REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 19 OF 2017

BADI HAMADI HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. P. K. Mutai RM

delivered on 7th October 2016 in Criminal Case No. 737 of 2014

in the Chief Magistrate's Court at Kwale)

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve fifteen (15) years imprisonment for the offence of defilement , contrary to section 8(1) (3) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 3rd and 13th June, 2014 in Kwale County in Coast region, he intentionally caused his penis to penetrate the vagina of AB a child aged 15 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.

3. The Appellant pleaded not guilty to the charge in the trial court on 16th June 2014 and was after full trial, convicted on the first count of defilement and sentenced to 15 years imprisonment. He is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in Amended Grounds of Appeal that he filed are as follows:

a) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to serve 15 years imprisonment without noting that there were a lot of anomalies and contradictions by the prosecution case casting doubt on the whole prosecution case contrary to section 109 of the Evidence Act.

b) That the trial magistrate erred in law and in fact by convicting and sentencing the Appellant to serve 15 years imprisonment without noting that the findings of the doctor and the evidence adduced in court by the doctor do not support the alleged act of defilement.

c) That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant to serve 15 years imprisonment without noting that the P3 form findings do not support the act of defilement.

d) That the trial magistrate erred in law and in fact by convicting and sentencing the Appellant to serve 15 years imprisonment on allegations that the victim was expectant which was a misdirection for nowhere was it alleged in the prosecution evidence.

e) That the trial magistrate erred in law and fact by convicting and sentencing the Appellant to serve 15 years imprisonment without noting that section 36 (1) of the Sexual Offences Act No. 3 of 2006 was not adhered to.

f) That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant to serve 15 years imprisonment without noting that section 150 of the Criminal Procedure Code was not adhered to.

g) That the learned trial magistrate erred in law and in fact by convicting and sentencing the Appellant to serve 15 years imprisonment without considering the Appellant's alibi defence statement which remained unshaken.

4. The appeal proceeded for hearing on 17th July, 2017, and the Appellant submitted that he would wholly rely on written submissions dated 20th July, 2017 that he had availed to the Court. The Prosecution counsel made oral submissions.

5. The Appellant in his submissions argued that there was contradiction as to the date of the offence. In particular, that the date revealed in the P3 form as the date the offence was committed is not same as the date PW1 was sent to hospital. Further, that the OB NO. is 16/15/6/2014, yet the offence is alleged to have occurred on 13th June, 2014.

6. The other contradictions alleged were that PW1 stated that she was brought home by PW3, and on the other hand stated that she was taken home after interrogation on 7th June, 2014 which is almost 4 days after the day it was alleged that she went missing. That if PW1 was at the Appellant's home from 7th June, 2014, then the prosecution case is in doubt starting as the charge sheet indicates the offence occurred on diverse dates between 3rd and 13th June, 2014. Further, that while PW2 states that he came back home and got a report that PW1 was missing after she was assaulted by her brother (PW3), PW4 stated that on 9th June, 2014, PW2 made a report that PW1 was missing at home.

7. The Appellant further submitted that no tests were done to confirm that he indeed defiled PW1 as alleged, and he cited **Fredrick Wadia Masanju v. Republic [2014] eKLR,** where it was held that no samples of blood or blood typing was done to prove that the semen found inside the complainant's private parts came from the Appellant. He further argued that although it was found that PW1's hymen was missing, the prosecution did not establish what caused the same, since the hymen can be lost from various causes among them horse riding, bicycle riding, masturbation etc.

8. Ms. Ogweno, the learned prosecution counsel, submitted that the complainant had run away from home between 3rd and 13th June 2014 and was living with the Appellant, and during this period she had sex with him. That PW2 and PW3 who were looking for the complainant during this period traced her to the Appellant's house, and reported the matter to the chief. In addition, that the P3 form showed that the complainant's hymen was broken, while the complainant's age was proved by her immunization card which showed that she was 15 yers old. Therefore that penetration was proved. Lastly, that the sentence of 15 years imprisonment was also lawful.

9. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

The Evidence

10. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses. The complainant (AB) was PW1, and she testified that she went to the Appellant's home on 2nd June, 2014, after the Appellant had visited her home and had a chat with her. She stated that she stayed at the Appellant's home for 13 days and that they had sex for that period. That later on, police officers came to the Appellant's home, and she was then taken to Mamba Police station and Kikoneni hospital for treatment.

11. It emerged from the testimony of BF (PW2) who was the complainant's father, and that of NB (PW3) who was her brother, that that after a confrontation between PW3 and PW1, PW1 went to stay with the Appellant, who hid her at his uncle's house. That after looking for PW1, PW2 and PW3 made a report to the police and the Appellant was arrested.

12. PW4 was PC Ali Ibrahim, and he testified that PW2 made a report about PW1's missing on 9th June, 2014 at Mamba Police post. Later, on 13th June 2014, PW2 came back and reported to the police that he had discovered where PW1 was. PW4 in company of his colleague Peter Korir proceeded to the Appellant's home, and that the Appellant directed them to the river where PW1 was washing clothes. PW1 and the Appellant were then both arrested, and PW4 asked PW2 to take PW1 for medical examination. Further, that PW1 was assessed and her age was 15 years old. He produced her clinical card as P. Exhibit 2.

13. Dr. Alfred Baya, a clinical officer based at Kikoneni Health Centre was the last prosecution witness (PW5). He testified that he examined PW1 and that her hymen was found to be broken, and she had a bacterial infection in her urine. He also stated that she was 15 years of age. He produced a P3 form as Exhibit 1.

14. The Appellant was put on his defence and he gave sworn testimony and called one witness. He stated that he had a dispute with the family of PW1, and that he took PW1 but later returned her home. On cross-examination he stated that he wanted to resolve the issue at home and reiterated that PW1 was taken to the Appellant's home by her brothers but that he took her back to her home. He alleged that the allegations made against him are false.

15. Jamilla Mande (DW2) who is the Appellant's mother, testified that it was PW1's brother who assaulted PW1, and took her to the Appellant's home. That the Appellant thereafter took PW1 to the village chairman and reported the incident. However, that on being asked if she wanted to go back to school PW1 refused. DW2 stated that the Appellant was falsely accused and linked with the offence, and denied that the Appellant was home when PW1 came there or that he was living with her. Further, that she did not see the Appellant bring any visitor to his house.

The Determination

16. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there is one issue for determination in this appeal. This is whether the Appellant was convicted for the offence of defilement on the basis of

sufficient and satisfactory evidence.

17. Defilement is defined in section 8(1) of the Sexual Offences Act as follows:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"."**

Section 2 of the Sexual Offences Act provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person. The ingredients of defilement were further highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

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

18. The relevant evidence adduced in the trial Court as to defilement was that of the complainant, who was PW1, and whose testimony was as follows:

> **"On 2nd June 2014 I woke in the morning and proceeded to school. It was about 8.00am. I was feeling unwell. I fell down at 10.00am. My teacher called my family. NB came. He was called by Evans. They took me home. I had fits before. I did not go to school the following day. The Accused Badi Hamadi came home at 4.00pm. We talked. I went to his home at 5.00pm. I went to his room. I stayed here for 13 days. We had sex during that period. He asked me to remove my clothes. I agreed. We had sex. Later police followed me..."**

19. It is my view that the evidence by PW1 was insufficient to sustain a conviction of the Appellant. In particular no evidence was given as to any penetration by the Appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as to whether defilement occurred or not. **Black's Law Dictionary , Ninth Edition** at pages 1498-1499 defines sex as the structures and functions that distinguish a male from a female; sexual intercourse; or sexual relations. In addition, sexual relations is defined either to be sexual intercourse or physical sexual activity that does not necessarily culminate in sexual intercourse. Therefore, it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by section 2 of the Sexual Offences Act, which is required to be proved beyond reasonable doubt.

20. This Court in **Julius Kioko Kivuva v Republic [2015] eKLR** held as follows as regards specificity required in the proof of penetration:

> **"Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal".**

PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex.

21. In this respect the evidence by PW5 that PW1's hymen was broken at the time of her medical examination was corroboration of penetration, however it did not identify the person responsible and was therefore not corroboration as to penetration by the Appellant. I therefore find that there were gaps in the evidence adduced by the prosecution and it was not sufficient to establish the offence of defilement as against the Appellant beyond reasonable doubt .

22. I accordingly quash the conviction of the Appellant for the offence of defilement, contrary to section 8 (1) (3) of the Sexual Offences Act. I also set aside the sentence of fifteen years imprisonment imposed upon the Appellant for this conviction, and order that he is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF APRIL 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 5th DAY OF JUNE 2018

D. O. CHEPKWONY

JUDGE