



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 3 OF 2020

JOO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. C.A. Ogweno Resident Magistrate, delivered on 14<sup>th</sup> November 2019 and sentenced on 16<sup>th</sup> January 2020 in Mombasa Chief Magistrate's Court Sexual Offences Case No. 101 of 2018).

**J U D G M E N T**

1. The Appellant JOO was accused in Mombasa CMC Sexual Offence Case No. 101 of 2019 with 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 JOO on the 14<sup>th</sup> day of November 2018 within [particulars withheld] area in Changamwe Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the anus of VM. a girl aged 11 years old.

3. In the alternative he was charged with offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Upon conclusion of trial the Magistrate found appellant guilty and convicted him and he was sentenced to serve 30 years imprisonment.

4. The Appellant was aggrieved by the conviction and sentence and in his amended grounds of appeal he filed together with submissions on 22/7/2021 said that:-

**i. The learned trial Magistrate erred in law & fact by failing to comply with the requirements of section 19 of the oath & statutory Declarations Act and that there were no questions put forward by the trial court towards the complainant which was indicated in the proceedings.**

**ii. That the learned trial Magistrate erred in law and fact by failing to call criminal witnesses who made the 1<sup>st</sup> Report.**

**iii. That the learned trial Magistrate erred in law & fact by failing to consider the contradictions and inconsistencies in the prosecution case.**

**iv. That the learned trial court erred in law & fact by failing to find out that there was no penetration to the victim which is a critical component of the offence of defilement.**

**v. That the learned trial Magistrate erred in law & fact by failing to find that the offence was a fabrication.**

**vi. That the learned trial court erred in law & fact by failing to find that the appellant raised a plausible defence which ought not to have been dismissed.**

**vii. That the learned trial Magistrate erred in failing to find that his fundamental rights were denied by allowing written submissions.**

**viii. That the learned trial Magistrate erred in law & fact by failing to find that the doctor made no application to have P3 form produced as an exhibit.**

**ix. That the learned trial Magistrate erred in law & fact by failing to find that the 30 years sentence was manifestly harsh & excessive in the circumstances.**

**x. That the learned trial Magistrate erred in law & fact by failing to consider the terms spent in remand custody prior to conviction and sentence.**

5. The Appellant prayed that his appeal be allowed conviction quashed and sentence set aside.

6. The prosecution's case was that the Appellant had been left with their 3 children including the Complainant who was the eldest. That they used to live on a single room and that whereas the children slept on a mattress on the floor the Appellant was supposed to sleep on a bed in the same room. That on the material night around 3.00am when muslims called for prayer the Complainant woke up and found the Appellant on their mattress. That after he confirmed they were asleep he moved closer to her and twined her to sleep on her abdomen and pulled up her dress and removed even panty and inserted his genital into her anus. That when he was done he pushed Complainants sibling next to her on the mattress.

7. That the next day after the Appellant had gone to work, she went to a neighbour to borrow a phone to talk to her mother. The neighbour inquired why she wanted to talk to the mother and she told her what had happened. That later the neighbour and one aunt D called her and interrogated her and she confirmed to them that appellant had defiled her.

8. That the lady neighbour went and reported to police where she was able to open up to a police officer known as Tuza and she also gave the officer the Appellants contacts. The Appellant was called to the police booth and complainant repeated what she told the officer in presence of the Appellant. That Appellant was arrested and detained and Complainant taken to Port Reitz Hospital.

9. She said the brother-in-law to Appellant to tell police that she was not biological child of the Appellant. She said she met Mama Kay at the hospital and her mother also came from Malindi and they went to Changamwe police station and the mother was told to take Complainant to a Childrens Home complainant said that by the time of the incident her parents were separated. She said she recognized the Appellant with help of security lights at the verandah and corridor.

10. The Appellant when asked to cross examine the complainant he said the complainant had said exactly what either statement to the police was and he had nothing. He was however advised on the seriousness of the offences he went ahead to cross examined PW 1 who said Appellant is the one who defiled her. She said that her mother did not tell her to lie against the Appellant.

11. PW 2 the mother of the complainant produced certificate of both indicating Complainant was born on 16<sup>th</sup> July 2007 – EXP 1. PW 2 said she met the Appellant when the complainant was one. She said on 13/11/2018, she was in Malindi when the Appellant called to tell her he was required at the police station. She said she had talked to Complainant on phone and when she asked Appellant if he defiled the Complainant he denied.

12. That she travelled to Mombasa and found the Complainant at Port Reitz Hospital where she was examined and it was confirmed she was defiled. That they went to Changamwe and later Appellant was arrested from the house at night. PW 4 said she had been in Malindi for 4 months but she used to communicate with the Appellant through phone. She said they lived in one roomed house but she had not heard about such incident before. She said she had a little disagreement with Appellant but they could still talk every day with him.

13. PW 3 Dr. Nadia Mustafa produced P3 form filled by Dr. Said Nishan who found that Complainant had bruises on the anal region. PRC form was also produced – EXP 29 & (B). In cross examination said the bruises in the anal region were fresh.

14. PW 4 P.C. Godfrey Kiplagat investigated the offence and that he together with P.C. Sarah went to Port Reitz Hospital where a nurse alerted them about a girl child who had been defiled and needed assistance. That it is the grand-father of the child who had taken her to hospital. PW 4 also met the father of the girl at the Hospital. He said child was taken to Makande childrens Home by the Children's officer.

15. That on 17<sup>th</sup> November 2018, PW 2 called police at 12.30a.m and informed them. Appellant was at home others went and arrested him. PW 4 said that on interrogation the complainant said that when she was being defiled she felt pain and cried softly since she was afraid the Appellant could beat her as he used to do. She also said that after Appellant had defiled her he wiped her then switched on lights and went to the bed.

16. PW 4 interrogated the appellant who said that one of the children was unwell and that is why he went to sleep next to him on the floor and he saw the complainant had slept with the dress raised to her head and he pulled it down.

17. When Appellant was placed on defence he gave shown statement and said that on 14/11/2018 at 3.00pm he was at work when police from Kwa Hola Police booth called him. That when he went there he found his daughter the complainant herein who had reported that he tried to defile her. That the child was in accompany of a woman neighbour who was a friend to his estranged wife. He confirmed that the 3 children slept on a mattress on the floor while he slept on the bed in their single room house.

18. That the next morning he gave the children money for lunch and went to work. He said he didn't defile the child. He said allegations of defilement were made by his wife and a neighbour who are prosecutions. He said that the landlord whom he had not paid rent had also threatened to deal with him on that when he was arrested the landlord collaborated. He said in cross examination that he suspected the Complainant's mother was involved in the scheme against him. He said he did not report the threats against him by the landlord to police.

19. The Appeal herein was canvassed by way of written submissions. The Appellants submissions were filed on 22<sup>nd</sup> July 2021 whereas the

Respondents submissions were filed on 22<sup>nd</sup> September 2021 together with a notice to enhance sentence to life imprisonment.

### **Appellant's submissions**

20. The Appellants submissions were that the trial Magistrate relied on the uncorroborated evidence of a child of tender years. That the evidence of PW 1 and the doctor PW 3 was inconsistent and the trial Magistrate erred in her application of Section 124 of the Evidence Act.

21. The Appellant argued that Mama Gigs who reported the matter was never called a witness and the officer who interrogated the complainant one Triza was also not called as a witness. The Appellant submitted that Complainant was not a credible witness and her evidence should not have been relied on to convict the Appellant.

22. The Appellant further submitted that medical evidence didn't connect her with the offence. He prayed that contradictory in the testimonies of PW 1 & PW 3 be resolved in his favour.

23. The Appellant cited the authority in **Kaingu Elias Kasome vs Republic CR. Appl. No. 504 of 2010** where it was held that age of the victim of the sexual assault is a crucial component. It forms part of the change which must be proved in the same way as penetration in the case of rape and defilement. He went further to state that the prosecution hand failed to prove beyond reasonable doubt that he committed the alleged defilement.

24. The Appellant stated that he raised a plausible defence and yet the court was quick to dismiss it. He said that the court should have excluded all shadows that emerged in prosecution case before dismissing his defence.

25. He further argued that admission of written submissions for no case to answer demand him the right to participate in all aspects of the trial. He relied in the authority in **Abdalla Kitengo Otieno vs Republic CR. Appl. No. 175 of 2002** to support that position. He also submitted that PW 3 produced P3 & PRC without moving the court to have it produced after it was marked and the said documents are entry hearsay, untested and unauthentic.

26. In regard to his sentence the Appellant complained that it was harsh & excessive particularly since then was no penetration. He begged the court to consider the time spent in remand prior to his conviction and sentence.

### **Respondent's submission**

27. The Respondents course on the otherhand submitted that ingredients of defilement namely age, penetration & identity of the perpetrator had been proved beyond all reasonable doubts and the appeal should be dismissed as the evidence tendered was cogent, consistent and uncontroverted that the victim's anus was penetrated as per the medical report. The Respondent submitted that the witnesses were credible and the trial Magistrate observed their demeanor and believed then.

28. On whether Section 19 of the Oaths & Statuary Declaration Act was complied with the prosecution submitted it was not mandatory. On whether crucial witnesses were left out it was submitted that Section 143 of the Evidence Act provides that no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact.

29. The Respondent also argued that the evidence of the complainant was corroborated by medical evidence and section 124 of the Evidence Act provides that if the court is satisfied that a victim of sexual offence is truthful. Such evidence doesn't need to be corroborated.

30. The Respondent counsel submitted that the prosecution case was cogent, consistent and uncontroverted and that the Appellant himself had no questions for the complainant whom he said at page 11 lines had spoken what was in her statement. The court found that the demeanor of the child did not look like she was coached and believed her.

31. The Respondent argued that penetration was proved as the doctor said that the anal bruises observed on the child were associated with in act of sexual activity i.e. forced penetration.

32. Having re-evaluated and re-analyzed the Records of the trial court together with ground of appeal and submissions, the issues for determination are:-

i. Whether offences defilement had been proved:-

- Age
- Penetration
- Identification of perpetrator

ii. Requirements of Section 19 of the Oaths & Statutory Declaration Act – voire dire examination was carried out and the trial Magistrate determined the child was possessed of sufficient intelligence and knew importance of oath and she took an oath before testifying. Although Appellant was given an opportunity to cross examine her he said that child had said all she recorded in her statement and the he had no questions for her.

33. Having not cross examined PW 1 & her mother on allegation of enmity, conspiracy & fabrication he cannot raise it on appeal. The Complainant was alone with the Appellant & her 2 siblings when the Appellant defiled her. Applicant didn't deny that he recorded a

statement with PW 4 confirming what he did to his child.

34. On whether or not there was penetration the medical evidence in P3 confirms that Complainant had fresh bruises in the anal area and it was concluded that the bruises were an indication of friction during forced sexual intercourse.

35. On whether Appellants defence was considered by trial Magistrate. The judgment from page 18 paragraph 2, 3, 4 and page 19 paragraph 2 & 3 are all about the Appellants defence. The trial Magistrate concluded thus

**“This court is alive to the rising possibilities of mother’s using their children to settle scores against their husbands in cases of domestic disputes. It was not demonstrated in this case that this was one of such case”.**

36. The Appellant had instruction an advocate Ms. Abuodha to represent him. The advocate asked to be allowed to file written submissions. The Appellant didn’t object a say he wanted to make oral submissions. As submitted by the Respondent counsel the court of Appeal in Katana Kaka alias Benson, Kitsao Kalume Karisa vs Republic held that relying on written submission is not necessary breach of fair trial provision under Article 50.

37. It is not in dispute that the penalty for offence under Section 8(1), 8(2) of the Sexual Offences Act No. 3 of 2006 is life imprisonment. The Appellant was however sentenced to serve 30 years imprisonment which the Respondent has sought to be enhanced as it is illegal sentence. This court is of the view that emerging to this prudence is encouraging computation of life imprisonment to definitive years to make it less dehumanizing. This court therefore finds that the trial Magistrate quantification was commensurate with the offence and she said as much on the sentencing proceedings.

38. Although the Appellant complained that the trial Magistrate did not consider the time the spent in remand custody, I have confirmed that his sentence of 30 years imprisonment was to run from 14<sup>th</sup> December 2018 when he was in remand custody.

39. In conclusion this court finds that the appeal is unmerited and the same is dismissed. The Appellant may appeal against the decision of this court within 14 days. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF NOVEMBER , 2021**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

**In the presence of:-**

Turuki - Court Assistant

Ms. Karanja for Respondent

Appellant – present in person

**Hon. Lady Justice A. Ong’injo**

**Judge**