



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO E006 OF 2021

JOHN NYANGAU MOKONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon F. Rashid (PM) delivered at Winam in the Chief Magistrate's Court in SOA Case No 14 of 2018 on 4th March 2021)

JUDGMENT

INTRODUCTION

1. The Appellant herein was tried and convicted of the offence of defilement contrary to Section 8(1) and (4) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on February 2018 at about 1700 hours at Kolwa in Kisumu East District within Kisumu County intentionally caused his penis to penetrate the vagina of GBA, a child (hereinafter referred to as PW 1) aged seven (7) years. He was sentenced to life imprisonment.
2. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on February 2018 at about 1700 hours at Kolwa in Kisumu East District within Kisumu County, he intentionally touched PW 1's vagina. The Learned Trial Magistrate found this alternative charge to have been superfluous having convicted him on the main charge.
3. Being dissatisfied with the said Judgement, on 17th March 2021, he lodged the Petition of Appeal herein dated 15th March 2021. He relied on twenty (20) grounds of appeal challenging both conviction and sentence.
4. His Written Submissions were dated 6th August 2021 and filed on 10th August 2021 while those of the State were dated 18th August 2021 and filed on 28th September 2021.
5. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the Learned Trial Magistrate in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that have been placed before it for determination were:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

b. Whether or not the sentence that was meted upon the Appellant by the Learned Trial Magistrate was harsh, cruel and unreasonable warranting the interference of this court.

9. The court dealt with the said issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

10. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14) and (15) were dealt with together under this head as they were all related.

11. The Appellant submitted that the Prosecution failed to prove its case beyond reasonable doubt for the reason that the evidence that was adduced by the witnesses was contradictory and not cogent rendering his conviction unsafe. His submission was that he was framed.

12. It was his contention that the Report filed at Kisumu Sub- County Hospital indicating that PW 1 was not defiled was not tendered in evidence, which could have raised doubt in the mind of the Trial Court. He argued that by dismissing his application seeking to be furnished with the said Report by the Prosecution, the Trial Court shifted the burden of proof to him contrary to the provisions of the law. He was emphatic that he was not the Investigating Officer in the case and the said Report was not in his possession. In this regard he relied on the case of **George Ngodhe Juma & Others vs Attorney General [2003] eKLR** where the court therein held that the public pays the State to carry out investigations.

13. He added that the Trial Court also disregarded the importance of calling the doctor who interacted with PW 1 and filled the Report indicating that PW 1 was not defiled, which was contrary to Article 50 (2)(c) of the Constitution of Kenya, 2010 which mandates that every accused person has a right to have adequate time and facilities to prepare for his defence as was also held in the case of **Thomas Patrick Gilbert Cholmondeley vs Republic [2008] eKLR**.

14. He placed reliance on the cases of **Republic vs Silas Magongo Onzere alias Fredrick Namema [2017] eKLR** and **Waita Munyoki vs Republic [2018] eKLR** where the common thread was that the Prosecution has the duty of sufficient adducing evidence to uphold a conviction. He added that where there is a single circumstance that creates doubt in the mind of the court, then the benefit of doubt must go to an accused person which was a holding that the court made in the case of **Elizabeth Waithegeni Atimu vs Republic [2015] eKLR**.

15. He argued out that although the documents the Prosecution adduced in evidence showed that PW 1's hymen was broken, there was no evidence that he was the one who penetrated her. He further submitted that Winfred Awour Sibuur, a Clinical Officer working at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) (hereinafter referred to as PW 5) testified that the hymen could also be broken in other ways other than through penetration. It was his further contention that the examination showed a normal finding save that there was a foul smelling vaginal discharge.

16. On its part, the State submitted that the Prosecution proved PW 1's age through the Birth Certificate that was submitted by her mother, LJA (hereinafter referred to as "PW 4") showing that she was born on 9th September 2010 and was therefore seven (7) years and five (5) months at the material time.

17. It further submitted that identification that PW 1 and the Appellant were well known to each other as he was a motorcyclist who used to take and collect her from school every day. It added that VAO (hereinafter referred to as "PW 2") and SOS (hereinafter referred to as "PW 3") who were both PW 1's relatives had known the Appellant for about a year. It further pointed out that in his defence, the Appellant admitted having known PW 2 as she was the one who instructed him to be taking and collecting PW 1 from school.

18. It was its further submission that the PRC and P3 Form that were tendered in evidence showed that PW 1's hymen was absent and that although PW 5 and Dr Lucy Ombok who used to work at JOOTRH) (hereinafter referred to as "PW 6") had both confirmed that the hymen could be broken by other activities, they relied on PW 1's history and were certain that the hymen had been broken because she had been defiled.

19. It was emphatic that the Prosecution did not have in its possession, any Report from Kisumu County Hospital showing that PW 1 was not defiled as the Appellant had contended. It pointed out that the Trial Court gave the Appellant an opportunity to call his own witness from Kisumu County Hospital but failed to do so.

20. It further argued that PW 1 was a seven (7) year old minor who had no reason to lie against the Appellant who she had depended on and trusted to take and collect her from school. It was its averment that the fact that PW 1 refused to be taken to school by the Appellant and instead opted to walk showed that the trust had been breached and she did not feel secure for him to take her to school.

21. A *voire dire* examination was done whereupon PW 1 adduced sworn testimony. In his sworn evidence, the Appellant admitted that he was the one who used to take and collect PW 1 from JA in Kolwa Central and he was asked to do so by PW 2. The issue of his identification and PW 1's age were therefore not in contestation. In any event, PW 1's minor age was proven by the Certificate of Birth that showed that she was born on 9th September 2010 and was therefore seven (7) years and five (5) months at the material time of the incident.

22. The court carefully analysed the evidence that was adduced in the Trial Court and noted the Prosecution's case was that on 7th February 2018, the Appellant dropped PW 1 from school at PW 2's house where she used to reside. He left and came back with a jerrican of water. He operated a boda boda and was also a water vendor. PW 1, PW 2 and PW 3 were all emphatic that on this day, the Appellant who used to bring them water was not supposed to bring them water.

23. He went inside the house and found PW 1 was trying to repair a remote. He offered to repair it and then asked her to lie on a seat

whereupon he unzipped his trouser and penetrated her. He then left and asked her not to tell anyone of what had happened.

24. It appears that he continued taking and collecting PW 1 from school until on 19th April 2018 when PW 1 wrote on a piece of paper that the Appellant had raped her. She was taken to hospital and a report was made at Kondele Police Station. A Post Rape Care (PRC) Form was completed at JOORTH.

25. At the material time, there did not appear to have been anyone else in the house. PW 1 also disclosed what had transpired almost two (2) months after the incident. There was therefore late reporting of the incident. PW 2 testified that when she and PW 2 took PW 1 to Kisumu District Hospital, the doctor told them that the incident happened long ago and thus refused to examine PW 1's private parts. They were then given some document. She did not disclose what document this was.

26. It was this document that the Appellant applied to be adduced in court but the Learned Trial Magistrate declined to grant. She directed that since the Prosecution did not have the said document in its possession and there was no witness to adduce it, then the Appellant ought to call his own witness from Kisumu County Hospital. It was this Report that the Appellant argued that the Learned Trial Magistrate did not see before convicting him.

27. Notably, the Appellant did not appeal against this decision. This court could not therefore consider the merits or otherwise of not having adduced this document in court.

28. Having said so, it was apparent that the said doctor at Kisumu County Hospital acknowledged that there was late reporting of the incident. PW 5 and PW 6 only established that PW 1's hymen was broken but could not confirm if the penetration was by the Appellant herein. They also stated that the hymen could be broken by other activities other than penetration. However, PW 6 was clear as evidenced in the P3 Form that the type of weapon was bodily penetration and that she had relied on the history that she was given by PW 1. The fact that there was late reporting of the incident did not mean that the penetration did not occur.

29. Section 124 of the Evidence Act Cap 80 (Laws of Kenya) stipulates that:-

“Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

30. This court found and held that the Learned Trial Magistrate came to a correct determination that the Prosecution had proved its case beyond reasonable doubt based on PW 1's evidence. Her evidence was very consistent. This court was thus not persuaded that she had framed the Appellant herein.

31. Even so, this court carefully considered the Appellant's sworn evidence and his Written Submissions and noted that there could not have been any clearer proof of his guilt than the admission he made during his mitigation. Before he was sentenced, he asked for forgiveness and indicated that he would never repeat such an offence again.

32. His arguments that the defilement never occurred were therefore neither here nor there. The court did not deem it necessary to spend more time evaluating his submissions further and in the circumstances, this court found and held that Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14) and (15) were not merited and the same be and are hereby dismissed.

II. SENTENCE

33. Grounds of Appeal Nos (16), (17), (18), (19) and (20) were dealt with under this head as they were all related.

34. As the Learned Trial Magistrate did not err when she convicted the Appellant, she proceeded correctly when she sentenced him to life imprisonment. Notably, Section 8(2) of the Sexual Offences Act provides that:-

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

35. In the premises foregoing, Grounds of Appeal Nos (16), (17), (18), (19) and (20) were not merited and the same be and are hereby dismissed.

DISPOSITION

36. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 15th March 2021 and lodged on 17th March 2021 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as it was safe to do so.

37. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JANUARY 2022

J. KAMAU

JUDGE