



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 201 OF 2017

JUMA HASSAN HENZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. D. Mochache, Senior Principal Magistrate, delivered on 14th June 2017 in

Shanzu Snr. Principal Magistrate's Court Sexual Offence Case No. 53 of 2016).

J U D G M E N T

1. Juma Hassan Henzi preferred this appeal against and conviction and sentence in Judgement of delivered on 14th June 2017 by Hon. D. Mochache (Mrs) SPM on Sexual Offence Case No. 53 of 2016 where appellant was convicted and sentenced to serve 10 years imprisonment which of the 2 counts.
2. The appellant faced 2 charges of Sexual Assault contrary to Section 5(1) (a) of the Sexual Offences Act No. 3 of 2006. Particulars to 1st Count was that Juma Hassan Henzi on diverse dates between 24th March 2016 and 23rd May 2016 in Kisauni subcounty within Mombasa County used his fingers to penetrate the vagina of MK a girl aged 8 years.
3. Particulars to Count II were that the appellant on diverse dates between 24th March 2016 to 23rd May 2016 in Kisauni subcounty within Mombasa unlawfully used his fingers to penetrate the vagina of RK a girl child aged 11 years old.
4. Alternative counts to the 2 principal counts was the offence of committing an indecent Act with a child contrary to Section II(1) of the Sexual Offences Act No. 3 of 2016 in respect to the 2 minors.
5. The complainants upon voire dire examination took an oath & testified how the appellant sexually assaulted them every time they went to his house with his grandchildren. That he induced them to get to his house everyday and he would entitle them by buying for them food at a nearby restaurant, buy them power drinks and also give them money.
6. The complainants said the appellant had warned them not to tell anyone about what he was doing to them as he would bewitch and kill them but they eventually told teacher Johari who reported to the Head-teacher and matter was reported to police.
7. PW 3 vividly narrated what the appellant did repeatedly to them when they went to this house. They said appellant was the grandfather of F and M who are their friends although PW 1 & PW 2 also called him Babu. PW 2 also said appellant used to send them to the hotel to get some food and there was a time he gave them 50% each which got lost.
8. PW 3 the grandmother of PW 1 was called to school on 20/5/2016 where she learnt from her granddaughter teachers that the appellant had been sexually assaulting the 2 minors over a long period of time. PW 3 took the 2 minors to Coast General Hospital where they were examined and treated and P3 form duly filled.
9. PW 3 produced certificate of birth for PW 2 showing she was born a minor born on 5/4/2008. PW 4 JA a teacher at [particulars withheld] testified on 5/4/2017 that PW 1 & PW 2 were his pupils in Standard 3. He said that PW 2 reported to him that the appellant used to insert his fingers in their vaginas and that he could rub his penis on their private parts until he ejaculates after which he could give them money when he inquired from PW 1 they started blaming each other for going to Babus house. PW 1 told him PW 2 started and introduced her.
10. PW 4 reported matter to PW 5 the Headteacher and upon interrogation matter was reported to social worker – Mama Sauti. PW 4 &

PW 5 said they didn't know the old man the 2 children were referring to. PW 5 narrated that he was told that the 2 pupils could be made to make tea in appellant's house and he buys for them cakes and also give them money. PW 5 & Social Worker reported matter to police. PW 5 said he had a duty to report child molestation to police for investigations.

11. PW 6 Cpl. Elizabeth Kombe of Nyali Police Station Gender & Children Desk testified that she was the Investigations Officer in the matter and that Elizabeth & Margaret went to her office with 2 children PW 1 & PW 2 who alleged the appellant had sexually assaulted them.

12. On interrogation she established the appellant had been entering the children with gifts, food & money to go to his house between March 2016 to 23rd May 2016. PW 6 took the children to hospital where they were examined and treated and P3 forms filled. PW 6 said appellant was identified by the 2 children and he was arrested.

13. PW 7 Dr. Tima Nassir from Coast General Hospital produced P3 forms filled by Dr. Jamuora Osman upon examination of PW 2 aged 8 years old. It was found her hymen was perforated with a healing scar. The child was treated for sexually transmitted infection and counselled. She also produced P3 form in respect to PW 1 in which it was found her hymen had irregular edges with a healing scar an indication of penetration.

14. PW 7 also produced PCR forms. Age Assessment Report by Dr. Sumbi of Coast General Hospital was also produced by PW 7 Dr. Tima Nassir. At the close of prosecution case accused was placed on his defence and he gave statement on oath. He said he was selling GNLD products. He said he had a house in Bombolulu. He said PW 1 & PW 2 lied in court. He said he didn't know Monica PW 2 and she was not his neighbour.

15. He said that the place that PW 2 alleged she was defiled from, was a public place where he showed videos. He said if he had sexually assaulted the girl she could not be going to his house every day. He said that when PW 2 testified on 10/3/2017 her mother beat her up for telling the court a different story from what she had been told to come and say. He said he didn't commit the offence. He said on the material day he was in Lunga Lunga where he stayed from 19th to 28th May 2016.

16. The appellant claimed that he travelled to Mombasa on 28th May when he was arrested by police officers. That he was however released and told to report the following day. That when he reported to police he was arraigned in court on 30/5/2016. He said that he was fabricated by neighbours because he was close with police officers and the children were coached to fabricate him so that he can vacate from the area.

17. In cross-examination, he said his grandchildren go to [particulars withheld] Primary School. He admitted that Monica PW 2 is a friend to his grand-daughter and that they used to go for money. He said he gave her a place of paper to go and pick soda from the kiosk.

18. He said he lived in Likoni but operated video in his business premises in Bombolulu. He said there is a room in the hall where the boys who operate video sleep. He admitted he is known as Babu by people. He said he didn't know PW 1. He said he had no grudge against PW 1 & PW 2 but neighbour had something against him. He said he used to go to Bombolulu every weekend.

19. DW 2 said she knew nothing about the case herein but appellant constructed a house for her between 19th and 28th May 2016 in LungaLunga. The appellant was aggrieved by the continuation and sentence and in his amended grounds of appeal urged the court to quash the conviction and set aside the sentence.

20. His grounds were:-

i. That the learned trial Magistrate erred in law & fact in convicting him without considering that he was denied a right to fair trial contrary to Article 50(2)(b).

ii. That the learned trial Magistrate erred in law & fact in convicting him without considering that the sentence meted on him was harsh, excessive, unjust, unfair and unconstitutional basing on the circumstances of the case.

iii. That the learned trial Magistrate erred in law & fact in convicting the appellant without considering his reasonable alibi defence.

21. This appeal was canvassed by way of written submissions. The appellants submissions were that the court read to him the offence in only one count but went ahead to convict him for the offences in counts 1 & 2 and it was therefore not clean as to which charge he took plea.

22. He said this was a violation of his constitutional rights as he was convicted on a charge he did not plead to and he should therefore be acquitted. In regards to excessive and harsh sentence the appellant argued that the use of the words "liable upon conviction to imprisonment gives room to exercise of judicial discretion.

23. He relied on the holding of **Sir Clement De lestage vs Republic in Opoya vs Uganda [1967] E.A. 75 at page 754**. It was appellant's submissions that mandatory sentences do not permit the court to consider peculiar circumstances of each case in order to arrive at an appropriate sentence. He argued that the provisions of the Sexual Offences Act does not meet the dictates of the constitution.

24. The Appellant also relied on the Supreme Court holding in **Francis Karioko Muruatetu & Another vs Republic [2017]**. The appellant also relied in the holding in **Nzombo Mwachizi Mageza vs Republic HCCR Appeal No. 45 of 2016 at Mombasa** where sentence of 15 years imprisonment for offence under Section 8(1) & 8(4) of the Sexual Offences Act was revised to 3 years imprisonment.

25. The appellant also submitted that his alibi defence was undisputed and that the onus to prove that he was at scene shifted to the prosecution. He relied in the authorities of **Wangombe vs Republic [1980] KLR 149** and **Victor Mwendwa Mulinge vs Republic [2014] eKLR** where it was held that burden of proving falsity of an accused persons alibi lies on the prosecution.

26. He said the condition is that as long as prosecution is put on notice that defence of alibi is likely to be raised, it is sufficient in **Festo Andrioa Asenua vs Uganda CR. Application No. 1 of 1998**, it was held:

“.....for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial or any prohibition of belated disclosure as in the UK statute cited above such belated disclosure must go to the credibility of the defence.”

27. Further submission by appellant was that defence & alibi must be proved in a balance of probabilities and that for it to be rejected, it must be incredible – **Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR**. The appellant further argued in reliance to the authority in **Adedeji vs state [1971] 1 ALL N.L.R. 75** that:

“failure by police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed”.

28. The appellant also relied on the **South African Authority of Ricky Ganda vs The state [2012] ZAFS HCC 59** to support his defence of alibi. The Respondents submissions were to the effect the charges as drafted sufficiently disclosed the offence for which the appellant was charged as provided for under Section 134 of the Criminal Procedures Code.

29. It was argued the appellant was sure of the charges he was facing and that trial court found the prosecution had proved both counts of sexual assault. It was also argued the appellant was supplied with all the materials the prosecution was intended to rely on beforehand and he extensively cross examined each prosecution witness.

30. It was submitted that in event records show he didn't plead to both counts then it didn't prejudice him or her defence at all as this matter went to full trials and faced his accusers in court and cross examined them. The prosecution urged the court to find that this ground cannot be sustained.

31. On the ground that the sentence was harsh and excessive, it was submitted that 10 years concurrent sentences was lenient on the appellant had not demonstrated any factors in mitigation to enable the court to intervene and revise sentence.

32. On defence of alibi the Respondents argued that the same covered only a few days out of the diverse dates over a period of around 2 months within which he repeatedly sexually assaulted the complainants. It was the Respondents case that PW 1 & PW 2 were specific about the incident of 24th March 2016 when the appellant lured them to his bedroom and sexually assaulted them.

33. It was submitted that appellant didn't account for his whereabouts in March 2016 during which period the offence was committed. It was submitted that the trial Magistrate went to great lengths to state the law on alibi and the authorities in support thereof. The trial Magistrate found that the defence had been contradicted by the appellants admission that he could give PW 2 written notes to go and get foodstuff from the shop.

34. It was submitted that his own defence placed him at the scene of offence. It was also submitted that the goods goodies that the appellant gave the minors were incidental to the sexual assault.

35. The Respondent submitted that the trial Magistrate had an opportunity to see and hear the witnesses and take down evidence and her finding should not be interfered with as the evidence of the prosecution was simply overwhelming. It was urged that appeal be dismissed.

36. Being a 1st Appellant Court the duty of this court as held in **Okeno vs Republic** and **Kiilu & Another vs Republic [2005] 1 KLR 17Q** is to re-examine, re-evaluate and analyze the evidence in the lower court record as well as the judgment of the trial court and having done so consider the grounds of appeal and submissions by the appellant and Respondent and weighed against each other come up with this courts own independent findings and conclusions on both facts and law.

37. The issues for determination are whether:-

§ The charges against appellant sufficiently disclosed offence for which the appellant was charged.

§ Whether charges in both courts were read to the appellant and if not whether that failure prejudiced the appellant's trial.

§ Whether the appellants defence of alibi was considered and whether the same satisfactorily displaced the appellant from scene of the offence.

§ Whether the sentence of 10 years in each count to run concurrently was harsh and manifestly excessive.

38. The offence for which the appellant was charged in the 2 counts is sexual assault as provided for under Section 5(1) (a) (i) and (2) of Act No. 3 of 2006. According to PW 1 & PW 2 the appellant used his grand-daughter who were friends to the complaints and went to the same school to lure them to his house and when he started interacting with them he used goody of goodies to lure them into coming to see him

frequently and he got the opportunity to sexually assault the 2 minors.

39. The 2 complainants said that appellant fondled their buttocks, inserted his finger on their genitalia and rubbed his genital organ on them until he ejaculated and he gave them food and sometimes money and he told them not to tell anyone. It would appear that one child was introduced to the act by the appellant and the 1st girl introduced her friend. According to PW 4 the Complainants teacher it is PW 1 Monica who started going to appellants place and later introduced PW 2. It is PW 2 who reported matter to PW 4 who in turn reported to the Headteacher PW 5 and matter was reported to police and appellant arrested.

40. Indeed when the 2 children were subjected to medical examination it was established they had been assaulted sexually. EXP 2, 3 & 4. PW 7 said one of the children even had an infection when urinalysis was done under microscope. The charge against the appellant therefore sufficiently disclosed an offence under Section 5(1) (a) (ii) & (2) of Act No. 3 of 2006.

41. The Appellant was known to the 2 children and he even admitted that he would give Monica –PW 1 a piece of paper to go and pick soda from the kiosk and that he didn't give her money. Appellant is not related to any of the complainants and one would wonder on what basis he was giving the children a piece of paper to go and pick soda from the kiosk if it was not to continue with his sexual escapades.

42. The appellant denied the charge when same was read to him and copies of charge sheet, statement and documentary exhibits were supplied to him indicating that he was facing an offence of sexual assault in 2 counts and the 2 complainants testified to that effect as well as the 2 teachers – PW 4 & PW 5 who reported the matter to the police. The accused also gave his defence in respect to the 2 counts and it is an afterthought for him to claim that he was denied a right to fair hearing under Article 50 (2) (b) of the constitution.

43. The offence under Section 5(1) (a)(i) & 1(2) provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years imprisonment but which may be enhanced to imprisonment for life. The appellant was sentenced to serve 10 years imprisonment in each of the 2 counts to run concurrently.

44. In passing the sentence the trial Magistrate considered the appellants mitigation and the fact that the complainants were young enough to be his grandchildren and that they will be traumatized for life. Had the trial Magistrate ordered that the sentence runs consecutively this court would have considered it to be harsh but concurrent sentence in a situation where vulnerable children were abused by a person who stands in the position of their grandfather and therefore owed a duty of care is commensurate to the offence and reasonable.

45. The appellant claimed he was in Lunga Lunga between 19th to 28th May 2016 when offence was alleged to have been committed and that therefore he was not at the scene. He didn't say what he was doing in Lunga Lunga and the evidence of DW 2 that he was constructing for her a house is not corroborated. The appellant didn't raise this defence while cross examining the complainants or even the Investigating Officer and there is no evidence that he travelled to Lungalunga and the same could not have been regarded as satisfactory defence of alibi. The trial Magistrate found that based on evidence of DW 2 she could not tell whether appellant committed the offence or not as she could not monitor lies movements all the time

46. The upshot is that the appeal herein fails and is dismissed. The appellant should serve the sentence of 10 years meted out against him fully.

Right of Appeal – 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MAY, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE