REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 8B OF 2017

CHARO KENGA GONA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 281

of 2014 in the Senior Principal Magistrate's Court at Kilifi – Hon. R. K. Ondieki SPM)

CORAM: Hon. Justice Reuben Nyakundi

Mr. Mwangi for the State

Appellant in person

J U D G M E N T

Charo Kenga Gona, the appellant herein was charged with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act. The particulars of the charge are that on the 21.7.2013 at Bamba location, the appellant defiled intentionally and unlawfully by inserting his penis into the genitals of **DKK** a minor aged 9 years.

The appellant initially pleaded not guilty. The trial commenced in earnest to disapprove his innocence by calling evidence to that effect. At the conclusion of the trial, appellant was found guilty, convicted and sentenced to life imprisonment. Aggrieved by the sentence and conviction, by the trial Court, the appellant preferred an appeal to this Court based on the following grounds.

(1). That the trial Magistrate erred in Law and fact by relying on the evidence without considering that the age of the complainant was not proved beyond any reasonable doubt.

(2). That the trial Magistrate erred in Law and fact by not considering there was an existence of bad blood between I and the complainant's family.

(3). That the trial Magistrate erred in Law and fact by not considering the prosecution did not prove its case to the reasonable doubt.

(4). That the trial Magistrate erred in Law and fact by not considering my reasonable defence statement.

Litigation history

The victim of defilement **(DKK)** testified that at the time of the trial she was aged 12 years old. To her recollection of the events of 21.7.2013, in company of **(A)** and **(R)** they went to the posho mill. During their assignment, she met with the appellant who gave her Kshs.50/= to use it to purchase doughnuts. Thereafter, upon buying the doughnuts, appellant asked them to wait outside the posho mill and later called her inside. That is the time she was undressed by the appellant accompanied with penetrative sex using his penis. She screamed and also her colleagues **(A)** and **(R).**

It did not take long, appellant released her from inside the posho mill and on reaching home, she did inform her grandmother. She further stated that the matter was referred to the police who subsequently issued her with a P3 Form. **(PW3) – AK** who allegedly was with **(PW1)** on the mutual day testified that the appellant at one time called **(PW1)** inside the posho mill that when she came out she was bleeding from her private parts. The inference and complaint made to her was that of being sexually assaulted by the appellant.

(PW4) PC Stanley Maritim of Bamba Police Station recalled and testified that a report of defilement against **((DKK)** was booked at the police station. In furtherance to that report a P3 and PRC Forms were issued to capture any medical evidence as to the penetration act of the victim **(PW1).** Following the investigations, the appellant was traced, arrested and charged of the offence before Court. In support of the case, **(PW4)** produced a birth certificate as exhibit 3.

(PW5) – Sheila Mukali, a medical doctor attached to Kilifi Hospital gave evidence in respect of the P3 Form filled following **(DKK**) examination. In **(PW5)** testimony, the victim was found to be of good general condition, save for the blood stained clothes and rupture of the hymen. **(PW5)** produced the P3 and PRC Form as documentary evidence in support of the charge. At the close of the prosecution case, appellant was placed on his defence. He elected to give unsworn statement in which he denied any encounter with the victim **(PW1)** or committing the crime.

Appellant's submissions

In support of this appeal, appellant relied on his written submissions dated 4.7.2019. The appellant submitted on the charge being defective for failure of an omission of the word unlawful not being part of the particulars. That failure by the prosecution not to amend the charge under Section 214 of the Criminal Procedure Code occasioned prejudice which cannot be remedied at this stage save for the acquittal of the appellant.

The other concern was on the imposition of the mandatory sentence of life imprisonment. Appellant submitted that the mandatoriness of the sentence was discriminatory and in breach of the stated principles on discretion of the trial Court to consider mitigation before the final verdict. The appellant on age argued and submitted that the P3 and PRC Forms were missing from the Court file. Thus rendering confirmation of the age of the victim suspicious.

Further, the appellant submitted that though the medical officer mentioned the blood stained clothes, they were never exhibited before this Court. In essence appellant submitted and urged the Court to allow the appeal for lack of sufficient evidence.

Respondent's submissions

Mr. Mwangi for the state submitted that apart from the time of attack taken by the appellant all ingredients of the offence were proved beyond reasonable doubt. He urged the Court to ignore the submissions on the missing P3 and PRC Form as a measure to disapprove the element on age. He reiterated that the birth certificate provided the basis upon which the trial Magistrate made a finding on the age of the victim. In a nutshell, prosecution counsel urged the Court to dismiss the appeal for want of merit.

Analysis and determination

This is a first appeal and the Court has to adhere with the principles in **Okeno v R {1972} EA 32**. I have considered the grounds of appeal, the respective submissions by the appellant, the respondent counsel and also the record of appeal. The question is whether, the grounds of appeal can stand the test of overturning the Judgment of the trial Court.

In a charge of defilement, there are two main elements that the prosecution must proof beyond reasonable. First the act of penetration as defined under Section 2 of the Sexual Offences Act. Second proof of age of the victim which contributes to the nature of the punishment to be imposed, in the event the first hurdle is satisfied by the prosecution. **(See Charles Wamukoya Karani v R CR Appeal No. 72 of 2013; Thomas Mwambu Wenyi v R {2017} eKLR)**

The issue of age as expounded in **Francis Omuroni v Uganda CR Appeal No. 2 of 2000:**

"is proven by medical evidence, birth certificate, the victim's parents or guardian. In addition by observation and common sense."

It is quite apparent from the evidence of **(PW1)** and **(PW3)** that on the fateful day they had gone to the posho mill where also the appellant worked. Clearly, as stated in **(PW1)** and **(PW2)** evidence, appellant first gave **(PW1)** some money to buy some doughnut and subsequently asked her to wait outside. It followed soon thereafter he called for **(PW1)** to go inside the posho mill leaving **(PW3)** outside of the premises. In **(PW3)** whole evidence **(PW1)** really overstayed inside the posho mill and by the time she came out it was a matter of distressful condition. In the words of **(PW3),** her physical condition depicted bleeding from the private parts. By virtue of that condition **(PW1)** and **(PW3)** told the Court that they went home to seek assistance from the parents/guardians. It is at that moment **(PW1)** reported the incident and thereafter the police booked the incident to pursue leads so as to arrest the perpetrator.

In this matter not only did the trial Court accept the evidence of **(PW1)** and **(PW3)** but further corroboration from the medical report by **(PW5).** The physical status of the victim **(PW1)** by **(PW5)** P3 revealed, a ruptured hymen freshly occasioned accompanied with blood stained clothes. In that textual of the P3, the prosecution managed to demonstrate that **(PW1)** genitals has been penetrated by a male organ. Indeed as established by **(PW5),** through penetrative sex, **(PW1)** hymen was broken. That act of defilement turned into a nightmare for the complainant who suffered the ruptured hymen and bleeding from her genitals.

It is in apt for the appellant to argue that because the P3 report is missing while adjudicating this matter an appeal, generally that element should be considered as unproven. In the realm of pure fact, as the principles **in Okeno v R, Ruwalla v R {1957} EA, Sunday Post v Peters {1957} EA** repeatedly emphasize, the advantage which the trial Court derives from seeing and hearing the witnesses must always be respected by an appellate Court.

At the same time, the importance of the part played by those advantages in assessing the appeal, the Judge to draw any particular conclusion of fact varies through a wide spectrum from one end to another. A straight conflict of primary fact between witnesses, where credibility is crucial and the appellate Court can hardly interfere, unless inferentially there exist evidence of misdirection of facts or taking into account wrong principles.

In this instant case, I do not see prima facie evidence, material enough to provide a basis for saying that penetrative sex between appellant and the victim **(PW1)** did not take place on 21.7.2013 at Ikuthe village.

As regards age assessment, the principles in **Francis Omuroni** case are relevant to this appeal. The appellant addressed this Court on missing P3 Forms and PRC documents. However, he forgot that the age element was proved by way of a birth certificate produced as an exhibit by **(PW4) PC. Maritim**. There was no corresponding evidence from the appellant to challenge that strand of prosecution evidence. This concludes the story of the action on the two crucial elements of the offence.

The appellant also invoked the aspect of the charge being defective. A charge sheet can only be defective if it offends Section 137 of the Criminal Procedure Code. On review of the appellant's submissions, there is no evidence that the prosecution disregarded any of the characteristics on the framing of charges. The principle has always been that an accused person must know the nature of the offence facing him, so that he can challenge it at the trial in putting up an adequate defence. In the instant appeal, there is no new compelling evidence from the appellant on this issue of the charge being defective. That ground of appeal fails.

Finally, is the question of identity of the appellant and being placed at the scene. **(See the principles in Ajode v R {2004} KLR 81, Roria v R {1967} EA 583, R v Turnbull {1976} 3 ALL ER)**. The above authorities set out the guidelines which are proper under the Law an identification. Having reviewed the evidence of **(PW1)** and **(PW3),** I am satisfied that there was credible admissible evidence upon which the appellant was placed at the scene. On this evidence, the appellant was properly identified as the one who

defiled **(PW1).** The prevailing circumstances were favorable and nothing marred the fact of observation and essential recognition by **(PW1)** and **(PW2)** as the perpetrator of the offence.

On sentence, appellant asserted that the sentence was manifestly excessive and punitive. The Sexual Offences Act carry broad statute defined ranges of penalties underpinned upon the age of the victim. The minimum sentences goals include certainty, predictability, uniformity and transparency in punishment and the elimination of unwanted disparity. I see Sexual Offences punishments as those geared towards incapacitation and deterrence. The appellate Court review of such sentences depends on clear fact findings and compelling evidence to provide sufficient circumstances for review. Again and again constraining the language of the statute, there is no evidence of err or wrong principles to warrant this Court to interfere with the order on sentence.

It follows that I would dismiss the appeal on both conviction and sentence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state

2. The appellant