REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 53 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 226 of 2015 by the Senior Principal Magistrate's Court at Mumias)

HO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon Cheruto C Kipkorir, Senior Resident Magistrate, of defilement contrary to Section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to life imprisonment. The particulars of the charge against the appellant were that on the 17th day of March 2015 at 4.00 pm in Mumias Sub-County of Kakamega County he intentionally caused his penis to penetrate the vagina of BA a child aged 8 years.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the same date and the same place stated in the main count, he had intentionally touched the vagina of the subject child with his penis.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

4. BA, the complainant, testified as PW1. She gave unsworn testimony. She identified the appellant as her uncle. She explained that as she was going on the material day with other children, she met him, he held her hand and pulled her to a house where he removed her clothes and defiled her. She thereafter reported the matter to her grandfather (PW2), she was taken to the police and hospital and was treated. she explained that the appellant had done a similar thing to her on a previous occasion. PW2, JO, was the grandfather to whom she made the initial report. He testified that she reported to him that the appellant, who he described as a nephew, had defiled her. He reported to a village elder recommended that he take her to hospital, which he did. He was escorted by the police, to whom a report had been made, and the mother of the appellant. She was treated and he was informed that she had been defiled. Jusiah Owino Obonyo (PW3) was among the elders that PW2 reported the matter and who talked to PW1. It was he and others who arrested the appellant and took him to the police. He and PW2 took PW1 to hospital, where after tests, they were informed that she had been defiled. Albert Dome (PW4) was the clinical officer who attended to the PW1 and prepared the Police Form 3 which was put in evidence. He stated that she was brought in by PW2 and a police officer. She had allegedly been defiled on 17th March 2015, was treated on 18th March 2015 and was brought to him on 19th March 2015. She had a bruise on her left labia, her vaginal orifice was tender and inflamed, and the hymen was broken. He concluded that there was evidence of penetration due to presence of pus cells in urine which indicated an infection. There were red blood cells too which was indication of trauma. Dr Khakina Lydia testified as PW5, she assessed PW1 for purpose determining her age and estimated her age to be eight years.

5. The appellant was put on his defence. He gave a sworn statement and called two witnesses, PN (DW2) and HW (DW3). He denied the offence, and explained how he had spent his time on 19th March 2015. He said he was not aware of what happened on 17th March 2015. He accused the parents of PW1 of having a grudge against him. DW2 said that he knew nothing about what happened on 17th March 2015. On cross-examination, he said that the appellant was at work at his barbershop on 17th March 2015. He stated that he had nothing to prove that he worked for him, and said that he used to leave him at sometimes to attend to other things. DW3 said that he was working at the barbershop on 17th March 2015, although he, DW3, was not employed by DW2. He started that the appellant left at some point and was away for about one hour. He stated that he did not know what he did after 4 pm that day.

6. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced as stated in paragraph 1 of their judgement.

7. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised serval grounds of appeal. He averred that the court amended the charge and did not accord him an opportunity to plead to the charge afresh, that the court erred in convicting without the evidence of the investigating and arresting officers, that the court did not consider his defence that the charges were trumped up

and driven by malice, that the court did not comply with Article 50 of the Constitution and therefore his trial amounted to an ambush, that he was not medically examined to determine the actual truth, that he was not allowed to cross-examine PW1, and that the court failed to realize that PW1 had been coached by her parents to frame him up.

8. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a 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 magistrates' findings can 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."*

9. The appeal was canvassed on 25th October, 2018. The appellant relied on written submissions that he placed before me, while Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. The appellant's written submissions dwelt on such issues as defects in the charge, non-appearance of crucial witnesses, his defence not being given consideration, non-disclosure of evidence, medical examination not being conducted on him, PW1's evidence being obtained by coaching and collusion, and non-compliance with section 200 of the Criminal Procedure Code, Cap 75, Laws of Kenya. I shall consider all the issues raised in both the petition of appeal and in the submissions.

10. Mr. Ng'etich submitted that there were no defects in the charge, and added that if there were any mistakes in the charge the same were addressed through section 382 of the Criminal Procedure Code in the judgement. He submitted that it was not mandatory for the investigating officer to testify, so long as the state was able to present its case beyond reasonable doubt. He argued that the defence evidence did not shake the prosecution's case. He stated that Article 50 was complied with to the extent that the appellant was supplied with evidence and given opportunity to cross-examine the witnesses. He submitted that there was no requirement that a person charged with defilement be medically examined to confirm whether he had had penetrated the complainant or not. He submitted that the prosecution had established its case beyond doubt, and implored the court to dismiss the appeal.

11. The first issue raised in the amended petition is that the trial court amended the charge but did not comply with the section 214 of the Criminal Procedure Code. His concern is with paragraph 18 of the judgment, which reads as follows -

> *'... I do note that the penalty section in the charge sheet is indicated as 8(3) as opposed to section 8(2) as the child was found to be 8 years old. As I have found accused has committed the offence I will correct the error under the provisions of section 382 of the Criminal Procedure Code as well as the opinion of the court in David Mwangi Njoroge vs. Republic (2015) eKLR. I find the accused guilty pf the offence of defilement contrary to section 8(1) as read with section 8(2) …'*

12. The appellant was charged under section 8(3) of the Children Act, but was convicted under section 8(2) after the amendment. He pleads that that act of amending the charge at that stage prejudiced him, and the trial court ought to have complied with section 214 of the Criminal Procedure Code and required him to plead to the amended charge. Section 8(1) defines the offence of defilement, the act of causing penetration with a child. Section 8(2) prescribes the penalty where the child is aged eleven or less, and it is life imprisonment; while section 8(3) prescribes the penalty where the offence is committed with respect to a child aged between twelve and fifteen, and it is imprisonment for a period of not less than twenty years. The charge as framed therefore meant that the appellant, upon conviction, could be sentenced to a minimum of twenty years. The amendment effected in the judgement exposed him to a penalty which was a lot more severe, life imprisonment.

13. Let me start by considering the propriety of the amendment of the charge in the first place. It was effected under section 382 of the Criminal Procedure Code, which provides as follows -

> *'Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, information, order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.'*

14. My reading of section 382 is that it does not empower a trial court to correct errors in charges or information or other process. In fact, the provision is not about powers of a trial court, but of a higher court charged with exercising appellate and revisionary or supervisory powers. The provision, therefore, does not empower the trial court to do what the trial court did in the instant case. The trial court exercised a power that it did not have.

15. Amendment of charges by a subordinate court is provided for in section 214 of the Criminal Procedure Code. As framed the provision appears to limit such amendments to 'at any stage of a trial before the close of the case for the prosecution.' There is nothing in the provision to suggest that a charge can be amended after the case for the prosecution has closed or during the defence case. It would appear that the court can only amend the charge before the case for the prosecution is closed. See *Republic vs. Michael Ezra Mulyoowa* (2015) eKLR.

16. The other relevant provision is section 179 of the Criminal Procedure Code. It enables the trial court to convict a person a person of a minor offence where the offence proved is included in the offence charged. That would apply in cases where the offence charged is not proved but the evidence proves a minor offence included in that offence, such as where a person is charged with murder, but is not proved but the facts prove manslaughter, or robbery with violence versus simple robbery or even theft. The offence charged was attracted a penalty of an imprisonment for a minimum of twenty years' imprisonment, but the appellant was jailed for life. The trial court concluded that the facts disclosed a more serious offence. No doubt section 179 of the Criminal Procedure Code would have been of no application in the

circumstances.

17. I appreciate the difficulty that the trial court found itself in. it came to a finding that the facts placed before it disclosed that an offence had been committed against an eight-year-old child, yet it could not convict him under the charge as framed for the charge he faced was in respect of a child victim aged between twelve and fifteen, and imposing the sentence prescribed under that portions would have resulted in an illegal sentence. Yet, the action the court took was prejudicial to the appellant for the charge could not be altered at the stage of conviction and sentence without occasioning a miscarriage of justice, and especially the same exposed the appellant to a stiffer penalty than that in the charge that he had all along faced. One way out would have been for the court to convict on the alternative charge instead of purporting to alter the charges in the judgement.

18. On the matter of convicting without the evidence or testimony of the investigating and arresting officers, for the two did not testify at the trial, it is well settled that the failure to call such witnesses does not weaken the prosecution's case. That has been stated in several decisions, such as *Evans Ouko Oduor vs. Republic* (2017) eKLR, *Aden Dahir Nuno vs. Republic* (2015) eKLR, *Lucas Odinga Onyango vs. Republic* (2018) eKLR, among others. In any event, the appellant did not seek to demonstrate how the failure to call police witnesses weakened the prosecution case.

19. On the dismissal of the defence of alleged grudge between the appellant and the family of PW1 and PW2, I have read and read the evidence. There is nothing in my view which suggests that there was any such grudge and that the charges the appellant faced were motivated by the alleged grudge.

20. The appellant alleged that Article 50 of the Constitution was not complied with, and that his rights were infringed. His case is that there was no pretrial disclosure. He was not availed with the material or evidence that the prosecution was to rely on, by way of witness statements. I have looked at the record. The appellant did apply for the statements when the matter came up for hearing on 22nd April 2015, and it was directed that he be furnished with the same. When the matter came up next on 13th May 2015 for hearing, he informed the court that he had not been provided with the statements and therefore he was not ready to proceed. The court nevertheless allowed the matter to proceed on the basis that it was to take evidence of the child only being a vulnerable witness. There is nothing on record thereafter to indicate whether or not the appellant was ever supplied with the statements. I note that on various occasions that the appellant did inform the court that he was ready to proceed, and did not raise of the statements again, suggesting that he was not prejudiced.

21. He submitted that he was not subjected to medical examination to determine whether or not he had had sexual connection with PW1. I am not aware of any law that requires that in cases where an accused person faces a sexual offence charge, he ought to be subjected to medical examination or to forensics to determine whether or not he had sexual intercourse with the victim of the alleged crime. It was held by the Court of Appeal in *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, that section 36 of the Sexual Offences Act allowed the court to order samples to be taken from an accused person for forensic examination or deoxynucleic acid (DNA) testing, but then that provision was not mandatory, and the penetration or sexual intercourse could be proved by alternative evidence.it was emphasized that medical or DNA evidence was not the only evidence by which commission of a sexual offence could be proved.

22. He complained that he was not allowed to cross-examine PW1. I have looked at the record of the trial court. At page 6 of the typed proceedings indicate that the appellant did cross-examine PW1 even though she had made an unsworn statement. There cannot therefore be any basis for this ground,

23. He also argued that the court ought to have realized that the charges were trumped up and that it was a frame up conjured by PW1's parents. The appellant has not demonstrated in what respect the proceedings can be said to have been a frame up. He did not lay any basis upon which the court could draw that conclusion.

24. In view of what I have stead in paragraphs 12 to 17 of this judgement it is clear that the trial court fell into error. As mentioned elsewhere in this judgement, the appellant faced an alternative charge. A court convicts on the alternative charge where the main charge fails, but evidence exists that establishes the offence charged in the alternative. In the instance case there is evidence that the appellant's penis did come into contact with the vagina of the minor. Such contact with a child amounted to an incident act, and established commission of the offence defined in section 11(1) of the Sexual Offences Act. It attracts a penalty of imprisonment for a term of not less than ten years, with no option of a fine. I shall accordingly quash the conviction of the appellant of the offence of defilement under section 8(2) of the Sexual Offences Act and set aside the sentence imposed of life imprisonment, and substitute the same with a conviction under section 11(1) of an indecent act with a child and sentence the appellant to serve a period of twenty-five (25) years in prison. He has a right of appeal to the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April 2019

W MUSYOKA

JUDGE