REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 18 OF 2016

C O O.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(This is an appeal from the judgement of the Senior Resident Magistrate Court at Loitoktok presided over by Hon. Okuche delivered on 1.7.2016)

JUDGEMENT

The appellant was charged before the Senior Resident Magistrate on 17.2.2016 with a charge of defilement contrary to section 8 (1) (2) of the Sexual Offence Act. In the alternative count was that of committing an indecent Act with a child contrary to section 8 (1) of the Sexual Offences Act No. 3 of 2006.

Briefly, the particulars constituting the charge sere that on the 12th day of February 2016 in Kitengela Location within Kajiado County, appellant intentionally caused his penis to penetrate the vagina of **H B** a child aged 10 years.

The appellant pleaded not guilty to both counts and the allegations as particularized in the charge sheet. In his judgement dated 1.7.2016 the trial magistrate on considering the entire evidence convicted and sentenced the appellant to life imprisonment.

Being aggrieved with both conviction and sentence the appellant has appealed to this court in a notice and memorandum of appeal filed on 7.9.2016. The said grounds are stated in the following language:

> **1. That the learned Trial Magistrate erred in law and facts when he failed to appreciate that the whole charge was a fabrication by an estranged wife.**
>
> **2. That the learned trial magistrate erred in law and fact when he failed to notice an essential ingredient of penile penetration was never proved beyond reasonable doubt to sustain the charge.**
>
> **3. That I suffered prejudice from the failure by the learned trial magistrate to comply with article 50 (2) (h) of the constitution in totality.**
>
> **4. That the learned trial magistrate erred in law and facts in failing consider that the whole of the prosecution case was shoddy**

He was represented in this appeal by learned Counsel Ms. Mageto Advocate.

Evidence at the trial

The evidence at the trial court comprised of four witnesses scrutinized by the state. Briefly, it commenced with the testimony of the complainant PW1 – H.B.O who stated how on 12.2.2016 the appellant demanded sex from her. It was PW1 evidence that when she tried to resist the appellant used force to undress her and went further to penetrate her private parts. According to PW1at the commencement of the sexual act she was not able to raise an alarm because appellant covered her mouth with t-shirt.

On the same day in the afternoon **PW1's mother R C** testified that when she came back from work PW1 reported this incident of the appellant having defiled her in the early hours of the day. This compelled PW2 to conduct a quick physical examination on the private parts which confirmed an inner wear with reddish substances. The complainant had to be taken to Kitengela Police Station who in turn referred her to Nairobi Women Hospital for a medical examination.

The complainant on being treated was issued with a P3 with positive indications that an offence of defilement had been committed. This was as per the evidence of **PW3 Samson Sanango** a Clinical Officer based at Isinya Health Centre. The P3 was admitted in evidence as exhibit 3 together with post rape care form as exhibit 2.

It is against this background **PW4 Sgt Cosmas Mwanya** attached to Kitengela Police Station told the court that the appellant was arrested to answer to the charge of defilement.

The appellant on his part gave unsworn statement denying any such incident ever took place as alleged by the prosecution witnesses.

On appeal learned counsel Ms. Mageto on behalf of the appellant submitted on the discrepancies of the prosecution case at the trial. Ms. Mageto identified gaps that the prosecution failed to avail treatment notes of the complainant from Isinya Health Centre. Ms. Mageto further argued and submitted that from the evidence PW2, mother to PW1 is said to have removed the reddish stained inner wear but it was never part of the evidence at the trial court. It was her contention that the element of penetration as known in law did not seem to have taken place against the complainant.

Ms. Mageto touching on the evidence of a child of tender years she invited the court to find that it lacked corroboration. According to Ms. Mageto the prosecution evidence at the trial court failed the legal test of a case proved beyond reasonable doubt. In support of the various arguments and issues arising in this appeal learned counsel cited the following cases: **Joseph Kimandu Versus Republic CR. Appeal No. 130 of 2013 UR.** In conclusion she urged this court to allow the appellant on both conviction and sentence.

Mr. Akula, the Senior prosecution counsel submitted and supported the conviction and sentence. Mr. Akula submitted that the conviction was based on watertight evidence adduced by the four witnesses. He contended that the elements of the offence of defilement as known in law was proved beyond reasonable doubt against the appellant. Mr. Akula further submitted that there were no material contradictions in the evidence of PW1-PW4 as it was positive on culpability and identification of the appellant as the perpetrator of the crime.

In sum he urged this court to rely on the following authorities to find that there is nothing to vitiate the case for the prosecution against the appellant, **Joseph Kieti Seet Versus Republic 2014 eKLR Ntooki Versus Republic 2016 eKLR, Peter Musau Versus Republic 2008 eKLR**. With this, Mr. Akula contended that the appeal lacks merit.

Analysis and Resolution

The duty of an appellant court on a first appeal from a conviction and sentence of a lower court was succinctly stated in the case of **Pandya Versus Republic 1957 EA. 336** in brief the court held:

> ***"On first appeal from a conviction by a Judge or magistrate siting without a jury the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material so before the Judge or magistrate with such other materials as it may have decided to admit. The appellate Court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the Judge or magistrate with such other materials as it may have decided to admit. The appellate court must then make up its mind not disregarding the judgement appealed from but carefully weighing and considering it. When the question arises, which witness is to be believed rather than another and that question turns on manned demeanor, the appellate court must be guided by the impressions made on the Judge or magistrate who saw the witness whom the appellate court has not seen. On second appeal it becomes a question of law as to whether the first appellate court in approaching its task, applied or filed to apply such principles' – see also Shantilal M. Ruwala Versus Republic, (1957) E.A. 570".***

These principles form the corner stone and power of an appellate court when faced with an appeal from a subordinate court.

At this juncture I will now examine the evidence and the submissions to establish whether the appeal carries any weight as to warrant setting aside the conviction and sentence.

The way I see the position of the appellant counsel the issue is whether the Senior Resident Magistrate was right in recaching a decision on conviction that the prosecution proved its case against the appellant on the offence of defilement beyond reasonable doubt.

This court must therefore re-examine the evidence and answer to the question of prove and the ingredients of the offence required to sustain a conviction.

It is trite that the offence of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act is proved when the following elements exist.

(a) Penetration act of a male human being into the genitalia of a female or minor aged below the age of 18 years.

(b) That for purposes of the offence age of the victim has to be proved beyond reasonable doubt

(c) That the offender before court has been positively identified as the one who committed the offence.

A closer view and analysis of each element would be appropriate in this appeal

(a) The first element is that of penetration

Section 2 of the Sexual Offences Act defines penetration in the following language:

> **"penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person".**

The purposes of the enactment of the Sexual Offences Act 2003 was to consolidate most of the sexual offences into a single legislation and to address the deficiencies in the law. The Act therefore covers vast range of sexual behavior that are criminalized in Kenya in the context of criminal acts of sexual assault. One such offence is that of defilement.

Penetration as defined under section 2 of the Act is not limited to the genitalia but also the penetration of the anus of the victim. It is noted therefore it would not be wrong to state that penetration occurs when the penis either partially or wholly enters the vulva or between the labia majora of the female genital organ. In the same vein, when the penis reaches entry to the anal opening penetration is presumed to have taken place. It is also well settled in law that the victim of sexual intercourse need not suffer vaginal or anal injury as a condition precedent to prove penetration.

When evaluating this case, the appellant and the complainant were alone in the house where the offence took place. The complainant graphically stated on how she was forcibly undressed and the appellant put his penis into her private parts. The mother of the complainant who testified as PW2 was to be informed of the ordeal in the afternoon. This followed a physical examination of the inner wear which had reddish substances.

According to PW2 testimony there was prima facie evidence that the complainant had been sexually assaulted. As it appears from the clinal officer's report in the P3 form exhibit 3 he was confirmed that the complainant had bruises on the labia minora. The firm conclusion was that the complainant had been sexually assaulted.

The appellant's defence did not controvert the version given by PW1 as corroborated and consistently supported with the testimony of PW2 and PW3.

Following the decision in **Twamoi Versus Uganda 1967 EA** case the testimony by the complainant has been corroborated by material evidence of the Clinical Officer PW3 who prepared the P3 and also PW2 who saw the inner wear of the complainant in the first instance.

In my conceded view the complainant's testimony and that of PW2 and PW3 proved certainly that penetration occurred.

(b) The age of the child

I agree with the respondent's case on the importance of prove of age in defilement cases under the Sexual Offences Act. The law upon this matter is plain as understood in the case of **Joseph Kiet Seet Versus Republic 2014 EKLR**.

> **"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni – Versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus: In defilement case, 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 also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"**

According to the testimony of PW1 and PW2 the age of the complainant at the time of the offence was aged 11 years. The birth certificate admitted an evidence as exhibit 1 is unequivocal on the exact age of the complainant. Our examination of the evidence reveals that the appellant had carnal knowledge of the complainant through force while knowing she was incapable of consenting to the act. This is an offence which does use respect age of the victim. The trial court did not fall unto error when it established that the complainant was a minor aged 11 years as per the birth certificate.

(c) Identification of the appellant

Was the identification free from reasonable doubt. The law on identification by a single witness has been clearly illustrated in the cases of **Abdala, BinWendo Versus Republic 1953 20 EACA 166, Republic Versus Turubulki Peter Musau Mwanzia Versus Republic 2008 EKLR**. In these cases, it is a trite that a fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with greatest care.

There are two pieces of circumstantial evidence connecting the appellant with the crime. The appellant according to PW2 presumably cohabited together as husband and wife. In the morning hours PW2 had left for work leaving both the appellant and complainant at home. Thus, the appellant was the only male adult member of the family in the residence where the sexual offence took place. In the course of the day PW2 sought permission from work for reasons of being taken ill. On arrival at home she was approached by PW1 and told how the appellant inserted his penis into her vagina.

The appellant unsworn defence did not displace him from being at the scene of the crime. The appellant having been confronted with the prosecution evidence on recognition and being present at the scene did not cast any doubt that he was in the house where the defilement took place. If the appellant had an alibi defence to the offence nothing could have been easier than providing such particulars in his defence.

This is more so where opportunity in commission of a crime can afford to be conclusively said to be corroboration. The court of appeal for **Eastern Africa in the case of Republic Versus Erusani Sekni & another 1947 EACA** where the court adopting Lord Dunedin on the value of opportunity in the following passage:

> ***"this idea has been expressed in the Scottish case Dawson Versus Mckenzie 45 S.L.R.p. 474 by Lord Dunedin, where he says; mere opportunity alone does not amount corroboration, but two things may be said about it. One is that the opportunity may be of such a character to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves amount to corroboration".***

It is important to note that the in the circumstances of this case the appellant was in the house with the complainant alone on the material day. He therefore had the opportunity, time and facilities to commit the offence.

In view of the foregoing this court finds that the appellant was positively recognized and placed at the scene of the defilement. On the other hand, the appellant attacked the lower court judgement on the basis that treatment notes and non-presentation of the inner wear violated the case for the state.

I have appraised and weighed the testimonies of witnesses PW1 – PW4 for the state. The observation I make is that the absence of treatment notes to accompany the P3 is not fatal to the prosecution case. The credibility of PW1 as to the sexual assault has not been infringed by the defence. According to PW1-PW4 on the events that transpired after the alleged defilement remains unchallenged. I am not persuaded by the defence that the testimonies of the prosecution witnesses reveal such inconsistencies or contradictions that bear upon the elements of the defilement against the complainant. It should be noted that for a discrepancy or inconsistent of the evidence to serve as a ground to discharge or acquit an offender it must be of a nature significant enough to resolve the benefit of doubt in his favour. Unfortunately, that is not the case in this appeal.

One of the grounds relied on this appeal is that the appellant could not understand the language used in the trial. The issue of language as an element of a right to a fair hearing is so fundamental in the identification of justice that it found a place in our constitution under article 50 (2). The appellant in his quest to have this appeal quashed submitted that he did not understand the language and mode of communication of the trial court.

It is a fundamental right for every accused person before court to be provided with services of an interpreter to translate the evidence and proceedings to him. This is clear from Article 50 2(m) of the constitution.

Section 198 of the CPC is even more precise and it states:

> ***"Whether any evidence is given in a language not understood by the accused and he is present in person it shall be interpreted to him in open court in a language which he understands".***

I have considered this complaint and also perused the record. It clearly shows that the appellant pleaded not guilty to the charges. The prosecution summoned four witnesses and also provided documentary evidence. The proceedings indicate that the appellant fully participated in cross-examining the witnesses where applicable. When it came to his turn to state his case, the appellant opted to give unsworn evidence.

The words in a language he understands are crucial and it is the duty of the trial magistrate to ascertain by making an inquiry before plea or trial. The language confirmed as being understood by the accused because the one to be used throughout the proceedings.

In this case there is reference to the magistrate record that the language of interpretation at the time of plea was Swahili while the notes were taken in English. Indeed, the record demonstrates that the accused freely understood the proceedings. The standard practice is not to indicate in each piece of proceedings and evidence that the language used is Borana, Kisii, Kikuyu or Swahili. The statutory compliance is to identify the language of interpretation instantly before commencement of any action.

I have also had the advantage of meeting the appellant in the course of preparation and waiting his appeal to be determined. He struck me as a man who is aware of his environment and can articulate his course whenever a need arises. This can be exemplified from the record of appeal where he sought the services of an intermediary. To me he was preparing the court that at an opportune time that aspect will be a basis to demonstrate that he had a language barrier.

Having considered the record and submissions before, I do not find any merit in the ground on language being an issue at the trial. I therefore dismiss it.

Sentence

In a trial sentence follows the order on conviction. The statutory provisions an offender is alleged to have violated prescribed corresponding penalties. In the present case, the applicant was charged and convicted of the offence of defiling the complainant aged 11 years contrary to section 8 (2) of the Act. Under section 8 (3) any person found guilty of defilement and the complainant child is aged below 11 years shall be liable to serve life imprisonment. One can imagine the citizen frustration with the courage of sexual offences against children of tender years by adults. Parliament in responding to cries of the Kenyan people through the sexual offences Act No. 8 of 2001 legislated for minimum sentences as a solution to the problem.

It is not in dispute that courts have continued to pass the minimum sentences against offenders found guilty of defilement. The most

disappointing aspect of these sentences is that the sexual predators have not been deterred with the mandatory minimum sentences. With these in mind it is high time the legislature and the country to go to the drawing board to address the root causes of defilement offences. However, as we await a National discourse on this, courts will continue applying and interpreting the law as a constitutional mandate in the administration of justice.

As for this appeal the guiding principles are found in the case of **Ogalo S/O Owuora Versus Republic 1954 24 EACA** where it was held that:

> ***"an appellate court has the power to interfere with the sentence passed by the trial court. If there is evidence that the learned magistrate or Judge acted on wrong principles, overlooked some relevant material or factors or that the sentence passed is illegal or manifestly excessive or punitive or too low as to occasion a miscarriage of justice"***

Applying the above principles to the present appeal, the sentence of life imprisonment for the offence of defiling of an eleven-year-old minor is a mandatory minimum sentence. It is therefore clear that this curt has no power or the jurisdiction to interfere with a lawful sentence.

In all these circumstances, I have come to the conclusion that the appeal as filed lacks merit on both conviction and sentence. The result is that the appeal is dismissed and the judgment of the lower court dated 1st July 2016 affirmed.

Dated, delivered and signed in open court on this day of 4th June 2018.

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R. NYAKUNDI

JUDGE

Representation

Mr. Akula for the State – present

Mr. Itaya for Ms. Mageto

Appellant - Present

Mr. Mateli - Court Assistant