REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 71 OF 2015

GEORGE ONSELIO KADU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the

Chief Magistrate's Court at Limuru Criminal Case No. 847 of 2014

delivered by Hon. T. Ole Tanchu (SRM) on 7th May, 2015).

JUDGMENT

Background.

The Appellant, George Onselio Mokadu alias Mugaka, was charged with defilement contrary **to Section 8(1) as read with (3) of the Sexual Offences Act No. 3 of 2006**. He was charged in the alternative with committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**.

The particulars of the main charge were that on 22nd October, 2014 at Kinale area in Lari District within Kiambu County, he intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of JWK, a child aged 14 years. In the alternative, it was alleged that on 22nd of October, 2014 at Kinale area within Kiambu County, he intentionally and unlawfully touched the vagina of JWK, a child aged 14 years. He was convicted on the main charge and sentenced to 20 years imprisonment. Dissatisfied with the trial court's decision, he preferred this appeal.

Initially, the Appellant filed a Memorandum of Appeal in person. Thereafter, he was represented by Seneti Oburu & Co. Advocates who filed an Amended Memorandum of Appeal on 1st February, 2016. Counsel raised the following grounds of appeal:

1. **The learned Magistrate erred in Law and fact by not comprehending the evidence adduced by the Prosecution witness, thus delivering a wrong judgment not supported by the evidence on record.**

2. **The learned magistrate erred in law and fact in not making a finding that the prosecution had failed to prove its case on a balance of probability (*which ought to read beyond reasonable doubt- emphasis mine).***

3. **The learned magistrate erred in law and fact by convicting the accused on unsubstantiated evidence and by not making a finding that the evidence adduced by the prosecution was full of contradiction and not corroborated.**

4. **The learned magistrate erred in law and fact by passing an excessive sentence against the accused for an offence which was not proved in court.**

5. **Learned magistrate erred in law and fact by showing bias against the accused.**

6. **Learned magistrate erred in law and fact by not considering the evidence of the clinical officer and its implication to the case.**

Submissions

The appeal was canvassed by way of filing written submissions. Those of the Appellant are dated 9th March, 2016 whist of the Respondent were filed on 16th March, 2016.

The Appellant in his submissions contended that the learned magistrate was biased against his case as the conviction was against the weight of the evidence. He, on the same, further submitted that a finding that the prosecution had made out a case under Section 211 of the Criminal Procedure Code was not supported by the evidence. He also submitted that he was convicted on uncorroborated evidence in that the evidence of the Clinical Officer was not considered. The Appellant added that the complainant gave contradictory evidence, specifically, relating to her age. In this regard, it was submitted that the Appellant testified that she was aged 15 years yet the charge indicated that she was aged 14 years. It was further the Appellant's contention that the sentence meted out against him was manifestly excessive. He asked this court to quash his conviction and set aside the sentence.

The Respondent submitted that the prosecution's case was proved beyond all doubt and that the elements of defilement, namely; age of the complainant, penetration and identification of the Appellant, were proved accordingly. The court was urged to therefore uphold the conviction and sentence imposed by the trial court.

Evidence

The prosecution's case was that on 22nd October, 2014 at around 10.00 a.m., the complainant, then a Form 2 student at ***[particulars withheld]*** Secondary School was on her way home to pick a book when she ran into the Appellant at a place called ***[particulars withheld***]. The Appellant asked her what she wanted and she said nothing. He then proceeded to call one Karithi and enquired on his whereabouts. Thereafter, he asked the complainant JWK to escort her to Red Rock. They went to Karithi's house. She was ushered into the house and asked to take off her clothes, following which the Appellant stripped and proceeded to lie on top of her and had sex with her using a condom. She was then asked to head home.

At around 6.00 p.m., Mama Njoroge, PW3, came to the complainant's house and informed her mother that the complainant JWK had been seen on Karithi's (Mrefu's) property. The complainant, being fearful of being beaten, ran off to the forest where she spent the night. On 23rd October, 2014, she went home and her mother took her to Kinale Dispensary, then to Rukuma and subsequently to Tigoni District Hospital. Investigations were also carried out by Lari Police station which led to the Appellant's arrest.

The prosecution called a total of six witnesses whose evidence is as summarized above. PW1 was the complainant whilst PW2, her mother. PW2 testified that PW1 went home complaining that she had been sent home from school to collect history book. She told her that she would avail the book on the following day. At 7.00 p.m. one Sarah Mwihaki(Mama Njoroge) went and informed her that PW1had been seen with the Appellant. PW1 was not found on this day. On 23rd October, 2014, PW1 returned home and her mother took her to hospital for examination as she had information that the Appellant had defiled her.. Thereafter she reported the matter to the police. PW3 Sarah Mwihaki Kinyanjui testified that

she had information that PW1 had been seen going to Mogaka's (Mrefu) house. She identified the said Mogaka as the Appellant in Court. By the time she reported the incident to her mother, PW1 had escaped from their home. PW4 , Administration Police Constable, George Ndungu of Kinale AP Post testified that on 22nd October, 2014, (typed as year 2015) he heard people screaming near the Road Unit Camp. On rushing to the scene, found members of the public who wanted to lynch George Onserio, the Appellant herein on allegations that he had defiled a minor. He arrested him and escorted him to Lari Police Post for further investigations. PW5 James Kabue was a Clinical Officer at Tigoni District Hospital who examined PW1. PW6, Police Constable Agnes Motiso summed up the prosecution's case.

At the close of the prosecution's case, the Appellant was put on his defence and he gave an unsworn statement. He stated that he was a security guard and on 22nd October, 2014, he left home for work. On arrival at Nyarangi school junction, he met a girl called Wairimu coming from school. She was his neighbor. She informed him that she had been chased away from school. Both were going towards the same direction. When he arrived at his place of work, he parted ways with the girl. He next saw the girl at 10.00 p.m. when her parents went to his house and alleged that he had defiled her. He denied having committed the offence.

Determination

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion. See the case of **Kariuki Karanja v Republic (1986) e KLR.** The prosecution case is as summarized above. Having considered the evidence and the respective submissions, this court identifies the following issues for determination:

1. **Whether sufficient evidence was tendered by the prosecution before the Appellant was put on his defence pursuant to Section 211 of the Criminal Procedure Code.**

2. **Whether the evidence adduced was sufficient to prove the charge of defilement.**

3. **Whether the sentence was excessive.**

The first issue for determination is whether, the trial court, in putting the Appellant to answer to the charges under Section 211 of the Criminal Procedure Code was satisfied that there was sufficient evidence placed on record to support a finding that the Appellant needed to answer to the charges. *When Section 211 of the Criminal Procedure Code was explained to him he did not complain that he was being put on his defence based on evidence that was not sufficient. He even stated that he needed time to '**prepare for defenc**e'. The fact that he was granted the opportunity to put up a defence implied that the trial court observed one of the basic tenets of the rules of natural justice spelt out under Article 50(2)(c) of the Constitution of Kenya, 2010. The court accorded him 21 days within which to prepare a defence that would disprove the evidence that was set out by the prosecution. I add that the fact that an accused is put on his defence does not constitute a pronouncement on his guilt. It is merely a finding by the court that the prosecution had established a prima facie case which the Appellant was required to disprove. This is buttressed by the definition of the word '**prima facie'** in the Black's Law Dictionary, 9th Edition as:*

> '***The establishment of a legally required rebuttable presumption; a party's production of enough evidence to allow the fact-tier to infer the fact at issue and rule in the party's favour'***

Therefore, a ruling under section 211only creates a presumption that is rebuttable. The onus to rebut this presumption lay squarely with the Appellant and in this particular case he did not sufficiently do so. Moreover, he also failed to exercise his right to appeal against the ruling requiring him to answer to the charges. This ground of appeal hence lacks merit.

The next issue for consideration is whether the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act was proved beyond reasonable doubt. For the offence of defilement to be proved, three (3) succinct ingredients must be proved, these are; age of the victim,

identification of the Appellant and penetration.

The ingredient of age was proved by the complainant's Birth Certificate Serial number F No. 145031 which indicated her date of birth as 5th February, 2000. This brought her age at 14 years as at the time of the incident. The Appellant submitted that the complainant stated during her *voire dire* examination that she was 15 years old while the evidence adduced showed that she was 14 years old. This, he concluded was an inconsistency that created doubt on her exact age at the time of the incident. This contention lacks basis. A simple application of the evidence on record shows that on the date of her testimony, 03/02/2015, she was indeed 15 years old while on the date of her defilement, 22/20/2014, she was 14 years. There are therefore no inconsistencies in this respect, since the complainant's age was adequately proved and fell within the ambit of Section 8(3) of the Sexual Offences Act.

On identification the Appellant and the complainant knew each other before the day in question. The complainant testified that she knew the Appellant before and that they were friends. This fact is further buttressed by the Appellant who stated that he knew the complainant as they were neighbours. These statements leave no doubt in this court's mind that JWK knew the Appellant before the incident occurred and as such identified him based on this previous knowledge. This court is thus satisfied that the ingredient of identification was sufficiently proved.

The third ingredient that must be proved is that of penetration. On this issue the Appellant contended that the trial court erred in convicting him based only on the evidence of the complainant. Evidence adduced by PW5, the Clinical Officer who examined PW1, included a P3 form which indicated that the external genitalia was normal. Further that there was no hymen but that there was an old hymenal tear. That statement presupposes that the hymen was torn long before the date of the examination. This in my view was not inconsistent with the evidence on record as the charge clearly stated that the complainant was defiled on 22nd October, 2104 which was a week before the examination. The conclusion of the Clinical Officer is that this was a case of defilement. There is no doubt from the testimony of the complainant that the Appellant had sex with her and that she was telling the truth. I have no reason, accordingly, to doubt her evidence not withstanding that there was no eye witness. Moreover, the proviso to Section 124 of the Evidence Act empowers a court to convict an accused person in a case involving a sexual offence on the evidence of the victim alone if the court believes in it. The entire Section provides that;

> ***124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.***

Let me also comment on P. exhibit 2 which was the complainant's medical examination card dated 23rd October, 2014 and numbered 13913/14. In it is written' **The girl admits to have had sex willingly'.** Attached to it is also a medical card in respect of the Appellant from Lari Health Clinic dated 23.10.14. It indicated that the Appellant admitted to have had sex with the complainant in that, ' **Intercourse was under consensus, says he used a condom'**. The statement by the medical officer is a clear corroboration of the complainant's evidence that she was defiled. In any case, flowing from the medical records, I make a finding that the Appellant did not advance a defence that he reasonably believed that the girl was of mature age when he had sex with her. Accordingly, the medical evidence of PW5 sufficiently corroborated the evidence of the complainant.

This court upon re-examining the evidence finds that the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act was conclusively proved beyond reasonable doubt. I find that the conviction of the Appellant was safe.

On sentence, Section 8(3) of the Sexual Offences Act provides that;

> ***" A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

The above provision is couched in mandatory terms. The learned magistrate did mete out a sentence of 20 years in accordance with the law. This court cannot disturb the same.

Finally, I note that ground (2) of appeal insinuates that the burden of proof is on a balance of probabilities. That is a misguided assertion as in criminal trials the burden of proof is always beyond a reasonable doubt.

In the upshot, this appeal lacks merit and the same is accordingly dismissed.

DATED AND DELIVERED IN NAIROBI THIS 10TH DAY OF MAY, 2016

G. W. NGENYE-MACHARIA

JUDGE

In the present of;

1. Appellant present in person.

2. M/s Nyauncho holding brief for M/s Wario for the Respondent.