REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 158 OF 2013

BENJAMIN LIHURU MATWI …… APELLANT

VERSUS

REPUBLIC …….....RESPONDENT

(An Appeal from the Conviction and Sentence in Eldoret Chief Magistrate's Criminal Case No. 4690 of 2012, dated 10th October, 2013 (Hon. M. W NJAGI (SRM))

JUDGMENT

1. The appellant was charged in the lower court with the offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(2)*** of the ***Sexual Offences Act No. 3 of 2006*** (hereinafter referred to as the ***Act***).

The particulars supporting the charge alleged that on the 31st day of October 2012 at [particulars withheld] in Wareng District within the Rift Valley province, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (Vagina) of *A K,* a child aged 5 years.

The appellant also faced an alternative charge which alleged that on the same date and place, he committed an indecent act with the complainant in the main charge contrary to ***Section 11(1)*** *of the* ***Act.***

2. After a full trial, the appellant was convicted of the main charge of defilement. He was sentenced to life imprisonment. He was aggrieved by the learned trial magistrate's decision hence this appeal which challenges both his conviction and sentence.

3. In his petition of appeal filed on 7th August, 2013, the appellant raised ten grounds of appeal in which he basically complained that he was wrongly convicted on the basis of inadmissible and insufficient evidence. The main grounds taken by the appellant were that the learned trial magistrate erred in law when she allegedly failed to afford him a fair trial; failed to appreciate that the charge on which he was convicted was duplex; relied on uncorroborated evidence which did not prove the charges beyond any reasonable doubt and in failing to consider his defence. He in addition claimed that the sentence imposed upon him was harsh and excessive.

4. Before the appeal was listed for hearing, the appellant through Learned counsel *Mr. P.M Namiti* filed and prosecuted an application for bond pending appeal which was dismissed in a ruling delivered by *Hon. Ochieng J* on 30th April, 2014.

However, when the appeal came up for hearing on 16th July, 2015, the appellant informed the court that

he had withdrawn his instructions from his advocate and that he was ready to prosecute his appeal in person which he proceeded to do.

5. In prosecuting his appeal, the appellant relied on hand written submissions filed in court on 16th July, 2015. In his submissions, the appellant re-iterated his grounds of appeal and added that he was convicted on evidence which did not prove the charges against him beyond any reasonable doubt. He contended that the prosecution did not adduce sufficient evidence to prove penetration or evidence connecting him to the commission of the offence. He in a nutshell urged the court to find that he was wrongly convicted; that his appeal was merited and ought to be allowed.

6. The state is opposed to the appeal. Learned prosecuting counsel *Ms Mwaniki* in opposing the appeal made oral submissions and contended that the appeal was devoid of merit and ought to be dismissed. She submitted that the prosecution during the trial adduced sufficient evidence to prove that the appellant was identified as the person who defiled the complainant, a girl aged 5 years; that penetration had been proved through the medical evidence in the P3 form and that the trial magistrate correctly concluded that the appellant's guilt as charged in the principal count of defilement had been proved beyond any reasonable doubt.

On sentence, *Ms. Mwaniki* asserted that the sentence meted out against the appellant was lawful and should be upheld. She invited the court to dismiss the appeal for lack of merit.

7. This is a first appeal to the High Court. That being the case, I am by law enjoined to revisit the evidence tendered before the trial court, re-evaluate it to draw my own independent conclusions bearing in mind that I did not have the advantage of hearing and seeing the witnesses. ***See: Okeno V Republic (1977)EA32; Pandya V Republic (1975) EA 336; Kinyanjui V Republic (2004) 2 KLR 364.***

8. I have considered the grounds of appeal and the submissions made by the appellant and the state. I have also considered the evidence on record and the judgment of the learned trial magistrate.

I wish to start by addressing the appellant's complaint that the trial magistrate erred by considering inadmissible evidence and in disregarding his defence. It is important to note that the appellant in his submissions did not disclose or give specifics of which inadmissible evidence was in his view wrongly admitted by the trial court. My reading of the trial court's judgment does not show that the learned trial magistrate considered inadmissible evidence in arriving at her decision. Without making a finding on the validity or otherwise of the trial court's impugned decision at this stage, I find that it was based on evidence which was properly on record.

9. Regarding the claim that the trial court disregarded the appellant's defence, a look at the record shows clearly that this allegation is factually incorrect. The judgment of the learned trial magistrate clearly demonstrates that she considered the appellant's defence in detail and dismissed it as false after comparing it with the evidence adduced by the prosecution. On page 50 line 7 to 20 of the record, the trial magistrate said the following;

> ***" The accused blamed PW3 for this case for the reasons already said herein. In relation thereto when being cross examined by the prosecution he said it was on November 2012 that PW3 wanted an affair with him. If this be, then this was way after the offence herein and therefore could not have been an influence of the charges herein. Further, earlier in his evidence when being cross examined by the prosecution, he said that it was in November, 2011 that PW3 wanted an affair with him. There is therefore obvious contradiction as to when it was. Besides the allegations were never brought forth to PW3 during cross examination. The court considers they were an afterthought and also in view of the cited contradictions they have no basis. PW2 therefore had no reasons for falsely implicating the accused.***
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> ***The accused in his defence did not dispute that PW2 was in his house at about 1.00p.m the material time. Having found his alleged bad blood with PW3 is a lie, I find him not credit worth and therefore reject his defence that PW2 went to ask for drinking water from him. I believe in***

the evidence of PW2…''

Given the above, I find that the appellant's complaint that his defence was not given due consideration by the trial court is baseless.

10. Another complaint made by the appellant is that the trial magistrate erred in failing to dismiss the charge the subject of his conviction for duplicity. As stated earlier, the appellant was convicted of the offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(2)*** of the ***Act*** .

I have carefully looked at the charge sheet. I find that the charge contained a statement of the offence charged and the particulars thereof. The particulars clearly and precisely stated the facts supporting the offence. The statement of the offence and the particulars related to a single charge of defilement. The charge and its particulars did not combine two or more offences or created confusion as to which charge the appellant was supposed to answer to in his defence. A duplex charge is one which contains a mix up of offences in the statement of the offence or its particulars which creates uncertainty regarding the offence facing an accused person. This was not the position in this case.

I am thus satisfied that the charge on the basis of which the appellant was convicted as well as the charge in the alternative count were properly drafted in accordance with ***Section 134*** and ***Section 137*** of the ***Criminal Procedure Code*** and was not duplex. Nothing therefore turns on this ground of appeal.

11. The appellant also alleged that he was not afforded a fair hearing by the trial court. He did not however specify why he felt that he was denied a fair hearing. I have looked at the entire proceedings before the trial court and in my view, they do not contain any indication that the appellant was not given a fair hearing. The proceedings show that he was supplied with witness statements upon request; he was given opportunity to cross-examine prosecution witnesses as well as time to prepare and present his defence.

12. The only aspect of the trial that has caused me some concern is the fact that the complainant minor was not cross-examined by the appellant for reasons that are not on record. I note that the appellant has not complained that he was denied an opportunity to cross-examine the complainant. That notwithstanding, it is my finding that failure to cross-examine the complainant in the circumstances of this case did not occasion the appellant any prejudice or a miscarriage of justice since for reasons that will become clear shortly, even if the evidence of the complainant was to be expunged from the record, the offence of defilement would still have been proved against the appellant by the oral and documentary evidence adduced by the other prosecution witnesses.

I am fortified in this finding by the sentiments expressed by the Court of Appeal in ***Mark Oiruri Mose V Republic Criminal Appeal No. 295 of 2012 [2013] eKLR*** to the effect that when there is other evidence which establishes the offence of defilement, the failure of an appellant to cross-examine the victim cannot vitiate a conviction.

13. I now wish to turn to what I consider to be the main issue for determination in this appeal which is whether the evidence tendered before the trial court was sufficient to prove beyond any reasonable doubt that the appellant was the culprit who defiled the complainant. Put another way, whether the appellant was correctly convicted.

In order to properly address this issue, it is important to restate albeit in brief the evidence tendered by the prosecution before the trial court.

The record shows that the prosecution called a total of five witnesses.

After a brief voire dire examination, the complainant, a girl whose age was indicated as five years in the charge sheet gave a detailed account regarding how she was sexually assaulted by a man she physically identified in court as the appellant herein. It is worth noting at this point that the minor's age was not contested by the appellant either during the trial or on appeal.

According to the complainant (PW2), she knew the appellant well before the material date. She knew him through his alias name of ***Moshi***. Though she did not say so probably due to her tender age, it is clear from the evidence of PW3 and PW4 that she lived in rental premises in the same compound as the appellant. She told the court that she was in the appellant's house on the material date when he removed her clothes, carried her to his bed and defiled her.

14. The learned trial magistrate accepted and believed the evidence of the minor because it was corroborated by the evidence of PW3 their neighbor, PW4 her mother and the medical evidence in the P3 form as expounded by the doctor who examined the minor on the same date the offence was allegedly committed. The doctor testified as PW1. She testified that on examining PW2, she noted that her hymen was red though it did not have tears. In her evidence on cross- examination, PW1 stated that the redness noted on the minor's hymen was evidence of partial penetration.

It is significant to point out that penetration need not be complete for it to constitute the offence of defilement. According to ***Section 2*** of the ***Act,*** partial penetration would also suffice to establish the offence of defilement.

In the ***Mark Oiruri Mose*** case (Supra), the Court of Appeal when discussing what constitutes penetration in the context of defilement expressed itself as follows;

> ***"So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ…."***

15. In view of the foregoing, I find that the trial magistrate was correct in her finding that the medical evidence tendered by the prosecution coupled by the testimony of PW3 that she found the minor and the appellant on his bed on the material day corroborated PW2's evidence that she had in fact been defiled by the appellant. The minor knew the appellant very well prior to the material date considering that they were neighbours and she could not have been mistaken him for anybody else when she testified that he is the one who had sexually assaulted her. Besides, it could not have been mere coincidence that PW3 found her with the appellant on his bed and on the same date PW2 reported to her mother that the appellant had defiled her and the allegations of defilement were confirmed on medical examination by PW1 on the same date. She was also found to have contracted a sexually transmitted infection which was further proof of penetration.

16. The appellant in his defence denied having committed the offence and claimed that he was framed by PW3 who allegedly bore a grudge against him after he rejected her offer to be his lover. The learned trial magistrate considered his defence and rejected it for reasons which are on record and which I have reproduced in paragraph 9. Those reasons were based on the evidence before the trial court and I have no reason to fault the trial court for dismissing the appellants defence. In addition, I cannot interfere with the trial court's findings regarding the credibility of the prosecution witnesses since unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and I must give allowance for that.

17. From the evidence on record, I am persuaded to find that the trial court properly evaluated the evidence before it and arrived at the correct conclusion that the prosecution had proved the charges against the appellant in the main charge beyond any reasonable doubt. In the result, I find that the appellant was properly convicted.

On sentence, the appellant avers that the sentence imposed upon him by the trial court was harsh and excessive. The record shows that he was sentenced to life imprisonment. It is not disputed that the victim of the offence in this case was a minor said to be five years old though PW4 produced an immunization card as proof of the minor's age which indicated that she was about 4 years old at the time the offence was committed.

The law at ***Section 8(2)*** of the ***Act*** prescribes a mandatory sentence of life imprisonment for a person convicted of the offence of defilement where the victim is eleven years of age and below. The sentence imposed on the appellant in this case was therefore lawful and cannot be faulted. It was in fact the only

sentence which could have been lawfully meted out against the appellant. The learned trial magistrate did not have discretion to impose any other sentence. In the circumstances, the claim that the sentence was harsh or excessive is without any foundation.

For the foregoing reasons, I am satisfied that this appeal is not merited. I accordingly dismiss it in its entirety.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 8th day of October, 2015

In the presence of:

The Appellant

Lesinge court clerk

No appearance by the state