REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 11 OF 2015

OMAR NACHE UCHE.....APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From the original conviction and sentence in Criminal Case No.58 of 2013 of the Principal Magistrate's Court at Marsabit by Boaz M.Ombewa – Ag.Principal Magistrate)

JUDGMENT

The appellant, **OMAR NACHE UCHE**, was Charged with an Offence of defilement contrary to section 8(1) (3) (sic) of the Sexual Offences Act of 2006.He was alternatively charged with an offence of committing an indecent act with a child contrary to section 11(1) of the sexual Offences Act,2006.

The particulars of the offence were that on 19th January 2013 in Marsabit County, the appellant intentionally caused his penis to penetrate into the vagina of G.A.H, a child aged 15 years. Alternatively, he did an indecent act by intentionally causing his penis to come into contact with the vagina of G.A.H, a girl aged 15 years.

The appellant was found guilty of the offence in the substantive charge and sentenced to serve 25 years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by M/s Thibaru who relied on 10 grounds in the supplementary petition of appeal dated 23rd July 2015 as follows:

1. That the learned magistrate erred in law and in fact in convicting the appellant when there was no sufficient evidence tendered against the accused thus a miscarriage of justice was occasioned.

2. That the learned judge (sic) erred in law and in fact in relying entirely on circumstantial evidence that did not meet the evidentiary value and thus a miscarriage of justice was occasioned.

3. That the learned magistrate erred in law and in fact by failing to consider that the prosecution case was inconsistent and contradictory with each witness giving a different account of events especially PW1 and PW3 the key witnesses.

4. That the learned magistrate erred in law and in fact by relying on the evidence of the complainant without warning himself on the dangers of doing so.

5. That the learned magistrate erred in law and in fact in convicting the appellant for the offence of defilement when the ingredients of the offence were not satisfactorily proved, for example age of

the complainant and penetration.

6. That the learned magistrate erred in law and in fact by failing to find that the prosecution failed to summon vital witnesses mentioned during the trial for the just decision to be reached rendering the trial unfair.

7. That the learned magistrate erred in failing to find that the defence testimony was not considered and the trial magistrate did not give cogent reasons for rejecting the defence.

8. That the learned magistrate erred in law and in fact by relying on extraneous matters not provided in evidence to convict the Appellant.

9. That the learned magistrate erred in law and in fact by shifting the burden of proof to the Appellant.

10. That the learned magistrate erred in law and in fact in imposing a harsh sentence on the Appellant who was a minor during the alleged commission of the offence.

The state opposed the appeal through Mr. Motende the learned counsel.

Briefly the facts of this case are as follows:

The complainant herein called the Appellant using a friend's phone and secured a date with him. At the time the Appellant was residing in Nairobi. After meeting on two occasions in Marsabit, on the third they engaged in sexual intercourse. On the 24th January 2013 her uncle interrogated her after he had heard a rumour that she had engaged in sexual intercourse with a man. After this interview with her uncle, the matter was reported to the police, and the appellant was arrested and charged.

In his defence the Appellant contended that he indeed met with the complainant after the latter had initiated the meeting by calling him from Nairobi. He however denied that there was any sexual intercourse between the two.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 court's finding and conclusion; 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, see Peters vs. Sunday Post [1958] E.A 424."**

In analyzing the evidence afresh, I will compress the ten grounds in the supplementary petition of appeal into the following broad categories:

1. Whether the age of the complainant was proved or not,

2. Whether the sentence meted out was harsh or not,

3. Whether the Appellant was a minor at the time of the alleged offence or not,

4. Whether the prosecution omitted to summon some key witnesses or not; and

5. Whether the evidence on record was sufficient to be a basis for conviction or not.

G.A.H, in her evidence in chief testified that she was 14 years of age and during cross examination she said that while recording her statement she had indicated that she was approaching 15 years of age. When Dr. Irungu conducted an age assessment on her, he placed her in the age bracket of between 14 and 15 years.

F.G (PW4) and the mother of G.A.H testified that her daughter was 15 years old in January 2013.The offence was allegedly committed on 19th of January 2013.

In cases of defilement, age is very important aspect that requires to be proved for sentence to be meted out is pegged on the age of the victim.

In the case of **Francis Omuroni versus Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000.** It was observed as follows:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

Closer home in the case **of *Kaingu Elias Kasomo vs Republic*** in *Malindi* the Court of Appeal in **criminal appeal No. 504 of 2010** stated as follows:

> **"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."**

The court concluded that *"prove of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.*

In the instant case I am satisfied that the age of the victim was proved to the required standards.

The appellant was sentenced to serve 25 years imprisonment. It was contended that this sentence was very

harsh. **Section 8(3) of the Sexual offences Act** provide as follows:

> **"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."**

If we assume that the conviction was safe, then the sentence cannot be termed as harsh. The section has only provided a minimum sentence.

Briefly we may pause at this point and look at the correctness of the charge although it was not raised both at the trial and in this court. The charge cites a nonexistent section. In some instances citing a nonexistent section may be fatal to the prosecution case. The correct way of citing the section ought to have been:

> **"…contrary to section 8 (1) as read with section 8 (3)…**"

Since the accused understood the offence, there was no miscarriage of justice. This is curable under section 382 of the Criminal Procedure Code. This explains why it was not complained of.

Though the grounds of appeal raised the issue of the Appellant being a minor at the time of the alleged offence, it was not pursued in the oral submissions. It appears this ground was abandoned and rightly so. On 13.3.2014 when he testified, he gave his age as 20 years. This means in 2013 he was not a minor. I therefore find that at the time of the alleged offence the Appellant was aged 19 years and therefore an adult.

It was contended for the Appellant that the prosecution failed to call material witnesses. There is no specific number of witnesses that require to be called; however, in some instances failure to call some particular mentioned witnesses without any explanation may be fatal to the prosecution case. Although in the case of ***Mwangi V Republic*** **(2008) I KLR 1134** the Court of appeal held:

> **"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecutor and a court will not interfere with that discretion unless it may be shown that the prosecutor was influenced by some oblique motive,"**

We have to have in mind what the court of appeal for East Africa said in **Bukenya & others V Uganda [1972] E.A 549:** This is what was held inter alia:

> **(iii) "the Court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;"**

In the instant case, I will revert to this ground while examining the issue of sufficiency of evidence.

I was invited to find that the complainant and PW3's evidence was contradictory.

On the events of 24th January 2013 this is what the PW1 (the complainant) testified as follows:

At about 7pm while at home, her uncle O.O went and confronted her about a rumour he had heard that she had sexual intercourse with somebody. Initially she denied but after being pressed further she owned up.

This is when her uncle hatched a plot. He gave her his phone and she used it to call Omar (the Appellant).

They agreed where to meet and his uncle hid himself. He came out of his hide out when the Appellant and PW1 were together talking.

They proceeded to the complainant's parents' home.

PW3's version is that on 24.1.2013 at about 7pm he saw the complainant and the Appellant standing. He went and asked the girl what she was doing with the man. After interrogating them, PW1 conceded that they had indulged in sexual intercourse. He escorted both to the PW1's parents' home.

These two are two complete different versions. Although F.G (PW4) testified like O.O (PW3) the contradictions introduced by the complainant would have been resolved by calling A, the friend O.O (PW3) said was with him.

If the complainant contradicted her uncle and mother on the events of 24th January 2013 how sure are we that whatever she testified as having transpired on 19th January 2013 is true? Can we rely on her to tell the truth? The court of Appeal in the case of ***Ndungu Kimanyi VR [1979***] **KLR 283** held:

> **"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."**

We know from the evidence that it was PW1 who initiated the meeting with the Appellant. We also know but for her uncle (PW3) seeing them, she would not have complained. This is why the investigating officer could not get the exhibits to aid him in his case.

The medical evidence by Dr. Irungu (PW2) does not help much. He testified that the laceration in the genitalia of the complainant would mean penetration or fondling of external genitalia using fingers or any object. This left the prosecution case limping. There was no proof of penetration to the required standards.

Is it possible that the complainant had manipulated her genitalia in fantasy and only implicated the Appellant after being pressed by her uncle? We may never know the truth but one point is clear; the prosecution did not prove penetration.

Before concluding this case, I wish to observe that there is need for a relook into the **Sexual Offences Act CAP 62A** and introduce a clause that will protect the male child who may be termed as an age mate of a female minor (in spite of having attained the age of majority) where intercourse is consensual and also in instances where the female plays a leading role to initiate the relationship.

When the trial magistrate made a finding on the substantive charge, he ought to have remarked that he made no findings on the alternative charge. This however in my view is not fatal.

From the foregoing analysis of the evidence on record, I find that this is a case where some material witnesses were left out and who may have shed some more light in the evidence. I also find that the complainant painted herself as an unreliable witness and it is not safe to rely on her evidence. Consequently, I find that the conviction was unsafe. The same is quashed and the sentence meted out set aside.

The appellant is set at liberty unless if otherwise lawfully held.

DATED at Marsabit this 11th day of November 2015

KIARIE WAWERU KIARIE

JUDGE