REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 50 OF 2019

SKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of Hon. Senior Resident Magistrate,

(Hon. Kibosia, Senior Resident Magistrate), on 12.10.2018 in Makadara Chief Magistrate's Court

Criminal Case number S.O. 58 of 2016).

JUDGMENT

The appellant ***SKM*** was charged in the above mentioned case with 1 count of Defilement contrary to section 8(1) as read with section 8(3) of the sexual offences Act, No. 3 of 2006. The particulars were that on diverse dates of December 2015 at [Particulars withheld] village in Makadara District of Nairobi County, he intentionally caused his penis to penetrate the vagina of LW, a child aged 14 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. That on diverse dates of December 2015, at [particulars withheld] village in Makadara district of Nairobi County, he intentionally touched the vagina of LW, a child aged 14 years with his penis.

After the full hearing of the case, the appellant was convicted on the main charge. The Honourable Senior Resident Magistrate on 31.10.2018, sentenced the appellant to serve 20 years' imprisonment.

Dissatisfied with the conviction and sentence of the learned senior resident magistrate, the appellant has filed an appeal against the said conviction and sentence.

In the petition of appeal filed herein on 1.9.2021, the appellant has listed 6 grounds of appeal as follows;-

*1. **THAT** the learned trial magistrate erred in law and fact in convicting the appellant when the evidence on record from the prosecution witnesses was demonstrably insufficient, had material contradictions, was inconsistent, doubtful and had glaring gaps hence incapable of sustaining a conviction.*

*2. **THAT** the learned magistrate erred in law and fact in failing to find and hold that the prosecution failed to discharge its burden of proof to the required standard and thereby convicted the appellant based on inadequate and discredited evidence.*

*3. **THAT** the learned trial magistrate erred in law and fact by failing to find that the prosecution failed to call crucial witnesses and thus failed to make an adverse inference against the prosecution for failing to call certain witnesses whose evidence was essential to the just decision of the case.*

*4. **THAT** the learned trial magistrate erred in law and fact in convicting the appellant while relying on the uncorroborated evidence of a child of tender years and overlooked significant items of evidence bearing on the reliability of the complainant's story.*

*5. **THAT** the learned magistrate erred in law and fact in failing to weigh the evidence adduced by the prosecution, before arriving at the conclusion hence failed to find that the evidence adduced did not prove the offence facing the appellant beyond reasonable doubt.*

*6. **THAT** the learned magistrate erred in law and in fact in dismissing the appellant's defence that the case was a vendetta, as pointed out especially by the contradictions in the testimonies of the prosecution witnesses.*

If is the plea of the appellant that this court do allow this appeal and that the Judgment and sentence of the trial court be set aside and the conviction be quashed. The Respondent, on the other hand, has opposed this appeal and urged that the same be dismissed.

By agreement of the parties, this appeal was canvassed by way of written submissions. Both the appellant and respondent sides filed their set of submissions. On the side of the appellant, it was submitted as follows:-

With regard to ground 1, it was submitted that the evidence of PW5 was not sufficient to prove that the appellant had defiled the complainant for lack of corroboration since her said sisters did not testify. Mama S with whom the complainant was living was also never called to testify. Counsel relied on the case of ***Twehangene Alfred Versus Uganda, (Ug. CA Criminal Appeal No. 131/2001)***, in which it was held;

"***The absence of her evidence or the evidence of any other person who might have seen the children either going with the appellant to his house or coming out of the his house leaves the prosecution evidence weak. Such people would have provided the necessary corroboration."***

Counsel also challenged the veracity of the evidence of PW2 on the basis that whereas she was aware of the incident in February 2016, it was not until 9.5.2016 that a complainant was lodged. It was claimed that there were contradictions in the prosecutions case.

For grounds 2 and 5, counsel for the appellant submitted that under the Sexual Offences Act, the elements of defilement were that' the victim must be a minor, there must be penetration, which penetration need not be complete ***(David Mwangi Njoroge Versus Republic (2015)eKLR.*** That in view of the evidence of both pw3 and pw4 that complainant's hymen was intact, the offence was not proved. Counsel relied on ***Samwel Ayaa Oketch Versus Republic (2016)eKLR,*** in which the court found;

"***From PW3's evidence, there was no partial penetration or any penetration and PW3, being a medical officer and the one who examined PW1, I have no doubt in finding that there was no penetration of the genital organs of the appellant into the organs of PW1. Consequently, the offence of defilement was not proved."***

It was submitted that there was no credible evidence of defilement and even PW3 and 4 never expressed opinion on the same.

On ground 3, the appellant's submissions were that the lack of evidence of Mama S and the siblings of the complaint, left the case of the prosecution very weak and barely adequate to prove defilement. And for ground 4, the submissions were that there was total lack of corroboration of the evidence of PW1, though she was only 14 years old. Counsel relied on ***Sahali Omar Versus Republic (2017)eKLR***, that;

"The import of that section (section 124 of Evidence Act), is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated, notwithstanding the Voire dire examination of the child under section 19 of the oaths and statutory declarations act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section allows for an exception.

Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years. If the child is the victim, provided the court first satisfied itself on reasons to be recorded, that the child is being truthful."

It was noted that the trial magistrate never noted the reasons for believing the evidence of PW1.

Lastly, for ground 6, it was submitted that the defence of the appellant was not considered by the trial court.

Counsel for the respondent filed rival submissions in opposing this appeal. First, it was submitted that the prosecution proved the 3 ingredients of the offence of defilement, i.e penetration, age of the victim, and positive identification of the assailant. Relying on section 2(1) of the Sexual Offences Act, it was submitted that, "***Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** Such that lack of broken hymen does not imply that there was no penetration. Counsel relied on ***Erick Onyango Ondeng Versus Republic (2014)eKLR***, that;

"We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken, even partial penetration of the female genital by male genital will suffice to constitute the offence."

That this is the same view held in the Ugandan case of ***Twehangane Versus Uganda***, that in Sexual offences, the slightest penetration of a female sex organ by a male organ is sufficient to constitute the offence. And that it is not necessary that the hymen be ruptured.

Relying on the testimony of PW1, counsel submitted that defilement was proved, a fact also proved by both PW3 and 4. And that the birth certificate produced by PW5 showed she was 14 years having been born on 4.10.2001. The P3 form was further corroboration of this fact. On identification, it was noted that the appellant was a step father of the complainant, and they lived in the same house. The identification was therefore proper and accurate.

Responding to the submissions of the appellant, the respondent first submitted that on the issue of inconsistencies, the court must consider whether the inconsistencies are minor or whether they go to the root of the matter counsel relied on ***Philip Nzaka Watu Versus Republic (2016)eKLR, (C.A)*** that;

"However it must be remembered that when it comes to human recollection, no 2 witnesses recall exactly the same thing to the minutest details. Some inconsistencies must be expected because human recollection is not infallible and no 2 people perceive the same phenomena exactly the same way. Indeed as had been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

I have considered the 2 opposing submissions in detail. This matter comes up before this court as a first appeal. In the old case of ***Okeno Versus Republic (1972)EA***, it was held that the first appellate court is duty bound by law to reconsider, re-evaluate and analyse the evidence that was before the trial court to determine whether, on the basis of these facts, the decision of the trial court is justified. And in the more recent case of ***David Njuguna Kariuki Versus republic (2010)eKLR,*** the Court of Appeal held;

"The duty of the 1st appellate court, is to analyse and re-evaluate the evidence which was before the trial court, and itself came to its own conclusions."

This basically is the duty of this court over this matter coming up as a first appeal. From the proceedings before the lower court, the case of the prosecution commenced with the evidence of **PW1 LW,** 15, whose evidence was that the appellant is her dad. That in December 2015, her mother had moved out leaving her and her younger sister with their father. She and her sister slept on the upper deck of the bed as the appellant slept on the lower decker. That after her sister complained that the bed was squeezed, appellant instructed her that she would sleep on the lower decker with him. That one night, he demanded to have sex with her, but she resisted and went to sleep on the upper decker. The following happened on the subsequent night. On the 3rd night, he took her to his bed, and removed her clothes. He then inserted his penis in her vagina and when she told him it was painful, he left her. He left her when she started crying. The appellant is a step father of the complainant. She only told her mother when she came back from the village in January. It is her mother who took her to hospital. And **PW2 RNK**, testified that she had separated with her husband and left him

with her 3 children in December. That she came back in February only to find that her husband had moved to stay in Kaloleni with another woman, mama S. That it was mama S who told her that the husband had told her that her daughter need a pregnancy test and that she should take her to hospital. She took PW1 to Makadara Health Clinic. That is when PW1 told her what had happened. The matter was reported to Children's Officer and to the police. She confirmed that PW1 was 15 years old.

The **3rd witness**, **Doreen Muiya**, a Community Health Nurse, examined the complaint on 2.2.2016. Her findings were that she had no physical injuries, her external genitalia was normal. Her vagina had whitish smelly discharge and her hymen was pink with regular margin. She also had a slight tear on posterior pochet. And **Dr. Joseph Maundu, PW4,** also examined the complainant on 10.5.2016 he noted the same findings as PW3.

The last witness, **PW5**, was **Corporal Edward Nzaka**, the investigating Officer. He took the witness statements and also escorted the complainant to hospital. He later charged the accused.

The appellant gave an unsworn defence that h was arrested on 9.5.2016 after the complainant's mother had reported that he had remarried. He denied the charges and maintained that this was all a vendetta.

This basically is the evidence tendered by both sides before the trial court. In my view the following issues come up for determination in this appeal.

i) Age of the complainant.

ii) Whether there was defilement of the complaint.

iii) Identification of the accused or appellant.

iv) Defence of the appellant.

v) Whether the case was proved beyond any reasonable doubt as required by the law.

vi) The issue of sentence.

On the first issue of age of the complainant, it was the evidence of PW2, mother of the complainant that the complainant was born on 14.10.2011 making her 14 years old on 14.10.2011 making her 14 years old at the time of the commission of the offence. A birth certificate was also produced in court to confirm same. This is critical view of the charge that the appellant faced.

Section 8 (1) of the Sexual Offences Act states;

"A person who commits on an act causes penetration with a child is guilty of an offence termed defilement."

The Sexual Offence Act at the definition section 2(1) gives the definition of a child to be the same as defined in the Children's Act, Chapter 141, Laws of Kenya. The Children's Act, at section 2 defines a child as;

"child" mean any human being under the age of 18 years."

It is therefore clear that with the evidence of PW2, the birth certificate produced by PW5, and even the PW3 form produced in court, the complainant was 14 years at the time of the commission of the offences, and therefore a minor.

The 2nd issue for determination is one of penetration. On this, both sides are agreed that section 2(1) of the Sexual Offences Act defines same as

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

This court was referred to the case of ***Erick Onyango Ondeng' versus Republic (2014)eKLR***, in which the court of Appeal dealt with this issue of penetration and held in part that;-

"We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken, even partial penetration of a female genital by male genital will suffice to constitute the offence.

The position taken by the Ugandan courts is no different. In the case of ***Twehangane Alfred versus Uganda Uganda Court of Appeal, Crimina Appeal No. 139 of 2001***, cited by the respondent. Counsel, the court held amongst other that;

"***In sexual offences, the slightest penetration of a female sex organ is sufficient to constitute the offence. It is not necessary that the hymen be raptured."***

In this case, it was the evidence of the complainant that the appellant inserted his penis in her vagina. And that she screamed out of pain. That is when the appellant left her. 2 medical reports were produced by 2 witnesses, PW3 and PW4. Both reports were in agreement that on examination, the hymen of the complainant was pink with regular margin and a slight tear on the posterior fourchette – 6 o'clock. The evidence of the 2 medical officer's therefore corroborated the evidence of the complainant that there was in fact a partial penetration into her vagina.

On the issue of identification of the appellant, there is no dispute as to the fact that the complainant and the appellant stayed in the same house. The appellant is a step father of the complainant. There is therefore no doubt as to the fact that the complainant knows the appellant well. The complainant, in her evidence, gave detailed accounts on how the appellant demanded to have sex with her on earlier nights before eventually carrying out his evil actions. I am in the circumstances convinced that the identification of the complainant of the appellant as the assailant was accurate.

I have also considered the defence raised by the appellant. He claimed that all this was out of a vendetta against him for remarrying. He did not indicate the originator of the vendetta, if at all, or the cause of the said vendetta. If it was from the mother of the complainant, she gave evidence as PW2. The appellant had the opportunity to raise this issue with her. He failed to do so. More important however, is that the appellant had absolutely no defence to the evidence given by the complainant against him. I find therefore that the defence of the appellant totally lacked in any merit.

The appellant's counsel has submitted that the trial magistrate erred in convicting the appellant on uncorroborated evidence of a child of tender years. as I have already found above, the evidence of PW1 did not lack any corroboration. The evidence of both PW3 and PW4 and the exhibits produced by the 2 witnesses clearly corroborated he evidence of PW1 on the fact of defilement.

And was the complainant a child of tender years" A child of tender years is defined under section 2 of the Children's Act as:

"child of tender years means a child under the age of ten years."

The complainant was 14 years at the time of the offence and 15 years when she testified in court. She was therefore not a child of tender years as urged by the appellant.

This court gets guidance from the decision in ***Charles Karani Versus Republic Criminal Appeal No. 72/2013***, relied on by the trial magistrate, that the 3 critical elements of defilement are age of the complainant. Proof of penetration and positive identification of assailant. All these elements have been proved in the case. I am accordingly therefore convinced that the prosecution discharged its burden and proved their case against the appellant beyond any reasonable doubt as required by the law.

Lastly, on sentence, I have noted that the appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. The sentence therein is an imprisonment term of not less than 20 years.

In this case, the appellant was sentenced to serve 20 years' imprisonment. The sentence of the trial court was therefore legal and

proper except that the court in sentencing ought to have given account of the period that the appellant spent in remand custody pending the determination of his case.

I find no merit in the appeal of the appellant filed herein on 1.9.2020 (originally filed in person on 13.3.2020. The appeal is dismissed. The appellant to serve 20 years' imprisonment as ordered by the trial court. The sentence shall run from 11.5.2016 when the appellant was first arraigned in court. It is so ordered.

D. O. OGEMBO

JUDGE

22.3.2022.

Court:

Judgment read out in court (virtually) in presence of the appellant (Kamiti) and Ms. Joy, counsel for the state.

D. O. OGEMBO

JUDGE

22.3.2022.

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FROM: HIGH COURT APPELLATE SIDE

TO: @ G.K. PRISON KAMITI

INFO: PHQ.

23RD MARCH 2022

HCCR APPEAL. NO. 50 OF 2019

HIGH COURT CRIMINAL APPEAL NO. **50** OF **2019** ORIGINATING FROM THE CHIEF MAGISTRATE'S COURT AT MAKADARA CRIMINAL SEXUAL OFFENCE CASE NO. 58 OF 2016. APPELLANT **SAMUEL KAGEMBI MACHARIA KAM 1340/018/LS** THE APPELLANT TO SERVE 20 YEARS' IMPRISONMENT AS ORDERED BY THE TRIAL COURT. THE SENTENCE SHALL RUN FROM 11.5.2016 WHEN THE APPELLANT WAS FIRST ARRAIGNED IN COURT. IT IS SO ORDERED.

DEPUTY REGISTRAR