REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 19 OF 2015

(From Original Conviction and Sentence in Criminal Case No. 40 of 2011

of Senior Resident Magistrate's Court at Butali)

NN.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGEMENT

1. The appellant was convicted in the Senior Resident Magistrate Court (SN Abuya SRM), Butali, of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. He was found guilty and accordingly sentenced to twenty years imprisonment as per the law. The particulars of the charge against the appellant were that on the 27th December, 2010 at [particulars withheld] area Township Location in Kakamega North District within Western Province, he defiled KV, a child aged 12 years, by an act which intentionally and unlawfully caused penetration to her vagina by his penis. The appellant pleaded not guilty to the charge at trial.

2. The appeal raises four (4) grounds of appeal-

a) That the learned trial Magistrate convicted on evidence that was false, doubtful and fabricated, and marred by contradiction;

b) That the learned trial Magistrate failed to appreciate as inconclusive medical report;

c) That the evidence by the prosecution was circumstantial, coincidental and lacked credential value to justify conviction;

d) That the learned trial Magistrate relied on an investigating officer's report which was shoddy and misplaced; and

e) That the learned trial Magistrate erred in law and fact in taking into account extraneous matter which had no basis in evidence tendered before court which led him to make a wrongful conviction.

The appellant prays that this appeal succeeds, the conviction on record be quashed and the sentence imposed by trial Magistrate be set aside.

3. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

> *"An appellant 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. 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

4. The evidence of the complainant, KV, (PW1) was that on 27th December 2010, the appellant, who was her stepfather, asked her not to sleep on the same bed with the younger children, and got her to sleep on a chair next to the door. It was her testimony that while she was sleeping she began to feel pain and when she woke up she found the appellant lying on top of her with his thing in hers. He went out, and the

next she informed her siblings of what had happened. She reported the incident to her mother, who took no steps, instead she told her to keep quiet. Whereupon she reported to her teacher, who then took her to hospital and the police. She stated that her mother was not at home that night. PW2 Police Constable Caroline Achieng, was the policewoman to whom the report of the incident was reported by PW1 and her teacher on 12th January 2011. She recorded PW1's statement and thereafter took her to hospital. PW3 Kizito Sifuna, is the clinical officer who attended to PW1 on 12th January 2011. He found the hymen in her vagina missing, she had dirt smelling coming out of her labia, which showed epithelial cells indicating that there was friction on the inside of the vaginal walls. He stated that he attended to her one and half weeks after the incident. PW4, Sister BOO, is the teacher to whom PW1 reported the incident, and the person who escorted her to the police.

5. At the close of the prosecution's case, the court found that a *prima facie* case had been established and accordingly placed the accused person on his defence. The accused, who was bond, absconded, after the matter was reserved for ruling on a case to answer, and the court was forced to ruling on case to answer in his absence and to write the judgement without hearing the defence.

6. On the basis of the above evidence, the trial court was satisfied beyond any reasonable doubts that the said charge had been established against the appellant to the required degree, and found the appellant guilty and convicted him of the offence.

7. For the offence of defilement to occur, there must be penetration and the age of the victim must be below the age of 18 years.PW1's age is not in dispute in the instant case. She was 12 years old at the time of the alleged offence of defilement. The court conducted a *voire dire examination* of PW1 and found she possessed sufficient intelligence to testify, that would not have been necessary were it not clear to the court that it was dealing with a minor. She told the trial court that she was 13 years old and was in Standard 5 at the time of trial.

8. The appellant urged his appeal by way of written submissions. I have noted that the said written submissions are not based on the grounds set out in his petition are not based on the grounds set out in his petition of appeal. They are founded on totally different grounds. I shall address the issues raised in the written submissions.

9. He argues that the age of the complainant had not been established, and that there were contradictions or inconsistencies in her testimony on it. He claims that she had at one point said she was 19 years old. I have looked at the handwritten notes of the proceedings and noted that the complainant had mentioned to the court twice that she was 13 years old at the time of trial, but 12 at the time of the commission of the offence. I note that the trial court was compelled to conduct a *voire dire* examination of the complainant, which no doubt points to the fact that she must have obviously looked like a child to the court. I am satisfied that the the trial court did not make any mistake with respect to concluding that she was a minor of 12 at the material time.

10. He raises issue with the fact that the court relied on evidence of a single witness. He points out that the complainant had said that there were other children in the house at the time, they were not called as witnesses, and the complainant did not raise alarm. Section 143 of the Evidence Act, Cap 83, Laws of Kenya, provides that no particular number of witnesses is required to proof any fact. While section 124 of the said Act carries a proviso to the effect that in a criminal case involving a sexual offence where the only evidence is that of the alleged witness the court may receive that evidence and proceed to convict the offender if satisfied that the witness was telling the truth.

11. It is clear from the record that the sexual assault occurred within the confines and privacy of the home shared by the complainant and the appellant. The two were family, with the appellant being the stepfather of the complainant. That would provide an explanation as to why no alarm was raised. It is also clear that the complainant and the appellant were not sleeping in the same place with the younger children, they did not witness the incident, and the complainant was categorical that she reported the incident to them the next day.

12. He next raises the issue of identification. The incident happened at night and there was no evidence as to the whether there was sufficient lighting for identification purposes. He also mentions that the complainant talked of an open door which suggested that an intruder could have come in and committed the offence. As mentioned above, the two parties hereto related as parent and child, and were in the same house at the time of the alleged incident. The appellant was the only male adult in the house at the time. The complainant did not say the door was open and therefore the issue of an intruder should not arise. The parties knew each other well. The issue of identification should not be matter of any consequence in the circumstances.

13. On whether there were discrepancies as to the dates, the record is very clear that the complainant stated that the incident happened on 27th December 2010. The other witnesses may have mentioned 28th December 2010 or 27th December 2010, but what stands out is the testimony of the complainant herself. I do not think that anything turns on this. He raises the issue that the minor did not apparently bleed from the ordeal given her age, if indeed she had been defiled that night. The doctor found the hymen missing, there is nothing to suggest that her virginity was lost on 27th December 2010, and therefore the issue as to whether she bled or not at the time is neither here nor there. There is no law which requires that a person accused of a sexual offence must be medically tested to ascertain whether or not he committed the offence.

14. He raises issue with fact that the tail end of the trial proceeded in his absence. He avers that that denied him an opportunity to defend himself. The record is clear that he absconded. The surety confirmed that he absconded. His surety was arrested and confirmed that the appellant fled after he heard that the surety had been arrested. When he was given time to trace the appellant he, the surety, also fled. No doubt the hands of the court were tied and it acted within the law in cases where an accused person chooses to abuse the process.

15. I find that the elements of defilement, that is the age of the child and penetration, were established beyond doubt. The trial court correctly found that penetration did occur and the Appellant was positively identified by recognition as he was known to the complainant.

16. Overall, it is my conclusion that the appellant has not satisfied me that the trial court fell into error in the manner that he suggests. The appeal before me is not merited. I shall accordingly disallow the same. I hereby dismiss the same, and uphold the conviction of the appellant by the trial court in Butali SRMCCRC No. 40 of 2011 and confirm the sentence imposed of 20 years imprisonment.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 3RD DAY OF DECEMBER 2018

W MUSYOKA

JUDGE