REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 80 OF 2016

ISAAC WEKESA WAMALWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case number 2 of 2016 in the Principal Magistrate's Court at Sirisia – F. Kyambia (PM)*)

JUDGMENT

1. Isaac Wekesa Wamalwa, the Appellant herein was tried and convicted by the Principal Magistrate's Court at Sirisia on a charge of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars contained in the charge sheet were that on the 30th day of December, 2015 at [particulars withheld] village, Kimaswa sub-location Cheptais District within Bungoma County he intentionally caused his penis to penetrate the vagina of MNC a child aged 14 years at the time. (name deducted to protect the identity of the minor).

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars were that on the 30th day of December, 2015 at [particulars withheld] village, Kimaswa sub-location, Cheptais district in Bungoma County he intentionally touched the vagina of the said MNC.

3. A summary of the case was that on 30th December, 2015 at around 10 p.m. the Complainant was in her mother's house in the company of her two younger sisters when the Appellant knocked on their door. Upon entering the house, the Appellant flashed his torch and went to where the Complainant was sleeping, in her mother's bed. The Appellant held the Complainant's neck and warned her siblings not to raise alarm. He then undressed her and inserted his penis in her. After the act, the Appellant quietly found his way out of the home. The Complainant informed her mother about the incident upon her mother's return at 6.00 a.m. They reported the matter to the chairman of "*nyumba kumi*" (village elder) and to the police. The police visited the scene and subsequently arrested the Appellant and charged him with the present offence. The Complainant was examined and treated at Cheptais Hospital.

4. In his defence, the Appellant gave sworn testimony in which he merely gave an account of the events surrounding his arrest. He further stated that the Complainant was a person unknown to him and attempted to raise an *alibi* defence stating that he was with his friend at the time of the alleged incident.

5. At the end of the trial, the Appellant was convicted under **section 8(3)** of the **Sexual Offences Act** and sentenced to serve twenty years imprisonment. Being dissatisfied, the Appellant preferred the present appeal against both sentence and conviction. He argued that: the charge sheet was incurably defective; he did not understand the language used in court; he was not positively identified as the perpetrator and that the evidence tendered by the prosecution was unable to sustain a conviction since it lacked probative value and the prosecution witnesses lacked credibility.

6. Learned state counsel Mr. Oimbo opposed the appeal on behalf of the Respondent and urged the court to dismiss the appeal and allow the conviction and sentence to stand.

7. This being the first appeal, I have scrutinized 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 make my own findings and draw my own conclusions in line with **Boru & Anor vs. Republic Criminal Appeal No. 19 of 2001 [2005] 1 KLR 649**.

8. To begin with the Appellant argued that the charge sheet in this case was incurably defective in substance and was invalid since both the principal charge and the alternative charge omitted the word "unlawful" thereby rendering the charge defective. It is instructive to note that not all defects detected in the charge sheet on appeal will render a conviction invalid. The present charge is one of defilement and based on the age of the Complainant, there is no sexual act of whatever description which could be regarded as lawful.

9. This position was reaffirmed by R.S.C Omolo, S.E.O Bosire and J.G Nyamu in **JMA vs. Republic [2009] KLR 671** where the learned appellate judges opined thus:

> **"Rape was an offence which involved adults who are able to consent, unlike a situation where a child was involved, and the issue of consent or lack of it is wholly irrelevant. For a child of the age of the complainant there was no sexual act which could be regarded as lawful. This was a case in which the superior court should have invoked the provisions of section 382 of the Criminal Procedure Code to cure irregularity which on the facts and circumstances of this matter was minor."**

The irregularity in omitting the word "unlawful" in these circumstances is therefore one that is curable under **section 382** of the **Criminal Procedure Code**, there being no discernable prejudice occasioned to the Appellant as a result.

10. On the second ground, the Appellant complained that he did not understand the language used in court during trial. He stated that he is a Bukusu who only understands the Bukusu language yet the trial was conducted in English and Kiswahili without any interpretation. That he was therefore unable to cross-examine witnesses and follow the proceedings and this was in violation to his rights. In opposition, Mr. Oimbo stated that the proceedings were conducted in Kiswahili as the Appellant had indicated that he understood Kiswahili as indicated on the record.

11. Indeed, the record demonstrates that on 4th January, 2016 when the Appellant appeared in court to take plea, the court inquired from him what language he understood and he stated that he understood the Kiswahili language. He did plead to the charge and did not raise any issue on the language used being a hindrance to his following the proceedings. The record further demonstrates that the court employed English/Kiswahili interpretation throughout the proceedings. All the prosecution witnesses testified in Kiswahili and the Appellant too testified in Kiswahili. Further during the hearing of the present appeal, the Appellant presented his arguments quite well in Kiswahili language which he spoke very well.

12. The record also indicates that the Appellant stated that he did not have any questions for the witnesses with the exception of PW7 and PW8 both of whom he fully cross-examined. I am therefore satisfied that the Appellant was not prejudiced in any way on this ground since he fully participated in the proceedings after the plea was taken. – See **John Kamau Githuku and Anor. Vs. Republic Criminal Appeal No. 229 of 2008** (unreported).

13. In grounds three and four, the Appellant contended that the evidence presented by the prosecution was contradictory and that the trial court failed to take into account the credibility of the prosecution witnesses. That the prosecution failed to prove that he committed the offence. He complained that he was not issued with witness statements yet the prosecution is obligated to disclose to the defence the evidence it intends to rely on. That he was also not granted adequate time in which to prepare his defence. He asked the court to order a retrial in this respect.

14. Mr. Oimbo submitted on the two pronged grounds and stated that the prosecution had conclusively proved the age of the Complainant and penetration and that the Appellant was positively identified. He urged the court to dismiss the Appellant's prayer for a retrial stating that the Appellant fully participated in the trial and did not raise retrial as a ground in his appeal or give any specific reasons in support thereof.

15. The key ingredients of the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant as highlighted in the case of **Charles Wamukoya Karani vs. Republic Criminal Appeal No. 72 of 2013**.

16. On the age of the complainant, the Appellant submitted that the prosecution witnesses gave different varying ages of the Complainant. That the Complainant stated that she was aged 14 years, and so did the Complainant's mother PW2 who stated that the Complainant was aged 14 years having been born on 2nd January, 2001. The Appellant urged that calculations using the stated date would however reveal that the Complainant was aged 13 years at the time. Further that PW5 testified that the Complainant was taken for an age assessment and found to be aged 12 years.

17. I am alive to the fact that age is such a critical aspect in sexual offences involving minors that it has to be conclusively proved, because the sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence as reiterated by Makhandia J (as he then was) in **John Otieno Obwar vs. Republic High Court Criminal Appeal No. 34 'B' of 2010**. It is therefore important to interrogate this issue further to determine whether the age of the Complainant was conclusively proved.

18. In her testimony, the Complainant stated that she was born in the year 2002 and was aged 14 years at the time of the offence. This evidence ties with that of the Complainant's mother PW2, who testified that the Complainant was born on 2nd January, 2002 and was aged 14 years at the time. PW8, the clinical officer who examined the Complainant, also testified that he conducted an age assessment on the Complainant and approximated her to be aged 12 years. The age assessment report dated 31st December, 2015 was produced in court. I however wish to point out that both the Complainant and PW2 testified on 12th July, 2016 whereas the offence occurred on 30th December, 2015.

19. In the case of **Richard Wahome Chege vs. Republic Criminal Appeal 61 of 2014 [2014] eKLR** the Court of Appeal at Nyeri (Visram, Koome & Otieno-Odek, JJ A) had this to say:

> **"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."**

20. It is therefore not in doubt that the age of the Complainant was conclusively proved before the trial court. PW2 the Complainant's mother stated that she was born on 2nd January, 2002 corroborating was stated by the Complainant in her own testimony. This therefore puts the age of the Complainant at three (3) days shy of her 14th birthday at the time of the alleged offence which was committed on 30th December, 2015.

21. On proof of penetration, Mr. Oimbo submitted that this was conclusively proved through the P3 form and the evidence of PW8. Penetration is defined under **section 2** of the **Sexual Offences Act** to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

22. The Complainant gave a vivid description of what transpired on the material day. The relevant part of her testimony in her own words is as follows:

> "*I was sleeping in my mother's bed. He held my neck. He told my sisters that he will beat them if they raised alarm. He also warned me not to raise alarm. I attempted to raise alarm but he put his torch in my mouth. He then undressed me. He then inserted his penis in me. He did "tabia mbaya" to me…*"

23. The Complainant's testimony found support in the testimony of PW8 David Kimengich, the clinical officer who examined her. He produced the treatment notes and the P3 form he filled in this regard. He submitted that the Complainant was presented to Cheptais Sub-county Hospital on 31st December, 2015 with a history of having been defiled by a person known to her. Upon examining her, he observed the following:

- Dry spots of blood on the monis pubis.
- Fresh blood from the vaginal injuries.
- Multiple tears and lacerations on the labia which was still bleeding.
- Torn hymen.

24. The evidence of both the Complainant and PW8 was in tandem with the evidence of PW2 the Complainant's mother that when she returned home the morning after the incident, she found that the Complainant's pants were blood stained as were the bed sheet and mattress cover. All these items were produced in evidence before the trial court. From the foregoing it is not in doubt that the Complainant had engaged in recent sexual activity, and that penetration was proved to the required standard.

25. On the issue of positive identification of the assailant, I note that this is a case of recognition as opposed to identification. The Complainant in her testimony stated that the Appellant was known to her before the incident. She referred to him by name during her testimony. The relevant part of the Complainant's testimony as shown on the record is as follows:

> "*While in the house Isaiah the accused came and knocked the door (witness points at the accused when asked by the prosecutor who is Isaiah)…*
>
> *The accused was known to me before the incident. He stays at Kimaswa area where he deals with planting maize and tomatoes. He has been known to me for a long time.*"

26. The evidence of PW3 the Complainant's sister that the Appellant was at their home at the time of the alleged offence places him at the scene of the crime and lends credence to the testimony of the Complainant. PW3 stated that the Appellant stays in their locality and was therefore known to her before the incident. Further that she identified the Appellant by the light of a torch he had with him.

27. It is now well established that evidence of recognition is stronger than that of identification, because recognition of someone known to one is more reliable than identification of a stranger. However, the court must be careful in examining the circumstances in which the witnesses saw and recognized the Appellant because the offence occurred at night. In the case of **Republic vs. Turnbull and others [1976] 3 All ER 549** Lord Widgery CJ pointed out as follows:

> **"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made…**
>
> **All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."**

28. From the evidence on record, the Appellant was someone well known to both the Complainant and PW3. Their evidence places him at the scene of the offence on the night in question. Whereas the offence occurred at night, I note that the Appellant had a flash light which he had lit when he entered the house where the Complainant and her siblings were on the night in question. I am satisfied therefore that there was proper identification.

29. On the complaint that the Appellant was not supplied with witness statements, I note from the record that the Appellant took plea on 4th January, 2016 and when the matter came up for hearing on 7th January, 2016 the Appellant applied for an adjournment to enable him prepare

his defence. The trial court granted the adjournment and ordered that the Appellant be supplied with copies of the witness statements. The matter was adjourned to 12th January, 2016 when the first prosecution witness testified. There is nothing on record to show that the statements were never supplied because the Appellant did not revisit his request and he went on to fully participate in the proceedings.

30. The record further demonstrates that on 21st January, 2016 at the close of the prosecution case, the Appellant was placed on his defence whereupon he sought and was granted another hearing date to enable him prepare his defence. The court fixed the defence hearing on 15th February, 2016. The Appellant's claims that he was not afforded a chance to prepare his defence therefore has no basis.

31. After a careful scrutiny of the entire record, I can draw no other conclusion than that the trial court, directing itself to the evidence before it and the law applicable, reached the correct conclusion. I therefore find that both the conviction and the sentence were proper. I find that the appeal lacks merit and consequently it is dismissed in its entirety.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 14TH DAY OF DECEMBER 2018.

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H. K. CHEMITEI

HIGH COURT JUDGE