



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 68 OF 2019

JAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon R. Sang (SRM) delivered at Maseno in the Principal Magistrate's Court in Criminal Case No 934 of 2014 on 12th January 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (4) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 30th day of July 2014 at around midnight at [Particulars withheld] village, in Osiri Sub location within Kisumu West Sub County of Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of FAA (hereinafter referred to as "the Complainant"), a child aged sixteen (16) years.
2. He had also been charged with an alternative 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 30th day of July 2014 at around midnight at [Particulars withheld] village, in Osiri Sub location within Kisumu West Sub County of Kisumu County, he intentionally touched the Complainant's vagina.
3. He was tried and convicted by Hon R. Sang, Senior Resident Magistrate for the offence of incest as the Learned Trial Magistrate found the same to have been more appropriate and sentenced him to serve twenty (20) years imprisonment.
4. Being dissatisfied with the said Judgement, on 4th December 2019 he lodged this appeal. His Petition of Appeal was undated. He set out five (5) grounds of appeal challenging both conviction and sentence. He listed five (5) Amended Grounds of Appeal in his Written Submissions.
5. His undated Written Submissions were filed on 30th June 2021. Notably, the State's Written Submissions were dated 26th July 2021 and filed on even date.
6. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
8. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

9. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that have been placed before it for determination are:-

a. **Whether or not the Prosecution had proved its case beyond reasonable doubt.**

b. **Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful and or warranted.**

10. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

11. Grounds of Appeal Nos (1), (2) and (4) were dealt with together under this head as they were all related.

12. It was not clear to this court if the Appellant had abandoned the original Grounds of Appeal. Be that as it may, this court noted that the said amended Grounds of Appeal and Written Submissions solely focused on review of sentence, which has been addressed later on in this Judgment.

13. Be that as it may, this court looked into the question of whether or not the Prosecution had proved its case to the required standard as the Appellant asserted that the Trial Magistrate Court believed that he was guilty of the said offence, that was not sufficient. He averred that he was entitled to be given the benefit of doubt. He had asked this court to consider that there were a number of extenuating factors that could lower the degree of blame. He attributed the charge to the misunderstanding that he had with the Complainant's mother.

14. He added that the Trial Court did not explain to him of his right under the provisions of Section 200(3) of the Criminal Procedure Code to re-summoning the witnesses for further cross-examination. In this regard, he relied on the case of Antony Musee Matinge vs R (eKLR citation not given) in which failure to inform an accused person therein was found to have been fatal to the prosecution's case therein.

15. The State was categorical that the Prosecution proved the ingredients necessary to prove the offence of defilement beyond reasonable doubt as contemplated in Section 107 (1) of the Evidence Act.

16. It submitted that age of the Complainant was proven as she confirmed that she was sixteen (16) years old. It pointed out that the doctor who examined her also testified that she was a minor. It added that No 86662 CPL Rael Ambasa (hereinafter referred to as "PW 3") produced a baptismal card that showed that the Complainant was born on 22nd August 1998 which meant that she was sixteen (16) years at the time of the offence. It submitted that the Complainant's age was therefore proved beyond any reasonable doubt.

17. It contended that the Complainant testified that the Appellant was her father and that even though she did not live with him while younger, she had lived with him for four (4) years together with her mother. It was the State's contention therefore, that the Appellant and the Complainant were very well known to each other.

18. It asserted that penetration was also proven beyond reasonable doubt as the Complainant testified how the Appellant defiled her while her mother was away on 30th July 2014. It added that the P3 form produced proved that her hymen was broken.

19. It was categorical that the Appellant's defence was simply a denial that did not outweigh the evidence by the Prosecution and that at no time did the Trial Court shift the burden of proof to the Appellant.

20. The Complainant herein testified that on 30th July 2014, she was in their one-roomed house sleeping with her younger siblings and father, the Appellant. She further testified that her mother was not present on that material night. She stated that she was in a black skirt and orange top and at about midnight, she felt someone pull her clothes. She stated that she woke up and screamed but he told her to remain silent because he was going to do what he had decided to do.

21. She further averred that he removed her panty which got torn and then she held his penis but he rebuked her to leave it saying that he was the one on the wrong and not the penis. She told the Trial court that he inserted his finger into her vagina, caressed her breasts, pulled her, parted her legs and inserted his penis into her vagina while lying on top of her. It was her testimony that he was on top of her for twenty (20) minutes.

22. Her further evidence was that she called her mother the following morning and told her what had transpired. Her mother then took her to Chulaimbo Hospital. They also reported the matter to the Police Station where the P3 Form was filled.

23. When she was Cross-examined, she was emphatic that the Appellant was her father and that she had never known any other father. She also stated that she had started living with him four (4) years prior to the incident herein.

24. Mose Jones (hereinafter referred to as "PW 2") was a Clinician at Chulaimbo Hospital. He confirmed having examined the Complainant, then aged sixteen (16) years who had been brought under the escort of CPL Ambasa.

25. He told the Trial court that the Complainant presented with a history of sexual assault by a person known to her and that she had sustained injuries to her vagina and labias. He added that on detailed examination, he observed that there was a blood-stained blue pant, tears on the lower parts of the vagina, redness and tenderness on the vagina and blood on the outer vagina. He asserted that urinalysis showed presence of red blood cells but the HIV and Syphilis tests turned out negative.

26. He explained that PW 1 was put on Post Exposure Prophylaxis and drugs to prevent pregnancy and antibiotics to prevent STIs. He concluded that the hymen was broken and confirmed that there was penetration. He produced the treatments notes and the P3 form as

exhibits in the case.

27. Rael Ambasa, No 86662 CPL, the Investigation Officer (herein after referred to as PW3) testified that on 31st July 2014 the Complainant and her mother visited the Gender Desk at Maseno Police Station. The Complainant was crying. Upon asking her what was wrong, the Complainant told her that her father had defiled her on the night of 30th July 2014. She added that they lived on an island and that her mother was across the lake that night. She also rehashed the Complainant's evidence.

28. She further testified that she booked the report and took the Complainant to hospital and also arranged for the Appellant's arrest through his area Chief. She added that the Complainant did not have a birth certificate but that she had a baptismal card showing her date of birth as 22nd August 1998, which she adduced as evidence in the case. In her Cross-examinations, she reiterated that she recorded the report and took the Complainant to hospital.

29. In his sworn evidence, the Appellant testified that on the material day he was working on his farm, and was surprised when he was arrested and charged with the offence. He denied having committed the said offence.

30. Section 8(1) of the Sexual Offences Act provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

31. To prove an offence of defilement, the Prosecution must prove that there was an indecent act or an act which caused penetration, the victim must be a minor and that the offender must have been identified and/or recognized by the victim.

32. Having carefully scrutinised the evidence adduced on trial, this court was satisfied that there was penetration. The treatment notes, which were tendered in evidence by PW 2 showed that there was penetration of Complainant's vagina as there were tears, redness and tenderness in her vagina and her hymen had broken.

33. The Complainant's baptismal card showed that she was sixteen (16) years of age at the material time. The Appellant did not deny and/or challenge this fact. This court was satisfied that the evidence of the baptismal card that was adduced in court showed that the Complainant was a minor.

34. Notably, Rule 4 of the Sexual Offences Rules, 2014 provides that:-

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents.”

35. This court thus associated itself with the holding in the case of Musyoki Mwakavi vs Republic [2014] eKLR where the court held that apart from medical evidence, the age of the victim could also be proved by birth certificate, the victim's parents or guardian and by observation and common sense (emphasis court).

36. It was evident that the Appellant and the Complainant were known to each other. The Appellant did not deny this fact. This court found and held that identification was through recognition, which was proved beyond reasonable doubt as the Appellant was the Complainant's father.

37. This court thus came to the firm conclusion that the Prosecution's evidence was cogent, consistent, trustworthy and clear. There were no contradictions which if resolved in the Appellant's favour would create a doubt in the Prosecution case. On the contrary, the Appellant's defence was a mere denial and could not displace the Prosecution's case.

38. This court was therefore satisfied that the Prosecution proved that the Appellant was guilty of the offence of defilement beyond reasonable doubt.

39. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (4) were not merited and the same be and are hereby dismissed.

II. SENTENCE

40. The Appellant's Ground of Appeal No (3) and the Amended Grounds of Appeal Nos 1, 2, 3, 4 and 5 in his Written Submissions were dealt with under this head.

41. The Appellant submitted that he was a first offender and remorseful of the events that led to the offence. He contended that he had undergone rehabilitation and reform programs within the prison facility such as craftwork with the aim of acquiring skills which he believed would help him integrate well back to society. He urged this court to consider the case of Simon Kipkurui Kimoni vs R (eKLR citation not given) where the court held that the circumstances of the case and the mitigating factors of the Appellant had to be considered.

42. He argued further that this court pursuant to Article 165 and 23(f) of the Constitution of Kenya 2010 and Sections 354, 361 and 364 of the Criminal Procedure Code, has the capacity to deal with matters of severity of the sentence and reduction of the same.

43. He contended that mandatory minimum sentences were declared unconstitutional. In this respect, he relied on the case of Christopher Ochieng vs Republic [2005] eKLR where it was held that mandatory minimum sentences disregard all individual characteristics and such a

system can result in gross disregard of the right to dignity and appreciated by the Kenya Judiciary Sentencing policy guidelines. He also relied on the case of **Hamisi Bakari vs R [1987] eKLR** where the court held that mandatory sentences apply with equal to minimum sentences.

44. On its part, the State opposed the Appellant's appeal on sentence. It argued that the Appellant had failed to demonstrate how the sentence imposed on him was unconstitutional. It added that Section (4) of the Sexual Offences Act provides for the minimum sentence of fifteen (15) years upon proof of defilement of a child between the age of sixteen (16) and eighteen (18) years. It was the State's contention that a punishment to be described by court is entirely dependent on its discretion.

45. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in **Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010** as was cited in **NNC vs Republic [2018] eKLR** when it had this to say:-

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

46. Notably, Section 8(4) of the said Act provides that:-

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

47. As the court had determined hereinabove that the Complainant was a minor and was defiled by her father, this court was persuaded that the Trial Court exercised its discretion by observing that given that the relationship between the Appellant and the Complainant was that of a father and a daughter, the proper offence the Appellant ought to have been charged with was incest which attracts a penalty of life imprisonment.

48. Section 20(1) of the Sexual Offences Act provides as follows:-

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

49. The fact that the Appellant had engaged in various rehabilitative reforms while in prison was immaterial as this court thus came to the firm conclusion that the sentence of twenty (20) years imprisonment that the Trial Court imposed was lawful in the circumstances. The said sentence was also not harsh and/ or excessive warranting any interference and/or disturbance by this court.

50. In the premises foregoing, this court found that the Appellant's Ground of Appeal No (3) and Amended Grounds of Appeal Nos 1, 2, 3, 4 and 5 were not merited.

DISPOSITION

51. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 4th December 2019 was not merited. The conviction and sentence be and are hereby affirmed as it is safe to do so.

52. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE