REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO.91 OF 2013

BETWEEN

Z O I.....APPELLANT

AND

REPUBLIC.....PROSECUOR

(Being an appeal from original conviction and sentence in Kakamega P.M.CR.Case No.671 of 2010

delivered on 30/04/2013 by Hon. IRERI B. NTAGA–Ag. Principal Magistrate)

J U D G M E N T

Background

1. The appellant herein was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on the 8th of July 2010 in Vihiga district within Western province he intentionally and unlawfully had penetration of his genital organ namely penis into the genital organ namely vagina of a girl namely C.M a girl aged ten (10) years.

2. In the alternative the appellant was charged with the offence of an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006, the particulars being that on the 8th day of June 2010 in Vihiga district within western province intentionally and unlawfully caused his genital organ namely penis to make contact with the genital organ namely vagina of a girl child namely C.M a girl aged ten (10) years.

3. The appellant pleaded not guilty to both charges. After hearing the Prosecution and the appellants defence the trial Court found the appellant guilty on main count, convicted him and sentenced him to life imprisonment.

The Appeal

4. Being aggrieved by the said conviction and sentence the appellant filed this appeal on the following house made grounds:-

1. THAT the trial Magistrate erred in Law by sentencing and convicting the appellant when the

Prosecution had not proved its case against the appellant beyond reasonable doubt as required by Law.

2. THAT the learned trial Magistrate erred in Law by sentencing and convicting the appellant against the weight of evidence on record.

3. The learned trial Magistrate erred in Law by applying wrong principles of Law.

4. The learned trial Magistrate erred in Law by shifting the burden of proof to the appellant.

5. The learned trial Magistrate erred in Law by failing to consider the mitigation by the appellant.

6. The trial Magistrate erred in Law by passing an otherwise excessive sentence.

7. The learned trial Magistrate erred in Law and fact by failing to consider the appellants defence.

The appellant wants the appeal allowed the conviction quashed and sentence set aside or in the alternative an order for retrial or reduction of sentence. The appellant was on the day of the hearing of the appeal represented by Mr. Vadanga who held brief for Mr. Kahi.

5. In his submission Counsel relied on the appellants written submissions dated 20/07/2015 which were filed on 21/07/2015. Mr. Omwenga from the office of the Director of Public Prosecution conceded to the appeal for the simple reason that the evidence of PW1 and PW2 was contradictory as to what happened on the date of the alleged offence. Counsel submitted that the conviction in this case was not safe.

6. This is a first appeal. Being a first appeal this Court has the duty to carefully sift through the evidence on record and come up with its own conclusions bearing in mind that it neither saw nor heard the witnesses as they gave evidence at the trial, so as to appreciate the demeanor of the witnesses. See **David Njuguna Wairimu –vs- Republic [2010] e KLR** where the Court, relying on the holding of the Court **of Appeal for Eastern Africa** in **Okeno –vs- Republic [1972] E.A 32** held that:-

> "The duty of the first appellate Court is to analyze and re-evaluate the evidence which was before the trial Court and itself come to its own conclusions on that evidence without over-looking the conclusions of the trial Court. There are instances where the first appellate Court may, depending on the facts and circumstances of the case, come to the same conclusion as those of the lower Court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the Court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

Prosecution Case

7. The Prosecution called five (5) witnesses. The complainant who testified as PW1 was taken through *voir dire* examination before the trial Court allowed her to give sworn testimony. The trial Court was satisfied that she understood the meaning of taking an oath. During her testimony, PW1 told the trial Court that she was ten years old and a student at [particulars withheld] primary school in class 2.

8. She explained what happened to her on the 08/7/2010 at 6.45a.m. when she went out of her grandmother's to urinate. She had left her grandmother in the house. The appellant then came held her hand and led her to his house. She further told the trial Court that at the appellant's house, the appellant removed her pants and he (appellant) also removed his. He then lay on her inserting his penis into her vagina. She felt pain and cried. The appellant stepped on her feet and told her to tell her grandmother that it was a stick that pricked her.

9. PW1 explained further that her grandmother heard her cry and came out and found her when she was leaving the appellants house. She could not walk properly. They then went to the Police. She showed the trial Court the P3 form - PMFI -1 and a discharge summary PMFI -2. She identified the appellant

who was in the dock and added that he was a neighbour who she referred to as grandfather.

10. The appellant briefly cross examined PW1 who maintained that what she was telling Court was the truth. She also maintained that during the incident she was alone with the appellant in the house and that nobody else witnessed the incident. She reiterated that she bled and also screamed which scream attracted her grandmother who came out of the house. She added that she never fell on a stick and that Jane who she knew was not present during the ordeal.

11. PW2 S M M from Demesi told the trial Court that PW1 C.M was her grand child aged nine (9) years. She testified that on the 8/7/10 PW1 went out to urinate and took a long time. She decided to look for her outside the house and in the neighbours house but she didn't find her. She told the Court that the girl came back and told her that she was from M's house. She was bleeding from her vagina and she informed her that M grabbed her and took her to his bed and defiled her and that her pant had remained in M's house.

12. PW2 explained that M came and took PW1 to hospital in Mbale where she was admitted for one (1) week. She reported the incident to the Assistant Chief and the Police at Mbale. PW2 stated that the appellant was her step son because his mother is her co-wife and they stay in the same compound. She claimed that they had no differences with the appellant who she pointed out in the dock. Mr. Mukabi cross-examined her. She explained that she sleeps with the child in the same house but the child sleeps in her own room. She heard the child C.M leave the house to go and urinate and prepare for school and she confirmed this from the other children who were sleeping with C.M. She discovered at 7.00a.m that C.M was still missing and went to Jane and Apollo's house to look for her. She explained that she told her neighbour that the child C.M was lost. After some time the child came back home while crying.

13. She explained that she couldn't go to M's house as he stays alone and that she did not suspect that the child could go there. She maintained that they had a good relation with the appellant. She also explained that she called M (PW3) immediately and M came and took the child to Nadenya Dispensary and later to Mbale district hospital and since the situation was serious the child CM was admitted for one week. She visited CM in hospital who was being taken care of by another grand child of hers. She maintained that she did not frame the appellant.

14. PW3 Mary Akinyi Matongo who is member of the Area Advisory Council in the Children's Department testified that PW2 was her neighbour and that the appellant is an uncle. She was informed of the defilement of PW1 on the 8/7/2010 by Apollo Kiliro and that the villagers wanted to cover up the incident. She visited the home where she found the child lying down in pain while PW2 was just crying. She then took the child to Nadanya Health Centre. On examining the child she observed that her vagina was swollen and bleeding. The person on duty at Nadanya Health Centre referred PW1 to Mbale district hospital where the child was admitted for five (5) days.

15. PW3 stated that she reported the matter to the Police after admitting her to hospital. She testified that a P3 form was filled. She saw the P3 form and the discharge summary. She also recorded her statement with the Police. She said that she did not have a grudge with any of the parties and that she was just performing her duties. She also claimed that she knew the appellant before the incident.

16. On cross examination by Counsel PW3 reiterated her earlier statement only adding that she was told that CM had no parents and that she (CM) was PW2's grand child. She reiterated that she saw blood on CM's vagina. She did not know if there were differences between the parties.

17. This case was investigated by number 43176 Corporal Johnson Momanyi attached at Kilingili Police Station Crime Branch office. He testified as PW4. He received a report from PW3 on the 8/7/10 at around 6.30pm while at Mbale Crime Branch office that there was a girl aged nine (9) years by the name C.M who had been defiled and had been treated at Vihiga hospital the following day.

18. Together with Corporal Cheptoo they went to the hospital where they found the victim who was under treatment and thereafter, they visited the home of the victim where they found her grandmother, PW2 and

the appellant. They asked for CM and the appellant told them that she had fallen from a tree and was in hospital. PW4 arrested the appellant and took him to the Police Station. He later recorded the statements of all the witnesses during which time, PW1 told him that on the 8/7/2010 at around 8.45 she left her grandmother's house and went to urinate outside when the appellant grabbed her and took her to his house where he defiled her.

19. He then charged the appellant with the offence before the trial Court. He told the trial Court that the victim was a child whose age was assessed to the ten (10) years as per the P3 form. He also noted that the accused was in Court.

20. On cross examination by Counsel PW4 explained that PW3 reported the incident on 8/7/2010 and on the 9/7/2010 he arrested the appellant on allegations of defiling the complainant. He explained further that the complainant was taken to the Police by many women. He added that the P3 form was issued the same day the matter was reported to the Police. He also told the trial Court that he did not recover any clothes from the scene as the house where the complainant lived was not in the same compound where the appellant lived.

21. The Senior Clinical officer in charge of clinics and sexual violence and Gender clinic Sammy Chelule (PW5) produced the P3 form prepared by Dr. Odera who had gone for further studies. He explained the contents in the said form. That the age of the complainant was estimated as ten (10) years and that she was admitted in the hospital for five (5) days. History was that of defilement by a person known to her. On examination of her vagina her labia majora was neither swollen nor bruised and there were no tears although the hymen was perforated or inflamed. There was no blood noted on her clothes or vagina. There were red blood cells noted after the high vaginal swab but spermatozoa was not found. Dr. Odera concluded that it was defilement and signed and stamped the P3 form on the 12/7/10. PW5 produced the P3 form which was marked as Exhibit 1 (a) and the discharge summary which was marked as Exhibit 1(b) together with the Application Authority waiver form Exhibit 1 (c)

22. He claimed to have worked with Dr. Odera at the hospital for over two (2) yeas and was familiar with Dr. Odera's hand writing and signature. On cross examination by Mr Mukabi for the accused, PW5 stated that the patient was admitted on 8/7/2010 and discharged on 12/7/2010 as shown on PExhibit 2 whereas the patients P3 form was filled on 12/7/2010 the same date she was examined. He further explained that according to him defilement occurs where there is penetration of a person under the age of 18 years

23. He added that the P3 form showed the injuries sustained which confirm that there was penetration as her right labia was injured. He did not know whether the appellant was examined. He further testified that as per the P3 form the victim was aged ten (10) years. He explained that the age of injury at the time of examination was sixteen (16) hours and that the date of examination was between 8/7/2010 – 12/7/2010. He stated that part IV of the P3 form should be filled for a male suspect and that the appellant was not taken to the hospital.

24. At the close of the Prosecution case the trial Court placed the appellant on his defence. After satisfying itself that a prima facie case had been established against the appellant. Section 211 of the CPC was complied with and the appellant opted to give sworn evidence. He also stated that he would call two (2) witnesses.

The Defence Case

25. The appellant testifed that he understood the offence he was charged with. He told the trial Court that he knew the complainant C.M who was like his child (his niece) and that she lived in their compound together with her grandmother. He testified that on the 8/7/2010 he did not defile C.M. He claimed that on that day he was not around the home and that his mother L E witnessed how C.M had fallen from a tree though he himself did not witness the incident. He was told that C.M fell from a tree that morning. He did not bother about that issue but claimed that he was arrested on the 8th when he was told that he had defiled C.M. He testified that they had a land problem with the family of the complainant. He said

that there was no peace in the compound where they lived and that he was framed. He maintained that PW2's evidence was full of lies and that the evidence by M A PW3 was also not true. He maintained that when he was arrested he was not taken or examined at the hospital. He maintains that he did not commit the offence as alleged.

26. On cross examination, the appellant claimed that he had a long standing land problem from the 1970's with C.M's parents though there was no land case in Court. He reiterated his earlier testimony that he was told that C.M fell from a guava tree and that he did not do anything because they did not live peacefully. He denied defiling the child. He said he knew that the girl was taken to hospital for treatment for a fall from a tree. The appellant closed his case without calling the 2 witnesses he had indicated he would call.

Issues for Determination

27. From the above analysis the following issues are for determination:-

1. Was the case proved to the required standard to warrant the conviction sentencing and

2. Did the trial Magistrate apply wrong principles of the Law?

3. Did the learned trial Magistrate shift the burden of proof to the appellant?

4. Did the trial Magistrate consider the mitigation and the appellants defence?

5. Was the sentence meted upon the appellant excessive in the circumstances?

Analyzing and Findings

28. It is a cardinal principle of Law that in a criminal case the legal onus is always on the Prosecution to prove the guilt of an accused person and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the Prosecution throughout the trial to prove the guilt of an accused person. It is provided in section 107 of the Evidence Act Cap 80 thus "107 (1) whoever desires any Court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist. (2) when a person is bound to prove the existence of any fact it is said the burden of proof lies on that person."

29. In defilement cases such as the present one a trial Court has to be convinced and make a finding that the following ingredients have been proved:-

a. The age of the complainant and

b. Penetration of the vagina of the minor

The complainant CM told the trial Court that she was nine (9) years. PW2 testified that she was ten (10) years and PW5 the Clinical officer produced medical evidence i.e. P3 forms that estimated the complainant's age as ten (10) years.

30. In the case of **JOSEPH KIETI SEET –VS- REPUBLIC [2014] e KLR** H.C at MACHAKOS CRIMINAL APPEAL No.91 of 2011 the learned Mutende J. held as follows:

> "it is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni –vs- Uganda, Court of Appeal Criminal Appeal No.2 of 2000 it was held thus "in defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who professionally determines the age of the victim in the absence of any other evidence. Apart from medial evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ……"

I do agree with the learned Judge's proposition that the age of a minor can be proved by observation and common sense, especially in rural areas where many parents and/or guardians do not obtain birth certificates as a matter of course. In such cases, observation and common sense are key.

31. From the evidence by the Prosecution, the age of the victim was properly proved beyond reasonable doubt both by the medical evidence and the evidence of PW2 the complainants grandmother. PW3 in her testimony observed that the complainant's vagina was swollen and bleeding whereas PW5 who produced the P3 form explained the contents therein. He stated that the hymen was perforated inflamed and that there were red blood cells noted after the vaginal swab was analyzed though spermatozoa was not found. It was concluded that there was defilement. From the medical evidence the Prosecution proved that there was penetration of the complainant's vagina.

32. From the above evidence this Court finds that the Prosecution proved that the complainant C.M was defiled. The evidence that linked the appellant to the offence was that of the complainant herself. Section 124 of the Evidence Act as amended by Act No.5 of 2003 and Act No.3 of 2006 provides as follows:-

> "Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations act (cap 15) where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the Prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:-

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

33. The effect of the proviso to Section 124 is to create in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. In **JACOB ODHIAMBO OMUMBO =VS= REPUBLIC Cr. Appeal No.80 of 2008** (Kisumu) the Court made the same point as follows:-

> "Though P's evidence was that of a child of tender years, the Court can convict on it by virtue of the proviso to Section 124 of the Evidence Act Cap 80 Laws of Kenya as amended by Act No.5 of 2003".

34. In **Mohamed –vs- Republic [2006] 2 KLR 13** the Court of Appeal asserted the above proposition by stating thus "it is now settled that the Courts shall no longer be harmstrung by requirements of corroboration where the victim of Sexual Offence is a child of tender years if it is satisfied that the child is truthful."

35. Before the trial in the lower Court commenced, the trial Court took the complainant (CM) through a *voir dire* examination and found that the complainant understood the meaning of giving evidence under oath. That means that the Court was satisfied that the complainant was a truthful person.

36. The above analysis shows that the Prosecution has proved its case beyond reasonable doubt as required by law and that the trial Magistrate did not apply any wrong principles as alleged nor did he shift the burden of proof to the appellant. The Prosecution discharged the onus upon it and did so briefly.

37. The trial Magistrate in his judgment did consider the appellants mitigation and defence as he noted that the accused did into explain where he was and that he (appellant) did not call his mother as a witness to corroborate his testimony. I must point out here that the appellant had no duty to prove his innocence either by calling his mother or otherwise. My own assessment of the evidence shows that the Prosecution discharged the onus of proof. The trial Court found that the defence adduced was insufficient to shake the Prosecution's case. Thus it is not true to state that the defence was not considered or mitigation

considered. The facts of the mitigation were noted being that the accused was a first offender, an elderly person and the trial Court went ahead and sympathized with the loss of the appellant's wife and mother as submitted by the defence.

38. On sentencing the trial Court sentenced the appellant to life imprisonment. The trial Court was alive to the fact that the child was aged ten (10) years when she was defiled and the only sentence provided by Law for such an offence is life imprisonment which the Court pronounced.

39. This Court finds that the conviction by the trial Court was safe and the sentence proper. I therefore do not agree with the Prosecution Counsel that this appeal should be allowed. Any contradictions in the evidence in the evidence of PW1 and PW2 is immaterial and does not go to the root of the trial Court's conclusions.

Conclusions

40. For the reasons given above, the appellant's appeal on both conviction and sentence fails. The same is accordingly dismissed in its entirety. Right of Appeal 14 days.

41. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega

this 4th day of February 2016.

RUTH N. SITATI

JUDGE

In the presence:

Mr. Getruda for Mr. Kahi for Appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat -Court Assistant