REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL 109 OF 2016

CHRISTOPHER SITATI FWAMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case number 31 of 2016 in the Principal Magistrate's Court at Sirisia - K. Mukabi (RM))

JUDGMENT

Introduction:

1. The Appellant was charged with two counts. The main count was defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 7th and 8th within Bungoma county, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of DNM a child aged 13 years.

2. He faced an alternative count of committing indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars were that on 7th and 8th day of July 2015 within Bungoma county, he unlawfully and intentionally caused his penis to touch the vagina of DNM a child aged 13 years.

The Appellant's Case:

3. Having been dissatisfied with the judgment the Appellant appealed to this court on the following grounds: That, the evidence adduced was contradictory and did not prove the Appellant's guilt. Further that the trial magistrate dismissed the defence and considered extraneous factors in reaching the decision.

4. The Appellant filed written submissions and argued that the names of the complainant as written in the charge sheet on the main count and the alternative count differed. That the names of PW2 and PW3 on the charge sheet and the names given when they testified were also different. In his view this defect went into the substance of the case.

5. The Appellant also asserted that there were inconsistencies in the prosecution case and that the court erred in relying on the evidence of PW1 alone which was not effectively corroborated. Further that the issue of penetration was not well addressed since PW1 was examined four months after the alleged act. The Appellant relied entirely on his written submissions and did not highlight or add anything orally.

The Respondent's Case:

6. Mrs. Njeru opposed the appeal for the prosecution and submitted that the difference in names and the omission of the third name was due to typographical errors. That such errors can be corrected under **section 382** of the **Criminal Procedure Code** and were not fatal to the case. On penetration counsel asserted that the mere fact of PW1 being confirmed to be pregnant automatically proved that a sexual act was committed.

7. On identification Mrs. Njeru submitted that the complainant explained vividly how the Appellant lured her behind the posho mill where he worked and defiled her. That upon promise of money the next day the complainant returned and the Appellant defiled her again. That PW1 stated clearly that the Appellant worked at the posho mill and used to pass by their home and as such he was properly identified. With regard to the issue of DNA counsel submitted that a DNA report is not compulsory in a case where there is other compelling evidence.

Summary of the Case in the Trial Court:

8. A total of 4 witnesses were presented by the prosecution. It was the evidence of PW1 -DNM- that on 7th July, 2015 at around 7pm she left home to go to a posho mill situated at [particulars withheld] market. From the posho mill the Appellant took her to his house behind the posho mill and defiled her. He told her to return the following day so that he could give her some money but when she returned he defiled her again. On 3rd November, 2015 she was taken to a midwife and was found to be pregnant.

9. PW2 Leonard M W testified that he is the father of PW1 and that on 31st October, 2015 he was at home when PW1 came back from school and he noticed that she was not looking well. He instructed his wife to take her to a midwife the following day and it was confirmed that she was pregnant. He made a report to the chief on 3rd November, 2015 and on 6th November, 2015 he reported to Malakisi Police Station. With the aid of the police the Appellant was subsequently arrested at the posho mill and charged.

10. In his defence the Appellant gave sworn evidence and called 1 witness. He testified that he could not recall the events of 8th July, 2015. Instead he narrated the events of 10th January, 2016 when he was at the posho mill working and the chief came and arrested him. He was taken to Mukwa AP camp where the police informed him of the defilement charges. He asserted that the complainant was a complete stranger to him. At the end of the trial the appellant was found guilty on the main count and was convicted and sentenced to 20 years imprisonment.

Analysis:

11. The main issue for determination is whether the offence of defilement against the Appellant was properly established beyond reasonable doubt. This being the first appellate court I'm tasked with the duty of reevaluating the entire evidence to draw my own inferences and reach my own conclusions giving due allowance for the fact that I did not have the advantage of hearing or seeing the witnesses testify. See - **Okeno vs. Republic [1972] E.A, 32**.

12. Three ingredients are key in order to prove the offence of defilement. These ingredients are so inextricably intertwined that the absence of any one of them is fatal to the entire case. See **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 which set them out as** follows**:**

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

13. On the age of the complainant she testified in court that at that time of the offence she was aged 13 years. PW2 produced a dedication certificate that indicated that the complainant was born on 14th March, 2002. PW4 the clinical officer also testified that he established the age of PW1 to be 13 years by examining her dental formula. There being no dispute raised as to her age, I am satisfied that the age of the complainant was effectively proved, and that she was a minor at the time of the offence.

14. On penetration a medical examination done on complainant by PW4 on 6th November, 2015 established that the hymen was broken and when she was subjected to a pregnancy test it indicated that she was with child. The pregnancy was 2 months old. HIV and syphilis tests were also done with negative results. The medical witness classified the injuries done to the complainant as harm.

15. The confirmation of pregnancy is a strong pointer to a sexual encounter. In her testimony during the trial the complainant told the court that the Appellant took her to his house and undressed her. He also undressed himself and placed his penis into her vagina. She said that she felt pain but did not raise an alarm.

16. The following day on 8th July, 2015 she returned to the Appellant's house and he had sexual intercourse with her again. To further support her evidence, PW4 in his report made the following remarks ***"Obvious evidence of penile penetration as evidenced by pregnancy and other physical findings".*** Other physical findings included absence of hymen. Penetration was therefore effectively established.

17. Identification of the assailant is the most difficult ingredient to establish in offences of this nature. The Appellant submitted that the trial magistrate erred in law and fact by relying on the evidence of a single identifying witness which was not well corroborated. From the record the complainant testified that on 7th July, 2015 she went to the posho mill at [particulars withheld] market to mill flour. The Appellant took her behind the posho mill to his house and defiled her. The Appellant then instructed her to return the following day with a promise to give her money but when she returned he defiled her again.

18. The Appellant contended that at the trial he asked the court to order for a DNA test to be done but this was not done. During cross examination he asserted that on 7th July, 2015 there were many people milling flour at the posho mill and that there are many shops around. He did not therefore understand why the chief singled out his premises. The Appellant called one witness DW1 B N who is his wife. She testified that the appellant did not defile anyone on the particular days in question.

19. For PW1 to return to the scene where she was defiled to collect her money indicates that she knew the place and the person to go to. PW1 was not a stranger to the Appellant and his posho mill. This was where she regularly milled flour as was admitted by the Appellant in cross examination during his defence. The Appellant stated that **"It could be the girl recognizes my face and I could have been fixed because she is a regular customer at the posho mill."** This admission that the complainant was a regular customer at the posho mill supports her evidence that they were known to each other. The complainant also testified that the Appellant usually passed by her home and he was therefore a person well known to her.

20. In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

> ***"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

21. The court notes that the instant case turns on the evidence of the minor as a single identifying witness. The Court of Appeal acknowledged in **Ogeto vs. Republic [2004] KLR 19** that a fact can be proved by a single identification witness, except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows: -

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."***

22. In the instant case the evidence of the complainant is very clear on where she was and what the Appellant did her. It is also clear that she was familiar with her assailant and the offence occurred in broad daylight. The complainant is a minor but **section 124** of the **Evidence Act** allows the court to convict on the evidence of a single witness even if that witness is a minor as long as the court is satisfied that the witness is telling the truth.

23. I have anxiously considered the grounds of appeal, the response from the learned state counsel and the evidence of the entire case and for the reasons set out above, I find that the learned trial magistrate considered all the relevant factors before arriving at the conviction. The appeal is therefore found to be without merit and is consequently dismissed.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 20TH DAY OF NOVEMBER 2018.

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S. N. RIECHI

HIGH COURT JUDGE