REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 58 OF 2019

JORAM MAKANGA SABAILO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[Being an appeal against the Judgment and decision of the Chief Magistrate's Court at Kisumu

(Hon. W. K. Onkunya (SRM) dated the 7th October 2019 in Kisumu CMCCR S.O No. 19 of 2018]

JUDGMENT

The Appellant, **JORAM MAKANGA SABAILO**, was convicted for the offence of **Defilement**. He was then sentenced to Life Imprisonment.

1. By his Amended Grounds of Appeal, the Appellant raised the following issues;

> ***"1. THAT: My right of fair trial under Article 50 (2) of the Constitution was violated, on the basis that I was not supplied with witness statements before trial as per the same Article of the Constitution.***

2. THAT: The trial learned magistrate erred in both law and fact by convicting and sentencing me without considering that there were a lot of contradictions that could warrant an acquittal.

3. THAT: The learned trial magistrate erred in both law and fact by failing to acknowledge that penetration was not proved beyond reasonable doubt as per PW1's evidence.

4. THAT: The trial learned magistrate erred in both law and fact by convicting and sentencing me, the appellant, to life imprisonment of which the sentence manifested from a term that he 'acted in wrong principles'"

2. Being the first appellate Court, I am obliged to re-evaluate all the evidence on record.

3. Upon carrying out the process of re-assessment of the evidence, I will draw my own conclusions. In effect, I will not be limited to merely finding evidence which either justifies the conviction or reinforces the appeal.

Article 50 of the Constitution

4. Article 50 (2) stipulates that every accused person has the right to a fair trial. The said right includes the right;

> ***"(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

5. When canvassing his appeal, the Appellant submitted that his right was violated, when;

"……. the learned trial magistrate decided to continue with the trial despite knowing that it is the appellant's right to have every document as per foretold Article of the Constitution."

6. The Appellant told this Court that he knew that he had his rights, and that that is why he asked the trial Court to supply him with the Witness Statements.

7. Notwithstanding his said request for Witness Statements, the Appellant has said that the same were never supplied to him. He therefore blamed the trial Court for denying him his rights.

8. The record of the proceedings shows that on 7th January 2019, Hon. R. M. Ndombi SRM ordered the Officer Commanding Station (OCS) to supply Witness Statements to the accused.

9. As at that date, the accused had taken plea, but no witnesses had testified yet.

10. I also note that there is nothing on the Court records, to show that the accused had asked for the Witness Statements.

11. It does appear to me, that contrary to the Appellant's contention, the trial Court did not deny him the right to access the Witness Statements. I say so because the Court appears to have acted on its own volition when it directed the OCS to ensure that the accused was provided with Witness Statements.

12. On 21st January 2019, the accused informed the trial Court that he did not have the Witness Statements.

13. The learned trial magistrate directed that Witness Statements be made available to the accused. The Court then fixed the case for hearing on 4th February 2019.

14. On the scheduled hearing date, the accused expressly told the Court that he was ready to proceed. It is thereafter that the first witness started testifying.

15. The Court records also show that on 18th February 2019, the accused told the Court that he was ready to proceed with the trial. It was then that **PW3** testified.

16. The cross-examination of **PW3** was very elaborate and long.

17. Until that stage in the proceedings, the trial went ahead only after the accused had told the Court that he was ready.

18. On 25th February 2019, the accused told the trial Court that he wished to be given the Post Rape Care (PRC) Form.

19. In my understanding, when the accused asked for one specific document, that presupposes that the other documents which he had asked for earlier, had already been provided to him.

20. On 29th April 2019, the accused told the trial Court that he was ready; whereupon the Court directed that the matter could proceed.

21. Similarly, on 13th May 2019, the trial Court only ordered the case to proceed after the accused indicated that he was ready.

22. Even on 15th July 2019, the trial Court only ordered the trial to proceed after the accused said that he was ready.

23. In the circumstances, I hold that the Appellant has failed to prove that Witness Statements were not supplied to him prior to the commencement of the hearing. If they had not been made available, the Appellant would definitely have informed the Court, instead of declaring his readiness to proceed.

Penetration

24. The Appellant submitted that the evidence produced did not prove penetration.

25. He pointed out that the Complainant testified that after the assailant had unzipped his trouser, he lay on top of her. However, the Complainant made it clear that the assailant did *"nothing further."*

26. The said evidence, when coupled with the testimony of the Senior Medical Officer (**PW5**), convinced the Appellant that the assailant was exonerated from the alleged penetration.

27. His conclusion was derived from the fact that **PW5** had testified that the Complainant's;

"External genitalia appeared normal."

28. When the Appellant cited that part of the testimony of **PW5**, he edited the very next statement, which was in the following words;

> ***"There was a cut/laceration on the urethra opening. Hymen was absent. Anus was intact. No vaginal discharge at that point."***

29. It is not a honest analysis of evidence if a person picks and chooses bits and pieces, whilst excluding other parts.

30. In this case, the Senior Medical Officer stated as follows during cross-examination;

> ***"The child was not bleeding but there was a small but at the urethra opening due to the sexual penetration. The injuries depend on different circumstances such as size of penis; if there was a fight etc."***

31. In the light of that express testimony, I find that the medical evidence proved that there was penetration.

32. The medical evidence was not limited to the *"small cut at the urethra opening"*.

33. It also included the presence of **HVS** Epithelial cells and the Pus cells. As the Senior Medical Officer explained;

> ***"Under normal shape there are no epithelials. If there is a sexual activity, there is presence of Epithelial cells the HVS. Normal circumstances there would be no pus cells. The pus cells are an indication of an infection. There was proof that an infection was introduced in the genitalia."***

34. As the witness said, the evidence was proof of sexual activity, through which an infection was introduced in the genitalia.

35. I have no doubt whatsoever that the prosecution proved penetration.

36. PW6 was a Clinical Officer working at JOOTRH. When she examined the Complainant;

"The hymen was absent. Lacerations on the urethral opening.

LAB INVESTIGATIONS

HVS – Epithelial cells ++

Pus cells ++. HIV test –ve.

VDRL –ve. Hepatitis B –ve"

37. PW6 testified that the bruise on the urethral opening was not normal. He made it clear that;

> ***"There was penetration.***
>
> ***The hymen was absent."***

38. He attributed the loss of the hymen, to the penetration.

39. Clearly, penetration was proved beyond any reasonable doubt.

Contradictions

40. The Appellant submitted that there were so many contradictions in the evidence tendered, that the Court ought to have given him the benefit of doubt.

41. He pointed out that the evidence of **PW1** indicated that there were 3 children inside the Appellant's house.

42. In the circumstances, he was of the view that nothing untoward happened between him and the Complainant.

43. If anything, the Appellant believes that **PW2** exonerated him, when he said that he did not witness anything.

44. PW1 said that although the Appellant unzipped his trouser, and then lay on top of her, nothing further happened.

45. Before removing his trousers, the Appellant had removed the Complainant's trouser.

46. And he lay on top of her, upon a bed.

47. PW2 is a neighbour to the Complainant. He was 11 years old.

48. He said that **PW1** was inside the Appellant's house, together with Charles Odhiambo, who is a brother of **PW1**.

49. The Appellant gave his bicycle to Charles and **PW2**, to go and wash. As they were washing the bicycle, **PW3**, (who is the Complainant's father), sent **PW2** to go and call **PW1**.

50. When **PW2** returned to the Appellant's house, the door was ajar. He saw both the Appellant and the Complainant on the bed.

51. PW2 went and told **PW3** that his daughter was inside the Appellant's house.

52. PW2 testified that the trouser of the Appellant was unzipped.

53. When **PW3** was told that his daughter was together with the Appellant, on the Appellant's bed, he rushed to the Appellant's house.

54. He found **PW1** at the edge of the bed, with her trouser open. Meanwhile, the Appellant was on the other side of the bed, with his trouser unzipped.

55. When the Appellant was put to his defence, he confirmed that on the material day, he found 3 children. Of the said 3 children, 2 were boys and one was a girl.

56. The Appellant knew one of the boys, as the son of **PW3**; and he also knew that the Complainant was the daughter of **PW3**.

57. In the circumstances, there was absolutely no confusion in the identities of the children who were at or near the Appellant's house.

58. The Appellant testified that his bicycle was taken away by the 3 children.

59. When they returned the bicycle, the Appellant invited them into his house, and threatened to beat them because they had taken his bicycle without his permission.

60. According to the Appellant, the 2 boys ran away, leaving the Complainant. At that point, the Complainant started crying, but the Appellant assured her that he would not beat her.

61. Thereafter, the Complainant's father entered the Appellant's house, and assaulted him.

62. The Appellant also testified that the charges were preferred against him after he failed to raise the sum of Kshs 30,000/= which was to be used to bribe the police officer, in order to buy the Appellant's freedom.

63. However, the Appellant did not have any evidence of the alleged bribery attempt.

64. Having re-evaluated all the evidence on record, I find that although the Complainant testified that the Appellant did *"nothing further"*, the medical evidence clearly showed that the Complainant was defiled.

65. The sum total of the evidence was that the Complainant was a minor, who was 8 years old at the material time.

66. The identity of the person who violated her sexually was doubtlessly the Appellant. This was a case of recognition. Furthermore, the perpetrator was still at the *locus-in quo* when the Complainant's father arrived.

67. Accordingly, all the ingredients of the offence were proved beyond any reasonable doubt.

Sentence

68. After being convicted, the Appellant was accorded an opportunity for mitigation.

69. He said that he was an only son of his parents, who were old. He was their sole bread winner.

70. He also said that he had a young family, with 2 young children who depend on him. He pleaded for leniency.

71. The learned trial magistrate gave due consideration to the mitigation. However, the Court was of the view that due to the gravity of the offence, and the effect of the said offence upon the minor, (who was 8 years old), the accused deserved a deterrent sentence.

72. Nowhere did the trial court indicate that the sentence was being handed down because it was the mandatory sentence.

73. The learned trial magistrate's notes made it clear that the Court was handing down a deterrent sentence.

74. In principle, the trial Court did not err, in law, when it concluded that the appropriate sentence was Life Imprisonment.

75. In the result, there is no merit in the appeal; and it is therefore dismissed.

76. I uphold both the conviction and the sentence.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF FEBRUARY 2022

FRED A. OCHIENG

JUDGE