REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 7 OF 2015

MOSES LEPAPA KASAINE……..…………………………………....………………APPELLANT

-Versus-

REPUBLIC……………………………………….........................……………...…PROSECUTOR

(Being an appeal from original conviction and sentence in Criminal Case No. 144 of 2010 at Senior Principal Magistrate's Court at Kajiado – before Hon. W.N. Kaberia S.R.M. delivered on 11/2/2011)

JUDGEMENT

1. The appellant **Moses Lepapa Kasaine** was tried and convicted on 11/2/2011 by the Senior Resident Magistrate at Kajiado for the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.
2. The brief facts of the offence were that on 14/11/2010 in Kajiado District within Rift Valley Province appellant did cause his penis to penetrate the vagina of **N.K.** a child aged 12 years in violation of Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.
3. Upon conviction he was sentenced to twenty (20) years imprisonment.
4. The appellant was aggrieved by his conviction and sentence and filed an appeal to this court.
5. In his petition of appeal, appellant raised four grounds of appeal challenging his conviction and sentence.

The grounds constitute the following:

a. **That the learned trial magistrate made an error in both law and facts by holding that medical evidence proved penetration instead of making a finding the burden of prove in relation to the entire evidence adduced.**
b. **That the learned trial magistrate made an error in both law and fact by failing to observe that for due interest of justice DNA profile was wholly wanting in order to establish the unique genetic code of the person who deposited some spermatozoa in PW1's vagina.**
c. **That the learned trial magistrate made an error in both law and fact by failing to observe that the mode of my arrest was suspicious as no police officer was involved in spite of the report of the incident having been officially reported at Bisil Patrol Base by PW4 on 14/1/2010.**
d. **That the learned trial magistrate in relation to my defence statement made an error in both law and fact by failure to adhere to the provisions of Section 169(1) of criminal Procedure Code Cap 75 of the Laws of Kenya.**

6. The appeal was heard before me on 19/10/2015.
7. The appellant submitted orally and relied on written submissions dated 19/10/2015 in support of his appeal. He submitted and argued that prosecution did not establish their case beyond reasonable doubt. He further challenged the evidence for lacking DNA profile to connect him with the offence of defilement. It was his argument that the complainant came to court due to an existing family dispute. This family dispute he alleged it to a relationship by way of marriage between his uncle and sister to the complainant. According to his submissions several attempts made to reconcile them failed hence necessity to fix him through indictment. He took issue with the learned trial magistrate not complying with Section 169(1) of the Criminal Procedure Code to set out points of determination in his judgement. He restated that he had a plausible defence and circumstances of his arrest by the police ought not to have formed the basis of his conviction. He denied the charge and sought a declaration that his conviction and sentence be set aside by this court.
8. Mr. Akula for the state opposed the appeal. He submitted that the prosecution witnesses adduced evidence establishing a case against appellant beyond reasonable doubt. It was his argument and contention that (PW1) gave evidence that she was defiled by accused.

That her testimony was corroborated by PW2 and PW3. The appellant was positively identified and placed at the scene of the crime. That the complainant was taken to Kajiado District Hospital for medical examination. The medical report by PW5 confirmed the act of defilement. That the evidence adduced by the prosecution was never challenged by the defence. It all pointed to the appellant's guilt. He urged the court to find that the appeal lacks merit and dismiss it accordingly.

Evidence at the Trial Court

9. The facts of this case as presented by prosecution witnesses was as follows;

The complainant **(PW1) N.K.** testified how on 14/1/2010 at about 5.00 pm she went to Bisil to pick her sister kid. While at the verandah at the house of one Wanjiku appellant passed by. The appellant asked her to remove her underpants so that they could have sex. It was her testimony that she consented and even prior to removal appellant offered 30 (thirty shillings) to entice her into the act. She recalled that appellant penetrated her by lying on top as she lay on the ground. On her way home she further testified as having met a lady by the name Njeri who interrogated her keenly. After some inquiry she agreed to disclose the whole incident that of defilement by appellant. The matter was then reported to the police who issued a p3 for PW1 to be medically examined at Kajiado District Hospital.

10. **PW2 EVERLYNE JOHN** testified that on the 14/1/2010 at about 5.00 pm she saw appellant and complainant emerging from a certain house.

She further testified that she became suspicious and decided to inform her sister by the name Sharon. They rushed and pursued the complainant. When they got hold of the complainant she was interrogated and did reveal that she was in company of the appellant.

11. **PW3 SHARON WAMAITHA** testified that on the material day of 14/1/2010 PW2 called her to inform her as having seen appellant emerge from a particular house. The house apparently according to her evidence was unoccupied. That besides appellant she had seen complainant. In their testimony they reported the matter to the police and also PW4 father to the complainant was informed of the incident.
12. **PW4 D.O.K** testified that (PW1) was his last born child aged 12 years old. He however told the court that he had not yet obtained a birth certificate but possessed immunization case. It was

further his evidence that PW2 and PW3 reported that the appellant and complainant had come out of a particular house and there was evidence of sexual intercourse.

13. **PW5 DR. LUNDING KITHIA MUINDE** gave evidence on behalf of Dr. Titus Ndeti regarding filling p3 and examination of the complainant.

He testified that on examination of the complainant hymen was penetrated, high vaginal swab was done and spermatozoa detected.

He produced p3 as exhibit.

14. **PW6 NO. 79445 CPC MAGDALINE WANGUI** testified that while at Kajiado Police Station a suspect was brought from Bisil Patrol Base. The suspect who became appellant in this case had defiled the complainant. According to the report she investigated the matter, issued a p3 for medical examination and caused an age assessment to be undertaken. The medical doctor confirmed the age of complainant to be twelve years.
15. The appellant was put on his defence. He denied the charge. He alluded the complaint to malice because he refused to marry sister to the complainant.

As a result complainant father had vowed that he will finish him.

16. This being the first appellant court, it is the duty of this court to re-evaluate, revisit and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the judgement of the said court. In doing so this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect: This position has been settled as per: See the cases; - **NJOROGE VS. REPUBLIC 1987 KLR 99, OKENO VS. REPUBLIC 1972 EA 3Z, FELIX KANDA VS. REPUBLIC HIGH COURT CRA 177 OF 2011**

17. In have re-evaluated, considered and analysed the evidence adduced before the trial court a fresh. I have further re-examined the defence file forwarded by the appellant. I have weighed the grounds of appeal visa viz the evidence in support of the prosecution case. The oral submissions by appellant and Mr. Akula on behalf of the state. The written submissions by appellant have also been taken into account.
18. The issue for determination by this court is whether the prosecution proved its case on the charge of defilement brought against the appellant Contrary to Section 8(1) as read with Section 8(3) of Sexual Offences Act to the required standard of proof of beyond reasonable doubt.
19. In my considered opinion, the prosecution established a clear chain of events;

On the 14/1/2010 at 5.00 pm when complainant was defiled till the arrest and indictment of appellant. The complainant evidence on how appellant called her from Wanjiku's verandah to another house 300 metres near river is very clear the appellant was known to the complainant. The complainant's evidence that she was defiled on the material day was corroborated by PW2 and PW3.

20. PW2 adduced evidence as having seen both appellant and complainant emerge from a house. She summoned the company of PW3 to assist in going after the complainant. They caught up with the complainant immediately thereafter the incident.
21. The complainant admitted to have had sexual intercourse with the appellant. She even gave out the thirty shillings (30) appellant offered as an inducement for the favours. There is no dispute that appellant was well known to PW1, PW2, PW3 and PW4 prior to the incident of defilement.
22. There was no mistaken identify on the part of prosecution witnesses PW1 and PW2 that

appellant was seen on 14/1/2010 in company of complainant.

23. To establish a charge of defilement as envisaged under Section 8(1) as read with Section 8(3) of the Sexual Offences Act, the prosecution is required to prove:

i. **That there was penetrative sexual intercourse of a female.**
ii. **That the female was a minor.**
iii. **That the appellant was the perpetrator of the crime.**
iv. **Whether the evidence supports the charge.**

24. As regards the first ingredient of penetration the record reveals as follows;

The evidence of PW1 was categorical on how she was approached by the appellant. Her testimony is corroborated by PW2 who saw both of them at the scene of the crime.

Although PW2 did not witness the actual act of defilement, she immediately saw appellant and complainant emerge from unoccupied house. The time of the incident was after 5.00 pm in the evening. PW2 and PW3 rushed and went after the complainant. She confirmed that they were together with appellant who had sexual intercourse.

The behavior as noticed by PW2 indicated to her that there was something weird which has taken place between the two. PW5 was the medical officer who testified on the p3 regarding medical examination at Kajiado District Hospital. The examination revealed hymen was penetrated and presence of spermatozoa.

25. I find that there was clear evidence on penetration against the complainant.

The prosecution evidence by PW1 and PW2 places appellant squarely at the scene.

26. The second ingredient is that of age of the complainant.

Age is always crucial for offences under Sexual Offences Act. This is of particular important because sentencing of an accused is pegged on age of the complainant.

I have examined the record of appeal. The age of the complainant by testimony of (PW1) is stated to be twelve years. PW4 father to the complainant whose testimony confirmed her age to be twelve years. PW6 adduced evidence that complainant was examined at Kajiado District Hospital and her age assessed at twelve (12) years. The assessment report was produced as exhibit in evidence in support of prosecution case on age.

In the case of **FRANCIS ODWRONI VS. UGANDA CR. APPEAL NO. 2 OF 2000**

It was held interalia that:

"In defilement case, medical evidence is paramount in determining the age of the victim and that 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, guardian and by observation and common sense."

In the instant case PW4 father to the complainant and medical doctor's age assessment report confirms the age to be twelve years. That evidence has not been controverted by the defence.

27. Thirdly ingredient is whether it was the appellant who had sexual intercourse with the complainant. PW1 gave a chronology of events how on 14/1/2010 she was lured to the sexual acts by appellant. The testimonies of PW2 corroborated that of PW1 as she positively identified the appellant emerging from a house in company of PW1. PW2 called PW3 to assist her follow PW1 with accused to confirm their suspicion that an offence of defilement against PW1 had taken place. That evidence of recognition by PW1, PW2 and PW3 placed appellant at the scene of crime. The circumstances for a positive recognition to take place on 14/1/2010 at 5.00 pm were favourable and free from any error or mistake. The appellant adduced no evidence to deny that on the material day and time he had been seen together with the complainant.

28. **Determination**

I agree with the learned trial magistrate that the prosecution proved its case beyond reasonable doubt. From the evidence there was sufficient evidence to prove each ingredient of the offence of defilement. The appellant was properly convicted by the trial court. The appeal against conviction is therefore upheld.

29. **Sentence**

On the issue of sentencing I find the sentence of twenty years imprisonment imposed by the learned trial magistrate was the minimum prescribed under Section 8(3) of the Sexual Offences Act No. 3 of 2006. The sentence cannot be described as severe; excessive or harsh. It is a legal minimum sentence set out under the statute. The appeal on sentence is also dismissed.

30. The upshot being this appeal on both conviction and sentence fails. The same stands dismissed.

Dated and delivered at Kajiado this 16th day of November, 2015.

R. NYAKUNDI

JUDGE

In the presence of

Mr. Akula for the State

Mateli Court Assistant

Accused person present

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