REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 2 OF 2019

BETWEEN:

ALEX MWAZIGHE MWAFUSI.....APPELLANT

VERSUS

The REPUBLIC

Being an Appeal from the decision of Hon Emily Nyakundi Resident Magistrate sitting in Wundhanyi SPM's Court on 20th November 2018

J U D G M E N T

1. The Appellant was charged with the offence of Defilement with an alternative Charge of committing an indecent act with a Child. The Appellant was found guilty of the alternative charge and sentenced to a period of 10 years in accordance with the ***Sexual Offences Act***. The Appellant is appealing against conviction and sentence. The Appellant was convicted and sentenced on 20th November 2018.

2. The Appellant filed his Petition of Appeal on 22nd January 2019. The Petition states:

"I the under mention do most humbly beg leave to appeal against conviction and sentence for an offence of committing an indecent act passed upon me by the chief/principal/senior resident/1st class/and 2nd class MAGISTRATE PM'S WUNDANYI

In criminal case no 14/018 judgement dated 20-11-2018

I plead not guilty

I am a poor man and have no money for

3. The Grounds of Appeal set out are:

1. That the honourable learned principal magistrate erred in law and fact by not being partisan or being biased on giving a ruling or judgment, in this case by not taking into account section 33, 62,63,64 and 65 of the evidence act and others to be written in submission.

2. That the learned trial magistrate erred in law and fact for not considering or taking into account the use or the meaning of section of section 63(2) of the evidence act.

3. That the learned trial magistrate erred in law and fact that he/she didn't call for members of the public who took me to the police

station as the investigation officer claims in his statement

4. That, the learned trial magistrate erred in law and fact that he/she never took keen interest or to account any medical report or result concerning whether there were any evidence about committing an indecent act

5. That the learned trial magistrate erred in law and fact that he/she never proofed to believe and put open how indecent act could be proofed.

6. That, other grounds of appeal against the same case will be issued in the submission when I have the proceedings in the case."

4. The Appellant also prepared Amended Grounds of Appeal which were accepted on the Court File in open Court on 29th September 2019. The Amended Grounds of Appeal state:

1) That the learned trial magistrate erred in both law and fact to heavily reley on the charge sheet that entails character of the offence and its referrence however, dishonest the fact that there was no (OB No.) Occurence book Number that indicates the number date, month and year, when the crime number/police case 5331/2018 reported and that the charge sheet is irregular and illegal to be relied up on to allow justice.

2) That the trial court errered on both law and fact to convinced itself to trust and reliey on the evidence of PW1 (one) after taking notice during trial proceedings, on examining the witness, on the question that PW1 is not truthful, however went on and convict the appellant to serve 10 years imprisonment leaving life of the appellant at stake.

3) That the learned trial magistrate erred in both law and fact on the question of identification/recognition, however both the appellant and exhibits were not positively proved as required by both law and fact to clear doubt on prosecution evidence adduced before trial court beyond reasonable doubt to the horizon standard of the evidence act

4) That the learned trial magistrate erred in law and fact to rely on prosecution evidence that Based on contradictions and allegations that were not presented to the litmus test of proof.

5) *That the learned trial magistrate on its findings erred on both law and fact to convict the appellant by convicting the appellant on court (II) two to serve 10 years after confirming that the act of defilement was not proved, However fail to notice that there could be no fact to guilt this appellant on the second count if the prosecution fail to prove defilement irrespective of the evidence adduced before the trial court as a result dictates the difference of the appellant*."

5. The Appellant was charged with one offence with an alternative charge. The Charges as expressed on the Charge Sheet were:

Firstly; "*DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8 (4) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.*

The Particulars of that offence were that "*ALEX MWAZIGHE MWAFUSI on the 26th day of June 2018 at 600pm in Mwatate location within TaitaTaveta County, intentionally and unlawfully caused your penis to penetrate the vagina of DS a girl aged 17 years*."

The Alternative charge was: "*COMMITTING AN INDESCENT ACT (sic) WITH A CHILD CONTRARY TO SECTION 2 (1) AS READ WITH SECTION 11 (1) OF THE SEXUAL OFFENCES NO. 3 OF 2006.*

The Particulars of the alternative charge are that "*ALEX MWAZIGHE MWAFUSI: on the 26th day of June 2018 at 6.00pm in Mwatate location within TaitaTaveta, intentionally and unlawfully touched the vagina of DS a girl aged 17 years using your penis."*

6. The Learned Trial Magistrate delivered her Judgment on 20th November 2018. She found the Accused not guilty of the main charge but guilty of the alternative charge. As this is a first appeal, this Court is charged with the duty of reviewing the evidence heard and recorded by the court of first instance, in this case the Hon Resident Magistrate's Court in Wundhanyi. As the Appellant puts it in his Submissions; "Both Parties filed their Written Submissions as directed by the Court, the Appellant on 29th September

2019 and the Respondent on1st November 2019. The Respondent is stated to have conceded the appeal. This Court has considered the Submissions carefully and has taken then into account in coming to its decision.

7. The Appellant firstly challenges the Charge Sheet. He states that the Charge sheet is illegal and irregular because it does not contain an Occurrence Book Reference Number setting out the date of the complaint. In fact the Particulars of the offence set out the date and time etc of the allegations made against the Appellant during the trial. This complaint was not raised during the trial, nor was the investigating officer asked to produce the occurrence book, in the circumstances, the Appellant has failed to identify an irregularity that impacts on the completeness and fairness of the procedure by which he was found guilty.

The Appellant also challenges identity in a different way. He is not saying that he was improperly identified, but that he was incorrectly described in the Charge Sheet. The Appellant was named as Alex MwazigheMwafusi in the Charge Sheet. He was given the same name throughout the proceedings in the Lower Court. He raised no objection. Even for the purposes of the Appeal he filed a petition calling himself Alex MwazigheMwafusi. When produced to Court he was named in the production orders by the same name and he attended without any objection or demur. More pertinent, he accepted in open Court that he was Alex MwazigeMwafusi. In fact even the letter written by him on 28th November 2018 to the Executive Officer Wundanyi Law Court, he identified himself as Alex MwazigheMwafusi and states “I am the above named accused whose case was concluded on 20/11/2018. In the circumstances, the unsubstantiated, post decision change of name cannot be a correct basis to set aside the decision of the Trial Magistrate directed towards the individual present in Court, being tried at the time. The Appellant filed an application for leave to appeal out of time alongside his Petition, In his Supporting Affidavit the Appellant signs his name as Alex Mwazinghe Mafusi. Leave was granted by Hon Lady Justice Kamau, and then the matter was admitted for hearing on 18th June 2019.

8. It is only now, in his Submissions filed on 29th September 2019 in his Written Submissions that he says his name is not Alex Mwazighe Mwafusi but Alex Mwazighe Mwadime. State Counsel seems to have adopted the new nomenclature without any consideration or verification of the veracity of the criticism. The most relevant consideration is whether or not the wrong person was convicted. In this case the witnesses identified the Appellant as the person who they made the allegations complained of.

9. In his Submissions, the Appellant identifies the following issues for determination by the Court:

a) Whether the charge sheet was regular, legal and valid or not"

b) Whether the identification of both the appellant and exhibits were properly and positively proved or not"

c) Whether the contrary in both two counts were positively proved beyond any doubt or not"

d) Whether the complainant is to be treated as true and trusted witness or not"

e) Whether the trial court judgment is of this right opinion in the issue of law and fact or not"

10. The Complainant was a 17-year-old child at the date of the offence. Her age was confirmed by her mother and the Complainant (PW-1) producing her birth certificate to show that she was born on 30th December 2000 and therefore as having attained the age of 17 at the time of the commission of the offence(Serial Number not recorded but Exhibit 1 bears serial number xxxx). The Complainant’s evidence was that she was at the home of the Accused. She knew the siblings of the Accused, in particular Dennis who she studied with. The Complainant identified the Accused by pointing at him. The Appellant does not challenge the evidence that the Complainant was found in his company, in his home. In relation to the inappropriate contact the Complainant said that the Appellant initiated the interaction by suggesting that they have sex. The Complainant gave evidence on oath. She said that the Accused was her boyfriend for two months by then. On the day in question she said she was in his house. The Appellant suggested they have sex. The Appellant undressed himself and partially undressed the Complainant. She said he used force to remove her panties and then used force to put her on his bed. She says he inserted his penis into her vagina she did not scream but struggled for him to remove it. They were interrupted by Dennis after which the Accused left and came back later. The Complainant states that she was in the Accused’s house from early morning until the time her mother and the nyumba kumi people came to the house. The Complainant also concealed the evidence of the torn underwear which she gave evidence the Accused tore and also which she washed.

11. The Court heard the evidence of the investigating officer, Fredrick Onyiego (PW-5). The investigating officer confirmed that

He was at Mwatate Police Station on 26th June 2018 when the Accused was brought in by members of the public. He took the statements of the Complainant and witnesses. He said;

"I took the complainant to Mwatate sub county hospital. She was treated and discharged… The doctors report was of the opinion that the minor had been defiled.". Later the Complainant was taken to Moi Referral Hospital in Voi when the P3 was completed. He relates that the Complainant stated that she was the girlfriend of the Accused.

The Accused is said to also have a wife and child. The Accused claimed that he did not know the Complainant or have any contact with her but he was unable to explain her presence in his home. Under cross-examination the Investigating Officer stated that the Complainant had stated that she had intercourse with the Accused on a prior occasion, 9th June 2018 and that she had menstruated after that including on the day in question. The Complainant suggested that the Accused was going to give her money for school fees. The prosecutor did not examine the Complainant's Mother on the question of the lost school fees. The Accused did not give sworn evidence.

12. The Court also heard from PW-2 the Mother of the Complainant. She was alerted to her daughter's whereabouts by the person who claimed to be the wife of the Accused. When she arrived at the home of the Accused (about 6pm) the Complainant was still there. She said, I found my daughter in bed with the Accused. Before her arrival other people had come into the house and were beating the Accused and the Complainant.

13. Moving onto the medical evidence, the treatment notes dated 26th June 2018 – which must be from Mwatate Sub County Hospital, as it was the next day that she was taken to Moi Hospital in Voi. The notes record that the hymen was broken. From those notes the Investigating Officer states that the doctor formed the opinion that there was defilement. The prosecution failed to call that Doctor to give evidence. The next day the Complainant was taken to Moi Referral Hospital in Voi. The purpose was for tests and the P3 to be completed.She was seen by a Dr Shem Jeremiah (PW-4). It is clear from his evidence and the lack of care in completing the P3 Form that the said doctor was completely disinterested in getting to the correct answer in this issue.

14. He says that he completed and signed the P3 form. He says that he relied on the post rape care form and the lab notes (which may or may have not been filled on the day before). The Witness records that the Child was in her uniform etc without turning his mind to the fact that the date of the incident was the day before and therefore the condition of her clothing on a separate and completely different date had no bearing on the opinion he was to form. He also provides inconsistent conclusions, firstly that there was no defilement because the absence of the hymen without bleeding or bruising meant (in his mind) that there could not have been defilement. At the same time he states there was no 'sexual relations" because there was no spermatozoa. From that it is clear that he did not bother to take the time to appraise himself of the components of the offence before he filled the form. His sympathy with the Accused is readily discernable from his lack of care. The lack of attention to detail demonstrates a lack of interest in the subject matter.

15. In the circumstances, the trial court presented with such inadequate medical evidence was unable to come to the conclusion that the Accused had defiled the Complainant. Moving onto the alternative charge. The Appellant also denies that charge. It is clear that the Complainant gave other versions of events before she went on oath. On oath she said that she left home early in the morning. She travelled by a bodaboda driven by the Appellant. Instead of going to school she ended up in the home of the Appellant. The Appellant took her into his bedroom and subsequently they were found in bed together by a brother called Dennis. The Accused did not give evidence so he has not contradicted that version of events. It is clear from her evidence that the Complainant believed herself to be the girlfriend of the Accused. It is also clear from her evidence that she tried to protect him. However, it is clear that both the villagers and the members of the Complainant's family were alerted. They appear to have been alerted by the Wife of the Accused. Again there is no evidence by the family members of the Accused to challenge that evidence. Although what was said by "the wife" is hearsay and therefore inadmissible in criminal proceedings, the chain of events she started led to the Complainant being found in the bedroom of the Appellant. The Complainant told the Court what took place. The Accused did not contradict that. The medical evidence does not contradict that evidence because Dr Shem Jeremiah took such little care that his opinion is not even slightly persuasive.

16. In relation to sexual offences, the Court is entitled to look at circumstantial evidence.***Section 124*** of the ***Evidence Act, Cap 80*** provides; "*124. Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted inEvidence CAP. 80 43 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."

17. In the circumstances of this case, the Appellant has not provided any explanation as to why a school going child was in his bedroom from early morning until 8pm or thereabouts when she was found there. In cross-examination he suggested she was friends with his brother Dennis. She denied that categorically. She said that she was introduced to Dennis and Mcharo by the Appellant. She also told him she was in shock because he hurt her. The Appellant did not give sworn evidence and did not call any witnesses. The Trial Magistrate having observed the Complainant give evidence and her demeanour decided that part of her evidence was believable and part was not. The Court is entitled to do that. In the circumstances, she found the Accused not guilty of the main charge but guilty of the lesser charge. The Trial Magistrate was entitled to come to the conclusions that she did, on the evidence which she heard. The Appellant has not put forward any arguments on which the Learned Trial Magistrate misdirected herself.

18. It cannot go without mention that the Appeal has been conceded by the Prosecution. Again, with the lack of interest that has come to characterise the prosecution of this case, the Respondent's Submissions show that the author could not even be bothered to read the Judgment and take note of the decision delivered. There was no conviction of defilement therefore any concession on that offence bears no weight when a different charge and conviction are in issue as is the case here. Appeal against conviction, dismissed.

19. In relation to the Appeal against sentence, the Appellant has not put forward any grounds to establish that the sentence is manifestly excessive and the Respondent has neglected to address that issue in its submissions. Nevertheless this Court takes into account the relevant sections of the Sexual Offences Act, in particular Section 2 and Section 11. Section 2 provides:

2. Interpretation

(1) *In this Act, unless the context otherwise requires—…..*

***"child"** has the meaning assigned thereto in the Children Act (No. 8 of 2001);*

***"complainant"** means the Republic or the alleged victim of a sexual offence and in the case of a child or a person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse;…..*

***"genital organs"** includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;…..*

***"indecent act"** means an unlawful intentional act which causes—*

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will;

Section 11 provides:

" 11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with and child and is liable upon conviction to imprisonment for a term of not less than 10 years…"

In the circumstances, the Appellant was given the minimum sentence. This Court also takes cognizance of the Penal Code, Sections 256 (Abduction) read with Section 260, abducting in order to subject to grievous harm, which also provides for a sentence of 10 years. In the circumstances, Appeal against sentence is similarly dismissed.

Order accordingly.

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at Voi on this the 10th day of December 2019

In the Presence of:

Court Assistant: JosephatMavu

Prosecution: MrsNyakondi

Convict: Present in Person.