



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 70 OF 2017[SOA]

JACOB OTIENO NYASUDI.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(Being an Appeal against conviction and sentence dated 26.6.2017 in Criminal Case No. 835 of 2015

in Siaya PMCR.C. Ukwala Law Courts before Hon. J.O. Ongondo – Principal Magistrate).

JUDGMENT

1. The Appellant **JACOB OTIENO NYASUDI** was charged with the offence of **defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006** that on 14th November, 2015 Siaya County the Appellant intentionally caused his male genitalia to penetrate the female genitalia of MAO a child aged 9 years old. The appellant also faced another alternative count of **committing an indecent act with a minor contrary to S.11(1) of the Sexual Offences Act No. 3 of 2006** that on 14.11.2015 Siaya County appellant intentionally touched the front female private parts of MAO, a child aged 9 years.
2. The prosecution called 7 witnesses in effort to prove case against the appellant. The Appellant on the other hand gave sworn testimony without calling any witness.
3. This being the first appellate court, in determining this appeal, this Court is alive to the principles laid down in the case of **Okeno Vs. Republic [1972] E.A. 32** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (**see Pandya Versus Republic [1957] E.A. 336** and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.
4. In **Shantilal M. Ruwala Versus Republic [1957] East Africa 570** it was held that 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 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 Peters Versus Sunday Post [1958] East Africa 424.**
5. In the trial Court, the prosecution's case was that PW1, the minor (after voire ire examination) testified that she was playing with her friends when the appellant called her and took her into a thicket and removed his penis which he inserted in her vagina. She felt a lot of pain and screamed. She knew the appellant as Otis who lived near the river. She identified the appellant in court. She stated that she ran away and went to inform her father of what had transpired. She stated that following her screams, Mama Odhiambo heard her screams and went to the scene and found her seated on the ground and that she ran away when she saw Mama Odhiambo.
6. PW2, Elizabeth Achieng Otieno a villager from the area testified that on 14th November, 2019 at about 12 noon, she was at her home and proceeded to the appellant's home as he was her brother in law. As she approached a thicket, she noticed commotion and as she moved closer she saw a neighbour's child lying on the ground naked while the appellant was bending over the child.
7. She raised an alarm and went to report to the child's mother. She ran leaving the appellant and the child at the scene. She screamed and the appellant followed her pleading with her not to tell anyone what she had seen and that the child also ran away. She screamed as she ran to inform her mother. In cross examination she denied having any grudge with the appellant.
8. PW2 managed to inform PW3, LA the child's mother who searched for the child and when she traced the child, she took her to Urathi Health Centre and Rwambo and later to Siaya Referral Hospital. She identified the child's birth certificate indicating that she was born on

15.1.2006. She was therefore 9 years at the material time.

9. PW3 found the child in abandoned house. She had her panty in her hand. The child told her mother how the appellant took her on a bicycle into a thicket and attempted to penetrate her but PW2 emerged putting a spanner on appellant's plans.

10. In his medical examination report, PW4, Sila Oluoch Omondi the Clinical Officer indicated that there were no bruises or lacerations on the victim's private parts. He noted the hymen was missing but did not state whether it was removed during the commission of the offence. He found the vagina of the victim was continuously opening. There were whitish discharge at the *labia majora* but no bleeding. A high vaginal swap for HIV was done. It was negative. There were pus cells. Pus and leucocyte cells were seen following a urinalysis test. He filled the P3 form

11. The appellant gave sworn statement denying the offence. He avoided mentioning events of the material date and or time. He stated what happened on 14.11.2015 when he was arrested. He contended that PW2, PW3 had grudge with him and that they trumped the case against him.

12. The trial magistrate was persuaded that the prosecution had proved its case against the appellant beyond reasonable doubt. He convicted the appellant on the main charge and sentenced him to serve life in prison as stipulated in section 8(2) of the Sexual offences Act.

13. Aggrieved by the said conviction and sentence, the appellant who is acting *pro se* filed this appeal setting out the following grounds of appeal:

1. *THAT the trial Magistrate erred in law and facts by convicting despite the insufficiency of evidence adduced by the Prosecution.*
2. *THAT the prosecution's evidence did not meet the standard threshold hence was insufficient in law to earn conviction*
3. *THAT I cannot recall all that transverse hence pray for trial court proceedings and Judgments to adduce sufficient grounds.*
4. *The honourable court does quash the conviction setting the sentence aside.*
5. *Order for habeas corpus.*

14. In his written and oral submissions before the court, the appellant relied on the case of **Evans Mathenge Wachira v Republic [2014] e KLR** and submitted that the Clinical officer Mr. Silas Oluoch upon examining the victim testified that he found no bruises on her private parts and that although he found the hymen missing, he did not state whether it was removed during the commission of the offence.

15. According to the appellant, the evidence of PW2 who was the eye witness was circumstantial as she never saw the penetration during the said defilement ordeal. Reliance was placed on **Okeno v Republic [1972] EA 32** on what circumstantial evidence is and argued that such evidence is not as good as direct evidence. He relied on **Republic v Taylor Weaver and Donovan [1928] 21 Criminal Revision 20**.

16. The appellant further submitted that he had a grudge with PW2 who was his family member and who had seduced him but he refused. He stated that the victim's mother was his sister in law and that he was born again.

17. On sentence, the appellant argued that the sentence imposed on him by the trial court was higher than expected by law because under section 8(2) of the Sexual Offences Act, he could only be sentenced to serve a prison term of not more than 20 years upon conviction.

18. The appellant urged the court to allow his appeal and quash the sentence imposed.

19. In opposition to the appeal, the prosecution led by Mr. Okachi submitted that the prosecution proved its case against the appellant beyond reasonable doubt and that PW1 was clear on what happened to her and that she ran and told her father what had happened. Further, it was submitted that PW2 found the appellant ready handed hence the conviction was sound and sentence lawful since the offence is traumatizing to the victim and the society. Counsel urged the court to dismiss the appeal.

DETERMINATION

20. I have considered the appeal by the appellant and submissions for and against the appeal. In my humble view, the main issue for determination in this appeal is whether the prosecution proved the guilt of the appellant beyond reasonable doubt and therefore whether the conviction of the appellant and life sentence imposed on the appellant for defiling a child aged 9 years as per the charge sheet was sound.

21. To resolve this issue, I must first determine whether the prosecution evidence proved beyond reasonable doubt the main elements in cases of defilement of children as stipulated in section 8(1) and (2) of the Sexual Offences Act. These elements are:

1. Proof of penetration;
2. Positive identification or recognition of the accused person as the offender;
3. Proof of age of the victim child;

22. on whether penetration was proved, section 2 (1) (b) of the **Sexual Offences Act** provides:

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another.”

23. PW1, the minor victim stated that the appellant took her into a thicket and penetrated her vagina by inserting his penis in it and that she felt pain and screamed, attracting PW2 who was on her way to the appellant’s home. PW2 testified that on her way to the appellant’s home, she found the appellant half naked, with his trouser pulled down the knees. The child (PW1’s) panty had been removed too. The appellant was bending over the child who was lying on the ground.

24. In her evidence, PW1 described the appellant very well, and even indicated where his home was, at the river. The appellant was a brother in law of PW2 hence he was well known to her. She said she knew him for over 20 years.

25. In cross examination PW4 responded that the child told her that the appellant was forcing his penis into her vagina but that he was unable to completely penetrate her as PW2 appeared and interrupted him.

26. In addition, PW6 testified that there was penetration although he could not tell whether the missing hymen was caused by the material act of the appellant defiling the child.

27. Under section 2 of the Act, penetration need not be complete. Partial penetration is sufficient. From the evidence of PW1, PW2, PW4 and PW6, there was proof of partial penetration of the victim and it matters not that there was no conclusive evidence that the missing hymen was done by the material act of defiling the child on the material day. The Clinical Officer on examining the child found whitish discharge in her genitals and pus cells as well. Accordingly, I am satisfied that there was proof beyond reasonable doubt, of penetration.

28. On whether the offender was positively identified by the prosecution witnesses, this court observes that the offence took place during the day at about 12 noon as described by PW2. The victim and PW2 described the appellant with precision thus removing any doubt as to the identity of appellant. Furthermore, the appellant was well known to the PW1 and PW2 as PW2 was on that very day proceeding to the home of the appellant when she found the appellant in the compromising act giving rise to the charges herein. PW1 too knew the appellant and described where he lived. This was a case of recognition and not identification of a stranger.

29. There is nothing to demonstrate that PW1 and PW2 could have been lying or that this was case of mistaken identity. Albeit the appellant claimed that there was a grudge with PW2, the child was not PW2’s child and more so, PW2 denied any grudge. Furthermore, how PW2 could be going to the home of the appellant on the material day if at all they have score to settle. There was no evidence of a grudge between the two and even if there was a grudge, the evidence of PW2 was clear that the appellant took her to the thicket and as he was in the process of defiling her, PW2 appeared and disrupted the act.

30. Accordingly, I find and hold that the offender was positively identified as the appellant herein.

31. On proof of age of the child, a birth certificate produced in evidence by the investigating officer showed that the victim complainant was born on 15th January 2006. There was no contrary evidence that the child was aged 9 years as at the time of the offence. Accordingly, I find and hold that there was proof beyond reasonable doubt that the complainant was a child aged 9 years.

32. From the above analysis of the evidence before the trial court, I am persuaded that the prosecution established the guilt of the appellant beyond reasonable doubt and that therefore the conviction reached was sound. I uphold it and dismiss the appeal against conviction.

33. On sentence, the appellant complains that the sentence imposed was beyond what is stipulated in section 8(2) of the Sexual Offences Act. However, as the prosecution proved that the victim complainant was aged 9 years, section 8(2) of the Act is clear that where the age of the child is 11 years of age and below, upon conviction, the accused shall be sentenced to serve life imprisonment.

34. In this appeal, I accorded the appellant an opportunity to mitigate in view of the mandatory nature of section 8(2) of the Sexual Offences Act. He pleaded for leniency and prayed for a custodial sentence of 10 years because he was aged 30 years. The prosecution urged the court to consider the age of the victim child and the effect such offence has on the victim and the society at large.

35. Having considered the mitigations by the appellant and the submissions by the prosecution counsel and noting that the victim child was aged 9 years and the fact that defilement traumatizes its victims, as it leaves permanent psycho-traumatic experience on them, hence the stiff penalties contemplated in the Sexual offences Act which is intended to deal with the serious societal problem of sex predators of young children, I find and hold that the life imprisonment imposed on the appellant is lawful and a deterrent one.

36. However, as the said sentence is the mandatory sentence, invoking the principles espoused in the Francis **Karioko Muruatetu v Republic [2017] e KLR** as applied by the Court of Appeal in Kisumu **CA CRA No 93 of 2014, Jared Koita Injiri v Republic [2019] eKLR**, I would exercise discretion and resentence the appellant to serve 30 years in prison, to be calculated from 16th November, 2015, when he was first arrested and arraigned.

37. In the end, the appeal against conviction fails. The appeal against sentence is allowed.

Dated, Signed and Delivered in Open Court at Siaya this 26th Day of June, 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Snr Principal Prosecution Counsel for the State

CA: Brenda and Modestar