REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

HCCRA NO 125 OF 2015

(Appeal from Judgment of G. A. Mmasi PM on 29.6.2012 in CRC No. 246 of 2011 at Vihiga)

OSCAR AHOWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appeal

1. The appellant herein, Oscar Ahowa was vide Vihiga PM CR (SO) Case No. 246 of 2011 charged with the offences of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. Particulars being that on the 7th March 2011 at Isizi Village, Iyaduywa sub location within Vihiga County intentionally caused his penis to penetrate the vagina of PM, a child aged 13 years.

2. The appellant also faced an alternative count of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.it was alleged that on the 7th March 2011 at Isizi Village, Iyaduywa sub location within Vihiga County intentionally caused his penis to come in contact with the vagina of PM, a child aged 13 years.

3. The Trial Magistrate acquitted the Appellant of the alternative charge but convicted him of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The Appellant was sentenced to life imprisonment.

The Appeal

4. Being dissatisfied with the conviction and sentence, the Appellant lodged an appeal vide a Petition of appeal dated 10th November 2015. In his petition of appeal, the appellant raised five grounds of appeal which are as follows;

1. That he did not plead guilty to the appended charges.

2. That the Trial Magistrate erred both in law and fact by failing to consider that there was material contradictions in the prosecution case as pertains the alleged date of the incident.

3. That the Trial Magistrate erred both in law and fact by failing to consider the testimony of the complainant was inconsistent in its material particular, uncorroborated, incredible, speculative, fabricative and lack of probative values to justify the conviction.

4. That the Trial Magistrate erred both in law and fact by failing to consider that the prosecution failed to avail crucial witnesses who were the family members to spill the beans in the prosecution case to the required standards.

5. That the Trial Magistrate erred both in law and fact by failing to consider that there wasn't a DNA test or specimen sampling examination on the alleged offence anointing to shoddy investigations as the allegations which had no basis in total absence of the first report to the authority to prevent the alleged crime.

Duty of the Court.

5. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions.

6. In **KIILU & ANOTHER VS. REPUBLIC [2005]1 KLR 174,** the Court of Appeal stated thus:

> **"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."**

7. The main issue for determination before this Court is whether the conviction is sustainable on the strength of the evidence adduced in the trial court.

The Evidence and Submissions

The Prosecution's Case

8. The prosecution called 4 witnesses.

Evidence was led that on the 7th March 2011 at 7.00pm while the Complainant was cutting twigs outside their compound, the Appellant grabbed her, blocked her mouth and dragged her behind a neighbor's house and defiled her. The Complainant testified that the neighbor stays in Nairobi and that the Appellant removed her clothes and his and then inserted his penis in her vagina and after he was done he went away with her clothes. The incident was reported to Mbale police station and the complainant was taken to Vihiga hospital for treatment. PW4 PC John Njoroge confirmed that the incident was reported at Mbale Police station and that the Appellant was arrest. He produced to evidence a copy of the P3 form as Pexhibit 1 b.

The Defence Case

9. The Appellant testified that he is the Complainant's immediate neighbor and that they had boundary dispute with the mother and that he was being implicated for a crime he did not commit. In his submissions the Appellant challenged the prosecution's evidence on the age of the minor stating that the same had not been proved and that no birth certificate was produced. He also challenged the fact that the evidence of the Complainant was not corroborated by medical evidence and that the same was contradictory. He prayed that the conviction be set aside, if not the sentence be reduced as he termed it excessive and unjustifiable.

Issues for Determination

10. As stated above, the duty of this court is to analyze the facts of the case and determine whether the conviction is sustainable on the strength of the evidence adduced in the trial court.

The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

SECTION 8(1) & (3) OF THE SEXUAL OFFENCES ACT provides that: -

> **"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

11. Section 8 (1) cited above provides the key elements of the offence of defilement. These are *"Penetration,"* and *"Child."* The act defines *"penetration"* as partial or complete insertion of the genital organs of a person into the genital organs of another person while *"child"* has the meaning assigned thereto in the Children's Act."

The same was reiterated in the case of **DOMINIC MWILARIA V REPUBLIC [2018] eKLR** where court held that

> **"[7] It is now beyond peradventure that, in cases of defilement, the prosecution must prove:**
>
> **1. The age of the child. This is important because defilement relates to children who are persons below the age of 18 years. Secondly, the age of the victim determines the sentence to be imposed.**
>
> **2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and**
>
> **3. That the perpetrator is the Appellant."**

See the case of **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

Thus in determining this Appeal, the court has to establish

a) Whether the age of the complainant was proved.

b) Whether penetration was proved.

c) Whether the accused was positivity identified by the minor s her assailant.

Age of the Complainant

12. The Complainant testified that she was 13 years at the time of the incident. PW2 her mother testified that the Complainant was born in 1997. Meaning at the time of the incident she was approximately 14 years old. According to the P3 form produced to evidence, the minor was aged approximately 13 years at the time of the incident. The appellant challenged the Prosecution's evidence on the age of the minor stating that there was no proof of the same. He argued that there was no birth certificate, age assessment or baptism card to prove the same.

13. In the case of **HILARY NYONGESA VS REPUBLIC ELDORET CRIMINAL APPEAL NO 123 OF 2009)** the court stated that:

> **"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved….And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."**

14. In the instant suit the only evidence of the age of the Complainant is her evidence, that of the guardian and the approximate age on the P3 Form.

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

> **"In defilement cases, medical evidence 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 be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."**

16. Where the actual age of the complainant is not proved, the apparent age of complainant can be used. **In Evans Wamalwa Simiyu vs. R Criminal Appeal No. 118 Of 2013 [2016] eKLR**, the Court of Appeal pronounced itself as follows: -

> **"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."**

17. In the matter herein, the trail magistrate in her judgment held that the minor's age was proved. In light of the authorities above, it is the position of this court that the Complainant's apparent age was sufficiently proved by her evidence, that of her guardian and the P3 form.

Proof of penetration.

18. It was the complainant's evidence that the Appellant inserted his private parts in hers and that she felt pain. She stated that she felt a lot of pain and bled. Pw 2 confirmed that the Complainant was bleeding when she examined her.

According to the P3 form and PRC form produced to evidence, there was pus in the Complainant's vagina and there was infection of sexually transmitted disease.

19. It should be noted that no doctor was called to testify and it is on that basis that the Appellant submits that penetration was not proved. He argues that the Complainant's evidence was not corroborated by medical evidence.

Section 2 of the Sexual Offences Act provides that;

> **"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person." also see MARK OIRURI MOSE VS REPUBLIC [2013] eKLR.**

20. The Court of Appeal in **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010** (cited in **Dennis Osoro Obiri Vs Republic [2014] eKLR**), held that: -

> **"Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person …under proviso to section 124 of the Evidence Act Cap 80 Laws, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief."**

21. From the authorities above, it is clear that in defilement cases, the Complainant does not need medical evidence to corroborate her evidence as alluded by the appellant. Also in view of the provisions of Section 124 of the Evidence Act, the court can convict based on the sole evidence of the Complainant.

22. In the instant suit, the trial magistrate assessed the demeanor of the Complainant and arrived to the conclusion that she was telling the truth. It is therefore accepted by this court that the evidence adduced by the Complainant was sufficient to prove penetration.

23. The Appellant also submitted that there was no medical evidence linking him to the offence as he did not undergo DNA testing. In **EVANS WAMALWA SIMIYU VS. REPUBLIC [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word" may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her..."**

24. From the above authority, it is clear that subjecting the appellant to a medical examination is discretionary. The Trial court herein was satisfied that the evidence that was adduced by the prosecution was sufficient and thus the situation did not warrant DNA testing.

Whether the accused was positivity identified by the minor as her assailant

25. It was the Complainant's evidence that the Appellant was her neighbour and was well known to her. Her evidence was corroborated by the Appellant. She did not at any time waiver in her identification of the appellant. Given that the appellant was a man well known to the child there exists clear evidence of recognition. This evidence of recognition was held by the Court of Appeal in **ANJONONI & OTHERS Vs REPUBLIC [1989] KLR** to be 'more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person's knowledge of the assailant in some form or other'.

26. The Complainant knew the Appellant so well that mistaken identity did not arise. In the absence of any evidence to the contrary, it is the finding hereof that the complainant sufficiently identified the Appellant as her assailant.

27. With regard to the Prosecution's alleged failure to call crucial witnesses the court in **REUBEN SHITULI LUMISI V REPUBLIC [2019] eKLR** observed that:

> **"There is no requirement in law of a particular number of witnesses that are required to prove a particular fact. A fact may be proved by even a single witness unless the law required otherwise. Only in situations where the evidence of the witnesses called by the prosecution is not sufficient is the court entitled to make adverse conclusions on why material witnesses were not called." In MARTIN OKELLO ALOGO V REPUBLIC [2018] eKLR the court stated that:**
>
> **"The Proviso to Section 124 of the Evidence Act is clear that in criminal cases involving a Sexual Offence, if the only evidence is that of a child of tender years who alleges to have been defiled, then the Court shall receive the evidence of the said child and proceed to convict the Accused person if, for reasons to be recorded, in the proceedings, the Court is satisfied that the child is telling the truth. In this case, the trial Magistrate satisfied herself that the minor victim of defilement charge against the Appellant was telling the truth and she proceeded and convicted the Appellant on the basis of that evident which she described as credible. Accordingly, I have no reason to differ with that finding and holding by the learned trial Magistrate which I find to be sound. I hereby uphold it. I find and hold that no other evidence that the Appellant describes as "crucial" witnesses could have displaced the credible evidence given by the victim of the offence and corroborated by medical evidence."**

28. From the evidence it is clear that the trial magistrate assessed the evidence of the complainant and believed the same to be true. The trail magistrate when faced with the evidence made a conclusive determination on the case based on the evidence presented before her. From the proceedings it is clear that the prosecution proved its case to the required standards with the evidence of PW1 and thus the Appellant's contention cannot stand. It is the finding hereof that the conviction was safe and I hereby uphold the same.

Sentencing

29. **Section 8(1) & (3) of the Sexual Offences Act** provides that: -

"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

In **EVANS WANJALA WANYONYI V REPUBLIC [2019] eKLR**. The court held that:

"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:

In this case, the appellant was sentenced to 20 years imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) (3) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.

25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."

30. In the instant case, the appellant was sentenced to life imprisonment. In mitigation, he stated that he was remorseful and prayed for courts leniency. He is also a first offender. In view of the above authority and the circumstances of the case, this court hereby sets aside the life sentence imposed by the trial court, and in place thereof the appellant is sentenced to serve ten (10) years in prison.

Dated, Signed and Delivered in Open Court at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE