REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 52 OF 2014

(From original conviction and sentence in Criminal Case No. 742 of 2013 of the Principal Magistrate's Court at Baricho).

JOSEPH MWANGI KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Joseph Mwangi was convicted of the offence of defilement of a girl aged 8 years and sentenced to life imprisonment contrary to **Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. He has lodged an appeal claiming that;

a) The alleged clinician was not proved to have been registered.

b) Convicting on uncorroborated and doubtful evidence.

c) He was not medically examined.

d) Prosecution did not prove its case without reasonable doubt.

e) Identification was not proved to the required standard.

f) The trial was full of contradictions.

g) Doctor's expertise was in doubt and his evidence did not link appellant to the offence.

h) Investigation carried out was shoddy.

i) Not considering the appellant's defence and possible grudge observed.

The facts of the case that the complainant EN is a girl who was aged eight 8 years at the time of the incident. On 17/8/2013 at 9.30 Pm she was in the kitchen with E and the appellant when th appellant went and beckoned her to follow him. The appellant led her to the quarry where he defiled her. The complainant met with her Aunt by name R. The appellant disappeared. R checked her and confirmed that she was defiled. The next day she was escorted to hospital and the matter was also reported to the police. The complainant was issued with a P3 form which was filled by PW4, John Mwangi a Senior Clinical Officer at Kerugoya County Hospital. He examined the complainant and found that the hymen was torn but not freshly, she had bruises on the labia and majora,

no spermatozoa was seen. The P3 form was produced as **exhibit -1-.** The appellant was rescued by police who were on patrol and found him being beaten by a mob on an allegation that he had defiled a child. The appellant was escorted to Sagana Police Station and later charged. The prosecution called a total of five witnesses.

This is a first appeal and this court has a duty to evaluate, re-consider and analyse the evidence and come up with its own Independent decision but bearing in mind that the trial had chance to see the witnesses and leave room for that. This was held in the case of **Okeno –v- R(1972) EA.32.**

I have considered the evidence adduced before the trial court. I find that the evidence adduced was cogent and sufficient to prove the charge against the appellant.

I will now consider the issues raised in the grounds of appeal:

1. Expert Evidence:

The appellants states that the Clinical Officer did not state his registration number, years of practice and specification.

The Clinical Officer testified as PW4 on 8/7/2014. He gave his name as John Mwangi, a Senior Clinical Officer at Kerugoya District hospital. He further testified that he examined the complainant EN aged eight years and filled a P3 form. In cross-examination he testified that he did his work professionally.

I find that the witness clearly gave his designation as a Senior Clinical Officer and confirmed that he examined the complainant professionally. The appellant did not dispute that he is a Senior Clinical officer who was qualified to fill the P.3 form. The P3 form bears the hospital stamp of Medical Superintendent Kerugoya and is signed by the Clinical Officer. Though he did not give his registration number nor state his years of experience, there is no dispute that he was qualified as a Senior Clinical Officer and could fill the P.3 form. ***Section 48(1) of the Evidence Act*** provides:-

Opinions of experts

"(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions."

The Clinical Officer testified that he was qualified as such, a fact not in dispute and properly gave his expert opinion on the issue which was before the court. His testimony was that he did his work professionally by personally examining the complainant. He concluded that there was forceful penetration evidence by the bruises on the labia majora. The appellant was satisfied as he did not cross examine him further. The ground is without merits.

The appellant relies on regulation ***6 of the Sexual Offences Regulation 2008*** which states:-

For the purpose of Section 26(5) of the Act –

"designated person" includes –

i)……

ii) A clinical Officer registered under Section 7 of the Clinical Officers (Training, Registration and Licensing) Act.

The regulation must be read with the Section in the Act to which it relates. Section 26(5) relates to taking of samples in the case of deliberate transmission of HIV or any life threatening sexually transmitted disease. It does not apply to the charge the appellant is facing. The appellant cited the case of ***Mutongi –v- Republic (1982) KLR 203.*** Which I have considered. The prosecution complied

with the holding as the witness was qualified as a Clinical Officer.

2. Uncorroborated Evidence.

The ground relates to the testimony of PWI, 2 & 3. According to PW-1- she was in the kitchen when the appellant beckoned her and led her to the quarry where he defiled her. PW-2- was in the kitchen with PW-1- when this happened. When the complainant was released, she met with PW-3-. The appellant ran away he was spotted by PW-3- who was not very far away. There were no inconstancies. The evidence was well corroborated.

In **Erick Onyango Ondeng' v Republic [2014] eKLR**

The Court of appeal held;

In *BUKENYA & OTHERS VS UGANDA (supra),* the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;……

While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso *to* *Section 124 of the Evidence Act* and the medical evidence must be borne in mind as well *Section 143 of the Evidence Act (Cap 80)* which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of V would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, V would have been a peripheral witness as she was said to merely have happened by when the appellant was with PW2 on a different occasion.

The proviso to **Section 124 of the Evidence Act** therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

In this case, the evidence of the prosecution witnesses together with the medical evidence proved that PW 1 had been defiled and it was the appellant who had defiled her.

This is a binding decision. In any case, this matter is a Sexual Offence. The provison to **Section 124 of the Evidence Act** allows the court to convict on the sole evidence of a victim if it is satisfied that the victim is being truthful. The prosecution need not call all the witnesses who may have some information on the fact. The trial Magistrate found that PWI, 2 & 3 identified the appellant as the person who was responsible. They did identify him to the police, the Medical Officer and in court. He was someone known to them and he had been to their home before the incident. The appellant was arrested immediately by youths shortly after the incident.

The trial Magistrate found that there was sufficient evidence implicating the appellant as the perpetrator of the offence. Failure to call a witness will only be fatal if the evidence tendered by the prosecution is insufficient to sustain a conviction and that there was need to call the witness to fill gaps. This is not the case as the prosecution had adduced sufficient evidence which was corroborated by the medical evidence and proves that the minor was defiled by the appellant. The ground of appeal is without merits.

3. The appellant was not medically examined.

The appellant states that no tests were done on him to connect him to the allegation. The ingredients of the charge of defilement which must be proved by the prosecution are, age of the complainant, the identity of the perpetrator and penetration which must be proved by medical evidence. Medical examination of perpetrator is not a mandatory requirement to prove defilement. However in appropriate cases such examination maybe necessary depending on the circumstances of the case. For example, a minor may be defiled and a person is suspected and prove would only be dependent on medical examination of the perpetrator or a DNA test. The court has discretion to order examination.

Section 36 of the Sexual Offences Act provides:-

Evidence of medical or forensic nature

"(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.

(4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5)-

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and

(b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against –

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both".

This is a case where the court can rely on the testimony of the complainant alone to convict if the trial Magistrate for reasons to be recorded believed the complainant. This is provided under ***Section 124 of the Evidence Act.*** The section provides:-

Corroboration required in criminal cases

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

It is important to note that the law on Sexual Offences is proved by the evidence tendered by the prosecution and is not dependent on the examination of the perpetrator. Evidence of the victim is key in sexual offences and the only crucial medical examination is that of the victim to corroborate the fact of defilement or rape as the case may be. In the case of **Fappyton Mutuku Ngui –v- R (2014) eKLR** while considering a similar issue of medical examination of the perpetrator, the court had this to say –

"In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW-2-'s testimony which was trustworthy as to the person who had defiled her."

So if the trial Magistrate believes the testimony of the victim on the identity of the perpetrator the evidence is sufficient to support the conviction. Medical examination of the appellant was therefore not necessary. The ground is without merits.

The appellant raised the issue of his identification. According to the appellant, PW-2- could not recognize the alleged assailant and it is PW-1- who told her that the defiler was Mwangi. That the lighting used was moonlight and the complainant did not have sufficient time to identify him.

I find that this is far from the truth as PWI is on record as having stated that she was able to identify the appellant as the defiler. On her part PW-2- confirmed that she could recognize the appellant as he ran away at the quarry. The identity of the perpetrator was not in dispute. He was a well known person to the witnesses who easily recognized him. It is a well settled principle in criminal law that recognition is better than identification. This is the case here and there is no dispute that the appellant was well known to PW-1- & PW-2-. The appellant was arrested immediately. He was rescued by police from irate mob for defiling the complainant. The identity of the appellant as the perpetrator of this offence was not in dispute and was proved beyond any reasonable doubts.

1. Contradictory evidence

The appellant alleges the following contradictions;

i) PW 1 testified she was alone in the kitchen but later states she was with PW 2

PW 1 and PW 2 both stated that the appellant was in the kitchen together with them. But when she was recalled she stated that she was alone since PW 2 had gone to take food.

ii) PW 3 stated she found the appellant in the kitchen alone and PW 2 was not there

PW 3 has not stated that she found the appellant alone only that when she returned to the house she found the appellant in the kitchen.

The above contradictions are minor and they do not affect the main substance of the prosecutions' case that PW 1 was defiled and the culprit was identified as the appellant.

In **Erick Onyango Ondeng' –v- Republic [2014] eKLR**

The Court of appeal held;

Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at *"about 7 pm"* **in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in** *TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA,* 6 **it is not very contradiction that warrants rejection of evidence. As the court put it:**

"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 to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

The contradictions were minor and are ignored.

The appellant submits that his defence was not considered.

The appellant submits that he had gone to the home of Elizabeth to collect his pay.

This defence was considered by the trial Magistrate at page 32 of the record from line 1-8. Having analysed the defence, he rejected it and proceeded to convict the appellant. The ground is not supported by the record and must fail.

Finally the appellant submits that the charge was not proved beyond any reasonable doubts.

1. Did the prosecution prove its case beyond reasonable doubt"

Upon considering the entire evidence adduced, I find the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The evidence of PW 1 was collaborated by PW 4.

PW 4 who was the clinical officer produced her P3 form and discharge summary which indicated that the hymen was torn though not fleshly but she had bruises on the labia majora and which were consistent with forcible penetration.

The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. I find that the appeal is without merits and is dismissed.

Dated at Kerugoya this 17th day of December 2018.

L. W. GITARI

JUDGE