REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 15 OF 2015

JAMES MACHARIA WAMBUI............................APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's

Court (S. Jalang'o) at Baricho, Criminal Case No. 710 of 2013

dated 19th August, 2014)

JUDGMENT

1. **JAMES MACHARIA WAMBUI,** is the appellant herein who was charged with defilement contrary to ***Section 8 (1) (3)*** of the **Sexual Offences Act No. 3 of 2006** through Criminal Case No. 710 of 2013 at Baricho Principal Magistrate's Court. The particulars of the offence were that on 18th July, 2013 within Kirinyaga County he defiled **C M K** a girl aged 15 years. The appellant denied the offence and case went for full trial upon which he was found guilty of the offence, convicted and sentenced to serve 15 years imprisonment.

2. The evidence adduced at the trial court by the prosecution indicated that the complainant in the case C M K (P.W.2), was on her way to a cousin's place on the 18th July, 2013 at around 5 p.m. when the appellant waylaid her and took her to his house where he defiled her and released her the following day the 19th July, 2013 at around 6 a.m. She reported the incident to her sister P N (P.W.3) with whom she was staying with at *particulars withheld*. The said sister took her to Kandongu Dispensary where she was told to take the child first to Police Station to make a formal report which they did at Sagana Police Station. At Sagana they were attended by a Police officer Ann Achieng (P.W.4) who escorted them to a nearby Sagana Health Centre where the child was attended to and treated by a clinical officer known as John Mwangi (P.W.3) who later filled the P3 and confirmed that the complainant had been defiled. The P3 was produced as Prosecution Exhibit 1 and treatment notes were produced as Exhibit 2 by the said medical officer. The investigating officer Ann Achieng (P.W.4) produced the birth certificate No. *[particulars withheld]* which though wrongly marked as Exhibit 2 instead of Exhibit 3 showed that the complainant or victim was born on 2nd August, 1997 indicating that at the material time of the incident she was aged 16 years. In his defence given under oath the appellant denied the offence and denied knowledge of the complainant stating that he was seeing her for the first time in court. He conceded under cross-examination by the prosecution that the complainant had no reason or motive to lie against him.

3. The trial court upon evaluation of evidence tendered at the trial found the appellant guilty of the offence and convicted him to serve 15 years in prison. The appellant felt aggrieved and filed this appeal on the following grounds namely:-

i. ***That the trial court relied on hearsay and did not establish if the case had been proven to the required standard.***

ii. ***That the learned trial magistrate erred by not considering his defence that he was framed up.***

iii. ***That the learned magistrate failed to consider that the complainant never raised an alarm during or after the incident.***

iv. ***That the learned magistrate did not consider the evidence that the complainant had taken a bath and therefore interfered with evidence.***

v. ***That the learned trial magistrate erred by relying on evidence of a single witness which was not corroborated.***

vi. ***That the evidence of the complainant was erratic and full of contradictions but the trial magistrate erred by not considering the same.***

4. Mr. Ngigi, learned counsel for the appellant submitted that the evidence adduced in court did not support the particulars of the charge and pointed out that the age of the complainant at the hearing was established to be 16 years when the particulars of the charge and the evidence of the minor indicated that she was aged 15 years. The appellant further contended that there was nothing to indicate that there was defilement in the evidence adduced by the complainant.

5. On the issue of contradictions the appellant's counsel submitted that the treatment note produced as exhibit 2 shows some contradictions as on one part it indicated that there was no bleeding or lacerations noted as the victim had taken a bath and on another section it noted some lacerations on the genitalia of the victim. It was also submitted that the age of the injuries noted were not estimated by the officer who examined the victim and that this omission was fatal to the prosecution case. Mr. Ngigi cited the case of **BEN MAINA MWANGI -VS- R[2006]eKLR** in support of the contention.

6. Mr. Sitati learned counsel for the Respondent opposed this appeal and supported both the conviction and the sentence meted out against the appellant contending that the evidence adduced at the trial was overwhelming.

7. On the contention that the appellant was charged with wrong section of the law that is ***Section 8 (1) (3)*** instead of ***Section 8 (1) (4)*** of the **Sexual Offences Act** in view of the age of the victim, the Respondent contended that the error was not fatal as this Court could rectify the anomaly under ***Section 354 (3) (a) (iii)*** of the **Criminal Procedure Code**. The State further submitted that the victim was not sure of her age when the incident was reported as 15 years instead of 16 years which was established at the trial through production of birth certificate. Mr. Sitati denied the appellant's contention that the trial court relied on hearsay evidence. He further disputed the contention that there were 2 people in the house where the complainant was defiled insisting that the facts indicated that the appellant and the victim were the only people present in the house where the defilement took place.

8. The Respondent also countered the appellant's argument that no alarm was raised arguing that in law there is no consent and that the complainant was threatened with dire consequences. It was contended that there was no interference with evidence because despite taking a bath the doctor was still able to establish that the victim had been defiled because the hymen was broken and was fresh at the time of examination.

9. I have considered this appeal and the arguments of both counsels.

The appellant's counsel apart from presenting oral arguments in support of the grounds in the petition in my view introduced 2 additional grounds without the leave of court pursuant to ***Section 350 (2)*** of the **Criminal Procedure Code**. The two additional grounds are:

i. That the medical officer who examined the complainant and filled the P3 (Exhibit 1) did not estimate the age of injuries observed on the genitalia of the victim.

ii. That the evidence adduced at the trial did not support the particulars of the charge facing the appellant in that the age of the victim was given as 15 years in the particulars while the evidence adduced indicated that she was 16 years old at the material time.

10. I will begin with the age of the injuries of the victim. Although the ground was raised without leave, this Court would not have found the ground well founded even if it had been raised with leave of this Court. This is because, the clinical officer John Mwangi (P.W.1) clearly told the trial court he treated the patient/complainant and noted that her hymen was broken and fresh. The appellant cannot validly say that the age of the injuries was not given. I also do not find any contradictions on the question of dates when the complainant sought treatment at the health facility. She told the trial court that she had gone for treatment on 18 July, 2013 due to an ailment unrelated to the defilement and went on 19th July, 2013 for treatment in respect to defilement. She was escorted to the health facility by P.W.4 the investigating officer and P.W.3 P N who was said to be her sister. I do not find any contradiction there. The only inconsistency noted which was not clarified was the evidence of the clinical officer (P.W.1) who told the Court that he treated the complainant on 18th July, 2013. He may have treated her on 18th July, 2013 and again on 19th July, 2013 and even though the issue was not clarified at the trial I do find the discrepancy insignificant. The same did not affect the prosecution case in any significant way or prejudiced the appellant. The complainant had visited the health centre on two occasions as indicated above.

11. On the issue of the age of the complainant, it is also clear that the ground was raised at the hearing though the appellant's counsel qualified or tried to pass it as a contradiction in the prosecution case. Whatever the case I have considered the evidence adduced at the trial court and in particular the birth certificate which as I have indicated above was wrongly marked Exhibit 2 instead of exhibit 3. What is material is that the birth certificate showed that the complainant was born on 2nd August, 1997 which indicated that she was aged 16 years on the material date (18th July, 2013) of the offence. I also noted that she gave her age as 15 years when the report was made at the Police but I find this excusable given the fact that she was an orphan and the sister (P.W.3) probably was not so sure of her exact age. The discrepancy however, was minor and not fatal as contended by the appellant. The discrepancy did not substantially affect the charge facing the appellant and the same is curable under Section 382 of the Criminal Procedure Code. The same did not occasion any failure of justice to the appellant given that the appellant was convicted of a lesser offence and the sentence meted out was consistent with ***Section 8 (4)*** of the **Sexual Offences Act** even though the trial magistrate did not specifically state so. Had the trial magistrate meted out a sentence as per the charge sheet (***Section 8 (1) (3))*** **Sexual Offences Act No. 3 of 2006**, the appellant could have been sentenced to not less than 20 years imprisonment as provided by law and could have had a good ground to appeal against the sentence in that event but that is not the case in this appeal.

12. I have considered the evidence adduced at the trial court and re-evaluated the same bearing in mind that unlike the trial court which had the benefit of observing the demeanor of witnesses my analysis is limited to what is on record. The appellant contended that the trial court relied on hearsay evidence but a look at the evidence adduced from P.W.1 (clinical officer) P.W.2 (complainant) P.W.3 (sister and guardian to the victim and P.W.4 (the investigating officer) clearly show that the evidence was direct and primary to the offence that was committed. The trial court cannot be faulted in any way on hearsay evidence because there was none.

13. On the issue of corroboration of evidence my findings are that corroboration is not a requirement in law to prove offences of sexual nature. ***Section 124*** of **Evidence Act** clearly allows a court to rely on evidence of a single witness so long as the court has reasons (to be recorded) to believe that the witness is

telling the truth. I nonetheless find that in this case there was corroboration to the evidence adduced by the complainant that she had been defiled by the appellant. P.W.1 (clinical officer) corroborated the evidence by his findings when she examined and treated her. The exhibits (Exhibit 1 and Exhibit 2) show that the victim was defiled. Penetration which is a necessary element in defilement cases was established and proved beyond reasonable doubt. P.W.3 (sister to the complainant) told the trial court that the complainant was walking with her legs apart because of the pain she experienced. The evidence of the 3 witnesses in my view corroborated and was consistent with what the complainant told the trial court. See **N. K. -Vs- R [2011] eKLR** and **ALI MWARO MGANGA -VS- REPUBLIC [2009] eKLR.**

14. The appellant contended in this appeal that the trial court should have considered his defence and note that the charge facing him was a frame up. I have looked at what the appellant told the trial court in his defence. I have looked at what the appellant told the trial court in his defence. He simply denied the offence and wondered why the victim did not raise an alarm if it was true that she had been defiled. The appellant did not say that he was framed in any way if anything he told the trial court categorically that he was a stranger to the victim and there was no possibility that the said victim could lie against him or had a motive to lie against him. This displaces the ground that he was framed up. He could not have been framed and I find no evidence to suggest that he was framed up. The complainant and P.W. 3 properly identified him as the culprit and the trial court in his judgment correctly evaluated the evidence and concluded that the appellant had been positively identified and placed at the scene of crime. He was a neighbour to the complainant's guardian and he admitted in his defence that he comes from *Particulars withheld* the place where the complainant resided.

15. I have considered the issue raised by the appellant that the victim never raised an alarm and so there was no evidence that showed that force was applied on her. I have also considered the authority cited by the appellant in the case of **Ben Maina Mwangi -Vs- R [2006] eKLR** where the court found that there was no evidence that defilement had been committed against a child aged 4 years and that the doctor did not connect his findings on examination with the offence as he failed to indicate age of injuries. In my view the decision in the authority was based on a different set of circumstances. The trial court in that case did not conduct a proper *voire dire* examination in dealing with the evidence of a minor (aged 4 years). Secondly the doctor's evidence did not indicate the age of the injuries. The minor did not exhibit any sign of pain which the court found odd given her age as compared to that of the accused. In this appeal however, I find that unlike in the case cited, the trial was conducted properly. The doctor told the trial court that on examination he found the hymen was broken and "fresh" and clearly indicated that a broken hymen could be fresh for upto 72 hours and given the fact that the victim was examined on 19th July, 2013 (which I find to be the actual date of examination as per the evidence of P.W.2, P.W.3 and P.W.4), the approximate time of the defilement is consistent with the date given by the complainant which was 18th July, 2013. I also find that P.W.3 observed the manner in which the complainant was walking and the only inference that can be drawn is that she was experiencing pain some pain. It is also important to note that in defilement, consent cannot be a defence so it is immaterial whether the victim screamed or raised an alarm during or after the incident. So in view of the age of the complainant, the appellant cannot claim that because there was no evidence of force used, there was no defilement. I have further evaluated the evidence of the complainant and noted that she reported to her sister immediately she arrived home in the morning after the ordeal and told the trial court that she was forced and threatened by the appellant. That ground by the appellant does not therefore hold any water and the authority cited cannot assist the appellant in any way.

16. I also agree with the Respondent that the complainant did not interfere with evidence by taking a bath before going for a medical check up. Although naivety on the part of the complainant and the guardian cannot be ruled out, I still find that the medical officer was nonetheless able to note that defilement had taken place. Some evidence may have been lost through the bath taken by the victim for example blood stains etc but the evidence that remained was sufficient for the doctor to form the opinion that the complainant had been defiled. He noted lacerations on the genitalia of the victim which was well captured in the treatment notes (Exhibit 2) and the P3. He also noted that the hymen was broken and fresh which in my view justified his findings that the complainant had been defiled. The assessment of this evidence and the conclusions made by the trial court was correct in my view. Defilement was proved by the prosecution beyond reasonable doubt.

17. In view of the above findings this Court is unable to find any significant contradictions in the prosecution case. The evidence adduced was overwhelming and all the necessary ingredients of the offence to wit, penetration, identity of the appellant and age of the victim were proved beyond reasonable doubt. The trial court correctly arrived at the right conclusion which clearly pointed to the guilt of the appellant. I therefore find no merit in this appeal. The same is dismissed. I also add that under ***Section 354 (3) (iii)*** the appellant's conviction is based on ***Section 8(1)*** as read with ***Section 8 (4)*** of the **Sexual Offences Act NO. 3 of 2006**. The conviction and the sentence meted out against the appellant by lower court is otherwise upheld. It is so ordered.

Dated and delivered at Kerugoya this 3rd day of May, 2016.

R. K. LIMO

JUDGE

5.5.2016

Before Hon. Justice R. Limo

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation: English-Kiswahili

Ngigi for the appellant present

Sitati for State present

COURT: Judgment signed, dated and delivered in the open court in the presence of Ngigi Advocate for the appellant and Sitati for State.

R. K. LIMO

JUDGE

5.5.2016