REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 122 OF 2015

BETWEEN

FREDRICK WESONGA MUCHERE....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from original conviction and sentence dated 21.10.2015 by Hon. S. K. Ngetich, SRM in Mumias SPMC Criminal Case (SO) no. 678 of 2014)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGEMENT

INTRODUCTION

1. The appellant herein, Fredrick Wesonga Muchere was charged with the offences of ***defilement contrary to Section 8 (1) (4) of the Sexual Offences Act,*** particulars being that on the 7th day of July 2014 at Lubanga Village, Matungu District within Kakamega County, he intentionally caused his penis to penetrate the vagina of G.O, a child aged 17 years.

2. The appellant also faced an alternative count of committing an ***indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.***It was alleged that on the 7th day of July 2014, Matungu District within Kakamega County the Appellant intentionally caused his penis to come into contact with the vagina of G.O, a child aged 17 years.

3. The Trial Magistrate convicted the Appellant of the offence of ***defilement contrary to Section 8 (1)(4) of the Sexual Offences Act*** and sentenced him to 20 years imprisonment.

The Appeal

4. Being dissatisfied with the conviction and sentence, the Appellant lodged this of appeal which is premised on three grounds:-

> **1. That the Trial Court erred in law and in fact in convicting and sentencing the Appellant to the effect that the Complainant's health card produced to be relevant and an accurate document to show the date of birth of the complainant to be 17 years old.**
>
> **2. That the trial Court erred in law and fact in convicting and sentencing the appellant that he had committed an act which causes penetration with the alleged victim without relying on facts produced before court.**
>
> **3. That the trial Magistrate erred in law and facts by relying on the evidence of PW3 and PW5 when the conditions were not favourable for proper and positive identification.**

Duty of this Court

5. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at

its own independent conclusions. See ***Okeno Vs Republic [1972] EA 32.***

6. In ***Kiilu & Another Vs. Republic [2005]1 KLR 174***, the Court of Appeal stated thus:

> **"1. 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 Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."**

7. Similar views were reiterated in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR.*** This Court is guided accordingly.

The Prosecution Case

8. The prosecution called 6 witnesses. Evidence was led that on the 7th July 2014 at about 6.00pm while the Complainant was fetching water at Kodolo river, the Appellant accosted her while armed with a panga pulled her from the river forcefully removed her trouser and threatened to cut the complainant if she did not agree to have sexual intercourse with him. The Complainant testified that she tried to fight him off but he overpowered her, pulled his trousers and pant down and slept on top of her and inserted his "**Dudu"** in her vagina. She stated that after he was done, he got up and ran away.

9. PW5 testified that on the date and at the time of the alleged incident he met the Appellant walking briskly from the river with a panga in his hand .He stated that he heard noises from the direction where the Appellant was coming from and when he went there he found the complainant crying and stating that the Appellant had defiled her.

10. The incident was reported the next day at Mumias police station and the Appellant was arrested.

11. PW4 Nelson Lutta a clinician at St Mary's hospital, testified that he examined the Complainant on 7th July 2014.He stated that the hymen was broken and that she had cervical discharge and epithelial cells were seen during the high vaginal swab test.

The Defence case

12. By a ruling dated 23rdJuly 2015 the accused was found to have a case to answer and accordingly put on his defence. He testified that he did not commit the offence and that he was just arrested by the police and informed of the accusations. In cross examination he stated that he was with his family on the date of the alleged incident and that he did not commit the offence.

Submissions

13. The Appeal proceeded by way of both oral and written submissions. In his submissions, the Appellant challenged the manner in which the Trial was conducted, alleging that his rights as envisaged under ***Article 50 2(g),(h) and (j)*** had been violated.

14. He also challenged the complainant's evidence on his identification and the proof of penetration stating that there was no medical evidence to prove the same as the document produced stated that the complainant had no bruises on her vaginal wall.

15. The Appellant further challenged the evidence adduced by the prosecution stating that the prosecution did not call some crucial witnesses in support of their case. Regarding sentence the appellant submitted that the same was too harsh in the circumstances.

16. The State opposed the Appeal. Mr Juma, Prosecution counsel, submitted that the trial was proper and that all the elements of the offence of defilement were proved. He further submitted that the appellant was properly identified by two witnesses as the assailant and thus identification was not an issue. Regarding sentence, counsel for the respondent urged this court not to interfere with the same, contending that the circumstances of the offence were aggravated in nature.

Issues, Analysis and Determination

17. The issue for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, whether the Appellant's rights as envisaged under ***Article 50(2) (g),(h) and (j)of the Constitution*** were violated and the recourse thereto and whether the ingredients of the offence of defilement were proved.

a) **whether the Appellant's rights as envisaged under Article 50 2(g), (h) and (j)of the Constitution were violated and the recourse thereto**

18. The Appellant submitted that his rights were infringed with regard to the issue of legal representation. In ***Karisa Chengo & 2 Others V R, Cr Appeal Nos. 44, 45 & 76 of 2014,*** it was stated:

"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result; and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

19. Essentially therefore, it is not in every criminal case that the state is under a duty to avail legal representation to an accused person. The court dealing with the matter, unless it is a case of murder or ***robbery contrary to section 296(2) of the Penal code,*** will consider various other factors before reaching any conclusion as to whether the accused person's rights to a state-funded advocate were breached. The Supreme Court in ***Republic Vs. Karisa Chengo And 2 Others (2017) eKLR*** set out some guidelines to assist courts in determining whether an accused person ought to be availed an advocate at state expense.

20. In the case of ***Nicholas Tambula V Republic [2018] eKLR*** the court held that:-

"10. The Appellant submitted that his right to fair trial was violated as provided for by Article 50(1) & (2) of the Constitution. The Appellant in his appeal stated that more particularly his rights under Section 50(2) (g) & (h) were infringed. The said provisions provide that:

(2). Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

11. The Supreme Court whilst interpreting Article 50(2)(h) in Republic v. Karisa Chengo & 2 Others[2017] eKLR expressed itself as follows:

"...the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

21. Also see ***Meshack Juma Wafula V Republic [2019] eKLR*** in which the court held the view that an accused person would be entitled to the services of an advocate if it is in the interest of ensuring justice, or if the situation requires it. In other words, an accused person would be entitled to the services of an advocate if it is shown that substantial injustice would occur if he has no advocate. The court also held, and rightly so, in my view, that the right to legal representation is not absolute.

22. The Appellant herein was an adult at the time of trial. When the matter was slated for hearing he indicated that he was ready to proceed and as a matter of fact he proceeded with the case in accordance with all laid down procedures for a proper trial.

23. At no point during trial does the Appellant seem to struggle in conducting the case,neither does he tell court that he is unable to understand the proceedings. It is thus my considered view that despite the fact the Appellant was not informed of his right to legal representation and was not availed a state funded advocate the failure to do so did not in any way cause substantial injustice to him. I therefore dismiss this ground of appeal.

24. Further the Appellant states that he was not given witness statements to enable him prepare for trial. The court records of the 7th August 2014 indicate that upon the Appellant's request, the court ordered that the witness statements be availed to the Appellant before hearing. On the hearing date Appellant indicated that he was ready to proceed with the case. No further complaints were made by him with regard to noncompliance with the said orders which can only mean that he was supplied with the copies of the statements. I therefore find and hold that the Appellant's averments that his rights as envisaged under ***Article 50 2 (j)*** were breached are a mere afterthought.

b) **Whether the ingredients of the offence of defilement were proved by the prosecution**

25. The Appellant herein was charged with the offence of ***defilement contrary to Section 8 (1) (4) of the Sexual Offences Act*** with an alternative charge of c***ommitting an indecent Act with a Child contrary to Section 11(1) of the Act.***

26. The above provisions require the prosecution to prove first that the victim is a child within the meaning of the Act and as defined under the Children's Act, 2001. Second that there was penetration and third that the appellant herein is the one who caused the penetration. The case of ***Dominic Mwilaria V Republic [2018] eKLR*** addressed these issues.

a) Age of the Complainant

27. The Complainant testified that she was aged 17 years old at the time the offence was committed. She stated that she was born on the 14th July 1997 and produced a clinic card in evidence as Pexhibit 1 to prove the same.

28. In the case of ***Hilary Nyongesa Vs Republic Eldoret Criminal Appeal No 123 of 2009*** the court stated that:

> **"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved….And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."**

29. In the case of ***Kaingu Elias Kasomo -V- R Malindi Cr. App. No. 504 0f 2010*** The Court stated that

> **"The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence…….Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."**

30. Other relevant though only persuasive authorities are ***Joseph Kieti Seet -VS- Republic [2014] eKLR*** and ***Francis Muthee Mwangi V Republic [2016] eKLR***.

31. It is clear from the above cited authorities that a birth notification or clinic card, the medical records and the evidence adduced by the complainant herself was conclusive proof of age of the complainant. The Trial Court made reference to the evidence of the minor, her guardian and the clinic card before accepting that the complainant's age had been proved. It is therefore sufficient to say that the Prosecution proved the age of the minor.

b) Proof of penetration

32. It is the complainant's evidence that she was defiled by the Appellant. She stated that the Appellant while holding a panga pushed her down, slept on top of her and inserted his "**dudu**" in her vagina.

33. PW 2 a clinical officer testified that upon examination he established that though the complainant's genitalia looked normal, her hymen was broken and that she had reddish hyperemic determination and a whitish discharge.

34. His evidence was corroborated by PW 4 who stated that though the complainant's vagina had neither bruises nor bleeding, he had detected epithelial cells in the urine.

35.It is the Appellant's submissions that the lack of bruises and injuries on the complainant's vagina was sufficient proof that there was no penetration.

36. In the case of ***Erick Onyango Ondeng V. Republic (2014) eKLR*** the Court of Appeal held that:-

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."**

37. In her Judgment in the present case, the Trial Court held that:-

> **"……there was presence of epithelial cells on examination and no hymen. The external vagina was intact with no bruises .I tend to believe because this wasn't the first time she was being defiled .The presence of the epithelial cells confirmed that there was friction on the vaginal walls during sexual intercourse .This therefore ascertains that there was penetration."**

38. In **Daniel Otieno Yugi V Republic [2018] eKLR** the court held that

> **"With respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), (D. K. Maraga, JA as he then was), D. Musinga & A. K. Murgor JJA citing Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 (Mombasa) where the court stated that:**
>
> **"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"**

39. In the instant case, PW4 the clinical officer testified that although there were no bruises on the vagina,the evidence of the epithelial cells proved that the complainant had been defiled. I accept those findings in agreeing with the learned trial court that penetration was proved to the required standard.

c) **Whether it was the appellant who caused the penetration**

40. In the present case, the complainant testified that as she was preparing to leave the river where she had gone to fetch water, a person emerged in front of her wielding a panga, and told her he would cut her with the panga if she refused to sleep with him. He then pulled her out of the water, "**forcefully removed my pair of trousers as I stood. He also removed my panty. He was still holding the panga with one hand. He repeated that he would slaughter me if I didn't sleep with him. At one point he put the panga down and held me with with both hands. He pulled his long trousers and pant down to the knees. We struggled but he overpowered me. I fell down whereby he slept on top of me as we faced each other. He inserted his "dudu" to my vagina. "dudu" is called penis in English."**

41. It was the Appellant's submission that the complainant did not know him and thus was not able to identify him properly as he was unknown to her and that they ought to have conducted an identification parade to identify him. The evidence on record shows that the incident took place at about 6.00 pm. The complainant testified that she knew the Appellant physically and had seen him at the river two months before though she did not know his name. She stated that she had seen him once before the ordeal and that she had described the man to her aunt as a short man who was dark and a bit heavy. With that description the aunt identified the appellant. The complainant also identified him in the dock. During cross examination by the Trial Court, the complainant confirmed that she did not know the Appellant's name and that she only described the man and the aunt matched the description to a man known as "**Wabwire**"

42. PW3 testified that the complainant informed her that she had been defiled by "**Wesonga**" the Appellant .She stated that the Appellant was their neighbor and that she only knew him by that one name.

43. The investigating officer testified that the Appellant was arrested by the members of the public. He does not give an account of how the Complainant described her assailant to him and how he decided to charge the Appellant. There was no identification parade.

44. This court is aware of the need for proper visual identification of an assailant if the evidence of such identification is to form the basis of a conviction. See ***Wamunga versus Republic [1989]KLR 424.***

45. In his judgment, the learned trial magistrate stated in part: "**There was still enough light as it was 6.00pm and the alleged victim must have seen the accused person very well as the accused was physically known to her. She named the person so soon after the incident as the person who raped her to her grandmother and mother, Juliana Oduor (PW3). The accused was also seen by Desterio Nyongesa Olando(PW5) walking briskly from the direction of the scene immediately after the alleged victim was raped. This evidence places the accused person squarely on the scene during the material time."**

46. Though I find some difficulty in appreciating the trial court's use of the words, "**.....the alleged victim must have seen the accused person very well.....**" my own reconsideration of the evidence confirms to me that the complainant gave a proper description of the appellant to those she spoke to soon after the incident. There may be a discrepancy in the name of the culprit, but the complainant had no hesitation in identifying the appellant during the trial that he is the one who had defiled her. Further the complainant testified that she knew the appellant by appearance, and apart from the day of the incident, she had seen the appellant twice at the river in the very recent past. The complainant also testified that as the appellant lay on top of her they faced each other and she was thus able to see him clearly.

47. With regard to the Prosecution's failure to call crucial witnesses the court in ***Benjamin Mbugua Gitau V Republic [2011] eKLR*** held that:-

> **"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys"**

48. Same was reiterated in **AGM versus Republic [2014] eKLR** and in ***Sahali Omar V Republic [2017] eKLR*** where the Court of Appeal stated that *inter alia* that:-

> **"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses."**

49. As stated herein above, the Prosecution reserves a right to decide which witness to call. The appellant has no right to elect which witnesses he deems as crucial or not to the prosecution's case. In this case, the trial magistrate, upon consideration of the evidence laid before him made a conclusive determination on the case, leased on the evidence of PW1 through to PW6. I hold that the evidence of any other witnesses who may not have been called by the prosecution was not crucial.

50. With regard to the sentence, the appellant was sentenced to 20 years imprisonment, while the offence carries a minimum of 15 years in jail. The trial court reasoned that the 20 year jail term was justified because the appellant used actual violence on the complainant while committing the offence. The above notwithstanding and bearing in mind recent developments in sentencing jurisprudence, I am inclined to interfere with the sentence in this case, by quashing the 20 year jail term and substituting it with a jail term of fifteen (15) years.

Conclusion

51. In light of all the foregoing, the final orders on this appeal are as follows:-

1. The appeal on conviction be and is hereby dismissed.

2. The appeal on sentence be and is hereby allowed to the extent that the 20 year jail term is hereby quashed and substituted with fifteen (15) years jail term.

3. Right of appeal within 14 days from the date of this judgment.

52. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 15th day of November 2019

WILLIAM MUSYOKA

JUDGMENT

In the presence of:-

Fredrick Wesonga Muchere - Appellant in person

Ms Omondi for Respondent

Erick - Court Assistant