



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 35 OF 2019

AOJ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. C.A. Ogwenso Resident Magistrate on 25th January, 2019 in Mombasa Chief Magistrate's Court Sexual Offences Case No. 44 of 2018).

J U D G M E N T

1. AOJ alias I was the accused in Mombasa Chief Magistrate Court Sexual Offence Case No. 40 of 2018 where he was charged and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.
2. Particulars were that AOJ alias I on the 2nd day of July 2018 in Likoni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the anus of AAK a child aged 9 years.
3. Upon conviction the Appellant was sentenced to serve life imprisonment. Being aggrieved by the conviction and sentence the Appellant preferred the appeal herein on the following grounds: -
 - i. That the conduct of the trial was unfair as the trial court did not inform the Appellant of his right to choose and be represented by an advocate as required by Article 50(1)(g) of the constitution of Kenya 2010 which failure caused a miscarriage of Justice to the Appellant.
 - ii. That the trial court failed to direct the state to assign to the Appellant an advocate at the states expense and also failed to inform the Appellant of this right, while the trial court knew that proceeding with the matter without the Appellant being represented would result into substantial injustice to the Appellant contrary to Article 50(2) (h) of the Constitution of Kenya 2010.
 - iii. That the trial Magistrate erred both in fact and in law in accepting the evidence of identification of the Appellant without the details of the identification being produced to court as required by law thereby rendering the evidence on identification inadmissible hence illegal.
 - iv. That the trial Magistrate erred in fact and in law in convicting the Appellant for having defiled one AH while the certificate of Birth indicated a different name AAK making the particulars of the charge to be at variance with the evidence on record.
 - v. That the trial Magistrate erred in fact and in law in accepting an application for amendment of the charge sheet to introduce an alias after the production of the certificate of birth without firm foundation or justification.
 - vi. That the trial Magistrate erred both in fact and in law in convicting the Appellant on a charge sheet that did not exist and which was not supplied to the Appellant as required by Article 50(2) (b) & (c) of the Constitution of Kenya 2010.
 - vii. That the trial Magistrate erred both in fact and in law in convicting the Appellant on the basis of evidence of a minor which renders the evidence unsafe.
 - viii. That the trial Magistrate erred both in fact & in law in convicting the Appellant based on evidence which had significant contradictions and which has unexplained gaps.

- ix. That the trial Magistrate erred both in fact and in law in disregarding the Appellants defence and particularly that of alibi together with that of his principal JKN.
- x. That the trial Magistrate erred both in fact and in law in sentencing the Appellant to life imprisonment.
- xi. That the trial Magistrate erred both in fact and in law in convicting the Appellant despite the prosecution's failure to discharge its burden of proof.

4. The case for the prosecution at trial was that AM alias AAK was sodomised/defiled by the Appellant herein who lured him to go and get a candy when his ball rolled outside the field and he went to get it. He said the Appellant defiled him ten times and told him not to tell anyone. That when the complainant went home his mother told him to remove his costume so she could examine him and she found feaces on the costume. That when the mother wanted to beat him he told her it was Ibra who defiled him.

5. The complainant's grandmother examined him and found he had been defiled and on interrogation he said he had been defiled by I a friend to S who was a student at [particulars withheld] Secondary School. PW 4 the complainant's mother reported at Likoni police station and took the complainant to Coast General Hospital where he was examined and P3 form filled by Dr. Aisha Ali. PW 1 who upon examination found the complainant had loose anus and loose sphincter muscles with healing laceration at 4 and 6'Oclock and had healing abrasions with fecal discharge. She classified degree of injury as maim.

6. PW 5 P.C. Sebastian Mwanguri conducted investigations and preferred charges of defilement against the Appellant. The Appellant on defence denied knowing the complainant or even where he lives. He said complainant went to school with police on 16th July 2018. He said on the alleged date of offence – 2/7/2018 he was in school from 6.00am to 5.20pm as they are not allowed to leave school and he didn't leave school on that day. He said allegations against him are fabricated. He said the school has a perimeter wall and there is one main gate manned by a guard and whenever he had to leave he had to seek permission from the principal. He said the field for the school is within the school and only used by students of [particulars withheld] Secondary School. He urged the court to acquit him.

7. He said he didn't know why the complainant lied about him and he didn't know him. He said [particulars withheld] Academy was not near their school. He said S was his childhood friend and knows him well. He said he had no dispute with S. DW 2 the Principal [particulars withheld] Secondary School testified for the accused and said Appellant was a Form 2 Student at his school. He said he was a fairly disciplined student. He said the school keeps registers for attendance as well as absentee students. He said the register for 2/7/2018 Form II showed all students were present in class including the Appellant. He said students seek permission when they sought to leave school.

8. DW 2 also said that the school has a 10 feet high perimeter wall. He said that on 16/7/2018, 2 police officers went to school and asked for the Appellant but he refused to let them arrest him in school as it was against policy to release a student to police in the absence of parents. That the parents did not go to school and he released Appellant at 5.30pm and he was arrested outside the school. He said he could not confirm if Appellant left school before 5.30pm as he didn't have the gate records. He said he did not know if allegations against the Appellant were true. He said he could not verify if the Appellant was in school at 3.00pm.

SUBMISSIONS.

9. The appeal was canvassed by way of written submissions which were highlighted on 4th February, 2021. **Mr. Abubakar** submitted that the Court had a duty to inform the Appellant of his right to be represented by an advocate as provided for under Article 50 (2) (g) & (h) of the Constitution of Kenya which was not done by the trial Court hence the Appellant proceeded an entire trial without an Advocate. Reliance was placed on the case of Chacha Muita v Republic H.C.CR.C NO. 33 of 2019. Counsel further submitted that the charges facing the Appellant were of the nature that required him to be represented by an advocate and since the state did not appoint one for him, the trial before the trial Court was unfair

10. **Mr. Abubakar** submitted that on identification, the complainant said that the person who defiled him was unknown to him. That the defilement was on 2nd July, 2018 and the identification of the Appellant was two weeks later on 16th July, 2018 at the Appellant's school. Counsel submitted that no description had been given on 2nd July, 2018 since the OB where particulars of complainant were booked was not produced. Counsel submitted that it is mandatory if the victim did not know the perpetrator an identification parade must be conducted and that there is no indication of what prompted the police to go to the Appellant's school as it has not been indicated how the Appellant's name was arrived at. Therefore, the Appellant was not properly identified as the person who committed the offence.

11. **Mr. Abubakar** submitted that the charge sheet shows the complainant as AA while the complainant's mother produced a birth certificate of AAK. He also submitted that the proceedings refer to AA and not AAK hence these are two different persons. Counsel submitted that once the prosecution realized the differences in name of the complainant, it amended the charge sheet, the said amendment was in violation of section 214 of the Criminal procedure code since it was done without leave of Court.

12. Counsel submitted that the trial Court misapplied Section 124 of the evidence Act since it is unsafe to rely on uncorroborated evidence of a minor and the exception is that there must be reasons to be recorded satisfying the Court that the minor is telling the truth. **Mr. Abubakar** also submitted that there are significant contradictions that raise doubt on whether the Appellant committed the offence, for instance PW1 testified that he was taken near a river while the IO testified that he was taken to the suspects house.

13. **Mr. Abubakar** further submitted that the Appellant's defence and that of his witnesses was disregarded by the Trial Magistrate. He further submitted that S who was said to be the one who told PW2 that he is the Appellants friend and that they were students in the same school and the same class ought to have been called as a witness to confirm that indeed the Appellant left school before 5.00 pm on the day of the offence and that the Trial Magistrate was empowered under Section 63 of the Evidence Act and Section 150 of the Criminal Procedure Code to call S. **Mr. Abubakar** submitted that the sentence meted against the Appellant was excessive in consideration of Francis Muruatetu case.

14. **Ms. Mwangeka** submitted that there was no constitutional violation occasioned to the Appellant, reliance was placed on Criminal Appeal No. 120 of 2012 where the Court dealt with similar circumstances, it was held that there was no violation of Appellant's counsel because sometimes during trial Appellant engaged an advocate hence in this case Appellant chose to cross examine witness on his own and when he was placed on defence he engaged the advocate.

15. On identification, **Ms. Mwangeka** submitted that it was the victim's evidence that the Appellant identified himself as I which information was relayed to the victim's mother and that when the minor was examined by the Court he stated that I was a student at [particulars withheld] and he was a friend to S a fact which is not disputed by the Appellant. She further submitted that on 3rd July, 2018, officers visited the school and the complainant identified the Appellant by touching his hand.

16. **Ms. Mwangeka** also submitted that on name discrepancy, it is available under Section 382 of the Criminal Procedure Code and the Appellant was given an opportunity to recall witnesses. Counsel submitted that on contradictions on the issue of where the offence took place, the elements required to be proved are age, penetration and identity of perpetrator. She also submitted that the Appellants defence was thoroughly analyzed in accordance to section 11 (1) of the Evidence Act and was found to be outright lie and unbelievable.

17. **Ms. Mwangeka** submitted that no negative inference can be inferred on failure to call S to testify and relied on the provision of Section 143 of the Evidence Act. Counsel submitted that the Muruatetu case does not bar the Court from meting out maximum sentences, it declared that mandatory minimum sentences are unconstitutional and urged the Court to uphold the conviction and sentence of the trial Court.

ANALYSIS AND DETERMINATION.

18. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

“An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely 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 finding 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.....

19. I have considered the record of appeal and the submissions by Counsel and the issues that arise for determination by this Court are as follows: -

- i. Whether the amendment of the charge sheet was done in accordance with the law;**
- ii. Whether the Appellant's rights as provided for under Article 50 (2) (g) & (h) were violated/infringed;**
- iii. Whether the Appellant's identification was proper; and**
- iv. Whether the prosecution proved its case beyond reasonable doubt.**

Whether the amendment of the charge sheet was done in accordance with the law;

20. Section 214 of the Criminal Procedure Code Cap 75 Laws of Kenya provides as follows: -

Variance between charge and evidence, and amendment of charge

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

21. In light of Section 214 (1) of the Criminal Procedure Code, the prosecution is at liberty to amend a charge sheet at any time before the close of its case. from the record of appeal, I note that on 20th September, 2018, the prosecution indicated that they had amended the charge sheet to rectify the complainant's name and add an alias to the Appellant. The Appellant responded that he had no objection and he proceeded to take plea on the amended charge sheet. It is evident that the prosecution sought to amend the charge sheet, disclosed the nature of the amendment which the Appellant had no objection to and the trial Court allowed their request. I therefore find that the amendment of

the charge sheet was not only proper but was done in accordance to the law.

22. It is noteworthy that Section 214 (1) (ii) of the Criminal Procedure Code however, provides that the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate. I am of the view that had the Appellant been informed of his right to legal representation as enshrined under Article 50 (2) of the Constitution, then his Advocate would have been aware of the said provision thus better placed to decide whether or not to recall any of the prosecution witnesses.

Whether the Appellant's rights as provided for under Article 50 (2) (g) & (h) were over looked by the trial Court.

23. Article 50 (2) (g) & (h) of the Constitution of Kenya 2010 provides as follows; -

(2) Every accused person has the right to a fair trial, which includes the right--

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

24. The aforementioned provision of the Constitution makes it mandatory for an accused to be promptly informed of this right before the trial commences and/or on his/her first arraignment before the Court. Section 43 of the Legal Aid Act of 2016 outlines the duties of the Court when interacting with an unrepresented person as follows; -

“A Court before which an unrepresented accused person is presented shall:

a) Promptly inform the accused of his or her right to legal representation;

b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and

c) Inform the service to provide legal aid to the accused person”

25. I have gone through the record of appeal and on 17th July, 2018, the Appellant was arraigned in Court, he took plea and was given a mention date before Hon. Ogwenyo, RM on 18th July, 2018. On 18th July, 2018, the matter was mentioned before Hon. Ogwenyo, RM and a hearing date for 25th July, 2018 was set. From the proceedings, it is clear that the accused was not informed of his right as enshrined under Article 50 (2) (g) and (h) of the Constitution. In **Joseph Kiema Philip –vs- Republic** [2019] eKLR it was held that:

“The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010...it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation...In this instance the Appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the trial court, the Appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice.”

26. Similarly, in **Karisa Chengo & 2 others vs. Republic** [2015] eKLR, it was emphasized that;

“one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The Appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years imprisonment. The charge was a very serious one, upon being found guilty the Appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trial should have informed him of his right to legal representation and directed that he be provided with an advocate at state expense.”

27. In the present case, the accused was 19 years a form 2 student at [Particulars withheld] secondary school and was charged with the offence of defilement which when found guilty attracts a life sentence hence a very serious offence which attracts a very serious sentence. It is clear that the Appellant was not informed of this right and in fact the trial Magistrate convicted him and sentenced him to serve life imprisonment. I find that this was a violation and/or contravention of the Appellant's right to a fair hearing as envisaged under Article 50 of the Constitution of Kenya, 2010, therefore an injustice was occasioned against the Appellant before the trial Court.

Whether the Appellant's identification was proper;

28. PW5 the Investigating Officer testified that on 3rd July, 2018 accompanied by another officer, the minor and his mother, they went to [particulars withheld] Secondary school. That a form 2 student known as S was called to the Principal's office and he agreed to having a friend by the name I. That all the male students called I in form 2 were lined up but the victim did not identify any of them. The minor then described I physically by the shape of his head and S said the said person who was described was called O and not I. He further testified that the said O came and joined the other boys and he was identified by the minor as the man who had defiled him.

29. PW2, the complainant stated that a man called him for candy and when he went for the candy, the man took him near a river and defiled him. PW1 also identified the Appellant in the dock. The trial Magistrate at page 23 of her judgment held that the identification of the Appellant was corroborated by the other prosecution witnesses and that the complainant's narration leading to the identification of the accused person to be consistent.

30. In my view the way the identification process was conducted was not proper. First all the form 2 students by the name I were called out and placed on a line thereafter, the minor gave a physical description of the head of the perpetrator and S said he must be referring to O who was called alone and the complainant identified him. From the record we are not told the exact description given by the complainant that made S connect the description to the appellant herein. In view of the above, the Court is also left wondering whether the appellant herein was S's only friend at [particulars withheld] Secondary School.

31. I find that the prosecution ought to have called S as a witness since his testimony was very crucial in corroborating the identification process of the appellant herein and also establishing the connection between the appellant herein and I the person who defiled the complainant. Failure to call S as a witness was therefore detrimental to the prosecution's case and the Court can only draw an adverse inference due to the failure. In view of the fact that the complainant had been beaten by his mother, it is possible that the complainant identified the appellant since he was the last to be called into the Principal's office. In light of the above, I have no hesitation in finding that the identification of the Appellant was not proper.

Whether the prosecution proved its case beyond reasonable doubt.

32. For the prosecution to prove its case beyond reasonable doubt, it has to prove the three elements that constitute an offence for defilement. The said elements are penetration, age of the complainant and positive identification of the perpetrator.

33. Proof beyond reasonable doubt constitutes of a series of events. In this case, the prosecution proved the complainant's age by producing a copy of his birth certificate after the Court had an opportunity of looking at the original one. It proved penetration through the evidence of PW2 the complainant which was corroborated by the evidence of PW1 the doctor who examined the complainant at Coast General Hospital. For reasons cited herein above, I find that the prosecution failed to prove that the Appellant was indeed the one who defiled the Appellant, I therefore conclude that the prosecution failed to discharge its duty of proving the case against the Appellant beyond reasonable doubt.

34. In view of the fact that the Appellant's rights under Article 50 (2) (g) &(h) of the Constitution were violated and/or infringed. It is noteworthy that if this was the only ground of appeal that succeeded then this would be a case that qualifies to go for a retrial, however, coupled with the fact that the prosecution failed to prove the identity of the perpetrator beyond reasonable doubt it would be unsafe to sustain the conviction of the Appellant.

35. The upshot is that, I allow the appeal, set aside the Appellant's conviction, quash his sentence and set him at liberty forthwith unless he is otherwise lawfully held.

36. Orders accordingly.

37. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED, IN OPEN COURT THIS 19TH DAY OF MARCH, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE