REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 177 OF 2019

REPUBLIC.....APPELLANT

VERSUS

VWW.....RESPONDENT

(*Being an appeal from the original Sexual Offences Case No. 8 of 2018 at the Chief Magistrate's Court Bungoma by Hon. G. P. Omondi – SRM on 15th July, 2019)*

JUDGMENT

1. **VWW**, the Respondent, was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act. Particulars of the offence were that on 19th day of October 2017 at [Particulars Withheld] Village in Bungoma County being a male person caused his penis to penetrate the vagina of **CNM** a child aged 14 years old.

2. In the alternative, he faced the charge of Committing an Indecent Act with a child contrary to **Section 11(1)** of Sexual Offences Act No. 3 of 2006. The Particulars being that on the 19th day of October 2017 at [Particulars Withheld] Village in Bungoma County intentionally touched the vagina of **CNM** a child aged 14 years old.

3. On the second count he faced a second charge of Committing a Sexual Offence Related to Position of Authority contrary to **Section 24 (1)** of the Sexual Offences Act No. 3 of 2006. Particulars being that on 19th day of October 2017 at [Particulars Withheld] Village in Bungoma County being in position of person in Authority (Headmaster) of [Particulars Withheld] Primary School took advantage of his official position to seduce/induce a pupil of the said school namely **CNM** aged 14 years to have sexual intercourse with her.

4. To prove the case the prosecution called six (6) witnesses PW1 **CNM**, the complainant testified that on the 19th day of October, 2017, while in school at [Particulars Withheld] Primary School she was unwell. Some of her fellow pupils reported to the Head teacher who was also her step father that she was sleeping in class. The Head teacher, the respondent herein, took her to the office then called her mother who advised that she tells her dad to purchase for her medicine but if there was no improvement she would take her to hospital. In the result the respondent told her to go home. She went home, entered the house and slept in her room. Thereafter she woke up to find the respondent standing beside her bed and he threatened to strangle her if she screamed. He undressed lifted up her uniform, removed her pants and inserted his genital organ into her genital organ and proceeded to violate her sexually. On finishing he used her petticoat to wipe himself then dressed up and went to the sitting room and enquired whether she needed anything from town. She told him that she did not want anything from town. He got out of the house and she heard a sound of a motorcycle's engine revving.

5. Having confirmed that the respondent had left, she went to a neighbor, Rose Okumu's place and requested her to call her mother whom she opened up to and she told her to go back home; while there she heard the sound of a motorcycle. It turned out to be the respondent who asked her why she told her mother about the incident, but she did not respond. The respondent told her to enter the house but she declined. She decided to go back to their neighbour's place where she stayed until her mother called their neighbour

and advised that she returns home. She went back with their neighbour who engaged in a discussion with her mother. Subsequently, her mother asked her to persevere until she sat for her examination. On the 18th December 2017, after sitting for her examination she went to her grandmother's home and told her what befell her but she took no action. On 14th January 2018, her maternal uncle went home and she informed him about the ordeal. He took her to Mbakalo Police Station, then Sangalo Police Station where she reported the matter.

6. **PW2 AKM**, the mother of the complainant adduced in evidence a copy of a birth certificate for the complainant who was born on the 1st January 2004. She testified that on the 19th day of October 2017, the respondent, her husband and father to her other three children called her and told her that the complainant was unwell. She advised him to buy for her some medicine then take her home. Thereafter she was called on phone by her neighbour who passed the phone to the complainant who was crying. She told her that she was defiled by the father. She sought permission from the Headteacher who was the respondent's cousin and told him the reason why she had to leave. Upon arrival at home the complainant was not there. She called their neighbour whose phone the complainant had used and asked her to go home. The complainant went home with Rose, her neighbour. When she confronted the respondent, he denied the allegations and left. Since the complainant was to sit for her examination in a week's time, she advised her to remain calm and not to bring up the issue until after sitting for examination. Upon completion of examination she advised the complainant to go to her grandmother's home and divulge what happened. Thereafter the police arrested them following a complaint lodged. She stated that she remained silent because she was threatened by the respondent.

7. **PW3 FSM**, the complainant's maternal uncle, testified that on the 14th January 2018, he had visited his mother when the complainant approached him. She looked disturbed and was crying. He calmed her down that is when she confided in him that she had been defiled by her step-father. He reported the matter to Mbakalo Police Station. A P3 form was issued and the complainant was subjected to medical examination.

8. **PW4 No. 70085 Sergeant Nachani Licha Babo**, upon receipt of the complaint caused her to go to Bungoma Hospital where she was examined and an age assessment done. He took possession of the Birth Certificate and Baptismal Card in respect of the complainant. It was reported that the mother to the complainant was threatened that is why the report was not made at the outset and when they went to the home of the respondent upon discovering that the matter had been reported the respondent took poison and he followed him to Bungoma West Hospital where he had been taken. And upon seeing him he wanted to escape through the window of the hospital but he was arrested.

9. **PW5 Barasa Juma**, a clinical officer at Bungoma Referral Hospital examined the complainant on the 15th January 2018, and found her hymen torn with smelling whitish discharge. She had epithelial cells therefore, he concluded that there had been sexual or penile penetration.

10. **PW6 Rose Okumu,** the neighbour that the complainant ran to for assistance admitted knowing both the complainant and respondent but declared that she was not any body's witness. She told the court that although the police went and interrogated her she knew nothing about the case. The prosecution applied to have her remanded in custody pursuant to **Section 152** of the Criminal Procedure Code (C.P.C) an application that was declined by the court. The witness denied the contents of the statement. The witness was subsequently declared hostile and cross examined, she denied the allegation that the complainant went to her home to report that she had been sexually assaulted and she called her mother. She however claimed that the complainant's mother called her and told her that the complainant was unwell.

11. In its ruling the trial court found that PW1 and PW2 were not credible witnesses for not acting immediately. That the reason given for not reporting the incident immediately was not plausible. That medical evidence did not connect the respondent with the offence. In the result the court dismissed the charge against the respondent and accordingly acquitted him.

12. Aggrieved the State/Appellant appeals on grounds that:

1. *The learned trial Magistrate erred in fact and in law in reaching a verdict that the Respondent should not tender a defence.*

2. *The learned trial magistrate erred in law by failing to put the Respondent on his defence yet the prosecution had established a prima facie against the Respondent.*

3. *The learned trial magistrate erred in law and in fact in analyzing the entirety of the prosecution's case at the stage of ruling on a case to answer.*

4. *That the learned trial magistrate erred in law by measuring the prosecution's case against a higher burden of proof as opposed to the standard required at the stage of ruling on a case to answer.*

5. *That the learned trial magistrate erred in law and in fact by analyzing the prosecution's case including its flaws at the stage of ruling on case to answer and as a result was not impartial.*

6. *That the learned trial magistrate erred in law and in facts by ruling that the flaws in the prosecution's case were fatal and as a result speculating on the defence of the Respondent.*

7. *That the learned trial magistrate erred in law in failing to place the Respondent on his defence in both the main or in the alternate charges yet a good prima facie case had been established as against the Respondent.*

13. The appeal was canvassed through written submissions.

It was urged by learned Prosecution Counsel for the State, Nyakabia Mburu that the prosecution established a prima facie case to have the respondent placed on his defence. That PW1 testified coherently; as to how the respondent violated her and after the ordeal she used the opportunity to escape and use her neighbour's phone to call her mother. That reluctance to answer a question on her date of birth should not have been used adversely against her as a birth certificate was produced to confirm the same. That PW2 and PW3 corroborated evidence of PW1.

14. That PW6 who was supposed to be a corroborating witness recanted her evidence and the trial court declined to treat her as a refractory witness, which made the prosecution treat her as a hostile witness.

15. Further it was submitted that the trial court was not impartial while analyzing the prosecution's case. That the court was presumptive of the defence to be preferred and analyzed medical evidence indicating that it could not put a link between a torn vagina and foul-smelling discharge as per the examination on the 15th January 2018 and the only incidence of defilement of the 19th October 2017. That although the respondent faced another charge of indecent act with the child, that was the only reason given by the court.

16. The court was faulted for its assessment of PW2 that she did not report the matter promptly hence was not credible when circumstances obtaining at the same time were that she lived with the respondent, the suspect, a person who was her benefactor in addition to being a father of her two other children, no malice was proved on her part.

17. The respondent through the firm of Makokha Wattanga & Luyali Associates, submitted that the appeal is improperly before the court and should be struck out. That the ruling of the trial court was delivered on the 15th July 2019 and the appeal was filed on 13th November 2019 or thereabout and there is nothing on record to show that an application seeking leave to appeal outside the fourteen days allowed by the law was filed.

18. In that regard the Supreme Court case of ***Nicholas Kiptoo***

Arap Korir Salat -vs- The IEBC and 7 Others, SC Appeal No. 16 of 2014 was cited, where the court stated that:

"To file an appeal out of time and seek the Court extending time is presumptive and inappropriate. No appeal can be filed out of time without leave of Court. Such filing renders the "document" so filed a nullity and of o legal consequences. Consequently, this court will not accept a document filed out of time without leave of the Court. The S. C. further held that a document (Petition filed out of time without leave of Court is irregular and unknown in law and the same should be struck out. Where one

intends to file an appeal out of time, what he can do is to annex the draft intended Petition of Appeal for the Court's perusal when making his application for extension of time and not to file an Appeal and seek to legalize it."

19. And in **Michael Onyango Owala -vs- The Republic Cr. Appeal No. 69 of 2017** where **Aburili J** stated that:

"Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the provision to Section 349 of the Criminal Procedure Code, to enlarge the time for tiling of such an appeal or to have the Appeal as filed out of time deemed to be duly file, such an "appeal" is no appeal at all. Its incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof. Such is not a procedural error. It is an error that goes to the root of the Appeal as it is the leave that would accord this Court Jurisdiction to hear and determine an appeal that is filed out of time"

20. In regard to evidence adduced, it is submitted that no proper examination was given as to why it took more than three months to have an incident reported to the police, which raises the issue of the respondent being victimized for an offence he never committed.

21. That it was not possible for a clinical officer to observe a foul smelling whitish discharge three months later unless she did not take a bath and the examining doctor could not ascertain the case of the torn/missing hymen as the absence of hymen alone could not be conclusive evidence that the victim was defiled.

22. That after PW2 was informed of what transpired she did not examine or observe the girl to ascertain whether the allegations were true and PW6 Rose Okumu the alleged first person to see the victim after the defilement denied the allegations and was treated as a hostile witness.

23. And, that PW1 and PW2 having not been credible witnesses, the trial court was fair and did not err in acquitting the respondent.

24. During the hearing of the appeal, Ms. Mukangu, learned Counsel for the State who represented the Respondent, was relied upon on the written submissions and added that the appeal filed out of time with leave of court granted in Misc. Application No. 76 of 2019 by Hon. Justice S.N. Riechi on 31st October 2019.

25. In response, Mr. Makokha, learned counsel for the respondent argued that no copy of the order was attached to the record of appeal, therefore, prayed for the appeal to be struck out.

26. The duty of the appellate court is to reassess evidence on record and reach its own conclusion bearing in mind that it did not have the opportunity to see or hear witnesses who testified during trial. In the case of **Odhiambo -vs- Republic Cr. App No. 280 of 2004 (2005) 1KLR** the Court of Appeal stated that:

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

27. An issue has been raised and rightly so whether the appeal was properly filed" The provision of the law that granted the Office of DPP the right to appeal is **Section 348A** of the CPC that provides thus:

When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law.

28. Time within which a party may appeal is however limited and if not complied with leave must be sought under **Section 349** of the CPC which provides thus:

An appeal shall be entered within fourteen days of the date of the order or sentence appealed against: Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.

29. The impugned ruling was delivered on the 15th July 2019.

On the 31st October 2019, the Appellant approached the court in **Misc. Criminal Application No. 76 of 2019 Republic vs Vincent Wanyonyi Walucho** seeking leave to appeal out time. The court presided over by **Riechi J.** considered the motion dated 24th October 2019 and granted the applicant (Republic) leave to file the appeal out time. The order was dated 31st October, 2019. The petition herein was filed on the 13th November 2019 which was within the fourteen (14) days.

30. I have taken note of the fact of the appeal having been admitted to hearing on the 26th October, 2020 by Riechi J. **Section 352(1**) of the CPC provides thus:

When the High Court has received the petition and copy under section 350, a judge shall peruse them, and, if he considers that there is no sufficient ground for interfering, may, notwithstanding the provisions of section 359, reject the appeal summarily:

31. To admit an appeal to hearing the court is obligated to determine if the appeal should proceed to hearing which includes determining whether it is properly before the court. The signature appended is proof of such a determination. In the premises, I find that this court has jurisdiction to determine the appeal.

32. It is urged that the trial court misdirected itself on the law regarding determination of whether or not a prima case had been made out against the respondent. The CPC does not define a prima case, but, the Osborne concise law Dictionary defines a prima facie case thus:

"A case in which there is some evidence in support of the charge or allegations made in it, and which will unless it is displaced. In a case which is being heard in court, the party starting, that is upon whom the burden of proof rests, must make out a prima facie case, or else the other party will be able to submit that there is no case to answer and the case will have to be dismissed."

33. The Black's Law Dictionary, Tenth Edition defines:

"Prima facie as evidence that will establish a fact or sustain a judgement unless contrary evidence is produced"

34. In the landmark case of **R.T. Bhatt v Republic (1957) EA**

332-335 the Eastern Court of Appeal stated as follows:

"Remembering that legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is merely one, which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court will fill gaps in the prosecution case. Nor can we agree that the question to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

35. The English Court in ***May –vs- O'Sullivan (1955) 92 CLR 654*** stated as follows:

"When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law."

36. Therefore, the evidence in the prosecution case must be able to convict the appellant even if the defence opted to remain silent. The evidence must not be lacking in weight or reliability, it must be safe to convict.

37. The respondent was charged with incest, committing an indecent act with a child in the alternative and a second count of committing a **Sexual Offence** contrary to **Section 24 (1)** of the Sexual Offences Act. In its impugned Ruling the trial court stated thus:

"The reason given by PW2 for not reporting immediately is also not plausible at all. On 15/1/2018 when Clinician Juma Barasa examined the victim he observed that the hymen was torn with foul smell and whitish discharge. How could this be associated to the accused who is alleged to have had secual intercourse with the victim on 19/10/2017" I find that the chance of the accused being the perpetrator are too remote.

I therefore find that the prosecution failed to adduce sufficient evidence to enable the court put the accused to his defence. Consequently I dismiss the charge against the accused and acquit him under Section 210 of the Criminal Procedure Code.

38. In acquitting the respondent, the trial court did not state whether or not it had considered the alternative charge and the second count. This was a fatal omission. This was a misdirection since it had a duty of determining issues raised before the court to finality.

39. To prove the offence of incest, the prosecution was required to prove the act of sexual intercourse having occurred with a person within the degree of consanguinity where marriage is prohibited. **Section 20 (1)** of the Sexual Offences Act provides thus:

(1) ***Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:***

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person

40. **Section 22** of the Sexual Offences Act Provides thus:

In cases of the offence of incest, brother and sister includes half brother,half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

41. And for purposes of sentencing the age of the victim has to be proved.

42. Evidence adduced was that the respondent was the complainant's half (step) father. Her age was proved by evidence of a birth certificate. Hesitating to say her age could not be dismissed as being incredible. In the case of ***Francis Omuroni -vs- Uganda, Criminal Appeal No. 2 of 2000***, the Court of Appeal held that:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"

43. This was proof that she was a child below the age of Eighteen (18) years. In the case of ***Moses Nato Raphael vs Republic*** **(2015) eKLR** the Court of Appeal clarified the difference between proof of age for purposes

of establishing the offence of defilement and for purposes of sentencing as follows:

"On the challenge posed by the uncertainity in the complainant's age this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability"

44. With regard to whether the respondent had sexual intercourse with the complainant, PW1 testified how she was molested by the respondent and after the act she ran to their neighbour's home to seek solace. She explained vividly how the act was committed. PW6 who assisted by letting her communicate with her mother (PW2) denied the allegations and she was treated as a hostile witness. The trial court based its decision on the fact of the witness' denial that she informed PW2 of what PW1 had told her regarding the defilement but on being subjected to cross examination she said that she informed her that the complainant was unwell.

45. The complainant was examined on the 15th January 2018 after the act was alleged to have been committed on the 19th October, 2017. Circumstances in which the complainant was not subjected to medical treatment immediately were explained. The child was stated to have been about to sit for her examination and PW2, her mother and also a mother to the respondent's two (2) biological children was in a precarious situation such that she could not allow her to act. Had it not been for the complainant's uncle, the occurrence would have gone unnoticed, and therefore, the complainant a child would have been denied justice.

46. It was admitted by the clinical officer that the tearing of the hymen, *perse* was not proof of penetration. It is trite that an act of penetration can be proved through oral evidence and the absence of a hymen is not conclusive proof of penetration. This was stated in the case of **P.K.W. -vs- Republic (2012) eKLR** where the court delivered itself thus:

"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."

47. In the case of **Kassim Ali -vs- Republic, Mombasa Cr. Appeal No. 84 of 2005** the court of Appeal stated that:

*"**Examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

48. In the case of ***George Kioji –vs- Republic Cr. Appeal No. 270 of 2021 (Nyeri)*** the court stated that:

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

49. Therefore, the court can convict on the victim's testimony without corroboration. All the court should ascertain is if the victim's evidence is truthful and indicate the reasons for believing the victim. (Also see Section 124 of the Evidence Act)

50. Looking at the evidence on record, the complainant was a minor not in control of the situation. She was advised by her mother PW2 who was under threats of her husband, guidance that caused her to remain silent. She was made to go to her grandmother's home soon after her examination and because of the deeply distressing experience she confided in her uncle, PW3 who reported the matter to the police. There was absolutely no evidence that PW3 had any grudge with the respondent.

51. In the alternative, the respondent was stated to have committed an act of indecency with a child.

In the case of ***Robert Mutungi Muumbi -vs- Republic (2015) eKLR*** *the* court of Appeal held that:

"Committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement."

52. This being the case the court should have analyzed evidence in that regard and came up with a conclusion.

53. On the second count, the respondent was alleged to have abused his position of trust as a Head teacher at the complainant's school. The court was required to consider the charge and apply the law then reach a finding. This was not done.

54. From the forgoing, it is apparent that the trial court fell into error when it acquitted the accused under Section 210 of the CPC. In the premises, the appeal succeeds. Therefore, I quash the Ruling of the trial court dismissing the case, which I set aside and direct the respondent to present himself before the Chief Magistrate's Court Bungoma within 14 days for purposes of re-consideration pursuant to the provisions of Section 210 of the CPC. The case shall be heard by a court of competent jurisdiction other than one presided over by Hon. G. P. Omondi SRM.

55. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 20TH DAY OF DECEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Linus Malaba

ODPP – Mukangu (Appellant) Respondent

Mr. Wanjala holding brief for Mr. Makokha for the Respondent