REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.25 OF 2018

NELSON MANDELA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of Hon. J.S. Wesonga, senior Resident Magistrate dated and delivered on the 29th day of June 2018, in the original Oyugis PMCR Sexual Offences case No.15 of 2017)

JUDGMENT

[1] The appellant, **Nelson Mandela**, appeared before the Senior Resident Magistrate at Oyugis facing a charge of defilement, contrary to **section 8 (1)** read with **Section 8 (3)** of the **Sexual Offences Act**, in that on the 10th June 2017, at Kotieno-Kanuonga Location in Rachuonyo South Homa Bay County, he defiled CA, a child aged fourteen (14) years. Alternatively, he committed an indecent act with the said child, contrary to **Section 11(1)** of the **Act**.

[2] Upon pleading not guilty of the charges, the appellant was tried, convicted and sentenced to twenty (20) years imprisonment on the main count of defilement. However, being dissatisfied with the conviction and sentence, he preferred this appeal on the basis of the eleven (11) grounds set out in the petition of appeal filed herein on his behalf by **Messrs. Oguttu, Ochwangi, Ochwal & Co. Advocates**.

[3] At the hearing of the appeal, learned counsel, **Mr. Adawo**, represented the appellant and canvassed the appeal by way of written submissions which were filed herein on 15th February 2019.

The state/respondent was represented by the learned prosecution counsel, **Mr. Oluoch**, Senior Assistant Director of Public Prosecutions (S/ADPP), who opposed the appeal and orally submitted that the appellant was clearly seen and identified as the culprit by the complainant victim (PW1) who had previously known him. That, the appellant defiled the complainant for hours, after which he assaulted, tied her hands and tethered her to a window. He later untethered and told her to leave. She also identified him at that juncture as the lights were on at the time.

[4] Learned Prosecution Counsel, submitted that PW2, saw the complainant after the incident and noted that she was bleeding and her clothes had blood stains.

That, the age of the complainant was confirmed by a copy of the birth certificate (P. Exhibit 4). That, the appellant's defence was outrageous as it suggested that the appellant was implicated in the commission of the offence after he rejected the complainant's mother's demand that they sleep together.

Learned Prosecution Counsel, contended that the appellant's defence in that regard was an afterthought as the issue was never raised earlier. He therefore urged this court to dismiss the appeal.

[5] In response to the foregoing, learned counsel for the appellant, orally submitted that the presence of light at a later stage was not a confirmation that there was light during the offence and anybody could have defiled the complainant in the dark.

Learned Counsel, observed that the alleged blood stained clothes were never produced at the trial and that the stains of blood on the clothes were never analyzed. Therefore, the case ought to have been determined in favour of the appellant.

Learned Counsel, contended that the appellant's defence was strong and that the issue pertaining to the lewd advances made by the complainant's mother towards the appellant was raised during the trial.

[6] Learned Counsel, implied that the original birth certificate was not availed to confirm the age of the complainant and that a photocopy of the same produced in court could have been doctored and therefore, an invalid document.

Learned Counsel urged this court to quash the appellant's conviction by the trial court and set aside the sentence imposed on him.

[7] The rival submissions and the grounds of appeal have duly been considered by this court whose duty as was held by the Court of Appeal in **Okeno –vs- Republic (1972) EA 32**, was to reconsider the evidence adduced at the trial and draw its own conclusions, of course, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

The court stated therein that the first appellate court must re-consider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld, as well, of course, as deal with any questions of law raised in the appeal. (See also, **Kiilu & Another –vs- Republic [2005] 1 KLR 174**).

[8] In that regard, this court is satisfied that there was sufficient and credible evidence establishing the material ingredients of the offence of defilement.

Indeed, the occurrence of the offence was a factor which was not substantially disputed by the defence and was effectively established by the complainant's (**PW1**) sworn testimony which was credibly corroborated by that of the Clinical Officer, **Jared Birundu (PW3)**, who produced the necessary medical examination report (P3 form, P. exhibit 3) which clearly showed that there was penetration of a male sexual organ into the female sexual organ of the complainant.

[9] Under the Sexual Offences Act, penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person and a person who effects such an act on a child is guilty of the offence of defilement (See, **Section 8 (1)** of the **Sexual Offences Act**).

Under the **Children Act**, a child means any human being under the age of eighteen (18) years.

[10] The birth certificate produced herein (P. Exhibit 1) showed that the complainant was born on the 26th June 2003, which meant that she was aged fourteen (14) years at the material time of the offence.

This fact was not disputed, neither was the validity of the birth certificate and its certified copy.

It is apparent from all the foregoing that an unlawful act of defilement was indeed committed against the complainant on the material date.

[11] It would therefore follow that grounds four (4), five (5) and six (6) of the appellant's grounds of appeal are devoid of merit.

Clearly, the occurrence of the offence having been a proved and an undisputed fact, the only issue that emerged for determination by the trial court was the alleged identification of the appellant as the offending culprit.

Indeed, grounds one (1), two (2) and three (3) of the grounds of appeal are anchored on the issue of identification.

[12] In its consideration of the issue, the trial court proceeded with extra caution when it rendered itself thus:-

"The offence occurred at night. The complainant's account is that on 10th day of June 2017 at 1.00 a.m. she went outside to answer to a call of nature. She found someone standing outside but couldn't see him because it was dark. The person pulled her to a house where he switched on his phone's torch then she was able to recognize her captor as Nelson Mandela the accused herein. She also had another opportunity to look at her captor's face in the morning at 6.00 a.m. when he was sending her away. The complainant was adamant that she identified the accused person, this was her evidence on identification.

"------ then he switched on the flash light on his phone.

Then he stood facing me, in that we could see each other face to face then I saw it was Nelson Mandela. I know Nelson Mandela, stays in our village ------ in the morning at around 6.00 a.m. there was light, he came and told me to leave. Again I had another opportunity to see his face clearly."

[13] The trial court appreciated that the offence occurred in the hours of darkness and that the complainant was the sole identifying witness. Against that background, the court proceeded to warn itself of the danger of relying on the evidence of identification by a single witness in difficult circumstances and stated as follows:-

"From the foregoing excerpt of the complainant's evidence it's clear that the accused person is the complainant's village mate and they are well known to each other. It is also clear that the prevailing lighting conditions at the time were conducive. The complainant and the accused person stood facing each other when he put on the flashlight/torch on his phone. The complainant had another opportunity to look at the accused person's face in the morning when he came to send her away from the house. I find that the complainant had ample time to observe the accused person that the prevailing conditions were conducive for a positive recognition and I do not think therefore that the identification of the accused by recognition was attended by any possibility of a mistake on the part of the complainant."

[14] Clearly, the foregoing findings by the trial court were aptly supported by evidence of the complainant which was found to be credible enough as to render the appellant's defence a "cock and bull" story and an outrageous afterthought inasmuch as it indicated that the appellant was carrying the complainant's mother on a motor cycle and on reaching a hotel called Winam, she stopped him so as to answer a call of nature and upon her return, in broad daylight, she was naked. She then asked him to have sexual intercourse with her but he refused. Later, the complainant's father approached and questioned him as to why he seduced his wife. It was then that he was threatened with dire consequences.

[15] With that implausible story, the appellant implied in his defence that he was implicated in the defilement of the complainant by her mother and father.

It was not the appellant's obligation to establish his innocence but rather the prosecution's obligation to prove its case against him beyond reasonable doubt. In that regard, the trial court rightly concluded that the prosecution had established its burden of proof in showing that the appellant was the person who defiled the complainant.

[16] This court agrees with that conclusion as it was based on sound and credible evidence availed by the prosecution against the appellant.

Although the offence occurred during the night, the flash light or torch light provided by the appellant's mobile phone during the offence and the light available at the scene after the commission of the offence at 6.00 a.m. afforded favourable conditions for positive identification of the appellant by way of recognition. The two were not strangers.

They were actually village mates who knew one another. A fact which was never disputed and was actually confirmed by the appellant in his defence when he referred to the complainant's mother and father.

[17] The evidence by the complainant, also proved that there was adequate opportunity for positive recognition of the appellant. The criminal transaction took a considerable period of time from the time they encountered one another to the time she was given her freedom and set free.

She was at the time being treated by the appellant as an "object" or "tool" for his perverted ways and sexual gratification.

[18] In essence, the appellant's conviction by the trial court was sound and proper and is hereby upheld. Consequently, grounds one, two, three as well as grounds seven, eight and nine of the appeal are also devoid of merit.

Section 8 (3) of the **Sexual Offences Act** provides that:-

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years".

The sentence imposed upon the appellant by the trial court was in accordance with the foregoing provision of the law and therefore, lawful.

Grounds ten (10) and eleven (11) of the appeal are in that regard lacking in merit.

[19] In sum, this appeal must and is hereby dismissed in its entirety.

Ordered accordingly.

J.R. KARANJAH

JUDGE

05.12.2019

[Delivered and signed this **5th** day of **December, 2019**]