REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.70 OF 2013

(An Appeal arising out of the judgment in Busia CMC.No.1233 of 2013 delivered by T. Cherere C.M on 24th September 2013)

JOSEPH OKUMU ……..APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

J U D G M E N T

1. John Okumu (The Appellant) is serving life imprisonment after conviction by the Chief Magistrate sitting at Busia on the offence of Defilement contrary to Section 8(1) (2) (***sic***) of The Sexual Offences Act No.3 of 2006.

2. It had been alleged that on the 1st day of March 2012, at about 2.00p.m. at [particulars withheld] Primary School of Busia County, he intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of L A a girl aged 10 years. He had also faced an alternative charge of committing an Indecent Act contrary to Section 11(1) of the Sexual Offences Act of 2006.

3. The story of the Prosecution was put together by the evidence of 8 witnesses. The star witness was L.A. (the Complainant). At the material time to the incident she was a Standard 3 pupil at [particulars withheld] Primary School. Her age, though in contention, was put at 12 years by her father J B M (PW2) when he testified on 15th April 2013. An age assessment by Doctor Edwin Bodo (PW8) estimated her age to be between 10 – 11 years at the time of examination on 29th June 2012.

4. The Complainant was in school on 1st March 2012 when she alleges that the Appellant who was a teacher in that school requested her to arrange papers in an office. As an obedient pupil would wont to, she obliged. That the Appellant had other things in his mind. While in the office, he knocked her down and forcefully removed her undergarments. He then, in the words of the Complainant, did "**bad manners to me in my part that I use to urinate using his part that urinates."** Shortly thereafter another teacher A M O (PW4) walked into the room unnoticed. PW4 said that he found the Appellants shirt untucked and the Complainant bending. There was a small distance of 40 cm between the Appellant and the Complainant. She was putting papers into a cupboard. The Appellant was pulling down his shirt.

5. PW4 thought the circumstances to be strange and informed M O (PW5) what he had seen. PW4 thought that the Appellant may have had sexual intercourse with the pupil. PW5 saw the Complainant on the same day at about 2.45p.m. She looked sad. The Complainant told PW5 that she had been defiled by the Appellant. She inspected the victim's private parts and her pants. The pants were wet and smelling of semen but there was nothing abnormal about her vagina. PW5 reported the incident to the Deputy teacher

E N (PW 6) whom together with PW5, a teacher E, and the Complainant went to the Headteacher's office to further report the matter. The Headteacher, it is said, promised to deal with it.

6. But things went quite for some time. It took the intervention of the Chairman of the school F O (PW3) to formally resuscitate inquiry into the matter. But this would be 3 months later in June 2012. The Police officer to whom the task of investigating the belated complaint was P.C Kibet Limo (PW 9). He issued a P3 Form to the Complainant. That P3 Form was duly completed by Doctor Edwin Bodo (PW 8) who reported that the Complainants hymen was torn. That examination was done on 20th June 2012.

7. In his defence, the Appellant gave a short unsworn statement denying the offence. He alleged that his colleagues had ganged up to give false testimony against him because he was not in good terms with them. That the Headmaster had found him to be without blame. And it was only after the Headmaster had been transferred that he was arrested and charged.

8. The Appeal raised 8 grounds but Mr Juma appearing for the Appellant argued them in 3 clusters. It was his submission that the Appellant was convicted on a defective charge. That the Appellant was charged with an offence under Section 8(1) (2) of The Sexual Offences Act which does not exist. Counsel asked me to follow the holding in criminal Nyeri High Court Criminal Appeal **No.206 of 2010 Joseph Toro Mwangi –vs- Republic** and find the charge to be incurably defective.

9. It was Counsels further submission that defilement was not proved. That the essential ingredient of penetration was not proved. It was also argued that the evidence of the key witnesses was inconsistent. Further that the medical examination which was conducted 3 months after the incident was indecisive.

10. Counsel also thought that the age of the victim was not unequivocally proved as required in offences of this nature. That no birth certificate or school records were produced to prove age.

11. Opposing the Appeal Mr Waweru appearing for the State argued that the Defect in the Charge Sheet could not vitiate the conviction as it was curable under the provisions of Section 382 Criminal Procedure Code. Counsel referred this Court to the decision of the Court of Appeal in **Nakuru Criminal Appeal No.113 of 2011 Amo –vs- Republic** where the Court held,

"Therefore, does the above mentioned defect in the charge sheet warrant the acquittal of the appellant? This court has decided that discrepancy as to an offence in a charge sheet is not considered material in a case if it does not cause prejudice to the appellant or if it is inconsequential to the conviction and or sentence."

12. Turning his attention to the evidence, Counsel thought it to be consistent and corroborative. That the evidence of how the Complainant was found pulling up his shirt, the subsequent report of PW4 to PW5 all supported the charge. On the crucial question of penetration, I was urged to find that the following words proved penetration,

"He did manners to me in my part that I use to urinate using his part that urinates."

13. As to the age of the victim it was submitted that the age assessment carried out by the Doctor was sufficient. It put the age of the victim at between 10 - 11 years at the date of examination (29th June 2012) and so she would be aged 10 years on 1st March 2012 when she was sexually assaulted.

14. I have abridged the version of the evidence I must re-evaluate in detail. That is what I am obliged to do as a first Appellant Court but keeping in mind that I did not have the advantage of seeing and hearing the witnesses testify first hand and I must therefore take account of this (**Republic –vs- Okeno [1932] E.A 32**).

15. It was conceded by the State, and correctly so, that indeed the Charge Sheet was Defective. The Appellant ought to have been charged under Section 8(2) and not Section 8(1) (2) of the Sexual offences Act. That latter Section does not exist. What would be critical is whether that defect is incurable and so

fundamental as to defeat the charge. On this the Court of Appeal reiterated (in **Amo** (supra) that a defect will not be considered material if it does not cause prejudice to the Appellant or if it is inconsequential to the conviction and/or sentence.

16. Although I was asked by the Appellants Counsel to follow the holding **Joseph Toro Mwangi** (supra) and find that quoting a non-existent Section in a charge is an incurable defect, I prefer to inquire from the circumstances of this case whether in fact the defect prejudiced the Defence case. That is the approach to take as suggested by the Court of Appeal in **Amo** (supra). This Court has examined the entire proceedings of the Trial Court. It is quite clear that the Appellant who was represented by Counsel was fully aware of the nature of charge he was facing. The cross-examination was robust and intended to displace the Prosecution's case that the Appellant had defiled a girl of age 10. Let me give some examples. Questions were asked about the state of the victim's vagina. Counsel probed witnesses on the exact age of the victim. Questions were put to the Doctor on what may have caused the rapture to the hymen.

17. In addition the particulars of the offence gave sufficient details of the offence and contained the essential elements of the offence. This is evident when the particulars are reproduced as below:-

"**On the 1st day of March 2012, at about 2.00p.m at [particulars withheld] Primary School of Busia County, intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of L A a girl aged 10 years."**

The particulars revealed that the Appellant was facing an offence in which it was alleged that he had, intentionally and unlawfully caused his penis to penetrate the vagina of a girl aged 10 years. That is an offence known in law and is created by Section 8(1) as read with Section 8(2) of The Sexual Offences Act.

18. It is for the above reasons that this Court will deal with the defect within the contemplation of Section 382 of The Criminal Procedure Code. That Section provides:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

I find and hold that the defect is curable. If this Court needs any fortification that this is how to deal with this defect then it finds it in the Court of Appeal decision in **Nrb Criminal Appeal No.32 of 2013 Fappylon Mutuku Ngui –vs- Republic** [2014] eKLR. The Court of Appeal considered a defect which was in all fours the same as the fault before me. Just like here, the Appellant there had been charged with Defilement of a Girl contrary to Section 8(1) (2) of the Sexual Offences Act No.3 of 2006. The Court of Appeal held,

"**The 1st Appellate Court was of the opinion that this defect was curable under Section 382 cited above, the Appellant had participated fully in his trial because he knew the charge that was facing him and the trial process was fair. There was no prejudice that faced the Appellant. We concur with the High Court and the learned Counsel for the Respondent that the Appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the Charge Sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in the ground of Appeal and dismiss it."**

19. Let me now turn to the heart of this Appeal. The Evidence. The only direct evidence in respect to the offence was provided by the victim. She narrated how the Appellant confronted her. She testified as follows:

"On 1.3.2012 at about 2p.m. I was in class with other pupils. Teacher Joseph Okumu sent M to call me. I went where he was behind our class. Behind our class there is an open field. He asked me to go and assist him to arrange papers in the office. Currently that office is a nursery class room. I arranged the papers on the floor. Joseph Okumu came and knocked me down and removed my pair of knickers. <u>He then started dong (sic) bad manners. He did manners to me in my part (sic) that I use to urinate using his part (sic) that urinates</u>. I cried when he was doing bad manners to me and he held my mouth. I cried for I was feeling pain. Mr. M came and found teacher Okumu doing bad manners to me. Mr. M is a teacher." (my emphasis)

20. Counsel for the Appellant argued that penetration was not proved. It may well be true that the words used are indefinite. But this may not be surprising because a young 10 year old girl was describing, in common parlance, what she understood had happened to her. That said it is the responsibility of the Prosecution, as is humanly possible in the difficult circumstances of cases of this nature to lead witnesses to use elucidating language. If however the words used are indefinite, the trial Court still has a duty to evaluate the entire evidence presented by the Prosecution to arrive at the answer whether penetration is proved or not. Medical or other evidence could clarify the evidence of the Complainant. It is to this evidence that I turn to.

21. PW2 was a critical witness. The evidence of the Complainant as to when he exactly made entry into the room was not consistent. At one point she said that,

"Mr M came and found teacher Okumu doing bad manners to me."

But she also said,

"When teacher M came I was standing. I had stopped crying. He found teacher Okumu wearing his pair of trousers?"

So did teacher M catch the Appellant in the act?

22. PW4 was unequivocal that he never saw Okumu defile the Complainant or touch her private parts. On what he saw as he made entry, he testified,

"Okumu's shirt was untucked. He was standing 40cm from the young girl. Okumu was pulling down his shirt. The girl was bending. She was putting papers in a cupboard."

This story is more in line with the victim's second version. So is the victim's earlier version to be overlooked as an insignificant inconsistence?

23. The incident is said to have happened at 2.00p.m. PW4 reported the incident to PW5 at about 2.30p.m on the same day and PW5 saw the girl at about 2.45p.m. PW5 asked the victim to remove her pants and PW5 says the pants were wet and adds,

"……..were smelling of semen."

She also inspected the girls private parts and testified,

"…….but she did not have blood stains."

She later added,

"There was nothing abnormal in her vagina."

This evidence does not seem to reconcile with that of the victim's own evidence that,

"I bled from my part that urinates."

There was no evidence that the victim had cleared up this blood so that someone inspecting her within the hour of the incident could not see any blood stains.

24. Another important piece of evidence would be the medical evidence of PW8. PW8 saw the victim on 20th June 2012. On that day he made his notes on the Patient's Health Record "Pass Book" and he also completed the P3 Form. In the Pass Book he noted that "**no medication examination done at point in time**." He was referring to the time of the incident. In the P3 Form, the Doctor returns the following findings,

"**The external genitalia was normal. Raptured hymen, no visible injuries to internal genitalia."**

The Doctor examined the victim 3 months after the alleged offence and the significant finding he made was that the hymen was broken. That would be consistent with defilement but what the Doctor said on re-examination cannot be ignored. He stated

"**Hymen can be broken in many different ways**."

25. In arriving at a conviction, the Trial Court believed the Complainant's testimony and found that it had been corroborated by PW4 and the medical evidence of PW8. An analysis of the Complainant's evidence together with that of PW4 and PW5 demonstrates that there are some inconsistences, which taken together, may not be insignificant. Sadly the medical examination was carried out 3 months after the incident and its outcome was not conclusive and could therefore not add much value to the weakened evidence of the other key witnesses. It is for these reasons that I find that the Prosecution evidence cannot found a safe conviction.

26. The upshot is that the Appeal is allowed. The conviction of the Lower Court is hereby quashed and the sentence set aside. The Appellant shall be set free now unless otherwise lawfully held.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 2ND DAY OF JULY 2014.

IN THE PRESENC OF:

KADENYI……COURT CLERK

MAKOKHA H/BRIEF FOR JUMA……FOR APPELLANT

KELWON……FOR RESPONDENT