REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 276 OF 2013

BENJAMIN MWEA NGUMBI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Principal Magistrate's Court at Makindu delivered by ***Honourable E. Muiru, (Resident Magistrate)*** *on 18th October, 2013 in* ***MAKINDU PM.CR.CASE NO.938 OF 2012***)

JUDGMENT OF THE COURT

1. The Appeal arises from the conviction and sentence by Hon. E. Muiru – Resident Magistrate at **Makindu Principal Magistrate Court Criminal Case No. 938 of 2012** on the 18th October, 2013. The Appellant had been charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No.3 of 2006 and with an alternative offence of committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act. No.3 of 2006. He was found guilty and sentenced to serve twenty (20) years imprisonment.

2. Not being satisfied with the conviction and sentence, the Appellant filed this Appeal raising the following ground of appeal:

a. That the Learned trial Magistrate erred in law and fact by convicting the Appellant for the offence of defilement on a charge which was not proved.

b. That the learned trial Magistrate erred in law and fact by allowing the complainant to testify on oath yet she has indicated in the voire dire examination that she did not know the difference between truth and lies.

c. That the learned trial Magistrate erred in law in convicting the Appellant yet the prosecution failed to establish the age of the Complainant.

d. That the learned trial Magistrate erred in law and fact by violating the Provisions of Section 214 Criminal Procedure Code by allowing the Prosecution to amend charges without the same being read over to him and allowed to plead to the amended charges.

e. That the learned trial Magistrate passed a sentence which was harsh, excessive and unsafe.

3. The Appellant prays that the Appeal be allowed, conviction quashed and sentence set aside.

4. The Appeal is opposed by the state through the submissions filed on the 30/06/2016. The Prosecution's case is that the trial court did not err in convicting and sentencing the Appellant. The Prosecution submitted that the case was proved beyond any reasonable doubt and that the appeal must fail.

5. It is the duty of this Court as the first Appellate Court to re-evaluate and to re-examine the evidence tendered before the trial court so as to arrive at its own independent conclusion but to bear in mind that it neither saw nor heard the witnesses testify and to make an allowance for that (see **OKENO =VS= REPUBLIC [1972] EA 32).**

6. In proving his case, the trial Prosecutor called a total of six (6) witnesses and when the Appellant was put on his defence, he gave an unsworn evidence and did not call any witness.

7. Summary of the Prosecution's case:

PW.1 testified that on 8/10/2012 at about 6.30 p.m. she had been sent by her mother to a nearby farm to buy tomatoes and while on her way back, she was accosted by the Appellant who was well known in the area and who went by the name "***Rasta***". The Appellant grabbed her and pushed her to the ground, held her mouth, tore her underpants and defiled her. She later informed her mother (PW.2) who escorted her to Makindu Police Station and Makindu District Hospital. PW.3 was the cousin to the complainant and who stated that he accompanied an AP Officer in search of the perpetrator who was well known in the area as "***Rasta"*** and had him arrested. PW.4 stated that she booked the report and accompanied the complainant to Makindu District Hospital where she was examined and P.3 form filled by Dr. Musyoki and which was later produced by Dr. Kibwana on behalf of Dr. Musyoki and that they noted that injuries were grievous harm and concluded that the complainant had been defiled. PW.6 was the Investigating officer and who stated that the Appellant was handed in by members of public and re-arrested him and recorded statements and later preferred the charges against him.

8. Appellant's defence:

In his defence, the Appellant opted to give unsworn evidence where he denied committing the offence. He maintained that his employer teamed up with his Maasai friends to frame him up so as to avoid paying his wages that had accumulated to about **Kshs.150,000/=.** The Appellant further stated that his employer and his neighbours had ganged up against him as he was a foreigner in the area and had no passport or identification documents.

9. Submissions:

Parties filed submissions which I have considered. The only issue for determination is whether the case was proved beyond reasonable doubt.

In determining the above issue, it is necessary to consider the key ingredients of the offence of defilement namely: ***age of complainant, act of penetration and whether the Appellant was the perpetrator of the alleged offence***.

10. As regards the issue of the age of the minor complainant, it is noted that the Appellant has argued in his ground of Appeal that the same was not established by the Prosecution. The complainant stated in her evidence that she was aged 13 years old and in standard six (6). The same is also indicated on the P.3 form filled by Dr. Musyoki which was produced as an exhibit by Dr. Kibwana (PW.5). Section 2 of the Sexual Offences Act adopts the definition of "***child"*** provided under the Children's Act as "***Any human being under the age of eighteen years***". Hence in establishing the offence of defilement proof of age is only relevant to show that the victim is under eighteen years of age and therefore a child within the definition of the Children's Act. It means therefore that the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organ of the perpetrators genital organs into a child's genital organs regardless of the age of the child. Indeed Seciton 8 of the Sexual Offences Act deals with the offence of defilement and states the defilement scenarios as

follows:

> 8(1) ***A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven (11) years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve (12) and fifteen (15) years is liable upon conviction to imprisonment for a term of not less than twenty (20) years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen (16) and eighteen (18) years is liable upon conviction for a term of not less than fifteen (15) years.***

11. From the above definitions, it is therefore clear that the offence of defilement is completed immediately there is an act that causes penetration and the victim of the act is a child. Section 2 of the Sexual Offences Act defines ***penetration*** to mean "***the partial or complete insertion of the genital organ of a person into the genital organ of another person"***. PW.1 stated before the trial court that the Appellant, whom she had known and who went by the nickname "***Rasta"*** in the area, grabbed her and blocked her mouth from screaming, tore her underpants and then defiled her. She further stated that he thereafter tried to give her money so as not to report about the ordeal but which she flatly rejected and later informed her mother (PW.2) about the incident. Dr. Musyoki confirmed that indeed the minor had been defiled.

The issue of age of a victim was clarified by the court of Appeal in the cases of **TUMANI MAASAI MWANYA =VS= REPUBLIC - MSA. CR. APPEAL NO.364 OF 2010** and **STEPHEN NGULI MULILI =VS= REPUBLIC [2014] eKLR** as follows:

> ***"Proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishments for the offence in respect of victims of defilement of various statutory categories of age."***

Hence, as far as the appellant's case is concerned, the issue of age is relevant at two levels. First, to establish that the victim was under the age of 18 years and therefore a child and secondly, to establish that the victim was between the age of 13 and 15 years so as to bring the sentence for the Appellant if convicted within the minimum provided under Section 8(3) of the Sexual Offences Act. Indeed the complainant testified and confirmed her age to be 13 years which was also indicated on the P.3 form produced as exhibit. Even though an age assessment was not conducted it noted that the trial court examination which implied that the said court formed the impression that the complainant was a child of tender years and her age was thus apparently under 18 years. Section 2 of the children's Act defines ***"age"*** as meaning ***apparent age in cases where actual age is not known.*** The trial court therefore properly established that the complainant was a child and the apparent age of 13 years was sufficient to fall within the bracket of 12 - 15 years for the purposes of the penalty under Section 8(3) of the Sexual Offences Act.

12. As regards the issue of penetration and identity of the Appellant, it is clear the evidence of the complainant that the Appellant accosted her at around 6.30 p.m. and forcefully defiled here. The complainant had known the Appellant previously as ***"Rasta***" and later reported to her mother and the Appellant was subsequently arrested and charged. The doctor who examined the girl confirmed that she had been defiled. The investigating officer (PW.6) took the vagina swabs to the Government analyst but same was not produced afterwards. I find the failure to produce the report was not at all fatal to the Respondent's case since the fact of defilement was properly proved by the evidence of the complainant. In the case of **KASSIM ALI =VS= REPUBLIC – MOMBASA CR. APPEAL NO.84 OF 2005** the Court of Appeal held thus:-

"***The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence".***

The complainant was quite candid as to the person who had defiled her as she stated before the trial court that it was the Appellant herein whose nickname in the area went by the name "***Rasta***" a person whom she had known in the area previously. There is therefore no doubt about the identity of the Appellant as the perpetrator. Hence the failure to avail the analysis report from the Government Chemist as regards the issue of spermatozoa linking the Appellant to the crime was not fatal to the Prosecution's case.

13. The Appellant has also raised the issue that the Prosecution had orally amended the charges and failed to accord him an opportunity to plead afresh. I find that the said failure did not occasion a miscarriage of justice and did not prejudice the Appellant because the same is curable under Section 382 of the Criminal Procedure Code. Indeed the Record of Appeal shows that the Appellant did not object to the said amendment. Again the amendment merely introduced the salient Provisions of Section 8(1) and 8(3) of the Sexual Offences Act to which the proceedings relate and in which the Appellant had vigorously participated throughout the trial. The Appellant cross-examined all the witnesses at length and thereafter conducted his defence. The Appellant had denied the charges which thus necessitated the trial which was conducted.

14. Finally, the Appellant raised the ground that the trial Magistrate allowed the complainant to give evidence on oath yet in the voire die examination she had indicated that she did not know anything about truth or lies, I have perused the record of Appeal and note that indeed the voire dire examination was conducted by the Learned trial Magistrate and that the complainant indicated that she did not know the effects of truth or lies. The trial magistrate allowed her to give sworn evidence. Indeed the complainant even if she was to tender unsworn evidence, she was subject to be cross – examined by the Appellant in any event. The Appellant duly cross-examined her at length and in the end the learned trial magistrate found that she had told the court the truth of what had happened. Besides her evidence was also corroborated by that of the doctor who examined her and who confirmed that indeed she had been defiled. Hence the complainant giving sworn evidence did not prejudice the Appellant in any way since he duly cross-examined her. In any event the purpose of a voire dire examination is to establish whether a witness who is of tender years is possessed with sufficient intelligence and knows the duty of speaking the truth can be allowed to tender evidence before court. The said examination was only to assist the court as to how a witness was to present evidence before court.

15. In the result it is the finding of this court that the Prosecution's case was proved beyond any reasonable doubt. The Appellant was properly convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Accordingly the Appellant's conviction and sentence is affirmed and the Appeal herein is ordered dismissed in its entirety.

It is so ordered.

Dated, signed and delivered at Machakos this 3rd day of MAY 2017.

D. K. KEMEI

JUDGE

In the presence of:

Appellant in person.....

C/A: Kituva .....