REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 9 0F 2020

DENIS OMONDI OTIENO alias EDWINE ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence for the offence of defilement c/s 8 (1)

as read with section. 8 (3) of S.0.A no. 3 of 2006 against the decision of Hon. I. Wasike in Malindi law Courts delivered by Hon. W. K. Chepseba, dated 24.1.2020)

Coram: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the state

J U D G E M E N T

The appellant **Dennis Otieno Omondi** was charged with Defilement contrary to Section 8(1) read with Sub-Section (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on 3/11/2018 at [Particulars Withheld] Centre in Magarini Sub-County within Kilifi County, intentionally and unlawfully caused his manhood to penetrate the genitalia of **CK** a girl aged 16. He was alternately charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act and the particulars are that on the same date, place and time, the appellant intentionally and unlawfully touched the genitalia of the said minor using his fingers and manhood.

The appellant pleaded not guilty to the abovementioned charges. The matter proceeded to trial after which he was found guilty, convicted and sentenced to serve 15 years imprisonment. The appellant, being dissatisfied with the decision of **Hon. Wasike** he appealed against both conviction and sentence. The appeal is based on the following amended grounds of appeal:

1. That, trial magistrate erred in law and fact by not realizing that PW1's behaviour as per her evidence on record was of doubtful integrity, hence unreliable in the circumstance she cannot be a straight forward witness.

2. That, the trial magistrate erred in law and fact by not according to the appellant a fair trial by not giving him that opportunity

to mitigate before the trial court.

3. That, the trial magistrate erred in law and fact by not appreciating the appellant's defense which was the whole truth of the matter in question.

4. That, the Hon Court be pleased to give further interpretation of the expression, "liable upon conviction, not less than" as used in Section 8(3) of S.O.A No. 3 of 2006 and its difference with the phrase "shall be liable to as used in Section 4(a) (1) of the narcotic drugs and psychotropic substances Act in the interests of sentencing in the interests of justice.

Evidence

(PW1) gave a sworn testimony. She averred that she was 16 years of age and that she was born on 8/6/2003. She produced a copy of her birth certificate which was marked as exhibit -PMFI 1. On the material day, she left home at around 7pm with two of her friends going to a cinema at Marereni. When she left the cinema, she went to **Mr. Edwin Omondi** who was her teacher. Before she entered into the house she heard voices inside. She peeped and saw two ladies inside his house. She called the appellants outside after which the two ladies left and she went in.

She stated that the appellant had sex with her. She told the court that the appellant told her that he wanted to go back to Kisumu but he wanted to have sex with her prior to that. She started that she removed all her clothes and he also removed all his clothes. He then inserted his manhood in her genitalia. The complainant told the court that it was the second time having sex with the appellant. I had once gone to his place and had sex with him. She then heard the Head Teacher knocking on the appellant's door, and asked if the appellant had seen him. The Head teacher requested the accused to accompany him to go search for her as she was missing.

The accused left her in the house and went with the head teacher. The appellant later came back and told them they were looking for her. He then took her to another boy's place and told her never to disclose the fact that she was with him but rather at that boy's place.

The complainant's aunt **LM** came with her uncle **R** accompanied by their young child. They inquired about where she had gone and after which she said she was at the said boy's place, **Masha**. They went to **Masha's** place and found the house locked. They then went to Marereni police station. The head teacher explained himself and also made her statement with the police. The next morning she was taken to hospital. She was given treatment notes marked as -PMFI 2. From the hospital they proceeded Marereni police station where they were given a P3 form which was filled at Malindi sub-county hospital. She started that the doctor did not examine her. The P3 form was marked as PMF1-3.

Upon cross examination, the complainant stated that it was the accused who defiled her and that it after she had been beaten that she decided to say the truth. Further that she doesn’t want to report him.

(PW2), basically corroborated the testimony of PW1 she came looking for the complainant in the company of her husband. The complainant had gone missing. She asked the appellant where he found her and were informed it's the appellant who had found her along the road heading to his place. PW2's suggested to take the complaint to the police station. The appellant took them to another house and told them that the complainant was there. They proceeded to Marereni police station and returned the following morning after reporting the matter. They then took her to the hospital. She also confirmed that the complainant was 16 years old at the time the offence was committed. She also alluded to the fact that the doctor confirmed that complainant had been defiled.

(PW3): Ibrahim Abdullahi based at Malindi sub-county hospital. He testified that on 7/11/18, he examined and filled P3 form of the complainant. She had been treated at Marereni dispensary. She was alleged to have been defiled by a person known to her. Upon examination, the hymen was broken. The doctor confirmed that there was penile penetration on the complainant's genitalia. He produced treatment notes before the trial court marked as PEX-1, the P3 Form marked as exhibit PEX-2. **(PW4): No.104661 PC Abdalla Mawazo** based at Marereni Police Station was the investigating officer in this matter. He basically corroborated the evidence of **(PW1), (PW2)** and **(PW3).**

After the close of the prosecution case, the learned magistrate found the appellant to have a case to answer. He was therefore placed on his defence He testified as **(DW1).** He started that he travelled from Marereni to Malindi to attend a camp meeting. It lasted for 1

week until 7/11/18. He stated that he went back to Marereni where he was living with his aunt. On the same day, he was called by my teacher **Mr. Silas Omollo** saying if he was back from the camp meeting. He was then called to the police station where he was arrested and later brought to court. He basically denied having committed the alleged offence. He confirmed having known the complainant as a pupil.

Submissions

The appellant alluded that there was no constant communication between **(PW1)** and him at the time of the alleged offence was committed. More so, the appellant argues that there is no any reason stated by PW1 for going to the appellant's place at that time, which reason could otherwise result or change into being involved in the said sexual activity.

The appellant made reference to PW1's evidence, specifically, Page 6 and 7, from line 23 and line 1-10 respectively, where **(PW1)** talked about going to the video place with her two friends and two cousins. After reaching the video place, she did not even enter the video place, she instead lied to her cousins that she was going to the petrol station to buy kerosene, which kerosene was not bought by **(PW1).** He further traces that the evidence of deceiving her cousins is supported by **(PW2)** at Page 9 line 11-12. He therefore argues that it is without doubt that **(PW1)** is a liar as per her evidence above. In his view, she first of all deceived that she was going to the video place but she didn't go. She again deceived her own cousins that she was going to buy kerosene. He therefore argues that there is nothing that stop her from lying to the court and she should be declared a witness of doubtful integrity.

The appellant also seems to argue that the act by the complaining to undress herself is a behaviour consistent to prostitutes and housewives to their husbands and not children. He further argues that due to **(PW1's)** behaviour as per her evidence, she lied and was not being straight forward and such evidence ought not to be truck out of the court record.

The appellant contends that in such a case as the instant one, the medical evidence must corroborate the victim's evidence. He therefore argues that even though **(PW1)** was examined at the hospital just a few hours after the commissions of the alleged offence, the treatment notes marked as PEX-2 does not show that the minor was indeed defiled.

Furthermore, the appellant is of the view that the legal authorities relied upon by the trial magistrate in the case, appears to be irrelevant, there was no evidence of penetration. The harm indicated on the P3 form is neither here nor there, because of the same reason, that is, there was no effect seen on **(PWI's)** genitalia or some sort of injuries which suggest that she had been defiled. He further argues that a missing hymen of such a child, does not necessarily mean that it was the appellant who broke it.

He cited the case by the learned **Judge Ang'awa J**. of Nyeri High Court who observed in the case of **Muriuki vs Rep. cra. No. 206 of 1993,** Judgement delivered and dated 7.12.1993. Judgement part-**Justice Mwendwa (CI)** as he was then stated in the case of **Maina vs Rep. (1970) EA 370 at pg. 371.**

"It has been said again and again that, in case of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because, human experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refuse. Such stories are fabricated for all sorts of reasons and sometimes for no reasons at all. It is also worth to note that the trial magistrate did not even warn himself when relying on the evidence of the minor in this case."

The appellant argued that he was not accorded a fair trial since he was not given the opportunity to mitigate before his sentence was imposed by the trial court. He cited the **Court of Appeal Case of Godfrey Ngotho Mutiso vs Rep. CRA. No. 17 of 2008 & Francis Karioko Muruatetu & Another v Republic, Petition No.15 of 2015** in support of this his contention. He also argued that an accused person who has been denied that opportunity to mitigate before the trial court, is denied the right to a fair trial, mitigation being part of the trial process. He therefore urge the court to consider this contention.

The appellant contends that his sworn defense appeared to be that of an alibi. Although it ought to be given in advance enough, such that the prosecution could have the opportunity to rebut it, but it is reasonably necessary to note that, the he is a layman in legal matters who did not have such knowledge and information. He further argues that the prosecution during the trial process ought to be at a right angle, such that its duty or intention is not saving or making sure that conviction is entered, but rather make sure that justice has been accessed to all as they appear to be representatives of state.

It is argued that the prosecution ought to therefore comply with Article 48 of the constitution as read with Section 212 of the justice has been accessed to all which "all" here does not exclude the appellant. In his view, the prosecution ought to have launched investigations concerning his alibi defence to clear any reasonable doubt, for safe conviction in this case as provided for under Section 212 of Criminal Procedure Code.

Analysis and Determination

It has been judicially held in several decisions that the offence of defilement is proved when the following ingredients are established;

1. The minority age of the complainant

2. Proof of penetration on the minor's genitalia

3. Positive identification of the perpetrator of the offence

In defilement cases, proof of the age of the victim is crucial because it is a determinant on what sentence will be meted in the event the accused is convicted. In ***Hilary Nyongesa vs Republic (2010) eKLR,*** the court said;

"Age is such a crucial aspect in Sexual Offences that it has to be conclusively proved.....

And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."

Turning to the circumstances of this case, it is clear that the minority of the complainant was proved beyond reasonable doubt. The complainant testified that she was 16 years old at the time the offence was committed. The prosecution produced her birth certificate marked as exhibit PMFI-1 which indicates that she was born on 8/6/2003. **(PW2),** the complainant's sister also confirmed that the complainant was 16 at the time the alleged offence was committed. In that regard, I place my reliance on the case of **Musyoki Mwakavi vs Republic (2014) eKLR** the court said;

"Apart from medical evidence, the age of the complainant may also be proved by both certificate, the victim's parents or guardian and observation or common sense..."

In light of the above judicial authority, the age of the complainant in the instant matter was ascertained by way of documentary evidence in form of the complainant's birth certificate. I find that the prosecution successfully proved the age of the complainant to the required standard of proof beyond reasonable doubt.

On the question of penetration, I note the same was proved beyond reasonable doubt. Penetration is defined under ***Section 2 of the Sexual Offences Act*** as the

"partial or complete insertion of the genital organs of a person into the genital organs of another person"

The complainant vividly narrated what transpired on the material date. She started She went to the place the appellant was staying for that week. She told the courts that he had said he wanted to go back to Kisumu but he wanted to have sex with her before he leaves. She described that when she entered his house, she removed all her clothes and the appellant did the same. They proceeded to have sexual intercourse. The complainant also stated that she had had sex with the appellant once before the material date. The Clinical Officer, **(PW3) Ibrahim Abdullahi** examined the complainant and made findings that she had no hymen. **(PW3)** confirmed that there was proof of penile penetration on the complainant's genitalia. The testimony of the complainant was corroborated by that of **(PW3).** I am satisfied that from **(PW1's)** narration of the events that there was indeed penetration.

As regards the question as to who was the author of the complainant's misfortune, the complainant gave a comprehensive account of

what transpired on the material date. She told the court that she had sex with the appellant. The complainant told the court that she went to see the appellant after he had called her to have sexual intercourse before he left for Kisumu. She joined her at his place and had sex with him as per their plan. The sexual intercourse according to the complainant was not in any way forcible. She removed her clothes on her own volition and proceeded to have sex with the appellant. The minor was reportedly missing from home, she told the court that the search for her began while she was still in the appellant's house. He took her to some other place and tried to hoodwink her into saying that she was with another boy instead of the appellant himself. She told the court that he then took her from the boy's and went to the Head teacher's place and told him that he had met her on her way from the boy's house. He even held a stick to disguise and deceive those that we're searching for her into believing that she was indeed at the said boy's house.

The appellant denied having committed the offence. However, the trial court found the same to be nothing more than an afterthought. I also find that the appellant was positively identified as the perpetrator of the offence. The matter was one of identification by recognition which makes it little or no risk as far as mistaken identity is concerned. I place reliance in the case of **Hassan Abdallah Mohammed vs Republic [2017] eKLR** it was stated that:

"Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga vs Republic (1989) KLR 424 at 426 had this to say:

"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

8. In Nzaro vs Republic (1991) KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

I have no doubt in my mind that the appellant was positively identified by way of recognition as the perpetrator of the defilement in question. Therefore, it is the court's view that the prosecution proved the offence of defilement to the required standard of proof beyond reasonable doubt. The appeal against conviction is hereby denied.

On the question of Sentence, the appellant was sentenced to serve 15 years imprisonment. An appeal against a sentence imposed by a trial Court can only be set aside, substituted or varied under the following circumstances:

(a). Where the trial Court misapprehended the relevant factors and principles on sentencing. (b). Where the trial Court failed to interpret the Laws on sentencing to ascertain the intention of the legislature. (c). Where in arriving at the sentence the balance of the relevant factors and the competing considerations were never dissected to arrive at a fair and proportionate sentence for the crime.

This is what the Court in **Bernard Kimani Gacheru v Republic [2002] eKLR** emphasised that:

"It is now settled Law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already states is shown to exist."

In this particular case, the appellant has not brought himself within the ambit of the **Bernard case (supra)** . In my view, the nature of the offence deterrence must apply and is permissible for the Court to impose disproportionate sentence provided the aim of such is to protect the larger society. The appeal on sentence is therefore denied.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE