



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 110 OF 2018

(Appeal arising out of conviction and sentence of Hon. Biwot P.C. (Senior Principle Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 128 of 2017 delivered on 10th December 2018)

DANIEL SIMIYU SIRENGO APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Daniel Simiyu Sirengo, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 22nd day of October 2017 at [particulars withheld] Village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of, BCS a child aged nine (9) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 22nd day of October 2017 at [particulars withheld] Village within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely the penis and the genital organ namely the vagina of BCS, a child aged nine (9) years. On arraignment, the Appellant pleaded not guilty to the two charges. After full trial, the Appellant was convicted of the main count as charged and sentenced to serve **life imprisonment**.

The Appellant is aggrieved by the respective conviction and sentence hence this Petition of Appeal. The grounds in support of the Petition are that the medical evidence was not weighty, the Prosecution failed to adduce evidence that met the required standard of proof, the age of the complainant and penetration were not proved, the charges were defective, the trial court failed to give due consideration to his defence, the *voire dire* was not done in accordance with the required standard and finally that the trial court failed to align itself with developing jurisprudence on sentencing. Consequently, the Appellant urged the court to allow the Appeal, quash the conviction and set aside the custodial sentence that was imposed and set him at liberty.

During the hearing of the appeal, the parties herein informed the court that they will rely on their written submissions. The Appellant submitted that the charges were defective for two reasons; firstly, the words 'intentionally' and 'unlawfully' were omitted in the charge sheet. Secondly, having been charged under **Section 8 (3)** of the **Sexual Offences Act** the court ought to have prescribed a punishment of twenty (20) years imprisonment. He faulted the trial magistrate for being biased since he ruled that the charges ought to have been brought under **Section 8 (2)** and the same having not being complied did not occasion a miscarriage of justice. He observed that PW5 did not set out his qualifications as an expert witness. His evidence was not credible since he is not a laboratory technician. On age, the prosecution ought to have tabled a birth certificate instead of an age assessment report. The trial court erred in not confirming whether the complainant understood the importance of telling the truth during *voire dire*. On the harshness of the sentence, the Appellant posited that the court failed to consider the recent decisions asserting that mandatory sentences should not be imposed and that the court should have taken that into consideration when imposing his sentence. Finally, the Appellant asserted that his defence was cogent, and in spite of its credibility, the trial magistrate dismissed it.

Mr. Omooria for the State opposed the appeal. He stated that the prosecution proved that the complainant was a minor relying on the age assessment report indicating that the complainant was 8 - 9 years old hence below the age of majority. Further, the court was satisfied as to her age having seen her physically at trial. On penetration, the prosecution submitted that bearing in mind the principle of absolute penetration, it had proven that indeed there same was answered in the affirmative. This is because the complainant confirmed that the Appellant put his penis into the complainant's vagina. It was painful. PW5 observed injuries and inflammation of the vaginal opening. The area was lacerated with a torn hymen. On identification, the prosecution relied on the complainant's testimony that she has known the Appellant prior to the sexual assault their relative. PW2 placed the Appellant at the crime scene and knew him as she had hosted him in the house.

Turning to the Appellant's defences, Learned Prosecutor submitted the evidence of the P3 form was sufficient medical evidence the absence of treatment notes notwithstanding. The same was uncontroverted at trial. The Appellant's defence was weak. Any defectiveness in a charge

was curable under **Section 382** of the **Criminal Procedure Code**. He was of the view that the sentence meted on the Appellant was proper and urged the court to dismiss the appeal and uphold the conviction and sentence.

This being a first appeal, it's the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court before reaching its own independent determination whether or not to uphold the conviction. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**See Njoroge -vs- Republic [1986] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established the charges brought against the Appellant to the required standards of proof beyond any reasonable doubt.

The prosecution called a total of six (6) witnesses in a bid to establish the case. The complainant, PW1 testified that on 22nd October 2017, she was sleeping in her grandmother's house. At midnight, the Appellant walked into her room in the absence of her grandmother. She was at the time helping a cow calve down. He then undressed her and sexually assaulted her after promising to buy her a phone. She felt pain and screamed. Her grandmother heard the scream and came to her room. She then called neighbours as the Appellant retreated to his room. She was taken to hospital the next day and treated. The Appellant was arrested in the presence of PW3. A P3 form was dully filled.

PW2, JM, the complainant's grandmother, testified that the minor was aged ten (10) years old at that time and lived with her. On 22nd October 2017, the Appellant visited him. He was with his sister. She then put the complainant to sleep with the Appellant's sister. She was the complainant's age. She showed the Appellant another room then went to assist her cow calve down. She heard the complainant scream. She rushed back to the house only to find the Appellant had defiled the complainant. She testified that the Appellant was related to her husband. The Appellant was apprehended and taken to the Police Station. She then took the complainant to hospital.

PW3, BM, the complainant's uncle, (brother to the complainant's deceased father) testified that he was asleep on 22nd October 2017 when he was awoken by his mother, PW2. He went to her house and found that the Appellant had been arrested. There were also other members of the public including the village elder. They wanted to administer mob justice on the Appellant. He was taken to the Police Station. He then accompanied PW2 and PW1 to Kitale District Hospital.

PW4, Dr. Sammy Osore, a dentist, produced the age assessment report PExh 2. He examined the complainant to determine her age. He took an x-ray to establish teeth development. He found that the roots were visible, she had mixed teeth (milk teeth and permanent teeth); her molars milk teeth were present. The incisors lower and upper teeth were permanent which usually erupts at six (6) years of age. Premolars were still in the roots; they had not germinated. The 1st molars had not developed roots. He thus concluded that the child was approximately 8 – 9 years old.

PW5, Peter Masake, a Clinical Officer at Kitale County Hospital, testified that he examined the complainant. She was in the company of PW2 and neighbour. She stated that she was in class 2 pupil. On the night of 22nd October 2017, she was sexually assaulted by a relative. He observed that her genitalia had not fully developed. The area had injuries. There was inflammation of the vaginal opening. The area was lacerated and had blood stains. The hymen was torn. Her injuries were classified as fresh. He concluded that she had been penetrated. There was no spermatozoa. He produced the P3 form as PExh 1.

PW6, CPL Paul Karanja, the investigating officer, testified that he took over from his predecessor SGT Kibowen in this case. He stated that the complainant recorded a statement. On 22nd October 2017, the Appellant sought accommodation at PW2's house. He sexually assaulted PW1 at night. The matter was booked at Fig Tree Police Post. The Appellant was taken there by members of the public. The complainant was issued with a P3 form. Her age was assessed at nine (9) years. The Appellant was subsequently charged.

The Appellant was placed on his defence. In his sworn testimony, he denied the charges. He stated that on 21st October 2017, he was visiting his cousin at [particulars withheld] Village. He found his *shemeji*. He was taken round as he wanted to lease land. He then went home at 7.00 p.m. He stayed at his relative's house in the company of two boys. He then had supper after which he slept in the homestead at his brother's room. He was then sent to fetch water as the other two boys brewed *chang'aa*. Upon his return, he slept in the kitchen as there was no space. He then heard a noise in the middle of the night. He went ahead to investigate. He was beaten. He was shocked when he became the suspect. He was accused of protecting his brother's wife. He was then taken to Fig Tree Police Post and charged with the current offence. He stated that PW2 is his sister-in-law. He did not know the complainant prior to that day. He blames his sister-in-law for this woes he attributed to her infidelity. In essence, he was saying that the charges were framed on him by the said sister-in-law to conceal her infidelity which she did not want her husband to know.

For the prosecution to sustain a conviction on a charge of defilement, the prosecution must establish that the following three ingredients which must be established to the required standard of proof beyond any reasonable doubt:

1. Age of the complainant
2. Penetration
3. Identification of the perpetrator

As regards the complainant's age, PW1, who was the complainant testified that she was a class 2 pupil. PW2, the complainant's grandmother testified that she was aged ten (10) years old at that time. She testified that she had been living with the complainant. PW4 on the other hand testified that the complainant was between the ages of eight (8) and nine (9) years after conducting an age assessment. The age assessment report was produced. The Appellant disputed this mode of age determination. According to the Appellant, the court ought to have relied on the complainant's birth certificate. In that respect, this court agrees with the holdings by the Court of Appeal in Uganda in **Francis Omuroni -vs- Uganda Court of Appeal; Criminal Appeal No. 2 of 2000** which held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”

This court therefore disagrees with the Appellant’s assertions that no conclusive proof in the form of a birth certificate was tendered in court to prove the age of the complainant. The age of the complainant was established.

The next issue is penetration. Section 2 (1) of the Sexual Offences Act defines “penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

PW1’s testimony gave an account of the sexual encounter with the Appellant. She testified that she was sexually assaulted by the Appellant on the night of 22nd October 2017. He sexually assaulted her. She felt pain. She screamed. When PW5 examined the complainant he established that her hymen had been torn. The tears were fresh. The vagina was blood stained. This was conclusive evidence of penetration. This court finds that there was evidence of penetration on account of the two witnesses. The Appellant challenged PW4’s evidence. He stated that no semen samples were collected. This in his view vitiated the testimony. This court finds the Appellant’s view to be without merit. There was overwhelming evidence based on the testimony of the said witnesses that there was indeed penetration.

The third element is the identification of the perpetrator. PW1 testified that she knew the perpetrator as he spent the night at PW2’s house on the material night. PW2 testified that he found the Appellant at the crime scene as was his in-law. The Appellant further confirmed that he was PW2’s in-law and spent the night there. Having considered the entire evidence, this court concludes that there was no doubt that the Appellant was the perpetrator of the crime. He was found red handed by PW2 and PW4. He was their relative so there can be no case of mistaken identity. This court finds no reason to disturb the trial court’s sound finding in their regard.

Turning to a ground of appeal put forward by the Appellant, the Appellant contends that no proper *voire dire* was conducted. Prior to the complainant being allowed to adduce her testimony, the trial court did not specifically inquire into the consequences of not telling the truth. In the absence of such inquiry he argued, it must be concluded that *voire dire* was not properly conducted. The purpose of *voire dire* was explained in **Johnson Muiruri vs Republic [1983] KLR 445** as follows:

- 1. “Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.***
- 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.***
- 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.***
- 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.***
- 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”***

Although the trial court did conduct *voire dire*, it was clear from the record that sufficient questions were not put to the complainant to establish whether she understood the meaning of the oath before she was asked to give sworn testimony. However, this court holds that from the evidence of the complainant, it was clear that she was sufficiently intelligent and gave cogent and truthful testimony. The Appellant was given the chance to cross examine the complainant. His right to fair trial was guaranteed. Nothing turns on this ground of appeal and the same is disallowed.

The Appellant further contends that the charges were defective for two reasons:

1. The charges levelled against him cited the provisions of Section 8 (3) of the Sexual Offences Act. Consequently, he argued, the trial magistrate had no business ruling in favour of the prosecution and proceeding to amend the said charge and convicting him under **Section 8 (2) of the Sexual Offences Act.**
2. The words ‘unlawfully’ and ‘intentionally’ were omitted from the particulars of the charges.

It is imperative to firstly ascertain what elements qualify to have a charge declared fatally defective. The Supreme Court of India in **Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391]**, held that:

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

Similarly, the Court of Appeal in **Isaac Nyoro Kimita & another vs. R [2014] eKLR** held thus:

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge?”

In **Benard Ombuna v Republic [2019] eKLR**, the Court of Appeal stated thus:

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”

Of importance is whether any prejudice was occasioned upon the Appellant. The Appellant must be so prejudiced his right to fair trial under **Article 50(2)** of the **Constitution** was infringed. This court finds that the Appellant understood the substance of the charge and the particulars thereof. In fact he not only pleaded “not guilty” to the charge but also gave a sworn testimony denying the charges leveled against him. He further did not object to any of the particulars raised at trial including the issues he is now raising on appeal. The failure to indicate the words ‘intentionally’ and ‘unlawful’ did not render the charges defective. No prejudice was occasioned to the Appellant. There was no miscarriage of justice. The ground must fail.

The other ground of appeal was that the prosecution who produced the medical evidence was not a competent medical witness. On re-evaluation of the evidence, this court finds no merit with his submission. The witness was qualified. He personally examined the complainant. He produced the medical evidence in court. The Appellant did not challenge the witnesses’ testimony during trial. The ground is clearly an afterthought. Having re-evaluated the evidence adduced before the trial court, this court for the above reasons holds that the Appellant’s appeal against conviction in respect of the above charge lacks merit and is hereby dismissed. This court shall not interfere with the conviction of the trial magistrate.

As regards sentence, the Appellant was under **the Sexual Offences Act** sentenced to life imprisonment. **Section 8 (2)** of the said Act provides as follows:

“A person who commits an offence of defilement with a child below the age of eleven years is liable upon conviction to life imprisonment.”

The Appellant appeals against the conviction and sentence and seeks that they both be quashed. The trial court stated that it was bound by law when sentencing the Appellant to serve life imprisonment. The Appellant argues that the court ought to have considered the decision in Muruatetu and subsequent decisions in **Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri -Vs- R, Kisumu Criminal Appeal No. 93 of 2014**, where the court declared mandatory sentences unconstitutional. This was however the position before the Supreme Court clarified the above decision in a recent direction issued on 6th July 2021 in the same case.

The Supreme Court held that the holdings in the above case did not affect mandatory sentences under the Sexual Offences Act. In the premises therefore, the court finds no fault with the decision of the trial court when it sentenced the Appellant. The sentence was legal. The Appeal against the sentence lacks merit and is hereby dismissed.

It is so ordered.

DATED AT KITALE THIS 26TH DAY OF JULY 2021

L KIMARU

JUDGE