REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NO.196 OF 2014

BETWEEEN

ROBERT WAFULA …….APPELLANT

AND

REPUBLIC ……RESPONDENT

(Being an appeal from original conviction and sentence in Butali SRM Cr. Case No.279 of 2013 dated 12/08/2013)

J U D G M E N T

Introduction

1. The appellant herein was arraigned before the Senior Resident Magistrate's Court at Butali on a charge of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, No.3 of 2006. The particulars of the offence are that on the 5th November 2012, at [particulars withheld] Township in Kakamega North District of Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of J.N, a child aged 12 years. He denied the charges as a result of which the case proceeded to full trial. In the alternative, the appellant was charged with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, No.3 of 2006. The particulars thereof being that on the night of 5th day of November 2012, at [particulars withheld] Township in Kakamega North District within Kakamega County unlawfully and intentionally touched the vagina of J.N a child aged 12 years with his penis.
2. At the conclusion of the hearing, and upon careful consideration of all the evidence on record, the learned trial magistrate was satisfied that the Prosecution had proved its case against the appellant beyond any reasonable doubt and convicted the appellant accordingly. He was sentenced to 15 years imprisonment.

The Appeal

3. Being dissatisfied with both conviction and sentence, the appellant preferred this appeal after being granted leave to file appeal out of time by an order of this Court dated 25/11/2014. In his Petition of Appeal, the appellant set out the following six (6) substantive grounds:-

1. That the learned Trial Magistrate erred in law and fact by convicting the appellant without considering that no examination of the age of the complainant was carried out.
2. That the learned Trial Magistrate erred in law and fact by not considering that the complainant was not taken for the test immediately after the alleged offence.

3. That the learned Trial Magistrate erred in law and fact by basing the judgment on a defective charge sheet.
4. That the learned trial Magistrate erred in law and fact when he decided the case against the appellant on the basis of hearsay evidence.
5. That the learned trial Magistrate erred in law and fact by convicting the appellant without allowing the appellant to cross-examine the complainant or to call witnesses in his defence.
6. The learned trial Magistrate erred in law and fact by failing to appreciate that the Investigating officer was not called to testify.

REASONS WHEREFORE, the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

4. This is a first appeal. On this first appeal, this Court is under a duty to carefully reconsider and assess afresh the evidence adduced by the Prosecution during the trial and to come to its own conclusions in the matter. It is to be remembered however, that in carrying out this mandate, this Court has no opportunity of seeing and hearing the witnesses who testified during the trial. Allowance should therefore be made for this fact. This Court is also under a duty to carefully consider the judgment of the learned trial Magistrate in light of the law and the evidence and where it is plainly clear that the trial Court did not appreciate the evidence on record or that it applied the wrong principles, then it will not hasten to interfere with the findings and conclusion of the learned trial Court.
5. In the case of **Okeno –vs- Republic [1972] E.A 32**, the Court of Appeal for Eastern Africa held inter alia, that "it is the duty of the first appellate Court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial Court should be upheld." This was also the position taken by the Court of Appeal in **Mwangi –vs- Republic [2004] 2 KLR 28** where the Court stated at holding number 3 that "it is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusion; it must make its own findings and draw its own 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 had the advantage of hearing and seeing the witnesses."
6. The above stated principles are of paramount importance because if the evidence laid before the trial Court is not given a careful re-examination on appeal, some slight misapprehension of it by the trial Court might lead to miscarriage of justice. I now proceed to set out the evidence placed before the trial Court.

The Prosecution Case

7. From the evidence of the 8 prosecution witnesses, the prosecution case is as follows:- On 05/11/2012 at about 6.00p.m, the complainant in this case, J.N who was aged 12 years was sent by her mother to the local market to buy some paraffin. As soon as J.N got to the shops, and after she had bought the kerosene, it started raining, thus forcing J.N to take shelter at the shops for a while. While J.N was still waiting for the rain to subside, the appellant approached her, grabbed her and took her to his house. Inside the house the appellant placed J.N on his bed and told her to remove her clothes. Without waiting for J.N to remove her clothes, the appellant removed her pants and put his penis into her vagina. He did so three times during the time the two were together that night.
8. On the following morning, the appellant locked J.N inside the house as he went to work. During the previous evening and night. J.N's mother, S N S , PW2 had looked for J.N everywhere, but to no avail. On this morning of 06/11/2012 L M, PW3, was asked by the appellant to make tea and take it to a visitor whom the appellant had left in the house. On reaching the house with the tea, PW3 found out that the appellant's visitor was a young child dressed in school uniform. PW3 informed E O A, PW5, about the presence of J.N in the appellant's house and together, PW3 and PW5 went back to the appellant's house and tried to interrogate J.N but she remained mute. PW3 and PW5 decided to report the matter to the village elder.
9. D B , PW6 also got to hear about the presence of J.N in the appellant's house and went to the

house to find out more, but J.N. could not say anything. He decided to report the matter to Kabras Police Station. He was accompanied by Isaiah Ndeche Mwereka the village elder who testified as PW7. On receipt of the report, Police Constable Geoffrey Kemboi of Kabras Police Station rushed to the scene and later arrested the appellant. Thereafter the appellant was charged with the offence of defilement.

10. The Clinical officer, Kizito Sifuna who examined and treated J.N appellant testified as PW4. He testified that on 06/11/2013, he received J.N at the hospital. J.N was accompanied by his parents who told him that J.N had been defiled on 05/11/2012. He stated that upon examination J.N was found with a bruise on the right side eye and her hymen was open. Test for HIV was non-reactive and the urine test was negative. A laboratory swab test revealed spermatozoa heads while the urine analysis disclosed spermatozoa cells. J.N was put on anti-pregnancy treatment analgesics and anti-tetanus treatment. He filled the P3 form which he produced as PExhibit 1. During cross examination, PW4 stated that J.N told him she had been defiled by a person known to her.

The Defence Case

11. At the close of the Prosecution case, the appellant was put on his defence. He gave sworn evidence and denied committing the offence. He testified that while he was at work at one of the local hotels the Police went and arrested him, put him onto an unregistered pick-up and took him to the Police Station. It was the appellant's case that his arrest was based on mistaken identify because his name was similar to the name of another man who used to sell bread at the market where he (appellant) also worked. He said that his arrest had something to do with a case in which he was a witness. He also denied that he worked at Malava though he conceded that he lived at Malava.

Issues for Determination

12. According to the provisions of Section 8 of the Sexual Offences Act No.3 of 2006 to prove the offence of defilement, the Prosecution must prove that there is/was penetration. Under Section 2 of the Act, penetration is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organ of another person." As can be discerned from the definition, penetration need not be complete. The Prosecution must also prove the age of the complainant because the gravity of the sentence under the Act is determined by the age of the complainant. Finally, the Prosecution must prove that it is the accused (in this case the appellant) who committed the act of penetration against the complainant.

Analysis and Findings

13. I shall start with the issue of the age of the complainant, J.N She told the Court at the hearing of the case on 10/06/2013 (about one year after the alleged offence) that she was 13 years old and a class 3 pupil at local primary school. In her testimony, PW2, the mother of J.N. told the Court that J.N was born on 10/08/2003. PW2 produced the Birth Certificate F.No.[particulars withheld] as Exhibit 2. The Court notes that if J.N was born on 10/08/2003, then she was nine (9) years old as at 05/11/2012 and not 12 years. The P3 form indicated that J.N was 12 years old but the P3 form is not normally an age assessment document. This would seem to suggest to me that the Section of the Act under which the appellant should have been charged is Section 8(1) as read with Section 8(2) of the Act. What this means is that upon conviction the appellant would have been sentenced to imprisonment for life.
14. It is to be noted that the production of the Birth Certificate was conclusive proof of the age of J.N and it is surprising that the Prosecutor who led the evidence of the Birth Certificate did not find it necessary to apply to amend the charge sheet. It is also surprising that the trial Court did not upon receipt of that evidence by PW2, urge the Prosecution to amend the charge sheet. The case therefore proceeded on the basis that J.N was 12 years old at the time of the alleged offence and this appeal will also proceed as such.
15. I further note that even during the hearing of the appeal, this anomaly was not apparent to the Prosecution Counsel. This appeal therefore proceeded and judgment is being rendered as if J.N

was 12 years old when she was allegedly defiled.

16. The next issue for determination is whether there was penetration. During part of her evidence in chief, J.N told the Court the following: "On 5th November 2012 at 6 pm my mother sent me to bring kerosene. It was raining. I sheltered at the shop. The accused (points at accused) came and carried me and took me inside the house. We went with him to the house. He placed me on the bed. He told me to remove all my clothes. He removed my pants. He put his penis into vagina. He did it three times."
17. According to the Clinical officer, PW4 examination of J.N's private parts revealed an open hymen while microscopic examination of the swab revealed the presence of spermatozoa heads. Clearly there is sufficient evidence confirming penetration. As stated earlier in this judgment, the penetration need not be complete. In the case of **Mark Oiruri Mose –vs- Republic [2013] e KLR** the Court of Appeal observed that "……..many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there is penetration, whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ…." In the instant case, I am satisfied that penetration occurred, no matter how superficial it may have been.
18. The third and final issue for determination is whether it was the appellant who committed the act of defilement against J.N. J.N herself stated that while she was sheltering from the rain at the shopping centre at about 6pm, on 05/11/2012, the appellant went to where she was, got hold of her and carried her to his house which was about 200 metres away from the shops according to PW5 who was the appellant's landlady. PW3 L M stated that on the morning of 06/11/2012, as the appellant was leaving for work, he requested her to make some tea and take it to his visitor whom he had left in the house. She did so, only to find that the appellant's visitor was a young girl dressed in uniform. L could not keep quiet after finding out the type of visitor who was in the appellant's house. She informed PW5, E O A who was the appellant's landlady. PW5 also went to the appellant's house and found J.N seated on the bed. D B , PW6, also confirmed being led to the appellant's house by PW5 and finding J.N seated on the appellant's bed.
19. In his defence, the appellant steered clear of the allegation that he had locked J.N in his house when he left for work on the morning of 06/11/2012 or that he had asked PW3 to prepare and serve tea to J.N. He only talked about his arrest. My finding on this matter is that there is overwhelming evidence that the appellant is the one who perpetrated the heinous act against J.N, otherwise what would J.N be doing in his house on the morning of 06/11/2012 completely unwilling to say what she was doing there. I therefore find that the appellant's defence did not in any way cast any doubt on the Prosecution allegation that J.N was found in the appellant's house and that the appellant had instructed PW3, L M to give J.N. some tea on that morning.

Other issues raised by the appellant

20. The appellant has also complained in one of his grounds of appeal that the learned trial Magistrate erred in law and fact for basing his judgment on a defective charge sheet. In his written submissions and also during the highlight of those submissions, the appellant did not pursue the complaint. All the same, even if the charge sheet was defective and unless the defect was such as would cause a failure of justice, the same would be curable under Section 382 as well as Section 134 of the Criminal Procedure Code.
21. In the instant case however, the charge sheet was clearly in line with the provisions of the Sexual Offences Act No.3 of 2006. The offence is clearly defined. The law that was alleged to have been breached was also given as well as the act which constituted the offence and the place where and the person against whom the offence was allegedly committed. The age of the complainant was also given as well as the date on which the alleged offence took place. It is therefore not true that the charge sheet was defective in any material particular. I accordingly dismiss that complaint by the appellant.
22. The appellant also complained that the case against him was decided on the basis of hearsay evidence. A look at the evidence shows that all the evidence against the appellant is direct evidence that neatly pins the appellant to the commission of the offence. J.N spoke of what the appellant did to her. PW4 spoke of what he observed when he examined J.N some 18 hours after

the ordeal. PW2 testified as to the age of J.N who is her daughter and also visited the appellant's house where J.N was found after she was informed J.N had been found in the said house. The appellant's complaint over alleged hearsay evidence has no basis.

23. In ground 6 of appeal, the appellant alleges that the Investigating officer was not called to testify in the case. The record is however clear that PW8, PC Geoffrey Kemboi testified that he was the Investigating officer of the case. In any event, the law does not require the Prosecution to produce a specific number of witnesses to prove their allegations against an accused person beyond any reasonable doubt. The record shows that it is the arresting officer who did not testify but even then, I am satisfied that no prejudice was caused to the appellant by the Prosecution's failure to call the arresting officer. I also find that there is no reason to make the inference that the Prosecution failed to call the arresting officer because his evidence would be adverse to the Prosecution's case.

24. The appellant's final complaint is that the learned trial Magistrate fell into error in not allowing the appellant to cross examine J.N. The record is not clear as to why the trial Court did not let the appellant cross examine J.N, but I suspect that this was premised on the mistaken belief that because J.N had given an unsworn statement she could not be cross examined. That notwithstanding, I find that no prejudice was occasioned to the appellant on account of that omission. J.N's testimony that she was taken to the appellant's house was corroborated by PW3, PW5 and PW6 all of whom saw J.N in the appellant's house on 06/11/2012. I accordingly dismiss the complaint.

Sentence

25. The appellant herein was sentenced to 15 years imprisonment upon conviction. Section 8(4) of the Act provides that anyone convicted of an offence under Section 8(1) of the Act is liable to imprisonment for a term not less than twenty years. In light of the above, I find and hold that the sentence meted out to the appellant by the trial Court was an illegal sentence, and I am therefore compelled to interfere with the same. In the case of **Ogalo –vs- R [1954] 24 EACA 279** it was held that an Appellate Court will not ordinarily interfere with the discretion exercised by the trial Judge unless, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor or that the sentence is harsh and manifestly excessive in the circumstances of the case. In the instant case the trial Court was under a duty to impose the sentence as by law prescribed. The Court had no choice in the matter because the sentence was strict since J.N was aged between twelve and fifteen years. For the above reasons, I set aside the sentence of 15 years imprisonment and in its place, I sentence the appellant to twenty (20) years imprisonment as prescribed by law.

Conclusion

26. In the premises and for the reasons given above, I find and hold that the appellant's appeal on both conviction and sentence has no merit and I dismiss the same. Save for the sentence, I confirm the judgment of the learned trial Magistrate. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this judgment.
27. Orders accordingly.

Judgment delivered, dated and signed in open Court this

4th day of February 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Present in Person for Appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat - Court Assistant