



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 44 OF 2019

FAA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision and conviction of the

Honourable Principal Magistrate A. K. Makoross of Wajir Law Courts

delivered on 8/11/2019 in the Senior Principal Magistrate's Court

at Wajir in Sexual Offence No. 27 of 2019)

JUDGMENT

1. The Appellant was charged with offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006.
2. Particulars were that on the 10th day of August 2019 within Wajir County intentionally attempted to cause his penis to penetrate the vagina of DA a child aged 15 years.
3. He pleaded not guilty and after full trial he was convicted and sentenced to serve 10 years' minimum mandatory sentence.
4. Being aggrieved by the verdict he appealed and set out 9 grounds which can be compressed to:-
 - **Whether the hearing was fair?**
 - **Whether the prosecution proved the ingredients of offence beyond reasonable doubt?**
 - **Whether Appellant was a minor and if so, what would be the implication on conviction?**
5. The parties were directed to canvas appeal via submissions.

APPELLANT'S SUBMISSIONS

6. The Appellant submitted that, at the trial, the appellant was at all times unrepresented. A probation officer or a children's officer was never involved in the hearing therefore the court proceeded with the trial without ascertaining the age of the appellant which was/is contrary to the tenets laid out under articles 50 and 53 in so far a rights to fair hearing and those of a child a well enshrined. See *Juma & Anor vs Attorney General [2003] eKLR* a pre-constitution case.
7. The constitution also provides for the rights of a child under Article 53(2) That a Childs' best interest should be paramount.
8. In the current appeal, the complainant is a child of 15 years and the accused who is a child of 16 years at the time of the offence. The Appellant submits that the protection of a child/minor in this case must not be applied discriminately. Accordingly, the principles of fairness and protection must be applied fairly on both parties. See *section 143 (1) of the Children Act*.

9. The appellant submits that the Constitutional guarantees under article 50 and 53 are not merely procedural underpinnings but constitutional and so that the court must in the quest of interpretation of the constitution protect citizens and in particular children.

10. In **Francis Omuroni vs Uganda C.C No. 2 of 2000** the court held that **“Apart from medical evidence age may also be proved by birth certificate, the victims’ parents or guardian and by observation and common sense.**

“The general rule at common law appears to be that strict proof of age is generally required, i.e. testimony from a witness present at the subject’s birth or an authenticated birth certificate (now admissible by statute) coupled in each case with evidence of identification of the person as being one and the same.”

11. The appellant being unrepresented was not accorded sufficient advice and did not enjoy the article 53 rights.

12. The United Nations Convention on the Rights of a Child at Article 37(d)(as ratified pursuant to Article 2(6)of the Constitution) provides that any child deprived of his/her liberty has a right to prompt access to legal and other appropriate assistance. The appellant a child never enjoyed the rights abovementioned.

13. It is readily obvious that once it is conceded that the court did not determine the age of the appellant at the time of trial, then one must come to a conclusion that the Appellant’s trial fell foul the fair standards guarantees in the Constitution and statute.

14. The provisions of the constitution and the United Nations Convention on the Rights of child unambiguously illustrate that the appellant being a minor with limited knowledge of his rights and even how to express those rights suffered substantial injustice in the absence of representation.

15. Accordingly, the National Children Policy states that All children deserve protection in matters regarding the law, whether they are in conflict with the law or requiring legal assistance. The appellant submits that he will be Eighteen (18) years on the 18th day of August, 2020 and that at the purported occurrence of the offence he was sixteen (16) years eight days short of celebrating his seventeenth (17) birthday.

16. The Appellant was charged with the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act. The section provides; 9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement. (2) A person who commits and offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

17. The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration. It must prove the age of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed.

18. The ingredient for an offence of defilement to suffice is **“an attempt to penetrate a child.”** The High Court at Lodwar in **Michael Lokomar v. Republic Lodwar High Court Criminal Appeal No. 60 of 2016** S.N Riechi J. observed that mere lowering of inner clothes did not meet the ingredient of defilement. The learned judge observed that there was no evidence adduced or an attempted defilement.

19. The complainant only stated in part that the she felt a liquid and woke up, the appellant submits that with lack of evidence adduced before the court the liquid could be anything in fact the original complaint by the complainant was that there was a thief in the house.

20. From the statement of the accused, there is no mention of any attempts by the appellant to defile her. Accordingly, there was no evidence that the appellant penis was erect to necessitate penetration. It is the evidence of pw1 and pw2 the only witnesses who saw the accused and that he was naked.

21. However, none the witnesses observed if the appellant had an erect penis. Attempted defilement should not be based on assumptions or speculation but rather evidence that the penis attempted to penetrate the vagina of a child and to facilitate penetration the *mens rea* and *actus reus* come to play.

22. In **Kateta v Republic (1972) E.A 532 Madan Ag. CJ** (as he then was put the matter succinctly as follows:

“A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do.”

23. In **Peter Ndoli Adisa v Republic Criminal Appeal No. 32 of 2016** S N Riechi J. Observed **“From the evidence of the complainant, it is evident that what constitutes the over act by the complainant is touching of her legs, which advance the complaint declined and the accused left her. The touching of the complainant cannot by itself alone be said to constitute “an act which would cause penetration to a child” for it to amount to attempted defilement.”**

24. The Learned Judge in admitting the appeal and quashing the conviction of the lower court further observed, **“that the prosecution ought to have proved that he committed an act which would cause penetration which is defined as a partial or complete insertion of the genuine organ of a person into the genital of another person.”**

25. PW2 in her sworn statement does not state whether the appellant intended to penetrate her vagina she only stated that she felt a cold liquid on her back and not anywhere near her vagina, in those circumstances an inference could not be drawn that the only probable

explanation could be defilement and nothing else, doing so would go against the provisions of Section 9(1) of the S.O.A.

26. In *Nyambane vs Republic (2016) A.C Mrima J.* Observed at Paragraph 23, **“I note that the actions and intention on the appellant’s part to commit defilement were clearly demonstrated when he waylaid the complainant to an abandoned house, laid her on the floor, held her mouth so that she would not raise alarm, undressed her skirt and removed her underpants, pulled his trousers down to the knee level and laid on top of the complainant. In those circumstances what was to follow was the real sexual act...the undressing of the complainant’s private parts and the laying on top of the complainant by the appellant were the last acts towards commission of the sexual act.”** The ingredients as observed by the learned trial magistrate were lacking in the current appeal and therefore could not amount to defilement.

RESPONDENT’S SUBMISSIONS

27. The Respondent submitted that the prosecution called a total of 4 witnesses against the evidence of the Appellant. He was convicted on the main count and sentenced to a period of 10 years on the 8/11/2019.

28. Though the Appellant is challenging both conviction and sentence, and the prosecution opposes the said appeal.

29. On the offence being committed, PW2 was the complainant. She indicated that she was aged 15 years and was born on 12/12/2004. She also identified the birth certificate which was subsequently produced as exhibit No. 1.

30. She gave graphical account of the events of 10/8/2019 at 3.30 am, that she was sleeping when she felt some liquid touch her back. She woke up and felt around only to touch the hand of a person.

31. She also felt her “*dera*” had been torn as well as her undergarments. When she felt the hand, she screamed. The assailant tried to run away and was naked. The complainant was instructed by PW1, the mother who was in the same room to switch on the lights. It is upon switching on the lights that they saw it was the Appellant. The Appellant managed to run away through the window.

32. PW1 was the mother to the complainant. Her evidence concurs with that of PW2 in all material aspect. She confirmed the complainant was aged 15 years. She confirms to have responded to the complainant’s distress call, held the Appellant who was trying to run from the locus.

33. Both interior lights and the security lights assisted them to see the assailant. The Appellant was a person they knew prior to the date of the incident. They reported the incident to the police and took the complainant to hospital.

34. PW3 was the investigating officer. He produced the birth certificate indicating the complainant was aged 15 years. He also produced the undergarment and “*dera*” that were both torn.

35. PW4 was a Clinical Officer based at Wajir County Referral Hospital. He examined the victim, the complainant on HIV status, he did high vaginal swab and test for pregnancy, hepatitis and syphilis. He filed the post rape form. He found that the genitalia were normal.

36. There was whitish substance on the vulva though there were no signs of penetration. Premised on the findings, he suspected sexual assault.

37. When the Appellant was put on his defence, he nuanced that of a land disputed. That he was framed.

38. The above defence was not brought up during cross examination of prosecution’s witnesses. The issue of land dispute is an afterthought. The prosecution evidence placed the Appellant at the locus. His actions at the scene were explained by PW2.

ISSUES, ANALYSIS AND DETERMINATION

39. After going through the materials before me, I find the **ISSUES** are;

i. Whether the hearing was fair?

ii. Whether Appellant was a minor and if so, what would be the implication on conviction?

iii. Whether the prosecution proved the ingredients of offence beyond reasonable doubt?

40. Issues I and II are on the same subject of fair trial of a minor. The appellant submits that he will be Eighteen (18) years on the 18th day of August, 2020 and that at the purported occurrence of the offence he was sixteen (16) years eight days short of celebrating his seventeenth (17) birthday.

41. The Appellant thus sought court discretion to allow the birth certificate (Attached hereinafter and marked as FAA-1) as prima facie evidence to prove the age of the Appellant in this appeal, and to find that the conditions set out above by the Supreme Court in so far as adopting new evidence on appeal in concerned.

42. The prosecution did not oppose and thus the court admits same and proceeds to consider that at the time of trial, the appellant was a

minor.

43. In determining the age of a child offender, the courts have held the position in **Francis Omunoni vs Uganda C.C No.2 of 2000** which held that apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardians and the observation and common sense.

44. in **MABI vs Republic (2018) eKLR** the Court of Appeal held in part:-

“To ensure a fair trial and obviate the possibility of dealing with a child offender as an adult, the trial court ought to have ordered that the appellant’s age be assessed by a doctor. Alternatively, the trial court ought to have made due inquiry as to the appellant’s age, in accordance to section 143(1) of the Children Act.”

45. The court went ahead to observe that the essence of complying with Section 143(1) of the Children's Act is to ensure that a child is not treated as an adult during the proceedings and after the proceedings.

46. The appellant submits that the trial was devoid of the express provisions of Section 143 of the Children's Act and the procedures set out in section 190(1) and 35(1) of the Penal Code.

47. The Appellant contends that since his arrest he has been detained in an adult facility which is in breach of his fundamental rights and freedoms as a child. Article 37(c) of The United Nations Convention on the rights of a child (which Kenya is a signatory to) provides:-

“..In particular every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interests not to do so...”

48. Article 53(1) (f) of The Constitution of Kenya provides that;

“Every child has the right not to be detained except as a last resort, and when detained to be held:-

For the shortest appropriate period of time.

Separate from adults and in conditions that take account of the Child’s sex and age.”

49. In **P.O.O (A minor) v Director of Public Prosecutions Constitutional Petition No. 1 of 2017** the court observed at paragraph 42 as follows;

“There is need to emphasize that a child remains a child whether the victim of an offence or a child in conflict with the law. Indeed policy No.5.10 of the National Children Policy states that ALL children deserve protection in matters regarding the law whether they are in conflict with the law or requiring legal assistance.”

50. The Court observed further at paragraph 44 in the following words:-

“It is not in the best interest for the children in conflict with the law to be mixed up with adult offenders, that is why the law is an unambiguous that they should be put separately, it is provided in Article 53 (1) (f) of the Constitution as well as bail and bond policy guidelines.”

51. This is further buttressed by the High Court of **Siaya, G.O v Republic Criminal Appeal No. 155 of 2016 (2017) eKLR**;

“As a matter of fact, the conduct of the Respondents contravened Article 53(2) of the Constitution of Kenya; the best interests of a child was not taken into consideration. In my view, the aforementioned rights of the Petitioner were infringed; the said contravention may bruise the petitioner for the rest of his life.”

52. The Appellant ought to have enjoyed the safeguards provided in law and the Constitution and that he was supposed to be detained separately upon his arrest as required in law.

53. The appellant being unrepresented was not accorded sufficient advice and did not enjoy the article 53 rights.

54. The United Nations Convention on the Rights of a Child at Article 37(d)(as ratified pursuant to Article 2(6)of the Constitution) provides that any child deprived of his/her liberty has a right to prompt access to legal and other appropriate assistance. The appellant a child never enjoyed the rights abovementioned.

55. It is readily obvious that once it is conceded that the court did not determine the age of the appellant at the time of trial, then one must come to a conclusion that the Appellant's trial fell foul the fair standards guarantees in the Constitution and statute.

56. The provisions of the constitution and the United Nations Convention on the Rights of child unambiguously illustrate that the appellant being a minor with limited knowledge of his rights and even how to express those rights suffered substantial injustice in the absence of

representation.

57. Accordingly, the National Children Policy states that All children deserve protection in matters regarding the law, whether they are in conflict with the law or requiring legal assistance. The appellant will be Eighteen (18) years on the 18th day of August, 2020 and that at the date of occurrence of the offence he was sixteen (16) years eight days short of celebrating his seventeenth (17) birthday.

58. The court finds that the trial was very prejudicial and unconstitutional on account of the noted violations aforesaid. On these grounds alone appeal succeeds without considering other grounds.

59. The next question is whether or not this court should order a retrial. The applicable principles were restated by the Court of Appeal in **Pius Olima & Another –Vs- Republic [1993] eKLR** as follows:

“Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar –Vs- Republic [1964] EA 481; Manji –Vs-Republic [1966] EA 343; Mujimba –Vs- Uganda, [1969] and Merali & Others –Vs- Republic, [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court.....is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.”

60. I have noted the circumstance of the case and the fact that the appellant is serving another 3 years’ sentence of a previous conviction. The appellant is charged in an offence which attracts a minimum of ten years’ imprisonment and he has served less than one year from 8/11/019.

61. There will be no prejudice even if retrial is ordered. Thus, the court makes the following orders;

i) The conviction and sentence are declared a nullity and set aside.

ii) The appellant shall be taken to magistrate court wajir for rehearing denovo of the criminal charges herein where all his constitutional rights to fair trial shall be adhered to by the trial court.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 30TH DAY OF JUNE, 2020.

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C. KARIUKI

JUDGE