



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 9 OF 2019

KAMAKEI SAMUEL OLE KISIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence Hon S.O. Temu, (SRM),

delivered on 18th December 2012 in Criminal Case No. 643 of 2011

in the Chief Magistrate's Court at Kajiado)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section, 8(1) (3) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 8th day of June, 2011 at about 6 pm at [particulars withheld] in Loitokitok District of the Rift Valley province, he intentionally caused his male organ to penetrate the female organ of NP, a child aged 13 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. Particulars being that on the same day at the same place he intentionally touched the private parts of NP, a child aged 13 years.
3. The appellant denied both counts and after a trial in which the prosecution called 4 witnesses, and the appellant's unsworn defence, he was convicted on the main count and sentenced to 20 years imprisonment.
4. He was aggrieved with both conviction and sentence and lodged this appeal raising the following grounds of appeal:
 - 1. That the prosecution did not prove its case to the required standard;**
 - 2. That the evidence relied upon by the trial magistrate as the basis for his conviction was not sufficiently trustworthy.**
 - 3. That the trial court did not properly consider his defence as required by Section 169 (1) of the Criminal Procedure Code.**
5. The appellant filed supplementary grounds of on 2nd December, 2020, stating that:
 - 1. The prosecution's case was not proved beyond reasonable doubt;**
 - 2. That the trial magistrate erred in law and fact by failing to make a specific finding on the issue (sic).**
 - 3. That sections 150, 333(2) and 169 (1) of the Criminal Procedure Code were violated.**
 - 4. That the charge sheet was defective, and**
 - 5. That his rights under Articles 50(2), 25, 27 of the Constitution were violated.**

6. The appellant relied on his written submissions to argue this appeal. He argued that he was not given witness statements although the law required that he be informed in advance the prosecution's evidence. This, he argued, violated his right to a fair trial and relied on Article

50(2) of the Constitution. He blamed the trial court for not inquiring whether he was able to conduct his defence and relied on ***Joseph Ndungu Kagiri v Republic*** [2010] eKLR citing ***Pett v Greyhound Racing Association*** [1968] 2 WLR 1471 that it is not every man who has the ability to defend himself as his own.

7. On the validity of the charge sheet, the appellant argued that the charge sheet did not have a stamp of the police station and court seal and therefore it was defective. He also argued that the prosecution did not call vital witnesses in terms of section 150 of the Criminal Procedure Code. According to the appellant, failure to call the witness who saw the complainant escape to go and tell his father should be construed against the prosecution. He submitted that the prosecution should have called the witness who was at the chief's office failure of which should also be construed against it.

8. The appellant further raised questions on the age assessment. He argued that whereas at one point it was said that the complainant was 14 years, it was also stated that she was 13 years old. He blamed the trial court for failing to reconcile these contradictions, and relied on ***Pandya v Republic*** [1957] EA 336.

9. According to the appellant, it is the duty of the prosecution to prove its case beyond reasonable doubt. He relied on ***Too v Republic*** [2015] eKLR to argue that it remains a cardinal duty on the prosecution to adduce adequate evidence so as to hold a conviction and the standard of proof in criminal cases is settled to be proof beyond reasonable doubt.

10. Regarding the mandatory sentence, the appellant relied on ***Christopher Ochieng v Republic*** CRA No. 93 of 2014 for the argument that a mandatory sentence fails to conform with the right to fair trial guaranteed under Article 25(c). The appellant also faulted the trial court for not taking into account the period he had spent in remand while awaiting trial as required by section 333(2) of the Criminal Procedure Code.

11. The prosecution counsel was directed to file their written submissions within 14 days but at the time of preparing this judgment, they had not done so. There were therefore no submissions for consideration on their part.

12. I have considered this appeal, submissions and the decisions relied on, I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reevaluate, reconsider and reanalyze the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. (See ***Okeno v Republic*** [1972 EA 32])

13. In ***Pandya v Republic*** [1957] EA 336, the court stated the duty of the first appellate court as follows:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury, the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

14. In ***Kiilu & Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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.”

15. Similarly, in ***Victor Owich Mbogo v Republic***, criminal appeal No. 152 of 2015 [2020] eKLR, the same court stated:

“It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify.”

16. PW1 testified after voir dire examination that on 8th June, 2011 she was tending to her father's livestock when the appellant went and got hold of her covered her mouth, pushed her to the ground, undressed her and defiled her. She screamed and people including her father (PW2) went to her rescue and arrested the appellant. She was taken to Loitokitok District Hospital for treatment and was issued with a P3 form. Her age was also assessed. She identified her skirt and pants which was blood stained. Her father reported the matter to the police. She identified the appellant as the person who had defiled her.

17. PW2, the complainant's father, testified that on the material day at about 6 p.m. he was harvesting beans on his farm. He saw the appellant on the complainant. When the appellant saw him, he ran away. He chased the appellant and got hold of him and took him to the Chief's office. The Chief referred them to Loitokitok police station from where he was asked to take the complainant to hospital. The complainant was treated and discharged and a P3 form was also filled for her. He identified the appellant in court as the person who had attacked the complainant.

18. PW3 Dr. Isha Mohamed of Loitokitok District Hospital, testified that he filled a P3 form for PW1 a 13-year-old girl who had been taken

to hospital with a history of defilement. On examination, she had no underpants which she claimed had been torn by the defiler. She had whitish discharge on her skirt, bruises on the labia manora and lacerations on the majora and vagina. She also had wet stuck discharge on her private parts. He concluded that she had been defiled. He assessed to be 13 years. He also examined the appellant who was 22 years old. He had colourless discharge on his genitalia. He produced the P3 forms for both the complainant and appellant as exhibits.

PW4, N0 85453 PC Everlyne Anyango attached to Loitokitok Police Station and the investigating officer, testified that she carried out investigations interrogated the complainant on the incident, took the complainant and appellant to hospital and later charged the appellant.

19. When put on his defence, the appellant gave unsworn testimony and denied committing the offence. He stated that he had worked on someone's farm that day, where he sprayed tomatoes within Kimana area and then went to Dip area at mama Rose's hotel where he stayed up to 5pm. Two maasai men went and asked him about his name. They asked him to get out so that they could explain to him something. They then asked him to go and assist them tend their farm near his. They took him to a home and locked him inside a house. The following day, they told him what had happened. They interrogated him but he denied knowing what had happened. He was asked for a bribe of Kshs. 1000,000 which he did not have. He was later taken to the police station and charged with the offence.

20. After considering the evidence, the trial court concluded that the prosecution had proved its case beyond reasonable doubt. The court stated:

“It is very clear from the evidence of PW1 and PW2 that the accused had defiled the complainant...PW2 did confirm that he found the accused on the complainant defiling her as she screamed for help. That was the same evidence that was adduced by the complainant...”

21. The appellant has faulted the trial court on many grounds. The main issue that arises for determination in this appeal is whether the prosecution proved its case against the appellant beyond reasonable doubt.

22. In a defilement charge, the prosecution has to prove three ingredients to secure a conviction, namely; age, penetration and identity of the perpetrator. The evidence of PW3 was that the complainant's age was assessed to be 13 years. There was no birth certificate or any other evidence on her date of birth. There was no dispute that the complainant was 13 years old.

23. The appellant submitted that there were contradictions regarding the complainant's age. According to him, there was evidence that she was 13 years old and again 14 years. In his view, these contradictions were material and the trial court was at fault for not reconciling them.

24. I have considered the evidence on record. The charge sheet states that the complainant was 13 years. PW1 stated that she was 5 years old but admitted that she did not know how to read and write. PW2 stated that the complainant was about 13 years. He did not state when she was born. PW3 assessed the complainant's age to be 13 years. He produced age assessment as PEX2. I have not come across evidence that the complainant was 14 years. To be fatal, contradictions or inconsistencies must be so grave and must go to the root of the prosecution case. That was not the case here. There would be much difference between the age of 13 years to that of 14 years. This is because the age is material only when it comes to sentence. On the other hand if the court were to accept 5 years as the complainant's age, it would only be detrimental to the appellant because the sentence would be severe. I do not find the contradictions, if any, fatal to the prosecution case.

25. Regarding penetration, the complainant testified that the appellant defiled her. PW2 stated that he found the appellant on the complainant. PW3, the doctor, testified that examination on the complainant revealed that she had whitish discharge on her skirt, bruises on the labia manora and lacerations on the labia majora and vagina. She also had stuck discharge on her private parts. These led him to conclude that she had been defiled.

26. The doctor confirmed that the complainant's private organ had injuries associated with defilement, namely bruises and lacerations on the labia manora and majora. There was no argument that the bruises and lacerations could have been caused by any other thing except defilement. I have perused the medical evidence P3 form produced as PEX1. It confirmed the evidence given by PW3 that the complainant had been defiled. I am satisfied that there was cogent evidence that the complainant was sexually assaulted.

27. Regarding identity of the perpetrator, the prosecution had to prove beyond reasonable doubt that the appellant committed the offence he was charged with. The complainant testified that it was the appellant who went to where she was tending livestock and defiled her. Her screamed attracted PW2. PW2 on his part told the court that he saw the appellant on top of the complainant. When the appellant saw him, he attempted to run away but he ran and apprehended the appellant. He took the appellant to the chief's office from where he was referred to the police station.

28. The complainant was clear that it was the appellant who defiled her. The appellant was arrested by PW2 who said that he had seen him with the complainant. The medical evidence confirmed that the complainant had been defiled. The appellant did not give reason why the complainant and PW2 would frame him as the person who had defiled the complainant. The offence was committed at about 6pm during day time and there was no possibility of mistaken identity. On the basis of the evidence on record, I am unable to fault the trial court regarding the identity of the perpetrator of the crime.

29. The appellant argued that he was working on someone's firm and was arrested in a hotel, implying that he was not the one who committed the crime. He did not say who the person he was working for was or call him so that his evidence could be tested. An accused is allowed to raise a defence of alibi. The general principle in law is that where an accused raises the defence of alibi, he assumes no burden to prove the truth of his alibi. The burden to disprove the alibi always lies with the prosecution. The prosecution has to disprove that alibi by adducing credible evidence placing the accused at the scene of the crime at that particular time when he claims he was elsewhere.

30. In ***Moses Nato Raphael v Republic*** [2015] e KLR, the Court of Appeal stated that ***“the burden of disproving the alibi is always on the shoulders of the prosecution.”*** In ***Victor Mwendwa Mulinge v R***, [2014] e KLR, the same court held that; ***“it is trite law that the burden of***

proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. And in Karanja v Republic [1983] KLR 50, it was held that;

“[I]n a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

31. The trial court did not see the appellant's defence and amounting to an alibi. That notwithstanding, having reviewed the prosecution evidence, I am not persuaded by the appellant's alibi. The appellant was arrested by PW2 and taken to the Chief's office and later to the police station. His claim that he was elsewhere was an afterthought. He did not raise it during cross examination and his evidence that he was arrested by some maasai men could not add up.

32. The appellant also argued that the prosecution did not call witnesses he said were material and urged the court to draw a negative inference against the prosecution. The law places the burden of proof on the prosecution. The prosecution is required to call necessary evidence to prove its case. It is however up to the prosecution to call witnesses that it finds necessary to prove its case. There is no requirement for a particular number of witnesses. It is also the law that the court can convict on the evidence of a sexual offence victim if the court believes that the victim is truthful. The trial court believed the prosecution evidence and for my part, I do not find any reason to hold that the complainant was not truthful.

33. The appellant again complained that his right to fair trial was violated in that he was not given witness statements. The right to fair trial is sacrosanct and non derogable. In Zahira Habibullah Sheikh and others v State of Gujarat and others(2006) 3 SCC 374 the Supreme Court of India stated;

“[E]ach one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and to society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried, is eliminated.”

34. Further, in Masettha v President of the Republic of South Africa [2008] ZACC 6; 2008 (5) SA 31 (CC), Moseneke DCJ stated;

“Ordinarily...courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial”

35. I have perused the trial court's record. The trial court ordered that the appellant be supplied with witness statements. The appellant took part in the trial and cross examined witnesses. He never raised the issue of witness statements again. It would be difficult for this court sitting on appeal to conclude that the appellant was not given witness statements when he did not complain to the trial court that he had not received the statements. I find no justification in this complaint.

36. The other complaint was that the charge sheet was defective. According to the appellant, the charge sheet did not have a stamp of the police station it originated from or court seal. This he argued, invalidated the charge sheet. **Section 134** of the **Criminal Procedure Code**, deals with the framing of charges and states;

“Every charge ...shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

37. The charge the appellant faced was clear and as already stated, he fully participated in the trial and asked questions which meant he understood the offence he was charged with. He also knew that it was the police who had arrested and charged him. He even knew the police station concerned.

38. I have perused the charge sheet and noted that it contains the stamp of Loitokitok police station. It does not have a court seal but has a signature. It was accepted by the court and the appellant was tried. Failure to contain the court seal could not, on its own, render the charge sheet defective where a lawful trial had been conducted.

39. Finally, the appellant faulted the trial court for imposing maximum sentence which did not conform with the right to fair trial, a non derogable right under Article 25 (c) of the Constitution. The appellant was charged under section 8(2) as read with subsection (3) of the Act. Sub section (3) provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable to imprisonment for a term not less than twenty years.

40. It is true as the appellant argued, that the trial court imposed mandatory minimum sentence of twenty years. This is against the jurisprudential shift in criminal trials with regard to sentencing. In Christopher Ochieng v Republic CRA No 202 of 2011 [2018] eKLR, the Court of Appeal stated:

“Arising from the decision in Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by section 204 of the Penal Code was

unconstitutional. The Court took the view that;

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis”.

It therefore follows, that the sentence of twenty years imposed by the trial court was unconstitutional.

41. Having considered the appeal and reviewed the evidence and reanalyzed it myself, the conclusion I come to is that the appeal against conviction has no merit and is dismissed. The appeal against sentence is allowed and the sentence of twenty years set aside.

42. Taking the complainant’s age as well as that of the appellant age and the number of years he had been in remand and even had two appeals, he is sentenced to ten years imprisonment. Taking into account the provisions of section 333(2) of the Criminal Procedure Code, the sentence of ten years shall run from 9th June 2011 when the appellant was arrested.

Dated, signed and delivered at Kajiado this 26th day of February, 2021.

E.C. MWITA

JUDGE