REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 16 OF 2020

DOM.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and sentence of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 30th day of June 2020 in the original Nyamira Chief Magistrate's Court Sexual Offence No. 59 of 2019}

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 and in alternative charge committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence of defilement were that on the 16th day of June, 2019 in Nyamira South Sub- County within Nyamira County, the appellant intentionally and unlawfully caused his penis to penetrate the genital organ, vagina of JJM, a child aged 10 years.

The particulars of the offence of committing indecent act were that on 16th June, 2019 in Nyamira South Sub- County within Nyamira County the appellant intentionally and unlawfully touched the genital organ vagina of JJM a child aged 10 years with his genital organ penis.

After the trial the Learned Magistrate found the appellant guilty of the offence of defilement and sentenced him to twenty (20) years imprisonment.

Being dissatisfied with the whole of the judgement the appellant preferred this appeal. The grounds urged are that: -

"1. The trial magistrate erred in both law and facts to have passed judgment without proof since there was no DNA test done to warrant the conviction.

2. The trial magistrate faulted in both law and facts to rely on fabricated medical report since it was clear that the examination was conducted after two weeks from the said date of the incident.

3. The learned magistrate convicted him without realizing that there was no hymen torn, no spermatozoa seen, and no other cogent proof to associate him with the said offence.

4. The trial magistrate failed in law to have conducted the hearing while he was sick and unable to ask the witnesses questions.

5. The trial magistrate convicted him without realizing that he was unrepresented."

The appeal was canvassed by way of written submissions.

In his submissions the appellant denied defiling the complainant. He submitted that there was no evidence adduced which confirmed the act of defilement. He challenged the medical report produced and stated that it was found that the hymen was intact and no vaginal injuries were seen hence a clear indication that there was no act of penetration. He contended that no DNA test was conducted so as to ascertain his involvement in the act of defilement. It was also his submission that the incident took too long to be noticed and to be reported. He argued that no proper and thorough investigations were carried out and that the prosecution failed to call crucial witnesses and only relied on the evidence of the complainant. He also submitted that he was convicted on contradictory and fabricated evidence whose aim was purely to frame him. He urged this court to allow the appeal, quash the conviction, set the sentence aside and order a retrial.

Mr. Majale, Counsel for the respondent, submitted that the prosecution called four witnesses who all gave corroborative and consistent evidence and that the evidence adduced was sufficient to prove all the ingredients of defilement hence the conviction and subsequent sentence by the trial court were safe. Mr. Majale argued that a DNA test is not an ingredient of the offence of defilement but is only used to prove paternity. He submitted that the ingredients of defilement are; penetration, age of the victim and identification of the perpetrator all of which he contended were proved to the standard required at the trial. On the issue of not calling additional witnesses, Mr. Majale relying on **Section 124 of the Evidence Act** submitted that the court is allowed to convict on the sole evidence of the minor even where no other evidence is adduced provided the court is satisfied that the minor is telling the truth. He submitted that in this case the court upon conducting a voire dire examination satisfied itself on the truthfulness of the victim. On the allegation that the trial court proceeded with the trial when the appellant was unwell Counsel submitted that the same was not true since the appellant always indicated that he was ready to proceed. Mr. Majale contended this is captured in the proceedings. Counsel further submitted that the warrant of arrest issued by the honorable court on 4th February 2020 was lifted because the appellant was unwell. He urged this court to dismiss the appeal for lack of merit and uphold the conviction and sentence of the trial court.

My duty as the first appellate court is to consider and re-evaluate the evidence in the trial court so as to arrive at my own independent conclusion while keeping mind that I did not see or hear the witnesses ***(see Okeno v Republic [1972] EA 32).***

I agree with Mr. Majale that in a case of defilement the prosecution is enjoined to prove three basic elements namely; penetration, age of the victim and identification of the perpetrator ***(see Francis Kennedy Owino v Republic [2017] eKLR).***

The complainant stated she was ten years old. The P3 form also indicated she was ten years old and the officer who assessed her age also confirmed her to be between 10 and 11 years.

In the case of **P M M v Republic [2018] eKLR** it was held that,

"What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant. Here, the medical evidence adduced by the clinical officer, which was not discredited by the appellant, estimated the age of the victim as 13 years. In addition, the appellant did not broach the question of age during cross examination. In the circumstances, I do not find it prudent to disturb the finding of the trial magistrate."

In this case other than the complainant's evidence that she was ten years old there was an opinion by the officer who filled her P3 form and the officer who assessed her age that she was between 10 and 11 years. I therefore find no reason to disturb the trial Magistrate's finding that the complainant was ten years old.

On the issue of penetration, the appellant argued that there was no proof of penetration since the hymen was intact and there was no evidence of spermatozoa on the complainant's vagina. He also contended that no DNA test was done to ascertain he was the perpetrator of the offence. In the case of **Kassim Ali v Republic [2006] eKLR** the Court of Appeal held that medical evidence need not be adduced to prove the guilt of the accused person. The complainant vividly described what the appellant did to her. It was her evidence that on 16th June, 2019 at around 7.00pm the appellant took her together with his children to his house and when they were asleep on the same bed, the petitioner removed her clothes and had sex with her while threatening her with a knife. Whereas PW3 gave evidence that the injuries inflicted on PW1's genitalia were not inflicted on 16th June, 2019, it is my finding that this does not negate the evidence of the complainant. I agree with prosecution Counsel that **Section 124 of the Evidence Act** permits the court to convict a person on the sole evidence of the victim even without corroboration provided the court is satisfied that the victim is telling the truth. I find the complainant's evidence consistent, credible and truthful. I find that the lack of injuries in her genitalia is not sufficient to negate that she was defiled.

On identification, it was PW1's evidence that the appellant is her uncle and this was not denied by the appellant. It was also her evidence that at around 7.00pm the appellant took her from her home together with his children and took her to his house where they ate again and slept and it was while all the other children were asleep that the appellant removed her clothes and defiled her. Since the complainant knew the appellant well prior to the offence I find that she positively identified him as the perpetrator of the offence and that given the amount of time he spent with her prior to committing the offence there was no possibility of a mistaken identity. The appellant argued that the prosecution failed to call witnesses whom he deemed were crucial to this case. With regards to the choice of witnesses, in **Sahali Omar Vs. Republic [2017] eKLR** the Court of Appeal quoted **Section 143 of the Evidence Act** and stated that:

"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

In the instant case I find that the evidence adduced by the four prosecution witnesses was sufficient to prove the guilt of the appellant beyond reasonable doubt and hence no adverse inference can be drawn from the prosecution's failure to call other witnesses.

On the allegation that the trial court proceeded with the case when the petitioner was unwell it is evident from the proceedings that on 14th January 2020 a warrant of arrest was issued because the appellant did not attended court. The warrant was however lifted on 4th February 2020 when it transpired that the appellant had been unwell. This is the only time that the appellant was absent and nothing continued in court in his absence hence his argument cannot stand. There is also nothing on the record to demonstrate that he was unwell during the trial. I am not therefore persuaded that the appellant's right to a fair trial was violated. I see no reason therefore to order a retrial.

On sentencing, **Section 8 (2) of the Sexual Offences Act** prescribes a mandatory sentence of life imprisonment. The trial Magistrate after considering the appellant's plea in mitigation sentenced the appellant to imprisonment for twenty (20) years which in my view was a just sentence in the circumstances.

The upshot is that this appeal lacks merit and the same is dismissed, the conviction upheld and the sentence affirmed.

Signed, dated and delivered electronically via video link (Microsoft Teams) on this 17th day of December 2020.

E. N. MAINA

JUDGE