



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 44 OF 2019

BETWEEN

GEORGE OTIENO OYUGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Tamu S. O Criminal Case Number 48 of 2018 by Hon. E.M. Onzere (SRM) on 17th January, 2019)

JUDGMENT

Background

1. The Appellant herein **GEORGE OTIENO OYUGI** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed against **FAN** a girl aged 13 years between 04th August 2018 and 5th August, 2018.
2. The prosecution called 5 witnesses in support of the charges. **PW1** the complainant stated that she was 13 years and in class 7 at [Particulars withheld] Academy in Koru. She said that the Appellant who was their herdsman defiled her in their kitchen on some date in August, 2018. It was also her evidence that he defiled her again in the toilet on 05.10.18.
3. **PW2 AO**, the complainant's brother aged 10 years recalled that sometimes in October, 2018, he went to the toilet at about 06.00 pm and upon knocking the complainant emerged leaving the Appellant therein and complainant said that the Appellant had defiled her.
4. **PW2 TAN**, the complainant's mother stated that the complainant was born on 12.03.05 as evidenced by her certificate of birth. She recalled on 05.10.18, complainant informed her that the Appellant who was her herdsman from April, 2018 had defiled her and she escorted complainant to hospital.
5. **PW5 Zebedee Ombija** a clinical officer examined complainant on 16.10.18 and found her with no injuries in the genitalia. and found no vaginal tears or bruises, there were remnants of hymen and she was HIV+. He produced complainant's PRC form as **PEXH. 2**.
6. **PW4 Sgt Dan Omachode**, the investigating officer received complainant's, arrested the Appellant and had him charged.
7. In his sworn defence, the Appellant conceded that he had defiled the complainant and pleaded for lenience.
8. *In a judgment* dated 17th January, 2019, *the Appellant* was convicted and sentenced to 20 years' imprisonment.

Appeal

9. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 14.08.19 on grounds that:
 - 1) **His rights under Article 50(2) (j) were violated**
 - 2) **Medical evidence did not prove penetration**

3) **Prosecution case was contradictory**

4) **Sentence was excessive**

10. When the appeal came up for hearing on 28.01.2020, Appellant stated that he was wholly relying on the grounds of appeal and written submissions filed on 28.01.2020. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and stated that the court ordered that the Appellant be supplied with statements on 23.10.18. It was further submitted that the prosecution had proved that complainant who was a minor had been defiled by the Appellant.

Analysis and Determination

11. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

12. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under **the Act**. These are the age of the victim, penetration and identity of the offender.

13. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

14. The trial court found as a fact that the complainant was born on 12.03.05 as evidenced by her certificate of birth and was 13 years when the offence was committed.

Penetration

15. Section 2 of **the Act** defines penetration to entail: -

"partial or complete insertion of a genital organ of a person into the genital organ of another person."

16. The P3 form shows that the complainant did not have injuries in her genitalia but her evidence that she was defiled was conceded by the Appellant. I entirely agree with the finding by the trial court that defilement can be established even in the absence of injuries in the complainant's genitalia.

Identity of the offender

17. The Appellant was well known to both complainant and PW2 having been employed as a herdsman by their parents. In any case, as stated hereinabove, the Appellant admitted defiling the complainant.

Article 50(2) (j)

18. The court record reveals that an order that the Appellant be supplied with statements was made on 23.10.18. I have perused the record of the trial court and the Appellant did not raise the issue of non-availability of statements throughout the trial. Had it been raised; I have no doubt that the learned trial magistrate would have given such orders and directions as are necessary to give effect to Appellants' right under Article 50 (2) (j) of the Constitution. I therefore find no merit in this ground of appeal.

Sentence was excessive

19. The Court of Appeal in the case of **Shadrack Kipchoge Kogo vs. Republic CRIMINAL APPEAL NO. 253 OF 2003** stated as follows with regard to sentencing:

"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

20. Appellant was charged under Section 8(1) as read with Section 8(3) of **the Act** which states as follows:

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

21. Since mandatory sentences have been declared unconstitutional, I am bound to re-examine the sentence meted on the Appellant having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the sentence prescribed by the legislature.

22. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

23. Even though Appellant is a first offender, the psychological effect of the offence on the 13-year-old complainant cannot be underestimated.

24. From the foregoing, the Appeal fails except on the issue of sentence. The 20 years' sentence imposed on the Appellant is substituted with a sentence of **10 years** from **17th January, 2019** when he was sentenced.

DELIVERED AND SIGNED IN KISUMU THIS 27th DAY OF February 2020

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi

Appellant - Present in person

For the State - Maureen