REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 70 OF 2017

FREDRICK ARUNA MUDERI...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(JUDGMENT)

(from the original conviction and sentence by T.A. Odera, SPM in Mumias SPMC S.O. No. 9 of 2016 dated 6th July 2017)

1. The appellant herein was convicted of the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act, Act No. 3 of 2006 and sentenced to serve 20 years imprisonment. He was aggrieved by the sentence and the conviction and filed this appeal. The grounds of appeal were contained in a petition of appeal dated 11th July 2017 and in a supplementary grounds of appeal dated 1st May 2017. The grounds of appeal can be summarized into that:

1. The learned trial magistrate erred in law and in fact by basing the conviction and the sentence on a defective charge.

2. The trial magistrate erred and or misdirected herself in law and in fact in finding that the charge of defilement was proved without observing that penile penetration was not mentioned in the medical findings of the clinical officer and neither was the medical evidence adduced conclusive or adequate.

3. The trial magistrate erred in law and in fact in believing the evidence of the complainant on cohabitation with the appellant when there was no independent evidence to render credence to the complainant's evidence to that effect.

4. The trial magistrate gravely misdirected herself in law and in fact in convicting the appellant in light of inconsistent, fabricated and suspicious evidence of the prosecution.

5. That the trial magistrate erred in law and in fact in presiding over a trial that did not meet the standards of Article 50 of the constitution, especially the right to be informed of legal representation and access to witness statements.

2. The particulars of the charge against the appellant were that between the 27th December 2015 and 8th February 2016 at [Particulars withheld] village in Mumias township in Nabongo Location Mumias sub county within Kakamega County he intentionally caused his penis to penetrate the vagina of E.I.(herein referred to as the complainant) a child aged 15 years.

Prosecution case

3. The evidence for the prosecution was that the complainant was at the material time a 15 year old class 8 pupil at [Particulars withheld] in Nambale. She was living with her parents. That on the 23/12/2015 she was at Nambale market when the appellant who was unknown to her approached her and introduced himself to her. The appellant requested her to be his girl friend. He then asked her to accompany him to Mumias. They arranged to meet on 25/12/15. The complainant went to spend the night at her grandmother's home at Mungatsi.

4. On 25/12/15, the two met at Mumias town. The appellant took the complainant to his house at [Particulars withheld] estate. The appellant locked her in the house and went away with the key. He returned to the house at night. They had sexual intercourse. On the following day he locked her in the house and went away. He continued to lock her in the house for days. She pleaded with him to let her go home but he did not listen. She stayed in the house till 8/2/2017. They would have sex on most of the days. On 8/2/16 the appellant forgot the key to the house on the table. The complainant gave the key to children who were playing outside who unlocked the door for her. She got out and went to Mujini centre where she met with the appellant. The appellant wanted to return her to the house but she declined. She told him that she wanted to go to her parents' home. He gave her shs.100/= for fare. She went home where she met her parents. She told her mother P.W.2 of the ordeal that had befallen her. Her mother had by then reported the disappearance at Kisoko Administration Police Post and at Nambale Police Station. When the girl returned home her mother reported to Mungatsi police post and at Mumias Police Station. The case

was investigated by P.C. Otieno P.W.4 of Mumias police station. The complainant led policemen and the complainant's mother to the house of the appellant. They did not find him in the house. They instead found a woman who said that she was a wife to the appellant. The complainant was issued with a P3 form. She was taken to Matungu sub county hospital where she was examined by a clinical officer P.W.3 who found that the hymen was broken but not recent. There was no other finding. The appellant was on the 13/2/16 arrested by a community policing volunteer P.W.6 who took him to Mumias Police Station. P.C. Otieno P.W.4 charged him with the offence.

5. During the hearing P.C. Otieno produced the complainant's birth certificate as exhibit, Pexh 1. It indicated that she was born on 16/11/2000. The clinical officer produced the treatment notes and the P 3 form as exhibits, Pex 2 and 3 respectively.

Defence case

6. When placed to his defence the appellant stated in an unsworn statement that he resides at Manyatta in Bomani. That he was a hawker of clothes materials in Mumias town. That in October 2015, the complainant's mother bought clothes materials from him and remained with a debt of Ksh.359 which she promised to pay. He called her on several occasions but she did not pay. Later she threatened him with dire consequences. That on 19/12/15 he received a report that his paternal grandmother had died. His neighbours at the plot where he was staying raised money for the funeral. They gave the money to Ben Mark Mackenzie D.W.2 to accompany him to the funeral at Kapsabet. He and Ben went for the burial. He returned to Mumias on 1/2/16. The complainant's mother then called him. He told her to send him the money. She said that she would bring it. On 13/2/16 he was at the gate to St. Mary's Hospital when he met Swalleh P.W.6 who told him that he was required at Mumias Police Station. He accompanied him to the police station. On getting there he was locked up. He was charged with defilement. When in the cells, the complainant's mother went there and mocked him up by asking him whether he had now known her as she had earlier told him.

7. The appellant's witness Ben Mark Mackenzie D.W.2 testified that the appellant was a neighbour at Manyatta. That on 19/12/15 they received a report that the appellant's grandmother had died. They had a welfare group in the plot for raising money for funerals. They raised money for the appellant. On 23/12/15 he and the appellant left for the funeral at Kapsabet. They stayed there upto 2/1/2016 when they returned to Mumias. On 13/2/16, he DW 2, got information that the appellant had been arrested.

Findings of the trial court

8. The trial magistrate found that the complainant was aged 15 years as the birth certificate indicated that she was born in the year 2000. The magistrate dismissed the alibi defence of the appellant because the defence was contradicted by his witness D.W.2 who said that they returned to Mumias on 2/1/16 while the appellant said that they returned on 1/2/16. The magistrate found the complainant to be a credible witness and saw no reason why the complainant would lie against the appellant. She dismissed the appellant's defence that the matter was fabricated by the complainant's mother over an unpaid debt. She held that there was sexual intercourse between the appellant and the complainant and therefore that the case against the appellant was proved beyond all reasonable doubt.

Submissions

9. The appellant made written submissions. The state did not make submissions but supported the conviction and the sentence while relying on the record of the lower court.

10. In his submissions the appellant stated that the charge was defective in that it was purported that the offence committed was under Sections 8(1) (3) of the Sexual Offences Act while there is no such single offence under the Act. That the charge would have been sufficient if it would have read "Contrary to Section 8(1) as read with Section 9(3)". Therefore that the charge was incurably defective.

11. That the absence of hymen alone and it not being recently broken was not sufficient proof of penetration by the appellant. The appellant was not examined so as to corroborate the findings made by the clinical officer on the complainant. That the evidence regarding penetration was not sufficient as there was no evidence of penile penetration.

12. That there was contradiction between the evidence of the prosecution witnesses. That Corporal Otieno P.W.4 stated in his evidence that the house he was led to by the complainant did not have a window while the complainant alleged that the house she was detained in had a window. Therefore that the issue of the house, if any, where the complainant was detained remains unresolved. That no neighbour to the said house was called to testify nor the landlord. The issue thereby remains only the word of the complainant against the word of the appellant. Therefore that the whereabouts of the complainant were not adequately established.

ANALYSIS AND DETERMINATION

13. This is a first appeal. It is the duty of a first appellate court to analyze and re-examine the evidence adduced before the lower court and draw its own conclusions while bearing in mind that the trial court had the benefit to see and hear the witnesses testify - See **Kiilu Vs Republic (2005) IKLR 1974.**

14. The appellant was charged with defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. I agree with the submissions by the appellant that there is no single offence under the Sexual Offences Act that can be referred to as Section 8(1) (3) as the subsections 8(1) and 8(3) are separate. Subsection 8(1) creates the offence of defilement where it says that " a person who commits an act which causes penetration with a child is guilty of an offence termed defilement" while subsection 8(3) creates the punishment for the offence when it says that "a person who commits an offence with a child between the age of twelve and fifteen years is liable to imprisonment for a period of not less than 20 years. The proper charge should therefore have read "contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act". The charge was therefore defective in that it tended to create one single offence under Sections 8(1) (3) of the Sexual Offences Act when there is no such offence under the Act. I am however of the considered view that the wording of the charge did not cause injustice to the appellant. It was clear from the charge that the appellant was being charged contrary to subsections 8(1) as read with 8(3) of

the Act. The defect in the charge is curable under Section 382 of the Criminal Procedure Code that states that:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error,. Omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:"

There was no failure of justice by the defect in the charge and the appellant did not suffer any prejudice.

15. The appellant submitted that the medical evidence adduced in the case was not conclusive that the complainant had been defiled. The report by the clinical officer only indicated that the hymen was broken though not recently broken. I agree with the submission that the absence of hymen by itself did not prove that the appellant had defiled the complainant. However lack of conclusive medical evidence does not mean that one cannot be convicted of defilement. In **Geofrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010** cited **in Dennis Osoro Obiri Vs Republic (2014) eKLR** the court of Appeal held that defilement can be proved even in the absence of medical evidence if the trial court believes the evidence of the victim. Said the court:

> "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 of Kenya, 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."

In view of the proviso to Section 124 of the Evidence Act, the question was whether the court believed that the complainant in this case was telling the truth that the appellant defiled her in the alleged period.

16. The appellant alleged that the charge of defilement was fabricated by the complainant's mother due to a debt that the complainant's mother had refused to pay him and had threatened him over. The trial magistrate considered the issue and said that the complainant's mother was surprised when the appellant asked her about an outstanding debt. The complainant's mother in her evidence in the lower court stated that she did not know the appellant before the day he was arrested. That on that day her daughter had taken them to the house of her defiler but they did not find the person in the house. That on their way back her daughter saw the appellant and pointed him out to police officers. He was then arrested. She denied in cross examination that on 15/10/15 she entered into an agreement with the appellant to led her money.

The trial court dismissed the appellant's defence that the charges were fabricated by the complainant's mother due to an outstanding debt.

17. The complainant stated in her evidence that she did not know whether her mother had a grudge against the appellant. She denied in cross examination that her mother had couched her in her evidence against the appellant.

18. It is apparent that it is the complainant herself who mentioned the appellant as the person who had defiled her. It is not her mother who did so. The appellant took her mother and policemen to the house of her defiler. There was thereby no reason to side with the appellant that the charges were fabricated due to a grudge with the complainant's mother over a debt. The complainant did not know of any debt between the appellant and her mother. There was nothing in evidence to indicate that the complainant was couched in her evidence by her mother. The trial court was therefore correct in dismissing the defence evidence that the case was a fabrication due to an outstanding debt.

19. The appellant submitted that the prosecution evidence was inconsistent, farfetched and suspicious. That the complainant stated that the house she was defiled in had a window while Cpl Otieno P.W.4 stated that the complainant was detained in a house which had no window.

20. The complainant testified that she led her mother and policemen to the appellant's house. They did not find him in the house but they found a girl who said that she was a wife to the appellant. The complainant's mother P.W.2 testified to the same effect. Swalleh P.W.6 stated that he was upraised of the matter by the OCS, Mumias Police Station who requested him to arrest a person by name Fred. He met the complainant and her mother. The complainant led him to the house of the said Fred at Mujini estate. He and a colleague twice went to the house of the appellant but they did not find him. The girl saw the person on the road and pointed him out to them. He was riding a motor cycle. They followed him to St. Mary's Hospital. The girl identified him to them and they arrested him. They took him to Mumias Police Station.

21. The complainant was categorical when she testified in court that the appellant is the person who had detained her in his house at [Particulars withheld] village and defiled her. The complainant stayed with the appellant for a period of one and a half months. It is not possible that she would mistake him for another person. It is apparent that the complainant took her mother, policeman and Swalleh to the appellant's house but they did not find him in the house. I do not think that the contradiction between her evidence and that of the investigating officer PW4 as to whether or not there was a window to that house was a crucial contradiction in the case that should lead to the evidence being dismissed. That the neighbours to the house where the complainant was detained were not called to testify was not a fatal omission in the case. Further Cpl Otieno stated that the neighbours to the appellant refused to record statements. It was therefore not the fault of the prosecution that the neighbours were not called to court to testify on the matter.

22. The appellant contended that the trial did not meet the standards of a fair trial as stipulated by article 50 of the constitution especially the right to be informed of legal representation and access to witness statements. The appellant did in the lower court raise the issue of not having been issued with witness statements and on the occasion when he did so, the case was adjourned with an order that he be supplied with the same. There is no evidence that he was not supplied with the same.

23. The trial court dismissed the alibi raised by appellant on the grounds that there was contradiction of the evidence of the appellant and his

witness DW2 as to the date they returned from Kapsabet. The appellant and his witness indeed contradicted each other as to the date they returned from Kapsabet. The appellant did not cross-examine any of the prosecution witnesses as to whether he was not at Mumias at the material time. The defence can only have been an afterthought. The fact that the defence gave contradictory evidence as to the date the appellant and his witness returned to Mumias was an indication that the defence was a fabrication. The trial court was thereby correct in dismissing the appellant's defence of alibi.

24. Upon a keen analysis of the evidence adduce before the lower court, I find that there was sufficient evidence to sustain the offence of defilement. The complainant was at the material time aged 15 years which was proved by the birth certificate. The complainant lived with the appellant for a period of 1 ½ months and positively identified him as the person who defiled her. The complainant was away from her home during that period. There was no reason to doubt that the person she was living with during that period was the appellant. The fact that the two were living together was sufficient corroboration to her evidence that the appellant had defiled her.

25. In the foregoing the charge against the appellant was proved beyond all reasonable doubt save that the conviction was under Section 8 (1) as read with section 8 (3) of the Sexual Offences Act, 2006. The sentence of 20 years imprisonment imposed on the appellant was the minimum sentence under section 8 (3) of the said Act. The appeal is thereby bereft of merit and is dismissed accordingly.

Delivered, dated and signed in open court at Kakamega this 18th day of September, 2018.

J. NJAGI.

JUDGE.

In the presence of:-

Appellant ……..…… acting in person.

Juma ……..…… for state.

George ….…… Court Assistant.

14 days Right of Appeal.