



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL CASE NO. 38 OF 2019

JAMES GISOI SAGERO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. W. Waswa (Mr.) – RM Nyamira dated and delivered on the 16th day of October 2019 in the original Nyamira Chief Magistrate’s Court Sexual Offence Case No. 33 of 2019}

JUDGMENT

On 16th October 2019, the appellant was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual offences act and subsequently sentenced to ten (10) years imprisonment. He has appealed against the conviction and sentence on grounds that:-

- “1. That the learned trial magistrate erred in law and fact by allowing medical evidence by a person other than author rendering the same hearsay.**
- 2. That the learned trial magistrate erred in law and fact by not inquiring why the assistant chief and the A.P. Officer from Itibo A.P. post were not called to support the victims claim of making a report.**
- 3. The learned trial magistrate erred in law and fact by not informing the appellant of his constitutional right to legal representation and hence occasioning a miscarriage of justice.**
- 4. That the learned trial magistrate erred in law and fact by not recording the proceedings verbatim but instead did the same in a manner geared towards a conviction by omitting fine details.**
- 5. That the learned trial magistrate erred in law and fact by not taking into consideration the time lapse between the time the victim alleges to have left home of the appellant and the alleged report at A.P. post and the possibility of the alleged assault having occurred in between.**
- 6. That the learned trial magistrate rightly addressed the issue as to sentencing as pronounced by the court of appeal but misdirected him grossly by awarding an ailing 65 years old ten (10) years imprisonment.”**

The appeal which is vehemently opposed was canvassed by way of written submissions. The appellant was represented by Mr. Ayuka Advocate while the state was represented by Senior Prosecution Counsel Mr. Majale.

Mr. Ayuka urged this court to re-examine and re-evaluate the evidence especially the P3 form which he submitted that apart from not being properly completed was produced by a person other than its maker. He stated that had the appellant been informed of his right to legal representation the anomalies in the medical evidence would have been detected at the stage of the trial to avert a miscarriage of justice. Counsel also submitted that the omission to call the administration police officers to whom the complainant is said to have made the first report was fatal. Counsel contended that it was not realistic for a twelve-year-old who was offended to run straight to a police station or home. He contended that her conduct was suspect and that of her minder was wanting and their evidence is not reliable. Counsel speculated that the complainant could have been defiled by the administration policemen and urged this court to consider that possibility. Counsel further contended that the appellant was framed because of a grudge between him and the appellant’s guardian. He submitted that the trial magistrate failed to fully appreciate the evidence of the appellant and his witnesses. He submitted that the defence witnesses were truthful. He concluded by asserting that the complainant’s narrative that the appellant removed her clothes was weird; that she did not show what clothes she was wearing and that she did not demonstrate how the clothes were removed. Further she did not state how many rooms there were in the house, where the bedroom was and whether the door was locked. Counsel faulted the trial magistrate for what he referred to as evidence scantily recorded and geared towards conviction. He contended that evidence must be watertight to attract a conviction but that this

case was conducted in a casual manner and witnesses were not properly interrogated on pertinent issues hence culminating in a miscarriage of justice. He urged this court to declare the conviction unsafe in view of the lacuna in the medical evidence, the conduct of the victim and erratic manner in which the prosecution was conducted.

On his part counsel for the prosecution submitted that the P3 form was produced in accordance with Sections 33 (b) and 77 of the Evidence Act and that the contents of the P3 were duly considered by the court. On the age of the complainant counsel submitted that the P3 estimated her age to be thirteen years but a birth certificate indicates her actual age as twelve years. He contended that the variance was not fatal given that the appellant was charged under Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act where the age bracket of the victim is twelve to fifteen years. Counsel further submitted that the ingredients of the offence were fully satisfied and that the defence was contradictory and hence the conviction was safe and it ought to be upheld. On the sentence counsel submitted that it was just having taken into consideration the age of the appellant, his mitigation and a pre-sentence report.

As submitted by learned counsel for the appellant this court is enjoined to analyse and evaluate the evidence in the court below and come to its own independent conclusion while keeping in mind that it did not see or hear the witnesses. (*See Okeno -Vrs- Republic (1972) EA 32*).

The ingredients for the offence of defilement are **proof that the complainant is a child and her age for purposes of the penalty; proof of penetration and positive identification of the perpetrator.**

In this case there is no doubt that the complainant is or was a child at the time in issue and whilst the clinical officer who completed her P3 form estimated her age as thirteen years, the birth certificate which is the best evidence for determination of age indicates her actual age was twelve years. I am not persuaded that the variance between the two documents is fatal. The birth certificate takes precedence and in any event whether she was twelve or thirteen she still fell within the age bracket for the offence the appellant was charged with and hence there was no prejudice.

On penetration there is the evidence of the complainant which although it does not require corroboration received much corroboration from the medical evidence as well as the testimony of her aunt (PW3). The complainant after she was defiled took refuge at an administration police post. Her conduct bespeaks of a very brave girl and is not in my view suspect at all. The clinical officer testified that when she was examined there were injuries in her genitalia. She also had a discharge and trace of blood and sperm cells. All this is consistent with an act of penetration as was found by the clinical officer who examined and completed the P3 form. The P3 form was properly admitted in evidence under Sections 33 and 77 (1) of the Evidence Act and it is my further finding that its production by a person other than its maker did not prejudice the appellant.

As for the submission that the omission to call the administration police officers and assistant chief was fatal Section 143 of the Evidence Act provides that no particular number of witnesses shall be required for proof of any fact. The evidence on record proves the fact that penetration occurred even though those officers were not called to testify. I refuse therefore to draw any adverse inference from the omission to call them. Penetration was proved beyond reasonable doubt on the evidence on record.

On the identification of the perpetrator it is not disputed that the appellant and the complainant are closely related. He is like her grandfather and they are therefore well known to each other. Secondly, the incident took place at 4p.m when she took a profoma to him in his house a fact which he admitted in his defence. He even confirmed her evidence that he gave her 30/=. Identification is in my view therefore not in doubt. It was in broad day light and he admits meeting her and giving her 30/=. His defence is not to be believed because the witnesses he called to support his evidence were not truthful. They both categorically denied seeing the complainant in their home whereas he himself admitted she was there. Unlike the witnesses called by the prosecution these were not credible or reliable witnesses. I find them untrustworthy and come to the conclusion that their evidence did not rebut or in any manner shake the evidence of the prosecution witnesses even though I say so at the risk of being accused of shifting the burden. In the upshot I find no merit in the appeal against conviction.

In regard to the sentence the trial magistrate considered the nature and circumstances of the offence, the appellant's plea in mitigation, his age and a pre-sentence report and arrived at a just and fair punishment for the offence. I find no justification to interfere and accordingly the appeal is dismissed in its entirety and the judgment and sentence of the lower court are upheld.

Signed, dated and delivered in Nyamira this 23rd day of April 2020.

E. N. MAINA

JUDGE

This judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines on combating the Covid-19 pandemic, the Advocates for the parties having consented.