REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 18 OF 2020

(Appeal arising out of conviction and sentence of Hon. Karanja V. (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 114 of 2019 delivered on 26th February 2020)

SAMMY WAFULA MEJA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Sammy Wafula Meja, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on 3rd May 2019 at [particulars withheld] Village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of PNN, a child aged thirteen (13) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars were that on 3rd May 2019 at [particulars withheld] Village within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely his penis and the genital organ namely the vagina of PNN, a child aged thirteen (13) years. The Appellant pleaded not guilty to the charges. After full trial, the Appellant was convicted of the main charge and sentenced to serve **ten (10) years imprisonment**.

The Appellant is aggrieved by the conviction and sentence hence this Petition of Appeal. The grounds in support of the Petition are that the trial court erred in convicting him based on the contradictory evidence of PW1 and PW2; that PW2 held a grudge with his family hence was malicious; that the prosecution did not prove his case beyond reasonable doubt; that no investigations were conducted by the Police; that he should have been medically examined alongside the complainant and that his defence was rejected without justification. The Appellant urged the court to allow the Appeal, quash the conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, the parties informed the court that they will rely on their written submissions in support of their respective positions. The Appellant maintained that he was charged on account of PW1 and PW2's evidence which indicated that the complainant was raped yet he was charged with defilement. The discrepancies regarding his alleged entry into the house the complainant lived in cast doubt in regard to the evidence that was adduced. He stated that it was impractical to identify him by voice recognition. Furthermore, the absence of proper lighting precluded a definite description of the clothes that he allegedly wore. He dismissed PW3's evidence as hearsay. The absence of photographs at the scene meant that no proper investigations were done. There were no DNA test to conclude that the semen found belonged to the Appellant. On sentence, the Appellant told the court he had reformed and is the breadwinner of his family, he will educate his family and the community on the folly of law breaking if set at liberty.

Mr. Omooria for the State opposed the appeal. He stated that the prosecution proved that the complainant was a minor. He relied on the age assessment report showing that the complainant was thirteen (13) years old at that time hence below eighteen (18) years. Further, the court was satisfied as to her age having seen her at trial. On penetration, the prosecution submitted that bearing in mind the principle of absolute penetration, it had proved that indeed the same was answered in the affirmative. This was because the

complainant confirmed that she was sexually assaulted by the Appellant. This evidence was corroborated by PW2. PW5 observed a torn hymen and concluded that there was penetration. On identification, the prosecution submitted that the complainant's testimony to the effect that she had known the Appellant as their neighbour prior to the incident. She saw him from the spotlight that night. He was also able to recognize him by voice. The Appellant was sufficiently recognized.

Regarding the Appellant's defence, Learned Prosecutor submitted that the discrepancies allegedly evident were immaterial to tilt the outcome of the case. They did not go to establish lack of credibility on the part of the prosecution's witness. The issue of the existence of a grudge was an afterthought. Investigations were properly conducted and the standard of proof discharged. The absence of DNA test did not vitiate the strength of the evidence presented before court. The Appellant's defence was a sham and based on mere denials. He was of the view that the sentence meted on the Appellant was proper. He urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

It is the duty of this court as a first appellate court to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court before reaching its own independent determination whether or not to uphold the conviction. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses **(Njoroge Vs Republic [1986] KLR 19).** In the present appeal, the issue for determination by this court is whether the prosecution established the charge brought against the Appellant to the required standards of proof beyond any reasonable doubt.

The prosecution called five (5) witnesses in its bid to establish the charge. PW1, the complainant testified that she was a Class 6 pupil at [particulars withheld] Primary School. She was born on 27th July 2007. On 03rd May 2019 at midnight, she was at home in [particulars withheld] with her sister's three children. She heard commotion at the window which was opened. Someone gained access to the house through it. She put on the spotlight. She was immediately grabbed by the throat and choked. She was unable to scream. She managed to point the torch at the intruder and recognized his voice as that of the Appellant. There were also security lights that had been switched on. The Appellant then tore her pant and sexually assaulted her. She felt pain. She bled. The house was a mess. M, one of the children in the house, heard the commotion and started calling her name. When M screamed, the intruder ran away. She recognized the intruder as Sammy who is their neighbour. He was armed with a pair of scissors. She testified that the Appellant wore the same clothes that he wore during the day. Her mother later took her to hospital for treatment. She thereafter recorded her statement.

PW2, MN, a minor, gave unsworn evidence. She stated that Sammy entered the house through the window and choked the complainant. She screamed. The complainant was in possession of a spotlight. Sammy injured the complainant's private part and jumped out of the window. She recognized the intruder as the Appellant.

PW3, NN, the complainant's mother, found the complainant in the house when she came home from a funeral. The complainant informed her that she had been sexually assaulted, choked and was bleeding from her vagina. The complainant told her that she had recognized her assailant by his voice. She then took the complainant to hospital for treatment. Thereafter, they reported the incident at the police station. They were issued with a P3 form and an Age Assessment request form.

PW4, PC (W) Purity Nabwire, the Investigating Officer, conducted investigations on the case. On 06th May 2019, the complainant was accompanied to the police station by her mother. She was issued with a P3 form and age assessment request form and referred to Kitale Hospital for treatment. She recorded the complainant's statement. She had her pant which was admitted into evidence. She visited the scene and arrested the Appellant. The torn pant was recovered at the scene. It was her testimony that the Appellant was positively identified as the perpetrator. She saw the broken window that had since been repaired. She did not take photographs at the scene.

PW5, Peter Masake, a clinician at Kitale County Hospital examined the complainant on 06th May 2019. He found that her hymen was missing. The tear was fresh. He concluded that there was actual penetration hence defilement. He produced the treatment notes and the P3 form into evidence. Since the complainant had attended to the facility after 72 hours, he noted that there was an absence of spermatozoa.

The Appellant was placed on his defence. In his unsworn testimony, he stated that on 12th May 2019, he was asleep in his house when he heard a knock at his door. It was two police officers who arrested him and escorted him to the police station. He was kept in remand. His fingerprints were taken. He was charged subsequently with the offence. He denies committing the offence.

The prosecution must establish the following three ingredients to prove the charge of defilement:

1. Age of the complainant

2. Penetration

3. Identification of the perpetrator

This court has aptly summarized the evidence of the trial court. On the issue of the complainant's age, PW1 testified that she was a Class 5 pupil and was aged thirteen (13) years old at the time of the sexual assault. The court further relied on the age assessment report which was marked for identification but was not produced as an exhibit by the prosecution. It is not clear whether this document was subsequently produced in court and marked as an exhibit. The complainant's mother did mention it in her testimony. However, it was marked MFI 3. No subsequent witness addressed the court on this issue. A cursory perusal of the trial court record reveals that the document remained marked "MFI 3". What then is the effect of a document marked for identification and not produced" The court in **Justus Musau Wambua & another –vs- Republic [2020] eKLR**, citing with approval the case of **Kenneth Nyaga Mwige –vs- Austin Kiguta & 2 others [2015] eKLR** held:

"In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before this court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- the State (1994) 7-8- SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision."

The court in **Justus Musau Wambua & another –vs- Republic (supra)** found that the trial magistrate was in error when he relied on documents that were not produced. This court agrees with this holding. The trial magistrate erred in relying on an unmarked document which had not formally been produced in evidence.

It should be emphasized that determining the age of the victim is at the core of such charge as the present one. It is a critical and as an essential ingredient. As was held by the Court of Appeal in **Alfayo Gombe Okello -vs- Republic Cr. Appl No. 203 of 2009 (Kisumu)**:

"… In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8 (1)."

Turning to the evidence that was adduced in court, this court is also alive that *voire dire* that was conducted and the observations made by the trial court. The court believes that the *voire dire* was conducted out of necessity based on the physical observation of the complainant. To the trial court's mind, the complainant had not attained the age of majority. She further testified that she was a Class 5 pupil aged thirteen (13) years born on 27th July 2007. However, no birth certificate was produced into evidence. The P3 form marked PExh 2 indicated that the estimated age of the complainant, under Section C, to be twelve (12) years. Additionally, the charge sheet in its particulars states that the complainant was aged thirteen (13) years. All this evidence remained uncontroverted. This court, based on the oral testimony of the complainant, the observation of the trial magistrate and the P3 form, forms the opinion that indeed the complainant was a child aged between twelve (12) and thirteen (13) years at the time of the sexual assault.

The Court of Appeal in **Francis Omuroni –vs- Uganda Court of Appeal; Criminal Appeal No. 2 of 2000** asserted that apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation of common sense. Similarly, in **Fappyton Mutuku Ngui vs. Republic [2012] eKLR,** the court held:

"... **That "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases**."

This court thus finds that the age of the complainant was established to the required standard of proof.

The next issue is penetration. Section **2 (1) of the Sexual Offences Act** defines **"penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

PW1 testified that the Appellant broke into their home on the night of 03rd May 2019. He choked her, tore her pants then sexually assaulted her. She felt pain. PW2, though giving unsworn evidence, corroborated the complainant's testimony. PW3 was informed of the same when she returned home. She took PW1 to hospital for treatment. PW5 testified that when he medically examined, the hymen was torn. It was fresh. Though there was no evidence of spermatozoa given the lapse of time, he concluded that there was actual penetration. The complainant was defiled. This court finds that there was evidence of penetration. The Appellant challenged PW5's evidence on the basis that no semen samples were collected. He was of the view that this vitiated PW5's testimony. This Court is not persuaded by the Appellant's argument. There is overwhelming evidence based on the testimony of the prosecution witnesses that there was indeed penetration.

We now move to the third element which is the identification of the perpetrator. PW1 testified that she knew the perpetrator before the incident. He was their neighbour. He was also positively identified as a neighbour by PW2 and PW3. The trial court was satisfied as to the veracity of the complainant's statement. It was found that the complainant had a torch. There were also security lights. She was further able to positively identify him from the clothes that he wore during the day and the lighting when the incident occurred. He also identified him by his voice. She properly profiled the perpetrator. The trial court considered the Appellant's defence and found that they were mere denials.

This court has carefully considered the evidence that was adduced by the complainant regarding the matter she says she identified the Appellant. Certain facts are not in dispute. The sexual assault occurred at night. From the complainant's testimony, it was dark. Someone entered the room she was sleeping in through the window. Before she could switch on the torch, she was grabbed by the neck, choked then sexually assaulted. The complainant said that she was not able to scream due to the choking. However, in the course of the sexual assault, she said she was able to identify the Appellant by his voice. He knew the Appellant prior to the sexual assault. He was a neigbour. The complainant's testimony was "corroborated" as to identification by PW2, a Baby Class pupil. Is this evidence credible"

The Court of Appeal in **Maitanyi –vs- R [1986] KLR 198** held that the court should not convict an accused on the basis of the evidence of identification especially that of a single witness made in difficult circumstances that were not favourable to positive identification without other evidence. The court held thus:

"When testing the evidence of a single witness, careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description."

In the present appeal, even though the complainant testified that she was able to identify the Appellant by the clothes he wore, she did not indicate the type of clothes that the Appellant allegedly wore on the material night. She did not tell the court the color of the clothes only stating that the Appellant wore the same clothes that he wore in court during the hearing of the case. In view of the hectic circumstances at that time, including the fact that the complainant was terrorized and traumatized, it cannot be ruled out that in those moments she may been mistaken that she had identified the Appellant as her assaulter. The voice identification may also be taken in this light. This court is not persuaded that's the evidence of identification adduced by the complainant excludes the possibility of mistaken identity. The testimony of PW2 was unhelpful because she was a child of less than five (5) years. Her testimony cannot be said to constitute corroboration of the complainant's testimony.

In such circumstances, other evidence such as forensic evidence would have assisted in identifying the perpetrator of the crime. As it were, no such evidence was procured from the scene of the crime or biological evidence recovered from the complainant. This court in the premises formed the view that the circumstances in which the said identification is said to have been made precludes this court from reaching a finding that the same was watertight and free of the possibility of mistaken identity.

This court therefore holds that the prosecution was unable to adduce sufficient evidence to tie the Appellant to the scene of crime. The result of this finding is that the Appeal lodge by the Appellant is allowed. His conviction is quashed. The sentence that was imposed on him is set aside. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.

It is so ordered.

DATED AT KITALE THIS 26TH DAY OF JULY 2021

L KIMARU

JUDGE