



IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 23 OF 2020

CORAM: D.S. MAJANJA J.

BETWEEN

JOSPHAT LOKWAYEN.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. Ngigi, PM

dated 12th February 2020 at the Magistrate's Court at Isiolo in Sexual Offence Case No. 17 of 2018)

JUDGMENT

1. The appellant, **JOSPHAT LOKWAYEN**, was charged and convicted on one count of the offence of defilement contrary to **section 8(1)** as read with **section (3)** of the **Sexual Offences Act** ("the Act"). The particulars of the charge were that on diverse dates between 23rd July and 3rd August 2018 at [particulars withheld] in Samburu East Sub-County within Samburu County, he intentionally caused his penis to penetrate the vagina of CN, a child aged 14 years.
2. The appellant was sentenced to serve 20 years imprisonment. He now appeals against conviction and sentence. As this is a first appeal, it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.
3. The complainant, PW 1, testified on oath after a voire dire. She stated that she knew the appellant and that he came to her home where he proceeded to remove her clothes, told her to lie down, removed her clothes and he proceed to insert his penis in her vagina. He threatened her once he had committed the act of penetration.
4. The complainant's mother, PW 2, recalled that between 23rd July and 3rd September 2018, he noticed that PW 1 was having frequent headaches and would be dizzy. He took her to hospital but nothing was diagnosed at the time. PW 2 told her son, PW 3, that PW 1 had been sick. PW 3 testified that he came home and demanded to know that was the problem. PW 1 admitted that she had been having sexual intercourse with the appellant. He also viewed her Facebook picture which showed her with the appellant. He informed PW 2 what he had seen. PW 2 took PW 1 to the hospital for examination and reported the matter to the police.
5. The report at the police station was booked by the Investigating officer, PW 4, on 7th August 2018. He recorded the witness statements and organized for PW 1 to be examined at the hospital. PW 5, a clinical officer, who examined the appellant and produced the P3 medical form and the laboratory medical form. When he examined PW 1, he observed that she was mentally challenged. The private parts were not injured but the hymen as broken. In his view, this was indicative of penetration.
6. In his unsworn defence, the appellant denied the charge against him. He stated that he was away and on his way back home on 30th July 2018 at 12.00am, he received a call from PW 3 who asked that they meet. When they finally met on 7th August 2018, PW 3 accused him of defiling PW1. He stated that the case against him was based on grudge due to a land dispute. He even accused PW 2 of killing his father.
7. The substance of the appellant's case as set out in the amended supplementary grounds of appeal and the written submissions filed on 14th July 2020 is that the prosecution did not prove the case against him beyond reasonable doubt. That he was not positively identified and that the entirety of the evidence was inconsistent and insufficient. He complained that the trial magistrate failed to note that the complainant was mentally challenged. The respondent supported the conviction and added that the prosecution failed to prove its case beyond reasonable

doubt.

8. In order to prove the offence of defilement under **section 8(1)** of the **Act**, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person. “Penetration” under **section 2** of the **Act** means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

9. It is not in doubt that PW 1 was mentally challenged. Her mother, PW 2 stated as much and this was confirmed by PW 2. **The issue of competence of witness is dealt with at section 125 of the Evidence Act (Chapter 80 of the Laws of Kenya) provides:**

125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.

(2) A mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

10. *The import of this provisions is that a mentally challenged person is competent. In order to determine whether the witness is able to testify, the trial magistrate conducted a voire dire. He was satisfied that that PW 1 understood the nature of the proceedings and that directed that she testifies on oath.*

11. Although the complaint was mentally challenged, she was able to give direct evidence on how the appellant sexually assaulted her. She knew the appellant as he was a neighbour, a fact which he admitted in his defence. In assessing the evidence, the trial magistrate rightly took into account that she was mentally impaired in such a way that she could not recall precise dates and other details. She was however clear that she was subjected to sexual assault. She used the word “**tomba**” which in Swahili means an act of sexual intercourse.

12. Her testimony was corroborated by the testimony of PW 2 who stated that during the time the complainant was subject to sexual acts, she was sick and it is only when PW 3 intervened that she was able to disclose the appellant’s acts over a period of time. The act was penetration was also confirmed by medical examination which showed that the hymen was broken. This is consistent with the fact of penetration.

13. The appellant’s defence was that of a grudge and alibi. When the appellant accused PW 2 of murdering her father, she denied the same. Like the learned magistrate, I find this a serious accusation made without basis. There is also no basis to imply that PW 1 was involved in framing the appellant in light of all the other evidence. Likewise, and in view of the overwhelming evidence, I reject the appellant’s alibi.

14. The prosecution proved that PW 1 was a child. The prosecution produced a birth certificate showing that PW 1 was born on 17th May 2004 hence she was 17 years old.

15. The totality of the evidence was that that it was the appellant who committed the act of penetration. I affirm the conviction.

16. On the issue of the sentence, the trial magistrate imposed the mandatory minimum sentence under **section 8(3)** of the **Act** which is 20 years’ imprisonment. The Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; **BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019]eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**. **In line with the decisions I have cited, I set aside the sentence of 20 years’ imprisonment and substitute the same with a sentence of 15 years’ imprisonment.**

17. The appeal is allowed only to the extent that the sentence of 20 year’s imprisonment is quashed and substituted with a sentence of 15 years’ imprisonment.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 20th day of AUGUST 2020.

A. MABEYA

JUDGE

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.