnazi evening with the grandfather to the complainant. this time round as stated by the complainant, the appellant apparently spent the night at their home, only to sneak out of the room to where the complainant left to commit the sex act.

On the issue of medical evidence **PW2 Dr. Rashid** who testified on behalf of **Dr. Adinani** alluded to the rupture of the hymen as a positive indicator that the complainant may have been defiled.

There based on the testimony of **PW1** who described the constitution of the act, as corroborated with **PW2** who produced the P3 Form which showed that an examination the complainant **PW1**hymen had been broken as the appellant defence has not controverted this ingredient. That left the direct and circumstantial evidence for the prosecution discharge the burden of proof beyond reasonable doubt.

The second ingredient required to be proved is the fact that when the complainant was defiled she was aged below eighteen (18) years old. As pointed out in cases of **Uganda v Godfrey HC CR Case No 141 of 2002, Francis Omuroni v Uganda CR Appeal No. 2 of 2008** the court held that:

"In defilement cases, medical examination, 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 any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim parents and by observation and common sense."

From the record before me, the particulars as to the age of the complainant was proved by medical assessment admitted as exhibit to that she was aged fifteen (15) years old. The age of the complainant was conclusive and there is no dispute even from the appellant.

The final ingredient turns on the identification or recognition of the appellant as to the correct basis of admissibility of identification evidence. Various courts decisions have provided guidelines and principles pursuant to the Evidence Act. The courts in **Maitonyi v R {1986} KLR 198, R v Turnbull {1976} 63 CR R 132** went on to extrapolate on identification evidence as

"an issue in a trial of an accused person. The stressed parameters and factors to be evaluated revolve around the following, the court should examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance, in what light was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition might be more reliable than identification of a stranger, but even then the court should remind itself that mistakes in recognition of close relatives and friends have been made sometimes."

In the present appeal most of the identification features of the appellant are not disputed. The complainant and the appellant appear to have known each other very well. They hail from the same village. The complainant version was that in respect of this offence she had been approached by the appellant. On 21.7.2011 to have improbable carnal knowledge. That incident aborted, when she raised an alarm. However, that did not discourage the appellant, who adequately spent a night with the grandfather to the complainant. Thereafter, the appellant sneaked out of the room for the complaints in order to have sexual intercourse.

The testimony of **PW3** solidifies **(PW1)** identification of the appellant and the substance of **PW3** evidence was to the effect that on the night of 23.7.2011, the appellant and complainant spent a night in the same house but different rooms.

The importance of **PW1** and **PW2** confirms that they had previous knowledge of the appellant. On the fateful day the appellant had chosen to have Mnazi until late to the night, culminating in electing to stay overnight in the same house with the complainant.

In the face of these facts what is important is the test and degree of previous knowledge by PW1 and PW2 and the opportunity for correct recognition to take place.

From the trial court record, I am satisfied that the appellant was properly and satisfactorily recognized by the complainant. Similarly, in this appeal the appellant complained that the start of the trial was marked with contradictions and inconsistencies between the complainant testimony with the medical evidence. That the evidence was not so strong to link him with the offence of defilement.

As regards the issue, the principles upon which an appellate court can decide whether the alleged inconsistencies are of such a nature to impeach the burden of proof were stated in **Twehangane Alfred v Uganda CR Appeal No. 139 of 2001 {2003 UGCA}** where the court held:

"With regard to contradictions in the prosecution's case, the Law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

Based on the foregoing principle was the appellant's claim sufficient to cause a break in the chain of the prosecution case as to his culpability.

In this case, the prosecution pitched their burden of proof mainly on the single identifying witness of the complainant. In her evidence, the complainant stated that the appellant went to her bedroom and forced his penis into her vagina to and fro. The appellant who was also sleeping the next room left after the sexual intercourse. The complainant made known this incident to her grandfather and the mother who testified as **(PW3).**

The doctors evidence was that the complainant was examined, though no lacerations or spermatozoa were seen in the vaginal canal. There was a rapture of the hymen.

In all these the prosecution was able to establish beyond reasonable doubt and in conformity with due process that the appellant performed the criminal act.

In my view, even if there were inconsistencies in this case, they are curable in terms of Section 382 of the Criminal Procedure Code. So therefore, this ground lacks merit.

Further, the appellant attacked the impugned Judgment on grounds that the chief of the location who arrested him was never called as a witness. In the well-known case of **Bukenya & Others v Uganda {1972} EA 549** the court addressed this issue in the following passage:

> ***"(i). The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistence.***
>
> ***(ii). The court has right and duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii). Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses could have tendered to be adverse to the prosecution.***

In the same vein the court in **Keter v R {2007} EA 135** said:

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

I have reviewed all the evidence adduced at the trial of the appellant, I think there is no error committed by the Learned Magistrate for not calling the chief of the area who happened to arrest the appellant. Any witness who may have missed out was not a material witness for the prosecution. I find no substance on this ground to support the appeal.

On sentence I am satisfied that the Learned trial Magistrate took into account the Law including any mitigation and aggravating factors to sentence the appellant. The sentence meted out by the trial court was not excessive. In the circumstances, I am not convinced that the appellant has availed new and compelling evidence to warrant interference with the sentence. I also find no merit in this appeal as it relates to sentence.

Accordingly, the entire appeal has no merit and each of the grounds is dismissed, to render the Judgment of the Lower Court to be confirmed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE