REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA. 108 OF 2015

AMIR ABDULMUIN SAID …….....……....… APPELLANT

=VERSUS=

REPUBLIC ….……..……..… RESPONDENT

JUDGMENT

(An Appeal from the conviction and sentence in CR Case No. 2642 of 2014 by Hon. Ruguru N (SRM) at Mombasa Law Courts on 8th June 2015)

1. The Appellant was sentence to life imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the sexual offences Act No. 3 of 2006.

2. The particulars of the charge were that on 10th August 2010, at [particulars withheld] area, Mombasa District within the Coast Province, the Appellant unlawfully and intentionally caused his penis to penetrate into the vagina of xxx a girl aged 11 years old.

3. The Appellant was charged with an alternative charge of indecent Act contrary to section 11 (1) of the sexual offences Act No. 3 of 2006 in that in the same material particulars as in count 1 above, the Appellant touched the vagina of xxx a girl aged 11 years old.

4. The prosecution evidence in summary is that the Appellant who used to be a former neighbour of the complainant found the complainant, a girl aged 11 years old with some children waiting for transport to go home from school.

The Appellant carried all the children in his car up to Mvita “Kona ya ice cream” where the other children alighted and the Appellant told the complainant that he would take her to her house at Kingorani.

5. The Appellant then took the complainant to his house where he told the complainant that he was dropping a gas cylinder. He took the Complainant to his house on 4th floor, locked the door and told the complainant to sit on a mattress on the floor.

The Appellant told the complainant to sleep on the mattress but she refused. He held her and forced her to sleep on her back.

The complainant said she made noise but since the house was on 4th floor no one would hear. She said the Appellant removed her biker and skirt and started licking her on her private parts.

6. The Appellant removed his “dudu ya kukojoa (penis) and put it into the complainant’s “dudu ya kukojoa” (vagina). The complainant said after the Appellant had finished, she put on her clothes and she wanted to run away but the Appellant closed the door. He gave her Kshs. 50/= and warned her not to tell her mother. The complainant had left her bag in the Appellant’s vehicle and when she went for it, he locked the car and took her to Kingorani round about. When the complainant reached home she told her mother that she was feeling pains and her mother gave her Panadol.

7. The following day the complainant was sent to fetch water and the Appellant met her and told her to go to the house they were the previous day and the complainant refused. The 3rd day they went to her Aunt’s place and she told M what had happened. M told her mother and the complainant’s mother was told. The matter was reported to police.

8. The complainant was taken to hospital and Doctor confirmed that she had been indeed defiled. The Appellant went to the complainant’s house to ask for forgiveness.

9. The trial court found the Appellant guilty and sentenced him to life imprisonment.

10. The Appellant has now appealed to this court on the following grounds:-

i. THAT the learned Magistrate erred in law and in fact in not considering that the statements of the prosecution witnesses recorded by the police and their testimony in court contradicted each other so much that a conviction could not be safe as against the Appellant.

ii. THAT the learned Magistrate erred in law and in fact in not considering that even the date of the alleged offence as disclosed in the charge sheet did not tally with the facts and the evidence of the prosecution witnesses testimonies and therefore the court did not warn itself that it was not safe to convict the Appellant.

iii. THAT the learned Magistrate erred in law and in fact that no age assessment was made in respect to the complainant for the court to know the exact age of the complainant.

iv. THAT the learned Magistrate erred in law and in fact in not considering that even the post rape report was never produced in court as evidence.

v. THAT the learned Magistrate erred in law and in fact in not making a finding that there was no medical evidence for corroborating the evidence of the complainant to show that the accused committed the alleged offence.

vi. THAT the learned Magistrate erred in law and in fact that she never considered that there were no treatment notes produced from Coast Province General Hospital where the Complainant was allegedly taken in connection with the alleged offence when the report was made to the police.

vii. THAT the learned Magistrate erred in law and in fact and failed to consider that there was no independent evidence in terms of witnesses linking the accused with the offence.

viii. THAT the learned Magistrate erred in law and failed to consider that the evidence given by the complainant in court pointed to the fact that she was coached to give the testimony and a total fabrication of the same to implicate the accused.

ix. THAT the learned Magistrate erred in law and in fact in that there was no evidence from the school where the complainant attended of such an incident act having been reported to the school by the complainant or a parent of the complainant.

x. THAT the learned Magistrate erred in law and in fact and failed to consider that despite Doctor Ngone stating in the P3 form that the hymen was not intact and there was no physical

injury the court did not consider that the alleged examination came three weeks after the alleged incident and there was no evidence linking defilement to the accused and it could possibly not be linked to the accused at all.

xi. THAT the learned Magistrate erred in law and in fact in not considering that the investigating officer PW4 did not carry out any investigation but only proceeded to arrest the accused on account of what she had been told by PW1.

xii. THAT the learned Magistrate erred in law and in fact by making theories and insinuations in the judgment only geared towards convicting the accused which theories were not supported by cogent evidence.

xiii. THAT the learned Magistrate erred in law and in fact by not considering that for the accused to drag the complainant to fourth floor in a building which is occupied by people, tenants, the said action could have attracted the neighbors who would have raised an alarm which was not the case.

xiv. THAT the learned Magistrate erred in law and in fact by choosing to believe the story of the complainant and not the story of the accused in his defence.

xv. THAT the learned Magistrate erred in law and in fact in not finding that it was clear the accused chose to drop the complainant home because the complainant was a neighbor and the court was unfair to read too much of the accused person gesture when the learned Magistrate failed to find that the complainant being a minor it was natural or out of curiosity for a child to follow the accused to the house where he had taken the gas cylinder and it was unfair for the court to make insinuations that the accused lured or forced the complainant to the house when there is no evidence of such luring or forceful movement of the complainant by the accused.

xvi. THAT the learned Magistrate erred in law and in fact and that it was unfair to convict the accused without any evidence and if the complainant allegedly 11 years of age had any such nasty experience of being defiled by an adult person of accused person's age she could not have walked simply back to her mother's house and simply complain that she is suffering from leg pain and the mother would have enquired about the source of such pains.

xvii. THAT the learned Magistrate erred in law and in fact in convicting the accused in the absence of the evidence of blood which was never found on the minor complainant, torn cloth including the biker, there was no evidence to link the accused for commission of any such offence namely defilement of the complainant.

xviii. THAT the learned Magistrate erred in law and in fact in making a finding that the complainant narrated her story to her friend PW4 Z and later to her cousin M PW5 the following day which is not true. The evidence show that the alleged explanation was made three weeks allegedly to PW5 M and there is nowhere that PW5 said the accused penetrated the complainant.

xix. THAT the learned Magistrate erred in law and in fact in not finding that the contradiction of prosecution witnesses' testimony left so many loop holes in the prosecution case and doubt on the evidence of the prosecution's case which doubts would have been resolved in favor of the accused by the lower court.

xx. THAT the learned Magistrate erred in law and in fact by filling the loop holes in the prosecution's case by making her perceptions theories and analysis purposely geared towards convicting the accused.

xxi. THAT the learned Magistrate erred in law and in fact by failing to see the complainant

had been properly coached in her testimony to implicate the accused/appellant.

xxii. THAT the learned Magistrate erred in law and in fact in not considering the appellant's defence that his intention to apologize was for having given the complainant a lift and was not an apology for having committed an act of defilement.

xxiii. THAT the learned Magistrate erred in law and in fact in not making a finding that the investigating officer PW5 never interviewed anyone at the alleged scene of the crime to corroborate the complainant's story where the premises where the alleged offence occurred are occupied by many tenants.

xxiv. THAT the learned Magistrate erred in law and in fact in that there were no exhibits being the gas cylinder, the alleged mattress, the alleged biker, the alleged costume that were recovered during the investigation of the case and were never produced in court for verification of the truthfulness of the prosecution's case.

xxv. THAT the learned Magistrate erred in law and in fact in not appreciating that by virtue of fact there was no proof or evidence against the accused. She imposed an illegal and an unfair sentence of life imprisonment against the accused in the absence of evidence.

11. The Appellant was represented by Egunza Advocate who submitted as follows;

i. The charge sheet initially stated that the defilement on 11th August 2012. It was later amended to 10th August 2012. The prosecution did not prove when the defilement took place. PW1 said it was during the month of Ramadhan and she could not recall the date.

ii. There was no effort to establish that the house belongs to the Appellant and no effort was made by the investigating officer to visit the scene and interview witnesses.

iii. There was no attempt to take the child to the Hospital the day the defilement occurred and the complainant was not subjected to post rape report.

iv. The Appellant's alibi was ignored by the trial court.

12. The Respondent opposed to Appeal and submitted as follows;

i. That there is no law that bars the prosecution from amending the charge sheet. The charge sheet was amended in accordance with the law and the complainant was recalled to testify.

ii. The complainant gave explicit evidence of the court and told the court how everything happened. The Appellant gave the complainant a small amount of money. She knew the Appellant who was her former neighbor.

iii. The Respondent urged the court to find that the prosecution proved its case and to dismiss this Appeal and confirm the sentence.

THE COURT'S FINDING

13. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The

first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; 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 has had the advantage of hearing and seeing the witnesses."

14. I have carefully re-evaluated the evidence adduced at the trial court bearing in mind that the trial court had the opportunity to see the witnesses. My findings are as follows:-

i. To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement. The first element is penetration. Penetration is defined under **Section 2(1) (d)** of the **Sexual Offences Act** as

"the partial or complete insertion of the genital organs of one person into the genital organs of another person".

15. I find that the Complainant's testimony was corroborated by medical evidence that her hymen was not intact. The Complainant said it was the Appellant who defiled her. Section 124 of the evidence Act provides that in cases of sexual offences, the court can convict on the evidence of a child even in the absence of corroboration. The trial Court properly relied on that section of the law to convict the Appellant.

ii. The second element that the prosecution was required to establish is the identity of the perpetrator. The complainant testified that she knew the Appellant prior to the incident. The Complainant said she knew the Appellant as Baba F. The Appellant used to be their neighbour and the Complainant was familiar with him to the extent of agreeing to get into his car.

iii. The third element that the prosecution is required to prove is the age of the complainant. Under **Section 2 (1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. In the present appeal, the age of the complainant was established by the production of the birth certificate which shows that the Complainant was born on 8th of August 2001 and that she was 11 years old at the time of the incident.

iv. I find that it is immaterial that the exact date of the defilement is not clear. I find that the evidence against the Appellant is watertight. His defence was considered and rightfully dismissed by the trial court.

v. From the foregoing, the prosecution proved its case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant's appeal on conviction lacks merit and is hereby dismissed. The conviction is safe and I accordingly uphold it and confirm the sentence.

Delivered and signed at Mombasa this 15th day of November 2016.

ASENATH ONGERI

JUDGE.