IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KOOME, MUSINGA & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 27 OF 2018

BETWEEN

JUMAA MALUNGA LUGO .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (S. Chitembwe, J.) dated 6th June, 2017

in

HC. CR. C. No. 27 of 2016)

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JUDGMENT OF THE COURT

1. The appellant and two others were arraigned before the Principal Magistrate's Court at Kilifi, each charged with the offence of gang rape contrary to **section 10** of the **Sexual Offences Act**. The particulars of the offence were that on 26th December, 2013 at around 1.00 a.m. in Ganze District within Kilifi County, having common intention, in association with two others, intentionally caused his penis to penetrate the vagina of JKK (the complainant), aged 13 years, without her consent. The appellant was also charged with assault causing actual bodily harm to LK (PW2) contrary to **section 251** of the **Penal Code**.

2. The trial court found that it was only the appellant who had sex with the complainant and consequently substituted the offence of gang rape with that of defilement. The appellant was accordingly convicted of the said offence and sentenced to 20 years' imprisonment. He was also sentenced to 6 months' imprisonment for the offence of assault but the sentences were to run concurrently.

3. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to the High Court. The High Court (Chitembwe, J.) dismissed the appeal in its entirety. Undeterred, the appellant preferred a second appeal to this Court.

4. This being a second appeal, by dint of the provisions of **section 361** of the **Criminal Procedure Code**, we are enjoined to consider only matters of law. We can only interfere with the decision of the High Court on facts if it is demonstrated that the trial court and the High Court failed to consider matters they should have considered, or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. See **KARANI v REPUBLIC [2010] eKLR.**

5. It is appropriate that we first give a brief background of the evidence that was tendered before the trial court; the grounds of appeal to the High Court and the findings thereon; and thereafter pronounce ourselves on the issues of law raised in this second appeal.

6. The complainant told the trial court that she was 13 years old; that on the material day she went to a disco together with PW2, PW3 and PW4. At around 1.00 a.m. they decided to go home. As they were walking they realized that three people were following them; the appellant hit PW2 with a piece of wood. The complainant and her friends and the girls took off; the appellant caught up with the complainant; took her to the forest and defiled her.

7. After the ordeal the complainant went home and told her mother. PW2 and PW3 testified that they knew the appellant and his accomplices as they were from the same area. The appellant was arrested on the following day. The complainant was taken to Kilifi County Hospital and **Dr. Busra Ahmed, PW5**, who examined her, confirmed that she had been defiled.

8. In his defence, the appellant, aged 25 years, testified that on the material night he went to the disco; later at night went home and slept; but in the morning he was arrested. He denied having defiled the complainant or assaulting PW2.

9. In his first appeal, the appellant contended that the charge of defilement was not proved beyond reasonable doubt; that the prosecution case was due to fabrication of evidence between the complainant and her mother; that members of the public who participated in his arrest did not testify; and that his defence was not considered. As earlier stated, the High Court dismissed all those grounds of appeal and affirmed the conviction and sentence.

10. In his self drawn memorandum of appeal before this Court, the appellant stated that the learned judge erred in law by failing to consider that: no birth certificate or age assessment of the complainant was produced to prove her age; the conviction and sentence were founded on a defective charge; the age of the injuries did not connect to the date of the commission of the alleged offence; there were sharp contradictions in the prosecution evidence; and for failing to consider his defence. In his supplementary grounds of appeal, the appellant stated that there was no proper evidence of his identification.

11. The appellant, who was unrepresented during the hearing of this appeal, did not make any oral submissions but relied on his written submissions which we shall shortly advert to. On the other hand, **David Fedha**, Senior Prosecution Counsel for the respondent, opposed the appeal. He submitted that the age of the complainant was proved; that the charge as drawn was not defective; that there was moonlight that enabled the complainant to identify the appellant; and that there was no material contradiction in the evidence of key prosecution witnesses.

12. Starting with the issue of the complainant's age, it is trite law that in sexual offences where the complainant is a minor, age is a very crucial aspect that must be proved because the sentence of an offender is determined by the age of the victim. The complainant herein testified that she was 13 years old; her mother, PW5, produced an age assessment report dated 9th January, 2014 (P.Exh.10) which gave the approximate age of the complainant as 15 years. Dr. Busra Ahmed, PW7, who examined the complainant and filled the P3 Form, stated the complainant's age as 13 years.

13. **Section 8(3)** of the **Sexual Offences Act** provides that for a sentence of imprisonment for a term of not less than 20 years upon conviction for defilement of a child aged between 12 and 15 years. In our view, therefore, the age of the complainant was proved to be within the aforesaid age bracket. Consequently, we dismiss that ground of appeal.

14. On the issue of identification, the offence was committed at night, about 1.00 a.m. The appellant submitted that there was no sufficient evidence as to how he was identified by the complainant. The complainant testified that she was able to see the appellant because there was moonlight. Although the complainant did not know the appellant, she said that both PW2 and PW3 knew him. What did these two witnesses say about the appellant? **LK, PW2**, a boy aged 14, left the disco together with the complainant, (PW1), **HT, PW3**, a boy aged 14 years, and **LPK (PW4)** a girl aged 14 years. PW2 and PW3 are cousins of PW4.

15. PW2 said that as they were walking home they were followed by the appellant and one Kitsao, who were boys from his home area and he knew them well. He had earlier seen them at the disco, where there were bright electric lights. The appellant hit him on the chest with a piece of wood and he fell down, he stood up and ran away. At the scene there was moonlight and he was able to see and recognize the appellant. Afterwards the complainant told PW2 and others that she had been raped by the person who hit him. PW2 knew it was the appellant. It is PW2 who took police officers to the home of the appellant later in the day where he was arrested.

16. PW3 also saw the appellant and Kitsao behind them as they were going home. He knew both of them. He had seen them at the disco. PW3 noticed that the appellant had a wooden stick; he saw the appellant hit PW2 with the stick; there was moonlight that enabled PW3 to see and recognize the appellant.

17. Though it is only the complainant who said that it was the appellant who defiled her, from the evidence of PW2 and PW3, it is evident that the appellant was at the scene. PW2 and PW3 knew the appellant well. They came from the same area and they had both seen him at the disco where there were bright electric lights. It was not therefore difficult for them to recognize him with the aid of moonlight, particularly when he was so close to PW2 as to hit him with the wooden stick.

18. The trial magistrate, who had the opportunity to see the demeanour of the witnesses as they testified, had no reason to doubt the complainant's evidence. Besides, the evidence of **Juma Chengo, DW4,** the only defence witness who was called by the appellant, was quite incriminating. DW4 told the trial court that he was at the disco together with the appellant and his co-accused; that at around 1.00 a.m. PW1, PW2, PW3 and PW4 left. They told him they were going home; after a little while PW2 and PW3 returned and told him that they had been attacked and the girls they were with had been raped; PW2 and PW3 requested for help to search for the girls; that a group of about 20 people went for the search mission; that near a swamp they found the complainant and the appellant naked; that when the appellant saw them he ran away and the complainant dressed up and they escorted her home.

19. We are satisfied that the appellant was properly identified as the person who defiled the complainant. We therefore reject the ground of appeal relating to identification evidence.

20. As regards the alleged defect in the charge, we have perused it and do not agree that it is defective. The learned trial magistrate did not amend the charge sheet as alleged by the appellant. The trial court merely found the appellant guilty of defilement and not gang rape. The learned judge carefully analyzed the implications of the substitution and rightly came to the conclusion that it was not prejudicial to the appellant, and the substitution was done in accordance with the provisions of the law. The learned judge cannot be faulted.

21. We now turn to the ground of appeal that alleges the learned judge failed to consider that there were sharp contradictions in the prosecution evidence. We do not agree that that there were material contradictions that would have occasioned any miscarriage of justice. Not every contradiction is prejudicial to the accused's case. In **TWEHANGANE ALFRED v UGANDA [2003] UGCA 6,** the Uganda Court of Appeal held:

> ***"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point out deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".***

22. We entirely agree with that rendition of the law. There will always be minor contradictions between the evidence of a multiplicity of witnesses, but as long as the contradictions do not affect the main substance of the case or prejudice the accused's defence, the court will ignore such contradictions and focus on the substance issues. We reject this ground of appeal.

23. Lastly, as regards the appellant's defence, the trial court as well as the learned judge considered it and rightly rejected it, finding that there was overwhelming evidence that the appellant defiled the complainant.

24. All in all, we find no merit in this appeal and dismiss it in its entirety.

Dated and delivered at Mombasa this 25th day of July, 2019.

M.K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

……..……..

JUDGE OF APPEAL

J. MOHAMMED

…….…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR