



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 155 OF 2012

FRANCIS KIPTOO TARUS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Upon going through a trial before the Magistrate's Court at Kapsabet, Francis Kiptoo Tarus (**the Appellant**) was convicted for defiling LJ. The particulars of the offence being that on 3rd June 2011 at about 13.00 hours in Nandi County he caused his penis to penetrate the vagina of the Complainant.

2. The prosecution put together the following case. LJ was on the fateful day at 1.00 pm sent by her mother to collect vegetables. Her evidence, received after a voir dire examination had been carried out by Court, was that the Appellant followed her, removed her under pant and did "bad manners" on her. She says that the accused made her lie on the grass on her back.

3. Rebbly Cherotich (**PW 1**) who at that time was on her way to the river saw a fat man lying on a child beside the road. He had unzipped his trousers and the child's underpants was on the path with the dress pulled up. His penis was erect. The man is the Appellant.

4. On attending to medical examination, after a complaint had been lodged at Kipkaren Police Post, Evans Bor (**PW 3**) returned a conclusion that:-

"Hymen broken, bruised labia minor and majora."

5. In his defence the Appellant stated that on the day of the alleged incident he decided to go to the river for a bath but first went to the nearest shopping centre to buy soap. As he approached the centre, he met the Complainant. He asked if her grandmother had changaa. The Complainant responded that her grandmother had gone to fetch firewood and she (the Complainant) then left. That shortly, someone (presumably PW 1) shouted and said that he had defiled the child. He denied the offence and was of the belief that the medical examination of child revealed that nothing had happened to her.

6. Raised as Amended Grounds of Appeal, are the following challenges to the decision of the lower Court;

- i. That the Court failed to inform him of his right to be represented by a lawyer.
- ii. That his right under Article 49 of the Constitution was violated.
- iii. That no proper voir dire examination was carried out.
- iv. That the medical evidence did not link him to the offence.
- v. That the Honourable Trial Court erred in both law and fact in dismissing his defence.
- vi. That the prosecution case was contradictory, inconsistent, uncorroborated and unreliable.

7. A first Appeal to this Court is an invitation to this Court to consider the matter within the parameters set out in **Okeno -vs- Republic[1972] E. A32;**

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

8. Under Article 50(2) (g) of the Constitution, a right to a fair trial of an accused person includes his right to choose, and be represented by an advocate, and to be informed of this right promptly. This right appears to be in respect to all criminal trials but must be more urgent where the offences are serious and the accused person is liable to serious sentences such as death or life imprisonment upon conviction. The offence which the Appellant faced carried with it a life imprisonment and no doubt it was incumbent of the Trial Court to promptly inform him of the existence of this right. This does not however, mean that the State was duty bound to provide him with counsel.

9. But so that the infraction of that right could vitiate a trial, the Appellant needed to demonstrate how this adversely affected his ability to mount a defence. None is demonstrated here. The record showed that the accused person cross-examined the witnesses and when invited to do so, put up his defence. This Court sees no reason to annul the conviction solely on the basis of this complaint.

10. The Appellant also complains of an infringement of his constitutional right because he was arraigned Court more than 24 hours after being arrested. Yet even if that was so, the same cannot be reason to vitiate a trial and to upset an eventual conviction entered. The remedy for the Appellant is in damages upon an action in tort.

11. A third ground is that the trial Court carried out a shallow and inadequate voir dire before receiving the evidence of the victim. The voir dire session is recorded as follows:-

“Questions asked to child to determine if she can testify.

My name is CL. I live in Kipkalen Selient. I am five years old. I go to school. I do not know the name of the school. I go to Sunday school. I do not know the name of the church. I am going to tell the truth.

I do not tell lies.”

12. The object and purpose of a voir dire is to establish whether the mind of a minor understands the duty to speak the truth and that there is a sanction for not doing so. In ideal circumstances the questions posed to the minor and answers elicited should be recorded in verbatim so that anyone can be able to check that the Court did not lead the minor into giving certain preferred answers.

13. The record of the Court does not capture a question – answer session in verbatim as it should. However, when the PW 2 told Court that “I am going to tell the truth. I do not tell lies”, then the Court was correctly entitled to hold that the minor understood the duty to tell the truth and should be allowed to testify.

14. I turn to a further ground. The Appellant states that the medical evidence fell short of establishing that there was penetration. The Appellant argues that the mere fact that the hymen of the victim was broken did not prove penetration.

15. Yet that was not all to the matter. On the space left for additional remarks, the doctor reports that on urinalyses, spermatozoa was found to be present in the minor. The presence of spermatozoa in the urine of the victim, coupled with a broken hymen and bruised labia is sufficient to lead to a conclusion that there was penetration. The Trial Magistrate cannot be faulted for making the finding that:-

“The clinical officer who examined the Complainant confirmed that she was indeed defiled. Even the urinalyses examination revealed spermatozoa cells.”

16. It is common cause that no document (e.g birth certificate, baptismal certificate, clinical card) was produced to prove the age of the victim which the prosecution theorized to be 5 years. However, she told Court that she was 5 years old, and so was the age entered in the P3 Form by the office requesting the examination. On this crucial matter the Court held:-

“The Complainant’s age as (sic) been given as being five (5) years. She is a child of tender years who was in baby class at the time she was defiled. The clinical officer who examined her estimated her age as being five (5) years. Even though no birth certificate or child immunization card was produced, I do belief that she was aged five years in any even less than eleven (11) years for purposes of Section 8(2) of the Sexual Offences Act No. 3 of 2006.”

17. They can never be doubt that documentary evidence or a clinical age assessment is the best proof of the age of a person. However, when it comes to whether a person is a minor, a Court can on observation make that call and in particular when it is so obvious that the person is a minor. So obvious that any substantial number of adults can agree that the person is a child. What however may be more difficult to give a visual assessment as to the exact age of the minor and while the Court could find that the child was a minor, it may not have been able to state the age with certainty. The Court had the benefit of seeing and hearing the victim both on voir dire and in testimony and cannot be faulted in finding that the victim who was in baby class was in any event less than 11 years.

18. The evidence against the Appellant was overwhelming. There was not just the account of the victim but also an eye witness. He was recognized by PW 1 as both the witness and the Appellant hailed from the locality. The medical evidence was strong corroboration of what

had happened. How else could spermatozoa be found in the body of a minor?

19. The Defence evidence of denial was therefore pale against the credible case put forth by the prosecution. The Trial Court was right to reject it. The conviction reached cannot be faulted.

20. Upon conviction, the Court imposed a life imprisonment. That is the maximum sentence in statute (Section 8(2) of the Sexual Offences Act) yet the law now is that minimum sentences do not hamstring sentencing courts from exercising their undoubted discretion in sentencing. The trial court may have felt somewhat restricted by what is provided in statute. This Court does not feel such limitation in view of the evolving jurisprudence. I reduce the life imprisonment to a jail term of 15 years with effect from the date of conviction. Only to that extent does the Appeal succeed.

Dated, Signed and Delivered in Court at Nairobi this 1st Day of January 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Francis Kiptoo Tarus (the Appellant) in person.

Miss Muhonja (D.P.P) for the State