REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 120 OF 2013

JOHN WAKABIU CINI…..……APPELLANT

VERSUS

REPUBLIC…….……..….RESPONDENT

Being an appeal from the judgment of the Principal Magistrate's Court (E. K. Nyutu), Wanguru Criminal Case Number 710 of 2012 delivered on 20th February, 2013)

JUDGMENT

1. JOHN WAKABIU CINI, the appellant herein was 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** before Wanguru Principal Magistrate's Court Criminal Case No. 710 of 2012. The particulars of the charge presented to the trial court was that on diverse dates between 6th and 14th of October, 2013 within Kirinyaga County, the Appellant defiled (name withheld) a girl aged 12 years. The Appellant did deny committing the offence and the matter proceeded for trial where the prosecution called a total of seven (7) witnesses to prove its case. When placed on his defence pursuant to ***Section 211*** of **Criminal Procedure Code**, the Appellant elected to remain silent and the learned trial magistrate proceeded to assess and evaluate evidence tendered by the prosecution and found him guilty of the offence and convicted him handing him 20 years imprisonment.

2. The Appellant felt aggrieved and preferred this appeal raising 4 grounds namely:-

i. That the trial court erred in law and fact by failing to hold that there was no prima facie case established by the prosecution case.

ii. That the trial court erred in law and fact by failing to find that none of the prosecution witnesses was an eye witness.

iii. That the trial court erred in law and fact by failing to find that no sufficient evidence was adduced against him.

iv. That the trial court erred in law and fact by failing to find that the entire prosecution case rested on hearsay.

3. At the hearing of this appeal the Appellant sought and was granted leave by this Court to rely on the following additional grounds:

a. That the learned trial magistrate erred by relying on the evidence of P.W. 1 whose credibility

was doubtful.

b. That the learned trial magistrate erred by relying on inconsistent prosecution witnesses.

4. The brief facts concerning this case as per the evidence tendered were the Appellant herein was the landlord and a neighbor of the parents of the complainant (name withheld) (P.W.1); that the Appellant had on four different occasions defiled her and it was the last episode that led to the action being taken against the Appellant. **L G** (P.W.3) the mother to the complainant told the trial court that she had sent her child on 14th October, 2012 to the accused to borrow a winnowing tray to clean her beans. The accused from the evidence operated a hotel nearby and that is where the child reported to have been defiled. The incident could have gone unnoticed had a keen Deputy Head Teacher at the school where the child schooled not noticed that the child appeared disturbed and not concentrating in class. P.W. 2 (J W G) – Head Teacher of the school where the girl schooled, told the trial court that she took the child and interrogated her for 30 minutes and after winning her trust, the child reported what had happened to her and named the Appellant whom she knew as "Wamuri" as the person who had defiled her. The matter was reported to the Police and later the child taken to Gathigiriri Health Center where she was examined and treated. The clinical officer **Ann Macharia** (P.W. 4) informed the trial court that she examined the child and though there was no discharge or lacerations on her genitalia, she concluded that there was sexual contact because of foul smell and the sexually transmitted infection suffered by the girl. She further explained that she carried out medical examination after a period of 4 days and that much evidence of defilement may have been lost with the passage of time.

5. When the Appellant was put on his defence, he elected to remain silent and therefore left the case to be determined by the court based on the evidence that had been tendered. The trial court based on the evidence tendered concluded that there was partial penetration which explained the sexually transmitted infection noted on the victim by P.W. 4 and found the said medical evidence to corroborate the evidence of the minor whom he found truthful. The learned trial magistrate also based his findings on the evidence of head teacher who testified and stated that she noted that the child had lost concentration in class apart from appearing disturbed. The learned trial magistrate in his judgment also observed that the minor was truthful because she had indicated that she was last defiled on a Sunday and that she was taken to the hospital for treatment on 18th October, 2012. The date given in evidence as the date of the last episode was 14th October, 2012 which actually fell on a Sunday and the trial magistrate found this to be demonstration that the minor spoke the truth. The learned trial magistrate found the evidence overwhelming and found the Appellant guilty and convicted him and on that basis and handed him 20 years imprisonment.

6. The Respondent has supported the findings of the learned trial magistrate and opposed this appeal. Mr. Sitati for the Respondent submitted that the prosecution case at the trial was overwhelming and well corroborated.

7. I have considered this appeal and the grounds raised by the Appellant. I have considered his written submissions and the response made by the State.

8. On the question of credibility of the complainant (P.W.1) a child aged 12 years or 13 years, the Appellant has submitted that P.W.1 was doubtful considering the chain of events put forward. I have considered the proceedings at the court below and note that *voire dire* examination was duly conducted and the trial court observed that the minor was possessed with sufficient intelligence to understand the questions put to her and give relevant and truthful answers although she did not understand the nature of taking an oath. I have re-evaluated the evidence she tendered at the trial and she clearly told the trial court that she had been defiled on four different occasions and told by the culprit not to tell anyone about it. She was also given chapatti and mandazi perhaps to buy her silence but what I found consistent and credible is the observations made by her teachers in school. The head teacher (P.W.2) told the trial court that the child was withdrawn and lacked concentration in class and this made the teacher concerned and upon interrogation she found out what had happened to her. She had been defiled. The said head teacher J W G (P.W. 2) appeared so concerned and touched that she took the trouble of going to where the Appellant operated his hotel (as per the information given to her by the minor) where the incident took

place and her observation concerning the scene in my view was quite telling:

> ***"I saw that the back of the hotel was very dark. I saw Wamuri sitting in a shed outside the hotel."***

The Appellant clearly from the way the scene was described had the opportunity to commit the crime. The mother to the complainant L G (P.W.3) gave evidence which I also find corroborative. I have also noted from the proceedings that the complainant at one stage under cross-examination broke down and cried. This in my view shows that the child was traumatized by the episode and that cannot shake her credibility in any way.

9. I have also noted that the Appellant elected to remain silent when the trial court in compliance with ***Section 211*** of the **Criminal Procedure Code** explained to him in Kikuyu language about his options and rights after being found with a case to answer. He has now submitted that he was not fully appraised about the same. I have noted that in the typed proceedings, the Appellant's response in respect to compliance of **Section 211** by trial court was inadvertently left out but I have looked at the handwritten proceedings and clearly the Appellant responded that "I will remain silent" when prodded on the option he had elected in defending himself. The Appellant chose to remain silent willingly and he had the right to do so. However, the fact that he chose to remain silent in my view had no bearing in the case because the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt and not to perhaps leave some gaps to be filled by the defence. An accused person does not assume any burden to prove his innocence. He is of course obliged in situations where strong evidence is laid against him to if he wishes given an explanation or raise defence to defend himself. In the case of **Stephen Nguli Mulili -Vs- R [2014] eKLR** the Court of Appeal made the following observations:-

> ***"On the issue of whether the prosecution discharged its burden of prove, it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP -Vs- Woolmington (1935) UKHL where the court eloquently stated that the "golden thread" in the "web of English Common Law" is that it is the duty of the prosecution to prove its case beyond reasonable doubt."***

It is therefore immaterial whether an accused person chooses to remain silent or not upon being called to defend himself pursuant to ***Section 211*** of the **Criminal Procedure Code**. What is material is that the prosecution is under a duty to prove their case and upon proving their case, an accused person cannot be heard to turn back and say the case was not proved because he chose to remain silent or that he did not understand the proceedings when all along the trial evidence abound like in this case that he had fully participated. See **JULIUS KIPSANG -VS- R [2014] eKLR & R -VS- ANTONY NGANGA WANJIKU & ANOR [2014 eKLR).** The Appellant in this case cannot say he did not understand the language used at the trial and I find no basis for that.

10. The Appellant's other ground in this appeal is that the trial court made an error by relying on uncorroborative and hearsay evidence. I have re-evaluated the evidence tendered and noted that one mama Wambui who found the Appellant and the minor in the act was not availed in court for reasons that are unrecorded and/or not given. The rest of the witnesses, P.W. 2, P.W.5 and P.W. 6 gave evidence on what they heard and saw. I however, find the evidence of the mother (P.W.3 – L G) who told the trial court that upon being informed of the defilement examined the genitalia of her child and confirmed that she had been defiled before taking her to hospital for further examination and treatment. I also find that the evidence of the clinical officer (P.W.4 – Ann Macharia) certainly cannot be termed hearsay because she found that there was partial penetration and that the child had been infected with a sexually transmitted infection.

11. It is also important to note that offences of sexual nature in law does not require corroboration so long as the trial court has reasons to be recorded that the victim or the complainant is speaking the truth (See Section 124 of the Evidence Act). It is evident that most sexual activities leave alone sexual assaults normally take place in privacy and in most cases with no eye witnesses. The requirement of

corroboration in such cases was removed by the proviso to ***Section 124*** of the **Evidence Act** in the light of this. I have looked at the evidence of the minor and noted the following:-

> ***"When I lay on top of the accused I felt pain in my private parts. I also felt pain when I urinated after the incident. That day was a Sunday. The accused put his penis inside my private parts……He used to reward me with a chapati or a mandazi."***

I have also noted from the judgment of the trial court that he observed the demeanor of the witness as she testified and found her truthful. The trial court unlike this court had the advantage of seeing the complainant and other witnesses first hand and was in a good position to observe their demeanor as they testified. I do not find any basis to fault or interfere with the finding by the trial court particularly in regard to the truthfulness of the complainant. I have observed what she told the trial court and I have no doubt that what she told the trial court was the truth. She knew the Appellant well as he was their landlord and a neighbor. There was no question of mistaken identity. The Appellant was positively identified and that issue of identification is not even an issue in this appeal.

12. I have noted that the issue of the age of the minor cropped up at the trial. This is because the charge sheet indicated that the child was aged 12 years old which is also the age indicated on the P3 form produced as Prosecution Exhibit 2. A birth certificate tendered in evidence as Prosecution Exhibit 3 showed that the minor was born on 20th June, 1999 which means that at the material time the minor was aged 12 years 8 months. The Appellant was convicted under ***Section 8 (3)*** of the **Sexual Offences Act** which covers child victims of ages between 12 years and 15 years. The discrepancy on the age of the victim whether she was aged 12 years or 12 years 8 months in my view is insignificant since the sentence meted out against the Appellant would not have changed.

13. I have looked at the Appellant's submissions on the contradictions pointed out about who was returning the winnowing tray. P.W. 1 claimed that she was returning the tray when the Appellant took the opportunity to defile her while her mother (P.W.3) under cross examination claimed that she was the one who returned the winnowing tray. The apparent contradiction in my view is insignificant as it did not change the fact that the complainant was sexually assaulted. It did not affect the main substance of the prosecution case and does not in my view point out that any of the witnesses deliberately set out to lie when giving their evidence in court.

14. The Appellant has submitted that the evidence adduced against him was insufficient and that the same did not point to him. He submitted that he was framed up because he was asking for his rent. However, the Appellant never gave any evidence to that effect. He chose to remain silent and cannot now raise any issue concerning being framed up. He ought to have raised it in his defence when he was given opportunity to do so. The evidence of P.W.1, P.W.2 and P.W.3 clearly identified the Appellant. The trial court was told that he had repeatedly defiled the minor. I have re-assessed the evidence tendered and I am not persuaded by the Appellant's contention that the evidence tendered did not connect him with the offence charged. I agree with the Respondent that the evidence tendered was watertight and went unchallenged. The prosecution case against him was proved beyond reasonable doubt. It is true that mama W if called could have shed more light on what transpired when she found the Appellant in the act but nevertheless in the absence of her evidence I am satisfied that the evidence tendered by the prosecution was sufficient enough to prove that the Appellant had committed the offence against the complainant.

In the premises, I find no merit in this appeal. The same is dismissed. The conviction and the sentence are upheld.

Dated and delivered at Kerugoya this 5th day of October, 2016.

R. K. LIMO

JUDGE

5.10.2016

Before Hon. Justice R. K. Limo J.,

State Counsel Omayo

Court Assistant Naomi Murage

Appellant present

Interpretation: English/Kikuyu

Omayo for State present

Appellant in person present.

COURT: Judgment signed, dated and delivered in the open court in the presence of the Appellant in person and Mr. Omayo for State.

R. K. LIMO

JUDGE

5.10.2016