



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 24 OF 2019

SHUKRI DUBOW YUSSUF.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in Sexual Offences Case No. 16 of 2019

and the judgment delivered on the 2nd day of July 2019 by Hon. Amos Mkoross,

Principal Magistrate Wajir Law Courts)

JUDGMENT

1. The Appellant was charged with offence of defilement contrary to section 8(1) as read with section (2) of the Sexual Offences Act No. 3 of 2006.

2. He pleaded not guilty and after full trial he was convicted and sentenced to serve life imprisonment.

3. Being aggrieved by aforesaid decision the Appellant lodged appeal and set out 12 grounds of appeal which can be summarized as follows:

(1) Whether charge was defective?

(2) Whether the prosecution proved offence charged ingredients beyond reasonable doubt?

(3) Whether the Appellant's defence was considered?

4. Parties were directed to canvas appeal via submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant submitted that the prosecution did not prove the case beyond reasonable doubt. The said child was defiled on 28/4/2019, examined in the hospital on 3/5/2019 that is 5 days after the said defilement. No Appellant's spermatozoa were found in the anus of the child belonging to him to conclusive confirm he did the said act. Neither the Appellant's DNA specimen found in the anus of the complainant. In the case of ***David Akech [2015] KLR*** the court held that for successful prosecution to the required standards there must be lacerations, bruises and semen. Semen was not found. Further 5 days lacerations on the anus of the complainant without DNA test to like Appellant is not sufficient evidence to convict.

6. The evidence is contradictory and uncorroborated. Courts must warn themselves of convicting without corroboration. The evidence of the complainant is contradictory. He states that he was not awake when his trousers were lowered.

7. Further that the Appellant penetrated his anus. In his evidence in chief he puts forth two contradictory positions which evidence is to be believed by court. PW1 and PW3 did not witness the act of penetration. Their evidence is hearsay.

8. PW4 who represented the Dr. Alio did not do proper medical examination to ascertain whether the Appellant defiled the said minor. He did not find sperms belonging to Appellant on complainant's anus. He also delayed doing the medical examination so we can never know

what conclusively caused lacerations of the minor's anus.

9. PW5 the investigator could not produce any evidence linking the appellant to the crime for example no clothes of the minor or Appellant with sperms were produced as evidence.

10. The Appellant relied on the authority of *Daniel Ombasa Omwoyo vs Republic Criminal Appeal No. 64 of 2014 Kisii High Court* specifically the case of *David Akech Ochieng [2015] eKLR* which is highlighted and applicable his appeal that evidence of spermatozoa is crucial to prove defilement. In this particular case no spermatozoa were found.

11. Lastly the Appellant submitted that he was convicted and sentenced without any sufficient corroboration or evidence tendered to the sufficient standards required and thus request the court to allow the appeal.

RESPONDENT'S SUBMISSIONS

12. On the first contention that the prosecution failed to prove its case beyond reasonable doubt, the Respondent submitted that the evidence of the complainant PW2 is to the effect that he was 9 years old (though the charge sheet indicated 6 years). He testified that on the 28th April 2019 the Appellant sodomized him.

13. That the Appellant came at 7.00pm and found him together with PW3. That they slept. That at night, the Appellant sodomized him. That the Appellant came and removed his shorts to the knees. He then told PW3 that he had been sodomized.

14. PW3, a minor, also placed the Appellant at the locus though he did not witness the action subject of the case.

15. PW1 was the mother to the complainant. She testified that on 3rd May 2019 after she returned from a journey, the complainant aged 6 years told her that on 28th April 2019, the Appellant came to their home and sodomized him.

16. Premised on that she reported the incident to the police and were referred to hospital. The medical examination confirmed that indeed PW2 had an injury in his anus.

17. PW4 was a clinical officer who examined the complainant. The findings on anal examination had bruises on the 12 o'clock position. There was no discharge but the anal orifice was reddish.

18. Their diagnosis was sodomy and the complainant was given pain killers. The clinician also produced a birth notification showing the complainant was born on 2/2/2013 at Hodhan in Wajir East.

19. The Respondent submitted that the Appellant was positively identified by PW2 and PW3 and was a person known to them prior to the date of the incident.

20. The act of sodomy; the version of the complainant was also corroborated by the clinician PW3. The age of the complainant was also confirmed by the birth notification which is a guestimate of 6 years as the time of offence.

21. On the contention that the evidence was uncorroborated, unsatisfactory, contradictory and unreliable, the Respondent submitted that from the record, the evidence of the complainant was consistent and was not shaken even by the cross examination.

22. The clinician corroborated by the findings on the account advanced by the complainant. There are no contradictions and if at all, the same are not material as to vitiate the prosecution's case.

23. On the issue of the age of the complainant, the birth notification that was produced by PW4 was that the complainant was born on 2/2/2013. Hence age was proved. (note the trial magistrate wrote as 2/2/2003. But the year is 2013. See exhibits).

24. The complainant indicated that he was sodomized. Under section 2 of the Sexual Offences Act, when defining genital organs, the act states that it includes the whole or part of male or female genital organs and for purposes of this Act includes the anus. Both PW2 and PW3 placed the Appellant at the locus. PW2 expressed that the Appellant sodomized him.

25. On contention that the defence was not considered, the Respondent submitted that from the record, Appellant nuanced that the officer who arrested him was a Somali but in court found a different officer. That the doctor who examined the complainant did not come to court.

26. That the case was instigated by tribal discrimination and he was framed. That evidence in court was hearsay. That there was a delay in reporting the case.

27. From the record and in the judgment, all these issues were analyzed as against the prosecution's case. The defence did not discount the prosecution's case and the trial court was justified to dismiss the same.

28. The Respondent submitted that the charge sheet was not defective at all. It complies with all the requirements stated under section 137 of the Criminal Procedure Code.

29. The offence is clearly stated. The particulars were clearly set out in the form as exemplified under second schedule of the Criminal

Procedure Code. The charge sheet was not defective.

ISSUES, ANALYSIS AND DETERMINATION

30. Being the first appellate court, this court is obliged to consider and re-look into the evidence adduced as it was stated in the case of **OKENO VS. REPUBLIC 1972 EA 32** where the Court of Appeal stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See PANDYA VS. REPUBLIC (1957) EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (See SHANTILAL M. RUWALA VS. REPUBLIC (1957) EA 570).

“...it is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (See also PETER vs. SUNDAY POST (1958) EA 424.”

31. After going through the evidence on record, grounds in appeal and submissions, I find the issues are mainly;

(i)-Whether charge was defective?

(ii)-Whether the prosecution proved offence charged ingredients beyond reasonable doubt?

(iii)-Whether the Appellant’s defence was considered?

32. On the first issue the appellant had complained in his grounds of appeal that the charge was defective. The Respondent submitted that the charge sheet was not defective at all. The court has perused the same and found that, it complies with all the requirements stated under section 137 of the Criminal Procedure Code.

33. The offence is clearly stated. The particulars were clearly set out in the form as exemplified under second schedule of the Criminal Procedure Code. The charge sheet was not defective.

34. Turning to the prosecution burden of proving their case beyond reasonable doubt, three ingredients were to be established namely; that the complainant was a child within the meaning of the Sexual Offences Act; that the complainant had been a victim of an act causing penetration and that the person who committed the act that caused penetration is the Appellant herein.

35. That the complainant was a child at the material time is not contested. An acknowledgement of birth notification card was produced and it shows that the complainant was aged at most seven years at the material time. Additionally, the general outpatient record (Pexh 2) and the P3 (Pex 1) indicate the complainant’s age as 8.

36. Those findings coupled with the trial court’s own observation, after a *voire dire* examination, that the complainant was a child of tender years leaves no doubt that the complainant herein was indeed a child within the meaning of the Sexual Offences Act at the material time.

37. The combined medical and oral evidence also leave no doubts that the complainant was a victim of an act causing penetration.

38. **“Penetration”** is defined in the Sexual Offences Act as, **“the partial or complete insertion of the genital organs of a person into the genital organs of another person”** whereas **“genital organs”** are described as **“the whole or part of a male or female genital organs”** and for purposes of this Act includes the anus.

39. The anatomy concerned here is the anus and, as is seen from the summary of evidence, there is oral and documentary medical evidence to show that when the complainant was examined, he was found to have injury.

40. That is a bruise (described as laceration in the P3) on the 12 o’clock position of the anus. The anus was also reddish and tender to touch leading to a diagnosis by the medical officers that sodomy had occurred.

41. That medical finding corroborates the complainant’s testimony that someone had forcefully penetrated his anus on the material night and having looked at both the documentary and oral evidence.

42. The trial court held; **I am in doubt that the complainant was a victim of an act causing penetration. The second ingredient has thus, also, been satisfactorily proved.** This court finds no fault in that.

43. As explained in the case of **George Owiti Raya vs. Republic [2013] eKLR where it was held:**

“There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant’s hymen was found to be intact, suffice it that there was evidence of partial penetration.”

44. In the case of *Mwangi vs. Republic* [1984] KLR 595 at 603, the Court rendered itself thus:

“The presence of spermatozoa alone in a woman’s vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape.”

45. On issue as to whether it is the appellant who committed the act causing penetration, the trial court held;

“There is clear and consistent evidence from the complainant and his brother (PW3) that on the material day the person, who they had known as Bokora, came to their home and offered to stay the night with them. They then remained together and slept near each other until the time that the complainant was molested. The complainant reported that in the course of the night he was awoken by the lowering of his trouser and felt it when the penetration occurred and when he turned, he saw that the person committing the act of penetration was Bokora. His brother (PW3) in his turn stated he was awoken by the complainant calling out his name and after he had woken up, the complainant told him that the Appellant had pulled down his trouser. PW3 observed that the trousers were still pulled down and he then advised the complainant to pull them up and together they moved away from the accused into the house. I reiterate that the evidence of these two witnesses was consistent and corroborative and when I observed them as they testified, they appeared to me to be straightforward and truthful boys. They gave no hint that they had any pending grudge against the Appellant and appear to have had a cordial relationship with the said Appellant prior to the incident giving rise to this case. I believed their testimonies.”

46. This court through the record and finds no fault in the aforesaid findings as the appellant never rebutted aforesaid testimonies.

47. Finally, the appellant complains that his defence was not considered. The trial court noted that whereas appellant claimed that there were tribal/clan differences that had caused him to be charged, he did not name the masterminds behind the said scheme nor did he raise his theory of thus conspiracy at a sufficiently early time to enable the investigators verify its truth. His defence thus comes across as an afterthought and was dismissed as such.

48. This court finds that the trial court considered the defence tendered and found no substance at all, this court agrees with that finding. The totality of that is that the appeal fails on conviction.

49. In his grounds the appellant sought setting aside of his conviction. The trial court held that the sentence for the offence charged was prescribed by law as life imprisonment. Though he never mitigated, the court never considered that he had no previous record thus considered as first offender.

50. Under the SCOKE case of **Muruatetu** and the subsequent superior court cases on mandatory sentences, the mandatory aspect is unconstitutional. The trial court could award life sentence as maximum penalty but not mandatory sentence as he did herein.

51. Thus, will allow appeal on sentence and make the following orders;

a) Appeal on conviction is dismissed and conviction upheld.

b) The sentence is set aside and matter referred to the trial court for sentencing after mitigations at Wajir Law Courts.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 23RD DAY OF JUNE, 2020.

C. KARIUKI

JUDGE