REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 60 OF 2018

JULIUS KITSAO MANYESO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of Chief Magistrates Court at Malindi Hon. L. Gicheha (SPM) delivered on 3rd October 2013 in Criminal Case No. 64 of 2013)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

On 3.10.2013, the appellant having been tried of the offence of defilement of a girl contrary to Section 8(1), (2) of the Sexual Offences Act No. 3 of 2006 was convicted and sentenced to life imprisonment. He was aggrieved by the entire Judgment necessitating the present appeal to this Court on both conviction and sentence.

In his amended grounds of appeal the appellant is aggrieved with the following issues:

> ***(1). That the Learned trial Magistrate grossly erred in Law and facts by failing to consider that the age of the appellant was not properly established because he was a minor below the age of 18 years.***
>
> ***(2). That the Learned trial Magistrate erred in Law and facts by failing to consider unlawful detention to a minor below the age of 18 years in breach of Section 189, 190 and 191 of the Childrens Act and Articles 53 (1) (c) of the Constitution of Kenya.***
>
> ***(3). That the Learned trial Magistrate erred in Law and facts by failing to consider that no formal documentary evidence like a copy of a birth certificate or age assessment was prepared, processed and produced as an exhibit in Court to prove the actual age of the complainant for purposes of sentencing.***
>
> ***(4). That the Learned trial Magistrate erred in both Law and facts by failing to consider sharp contradictions by the prosecution in breach of Section 163 (1) (c) of the Evidence Act.***
>
> ***(5).That the Learned trial Magistrate erred in Law and facts by failing to adequately consider my defence evidence.***

Procedural history as laid down by the prosecution

The case against the appellant was based on the testimony of five witnesses whose testimonies can be summarized as follows:

The victim **NM** upon voire dire inquiry was found to possess of knowledge and intelligence capable of telling the truth, and therefore her evidence was received as unsworn. In her brief evidence she happened to recall that the appellant did bad manners by putting some dirt into the organ she uses for urinating. She was later to be taken to the hospital at Malindi by **PW2 (E.K)** on 24/3/2013.

According to PW2, she stepped out of the house leaving the victim **(PW1)** in temporary custody of the appellant. It did not take long before she heard screams from **PW3 (SR),** that appellant has entered her room. Thereafter in response to the screams PW2 rushed to the room and came into contact with the appellant who was running away.

On entering the room **PW2** found **(PW1)** lying on the bed, where in quick physical examination she was full of male discharge including into her private parts. Together with PW3 they took the victim to the police station where a P3 Form was issued for purposes of a medical examination at Malindi Hospital. As **PW3** also managed to observe the child she also confirmed that (PW1) had mucus and watery discharge in her private parts. Further, **PW4 – clan elder JK** confirmed that PW2 and PW3 made a report to him with regard to the defilement of PW1 by the appellant. **PW5 – Julius Munene**, police detective testified that under instructions from his superiors he did re-arrest the appellant as a suspect for the defilement offence.

PW6 – Ibrahim the clinical officer attached to Malindi Hospital testified as to the medical examination carried out upon the victim (PW1) who had an history of being defiled by a person known to her.

On examination PW6 concluded that all indicators of hymen broken and inflamed made him to opine that had her genitals had been penetrated.

At the close of the prosecution case appellant was placed on his defence. He elected to give unsworn statement of defence in which he denied every allegations of defilement. He also claimed that on the material day he responded to the screams from a neighbour's house. He later went to the clan elder's house **(PW4)** to report that there are rumours doing the rounds that he had gone to the neighbours house to defile the victim **(PW1).** That is how on interrogation he was arrested and charged with the offence, which he did not commit.

On appeal the appellant relied on his written submissions dated 25.10.2019. His main intention was on the provisions of Article 53 (1) of the Constitution and Section 190 (1) of the Evidence Act. Indeed, it is the Law that no child shall be ordered to serve imprisonment or to be placed in detention camp.

Therefore, the appellant argued and submitted that the time the alleged defilement took place he was aged 15 years hence a subject of Section 190 (1) of the Childrens Act. Apart from the provisions of Section 190 (1) of the Childrens Act appellant pointed out that the age of the victim was never proved beyond reasonable doubt, necessary in determining the model of sentence to be imposed by the trial Court.

The appellant also took issue with the prosecution case and the findings by the trial Court that penetration was proved beyond reasonable doubt. With these appellant urged this Court to set aside the impugned Judgment by allowing the appeal.

It was the respondents case based on **Ms. Sombo** submissions that the charge being complained of was proved beyond reasonable doubt. **Ms. Sombo**, further submitted that as regards the issue of the appellant being stated to be below 18 years his age was subjected to a medical age assessment. The disputed age on assessment was established to be 18 years in contrast with the appellant claim of 15 years. **Ms. Sombo** also argued and contended that as the lower Court was entitled to do, the age of the victim was properly and sufficiently established to be 4 ½ years, on assessment by the clinical officer **(PW6).** She placed reliance in the guiding principles as laid down in **Hadson Ali Mwachongo v R {2016} eKLR, Koo v R {2019} eKLR.** It was also the respondents case that the appellant was positively identified as the perpetrator of defilement against the victim. On this Learned counsel cited the case of **Donald Atemia Sipendi v R {2019} eKLR.**

Therefore, **Ms. Sombo** submitted that the irresistible inference is that the trial Court arrived at a correct finding and determination on conviction of the appellant. She urged this Court to agree with the Judgment of the trial Court by dismissing the appeal on both conviction and sentence.

Therefore, having weighed up the evidence for the prosecution, as against the defence and recognizing that the burden of proof lies on the prosecution throughout, its now my duty to establish whether there are any defects worthy to interfere with the impugned Judgment.

Analysis and Determination

On the first appeal to this Court by virtue of the principles in **Okeno v R {1972} EA 32** the appellant's appeal is one on matters of Law and facts.

> ***"All this has been explained time and time again that the appellate Court is mandated to analyze and re-evaluate the evidence adduced before the trial Court, independently, to draw its own conclusions of course without overlooking or disregarding the findings made by the trial Court and bear in mind that unlike the trial Court it does not have the advantage and opportunity of hearing and seeing witness testify."***

It is against that background of fact and Law that I will consider the legal position of this appeal, whether the conviction of the appellant is supported by the evidence. This is better done by setting out the ingredients of the offence appellant was charged with at the trial Court.

In **Charles Wamukoya Karani v R CR Appeal No. 72 of 2013 the Court stated:**

> ***"That the critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant."***

For the sake of brevity Section 2 of the Sexual Offences Act, penetration means:

> ***"the partial or competent insertion of the genital organs of a person into the genital organs of another person."***

On appeal, the appellant attacked the findings of the trial Court that penetration was not proved as required by Law. From the record there was ample evidence from the victim testimony that she had been carnally known on 24.1.2013 at [particulars withheld] village in Malindi

District. Though the phrase ***"put dirt in my place for urinating"*** were used, analogously it referred to the genitals of the victim. Apart from the victim own evidence, immediately soon after the incident PW2 and PW3 rushed to the crime scene of the defilement being PW2 house. In their endeavor to find out what had happened to the victim a physical examination revealed presence of spermatozoa on the clothes and genitalia of the victim. The clinical officer (PW6) who filled the P3 Form upon examination of the victim opined that her hymen was broken and the labia was also inflamed.

It is therefore clear from the evidence of PW1 as corroborated with that of PW2, PW3 and the medical evidence by PW6 the victim had sexual intercourse on 24.1.2013. The fact of hymen rupture and lacerated labia captured on medical examination immediately after the commission of the alleged offence is significant and material to this case as determined by the trial Court. (In the case of **Remigious Kiwanuka v Uganda SC Crim Appeal No. 41 of 1995**):

> ***"Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence."***

It is also provided in Section 2 of the Act that penetration is either partial or complete insertion of male organ of the appellant into the genitalia of the victim. Therefore, any slightest entry into the genitalia completes proof of the element on penetration.

The second element of the defilement offence which ought to be proved for purposes of sentence is the age of the victim. In **Francis Omuroni v Uganda Court of Appeal CR Case No. 2 of 2000** the Court held interalia that:

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

The gist of proof of age and the distinct bearing and its useful guide is to be found in the case of **Moses Nato Raphael v R {2015} eKLR** in which the Court stated as follows:

> ***"On the challenge posed by the uncertainty in the complainants age, this Court had occasion to deal with similar issue in Tumaini Maasai Mwanya v R Mombasa CRA No. 364 of 2010 where the Court held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims 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."***

In the instant appeal, appellant grievance was to the effect that age of the victim was not proved, and therefore this Court should resolve any benefit of doubt on this issue in his favour.

On this ground it transpired that the prosecution case was based on the age assessment by the clinical officer during the medical examination of the victim. As a result of the medical assessment there is no dispute that the victim age was assessed at 4 ½ years old. Thus placing her under the bracket of victims defiled below the age of 11years to justify a maximum sentence of life imprisonment under Section 8 (2) of the Sexual Offences Act.

Besides, the mere assertion by the appellant, that the age of the victim was not proved, no credible evidence can be found in his defence to rebut the medical age assessment report. The ground therefore fails, to assist the appellant.

The third element which is as critical as the first two deals with identification of the appellant being at a crime scene as the defiler of the victim.

The Courts duty on identification is set out in **Roria v R {1967} EA 583, Abdalla Bin Wendo v R {1953} 20 EACA 166.** According to the principles in **Simiyu & Another v R IKLR 192** the Court of Appeal laid down the following guidelines:

> ***"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of the description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given."***

In this appeal (PW2) left her house leaving behind the appellant and the victim. There was overwhelming evidence from PW3 that appellant had entered inside the PW2's room. When PW2 responded to the alarm by PW3 she met the appellant running out of the house. Finding it rather unusual, PW2 on making entry into the room found the victim on the bed with residual mucus like substance over her clothes and the genitalia.

Here too, the victim in her testimony did identify the appellant as one who put dirt into her vagina, a matter which was under consideration by the trial Court. The import of the evidence of PW1, PW2 and PW3 on identification was watertight and free from any error or mistake capable of drawing an adverse inference against the appellant case. To this Court the appellant and no one else defiled the victim (PW1).

The appellant other concerns involves his arrest, indictment, trial, conviction and sentences to life imprisonment while he was still under the age of 18 years. Thus the foundation of Section 190 (1) of the Childrens Act was infringed by the Learned trial Magistrate.

In answer to this ground the trial record is clear that the appellant age was assessed on 31.1.2013 by **Dr. Ariba** of Malindi Hospital who

opined it to be 18 years old. I may add that the Learned trial Magistrate had the advantage of seeing the appellant and must have taken the earliest opportunity to safeguard any defects that there were on age assessment. Common sense and observation works, gained through experience by the Learned trial Magistrate as a trier of facts. Consequently, this Court has not been presented with any compelling new evidence that the appellant was tried as a minor below the age of 18 years. I therefore agree with Learned prosecution counsel that the question of age was clearly investigated and an age assessment taken by the medical doctor. That evidence cannot be faulted on appeal.

The narration in continuatium of the appellant's case, was that the prosecution case was riddled with inconsistencies and contradictions of fatal nature to warrant an acquittal. The appellant however chose not to identify those contradictions to this Court.

In this context, I may refer with profit the decision in **Affabhai v State of Gujrat AIR {1988} S.C. 694 CR. L.J. 848** where the Court observed that:

> ***"The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due attendance. The Court by calling into and, its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter, so as to demolise the entire prosecution story. The witness nowadays go on adding embellishment to their version perhaps for the fear of their testimony being rejected by the Court. The Courts however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."***

In considering the Judgment of the trial Court, there are no irregularities which the record reveals that the findings reached by the Learned trial Magistrate was patently based on inconsistencies and contradictions of the prosecution witnesses.

The dominant principle in exercise of discretion of the evidence admitted in a trial is as premised in the persuasive case of **S v Sauls & Others {1981} (3) SA 172** where the Court held that:

> ***"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider the merits and demerits and having, done so, will decide whether it is trustworthy and whether, despite, the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."***

On evaluation the aforesaid argument by the appellant shows no contradictions on material points to vitiate the conviction. This ground of appeal also is of no probative value to the appellant case. As a result the appellant was therefore convicted on overwhelming evidence.

On sentence, I desire to make it plain that in ordinary sense, the question as to whether the right principles were not applied by the Learned trial Magistrate to impose life sentence has not been brought to the attention of the Court. I am properly guided by the principles in the case of **Ogolla s/o Owuor v R {1954} EACA 270** where the Court stated interalia that:

> ***"The Court does not alter sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

The nature of the offence and the makeup of the offender are of such a nature that the public require protection for a considerable time, unless there is a change of circumstances of the appellant. Clearly there are no set of circumstances that are different to warrant interference with the legal sentence imposed by the trial Court.

In my view, it cannot also be said to be excessive, unlawful or punitive to the extent that this Court jurisdiction can be invoked to vary it. Indeed, I agree with the comments of the trial Court in this respect. The appellant loses this ground as well. In sum total, the appeal is dismissed.

14 days right of appeal explained.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MAY 2020

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R. NYAKUNDI

JUDGE

<u>In the presence of</u>

1. The appellant

2. Ms. Sombo for the state