REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 203 OF 2015

CLEOPHAS WANJALA……..…….APPELLANT

VERSUS

REPUBLIC……..…RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case number 89 of 2014 in the Principal Magistrate's Court at Kimilili – D. Onyango (SPM) on 9th November, 2015*)

JUDGMENT

1. The Appellant **Cleophas Wanjala** was convicted and sentenced to a term of fifteen (15) years imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on the 13th of January, 2014 at [Particulars Withheld] location of Bungoma County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of B.N a child aged 16 years. (initials substituted to protect the identity of the victim).

2. The Appellant had faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. It had been alleged that on the same date and place, he intentionally and unlawfully touched the vagina of the said B.N.

3. The Appellant entered a plea of not guilty on 27th January, 2014 and following a full trial, he was convicted and sentenced to serve fifteen (15) years imprisonment. Being disgruntled, the Appellant lodged an appeal on grounds that he was not accorded a fair trial; that the two main prosecution witnesses being members of the same family, there was need for their evidence to be corroborated; that the arresting officer should have testified and that the defilement was not proved since no DNA testing was done.

4. The Appellant filed written submissions which he relied on entirely. On the issue of fair trial, he argued that the court record indicates that when Hon. D. Onyango took over the matter, he explained the requirements of **section 200** of the **Criminal Procedure Code** to the Appellant. The Appellant denied this and stated that the same record indicates that he was in custody and could therefore not have been present in court. He asserts that for that reason, he did not exercise the option to proceed with the case from where it had reached as the record shows.

5. The Appellant further stated that he was not afforded adequate time to prepare his defense and avail his witnesses and that he is merely being framed. He urged that the prosecution had failed to prove its case beyond reasonable doubt and asked the court to allow the appeal and quash the conviction and sentence.

6. Mr. Oimbo learned state counsel opposed the appeal on behalf of the Respondent and urged the court to uphold the conviction and sentence of the trial court and consequently dismiss the appeal.

7. I have analyzed and re-evaluated the evidence on record, bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record, to see if there was some evidence to support the lower court's findings and conclusion, but to draw its own inferences and reach its own conclusions. At all times however, I am alive to the fact that I did not have the advantage of seeing and hearing the witnesses as they testified and have given due allowance therefor. In this I am guided by the case of **Kiilu and Anor vs. Republic [2005] 1 KLR pg 174**, in which the court of appeal (Tunoi, Waki & Onyango Otieno JJ A) held *inter alia* that:

> **"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 courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions"**

8. The critical ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant. I will proceed to interrogate whether these three ingredients were fulfilled at the trial to sustain the charge of defilement against the Appellant.

9. On the issue of the age of the Complainant, she testified that she was 16 years old at the time of the offence, and was a form one student at [Particulars Withheld] Secondary School. This was corroborated by PW2 the Complainant's mother, who testified that the Complainant was born in 1998 and was therefore 16 years old at the time of the offence. A birth certificate of number [Particulars Withheld] produced before the trial court indicates that the Complainant was born on 13th December, 1998. The birth certificate is conclusive as to the age of the Complainant.

10. On the issue of proof of penetration, Mr. Oimbo submitted that the evidence of PW1 proved this to the required standard. That she explained how she was defiled by the Appellant which evidence was corroborated by that of PW5, the Clinical officer who examined the Complainant at Kimilili District Hospital.

11. The Appellant argued that no DNA test was done on him and the evidence on record can therefore not sustain a conviction. In rebuttal, Mr. Oimbo cited **section 36(1)** of the **Sexual Offences Act** which states that the court "may" order for a DNA test and that it was therefore not a mandatory requirement. **Section 36(1)** states *inter alia* that:

> **"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed the offence."**

12. In the case of **Peter Muturi Njunguna vs. Kenya Wildlife Service Civil Appeal 260 of 2013 [2017] eKLR** the court of appeal (Waki, Nambuye, Kiage JJ.A) stated that ordinarily the word "may" is permissive and not mandatory but the contextual meaning would vary with the intention of the drafters. The appellate court further cited the Australian case of **Johnson's Tyne Foundry Pty Ltd vs. Maffra Shire Council (1948) 77 CLR 544 at 568** in which Williams, J stated thus:

> **"'May' unlike 'shall', is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as 'shall' which is a mandatory word, may be deprived of the obligatory force and become permissive in the context in which it appears."**

13. In the instant case, the use of the word "may" is permissive. This was stated in the case of **AML vs. Republic Criminal Appeal 74 of 2011 [2012] eKLR** in which Odero J observed thus:

> **"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**

14. The evidence on record indicates that PW3 an Administration Police officer attached to Kimilili Police Station took the Complainant to Kimilili District Hospital for examination. The Complainant was examined by PW5 a clinical officer at the hospital.

15. The Complainant testified that the Appellant forced her to have sex with him. That they engaged in sexual intercourse only on the first day after which he locked her in his house and warned her not to shout. She did not escape because the Appellant had threatened to kill her if she did.

16. PW5 told the trial court that the Complainant was presented to him with a history of defilement by a person well known to her. On examination, he found that the Complainant had no hymen and there was vaginal discharge. He relied on his clinical notes to fill the P3 form which he then signed. He produced both documents before the trial court.

17. In the premise therefore I find that the requirement of penetration was conclusively proved. Further, the Complainant testified that the Appellant is a person well known to her. That she is a friend to the Appellant's sister who she identified as B. This amounts to positive identification of the Appellant as the assailant. As such, all the three essential requirements necessary to sustain a conviction of defilement were proved.

18. The Appellant argued that crucial witnesses were not called to testify before the trial court and that those who testified came from the same family. The record indicates that the prosecution called four (4) witness: the Complainant PW1, the Complainant's mother PW2, the Investigating Officer PW3, and the clinical officer PW4. The Appellant's allegations that the prosecution witnesses came from the same family have no basis and would not bar the prosecution from calling them even if they were. Further, **section 143** of the **Evidence Act** provides that no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact.

19. On the issue that the trial court failed to consider the Appellant's defence and mitigation, the record shows that the Appellant was put on his defence as required by law, whereupon he chose to give unsworn testimony without calling any witnesses. The trial court then assessed the evidence and found that the Appellant had not cast doubt on the prosecution's case or rebutted the evidence tendered by the prosecution. At the end of the trial, the Appellant was convicted and in his mitigation, the Appellant stated "*I am an orphan. I pray for leniency*". The record further indicates that the trial court considered the Appellant's mitigation in arriving at the sentence.

20. The Appellant is categorical that his right to a fair trial under **section 200** of the **Criminal Procedure Code** was contravened. In opposition, Mr. Oimbo submitted that the Appellant's case was heard by two and not three magistrates as alleged. That Hon. Nanzushi heard the whole of the prosecution case while Hon. D. Onyango heard the defence case after applying **section 200** of the **Criminal Procedure Code** as reflected on the record.

21. For avoidance of doubt, **section 200** of the **Criminal Procedure Code** provides *inter alia* that:

"(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

(a) …

(b) …

(2) …

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by the predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

22. I do note that from the record, it is clear that the prosecution case was heard entirely by Hon. Nanzushi. The matter was then taken over by Hon. Sagero who heard the defence case entirely. The record further indicates that when Hon. Sagero took up the matter, **section 200** of the **Criminal Procedure Code** was explained to the Appellant who opted to have the case proceed from where it had reached. The trial court proceeded to rule on the matter and directed that the case would proceed on the basis of the evidence on record.

23. What is in dispute however is whether or not the Appellant was present in court at the time, since as pointed out by the Appellant, the record indicates that "*accused in custody present*". It is noteworthy however that from the record, even on the date on which the Accused gave evidence in his defence, the record indicates that "*accused in custody present*". In the context of the proceedings, the phrase "*accused in custody present*" merely seeks to distinguish him from an accused person who is out on bond and is present. It does not mean that he was locked away and was absent from the court during trial.

24. In the present circumstances it is important to interrogate whether the Appellant was prejudiced in any manner having been convicted upon evidence that was not wholly recorded by the convicting magistrate.

25. Having subjected the entire record to a fresh scrutiny, I find no contradictions which if resolved in the Appellant's favor would create doubt in the prosecution's case. The Appellant's defence merely alluded to the events surrounding his arrest and did not in any way dent the prosecution's case. In this regard, I find that the evidence adduced against the Appellant was sufficient and that the trial court evaluated it properly to reach its finding.

26. This being the first appeal, I considered and re-evaluated the evidence adduced by witnesses as pertains to each of the grounds advanced by the Appellant to arrive at my own independent decision, whether or not to uphold the conviction of the Appellant. In drawing my own conclusion, I was cognizant of the fact that I neither saw nor heard the witnesses as they testified and gave due allowance therefor. – See **Odhiambo vs. Republic Criminal Appeal No. 280 of 2004 [2005] 1 KLR**.

27. In sum, I have considered the appeal at length and find that the evidence on record was sufficient to sustain the conviction against the Appellant on the charge against him. Further, since I have established that the Complainant was aged 16 years at the time of the offence as evidenced by her birth certificate, I find that the sentence is proper as by law established. Consequently, I find that the appeal is lacking in merit and is therefore dismissed. I uphold both conviction and sentence as determined and imposed by the trial court.

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

L. A. ACHODE

HIGH COURT JUDGE

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

S. N. RIECHI

HIGH COURT JUDGE