



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 61 OF 2017 [SOA]

(CORAM: R.E. ABURILI - J)

JOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against sentence and conviction dated 29/6/2017 in SRM, Siaya in Criminal Case No. 67 of 2017 by Hon. C.A. Okore - SRM)

JUDGMENT

1. The Appellant JOO was charged with the offence of Sexual Assault contrary to **Section 5(1) a, (1)(2) of the Sexual Offences Act No. 3 of 2006**. Particulars of the offence are that on the 9th day of February, 2017 at [particulars withheld] sub-location in Siaya District within Siaya County, the appellant unlawfully used his fingers to penetrate the vagina of S.A, a child aged 7 years.
2. After the full trial, the appellant was found guilty and sentenced to serve 10 years imprisonment. Being dissatisfied with the said conviction and sentence, the appellant filed this appeal setting out the following grounds of appeal:

That, the learned trial court magistrate erroneously convicted the appellant on the purported allegation without considering the defence witnesses' evidence adduced.

That, the appellant cannot recall all that transverse during the trial hence pray for the trial records to adduce sufficient grounds at the hearing thereof.

That, the appellant prays for orders of **Habeas Corpus**.
3. The appellant filed written submissions which he relied on in arguing his appeal.
4. This being a first 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 decisions on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.
5. 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**).
6. In the trial court, the evidence of **PW1 W.A.O** the mother of the complainant was that on 9/2/2017 at about 2.00 pm the complainant returned home from school while not walking properly. She asked her why her walking style had changed and the complainant told her that O, appellant herein, led her to a bush on her way from school and inserted his fingers inside her vagina. She stated further that she checked the complainant's vagina and found scratches inside there, and that the bruises were causing her a lot of pain when passing urine. She took the complainant to hospital and later reported to case to the police. The appellant was later arrested and charged. She identified the appellant as O, who is her distant relative and village mate.
7. The appellant stated that he had no question to ask PW1.

8. PW2, **Silah Omondi Oluoch**, a Clinical officer who examined and filled P.3 form for the complainant on 10/2/2017, one day after the incident testified that on examination of the complainant's genitalia, he found she had a hyperemic and inflamed outer vagina. She also had bruises on her labia majora. The hymen was broken. He formed an opinion that there was conclusive evidence to show forceful vaginal penetration. He produced the P.3 form for the complainant herein as exhibit 1 and the Medical notes as exhibit 2.
9. PW2 also produced the P.3 form filled in respect of the appellant as exhibit 3 and medical notes as exhibit 4. The appellant's P.3 indicated injuries on neck, left eye, left chest, arm, buttock and thighs. These injuries showed that the appellant could have been assaulted.
10. **PW3, S.A.** the complainant in Class 2 gave sworn evidence after *voire dire* examination by the court and stated that on the material date she was heading back to school from lunch when she met the appellant herein whom she referred to as O. And that the appellant held her hand and took her to a nearby bush and lifted her dress and removed her skin tight and pant. She stated further that the appellant started touching her private parts (she pointed at her vagina when referring to her private parts). And that the appellant inserted his fingers inside her vagina which referred to as "dudu" as she pointed at her vagina in court. she also stated that appellant warned her not to cry or make noise and so she kept quiet. And that when appellant heard the footsteps of a passerby, he ran away and left her there. She then proceeded home and told her mother (PW2) who took her to hospital. She identified the appellant as O who is her neighbour. And that she sees him at home every day.
11. In cross examination by appellant, PW3 stated that she was alone when she met the appellant who was also alone.
12. **PW4, Gabriel Ochieng Midiwo**, the village elder of [particulars withheld] village who received the report in relation to the assault of PW3 from PW1 on 9/2/2017 at 6.00 pm testified that he assisted in arresting the appellant and escorting him to Siaya Police Station to face charges. He identified the appellant as JO his nephew who stays with their grandmother.
13. **PW5 No. 83796 Corporal Serah Kavatha**, the Investigating Officer testified that she received the complainant with her parents on 10/2/2017 and recorded statements of witnesses. PW3 told her that the appellant found her on her way to school from lunch, led her to the bush and removed her tights and pants and inserted his fingers in her private parts and that she went home later and told her mother. PW5 later charged the appellant who was already in custody. She produced a Baptismal card in respect of PW3 (complainant) to confirm her age as exhibit 5 herein. She was born on 15/8/2009. At the material time, she was aged (7) seven years and (6) six months.
14. At the close of the prosecution's case, the Appellant was placed on his defence in which he opted to give sworn testimony and called (2) two witnesses in his defence. The appellant JOO testified as DW1 and denied the offence. He stated that he was aged (21) twenty one years with Identity Card No. 33328005. He further stated that on the material date at 2.00 pm he met Oduo a child and PW3 herein, on their way to school. He greeted them and passed and that at 3.00 pm till 5.00 pm, he went to fetch water for Nyangiya. He denied sexually assaulting PW3.
15. DW2, B.A. a minor gave unsworn evidence and stated that she knew the complainant and the appellant. That the complainant was her neighbour. She stated that she was with the complainant when heading back to school at 2.00 pm and that they met O and that they took a shortcut as the appellant took the main road. Later in the evening she went back home with the complainant. She denied that the appellant touched the complainant (court observed that the witness at that point looked at the appellant first before answering questions and that she only answered questions after getting a nod from the appellant). She stated that she had come to tell the court that Ouma the appellant did not assault the complainant.
16. DW3, Julia Oloo a.k.a Nyangiya testified that the appellant fetched water for her on the material date from 3.00 pm to 6.00 pm. She stated that she was NOT with the appellant between 1.00 pm and 2.00 pm that date.
17. In his written submissions as adopted canvassing this appeal, the appellant submitted that he pleaded not guilty for the offence and that he pleads with the court to consider that he had served enough while in prison since he was ailing hence he should be released on probation or acquit him since the evidence adduced by witnesses PW1, PW3 and PW4 were all lies and fabricated only to convict him since that he was not his matrimonial habitat area.
18. Further, that in the court proceedings, the statement of B.A.O, DW2 at page 11 and 12 is incomplete since page 12 was missing. He submitted that the learned Magistrate failed to consider that there was insufficient/concrete evidence produced throughout the hearing by all the witnesses who were present to guarantee his conviction and judgment.
19. That all the witnesses failed to prove to Court that he was actually the one who caused the bruises and penetration to PW3 and ignoring cross examination records of (DW2) who was with the complainant at the time of the incident.
20. That PW1 and PW4 who is the complainant's mother and the village elder respectively collaborated to fix the appellant by calling a village meeting yet they were not at the alleged scene of crime.
21. That the Honourable court failed by facts and law by accepting the affidavit of S.A. PW3 who is the complainant and disregarding the affidavit of DW2 (B.A.O who was with the complainant at the time of incident as noted in DW2's cross examination).
22. That PW1 mother to the complainant could not clarify to the Court when and where the alleged incident took place, as the exhibits which were taken to the police like panties and bikers were not displayed in Court as required and were missing in Police Inventory, showing a shoddy investigation.
23. That the statement of PW4 and DW5 were definitely contradicting since PW4 said she was alone at the time of incident while DW2 B.A.O confirmed to the Court that they were with PW4 when they met JOO who was is the accused/appellant.

24. That PW3 Cpl. Sara Kevatha could not specify the type of finger which was alleged by Plaintiff to be used.
25. That the trial court failed to accept the evidence of DW2 a minor and accepted that of PW3.
26. That PW2 Silas Omondi Oluoch, a Clinical Officer, Medical report reveals that the penetration and bruises were caused by blunt object, yet there was no vaginal swab conducted to ascertain what might have caused the hymen to break.
27. That the Village elder is from the complainant's clan and had a grudge to eliminate him from that area. That his dependents are starving and so the court should give him non-custodial sentence.
28. The Prosecution led by Miss ODUMBA opposed the appeal and submitted that the prosecution proved its case against the appellant beyond reasonable doubt and that the sentence meted out on him was the minimum allowed by law. She urged the court to dismiss the appeal and uphold the conviction and sentence.
29. The appellant in a rejoinder pleaded with the court to reduce sentence as he had been in prison for 3 years and had learnt masonry, and that he was 18 years and was born in 1995.

DETERMINATION

30. I have considered the appeal herein, the grounds, evidence adduced in the trial court, submissions and opposition thereto. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant a conviction and sentence of 10 years imprisonment.

31. For the offence of sexual assault to be established, the prosecution must prove the following elements: -

1. ***Penetration;***
2. ***Proof of age of the victim of the complainant***
3. ***Whether consent was obtained from the complainant.***
4. ***Whether the complainant was sexually assaulted.***
5. ***Whether the assailant was properly identified.***
6. ***Whether the prosecution proved its case against the appellant beyond reasonable doubt.***

32. On whether there was penetration, PW3 testified that that O, the appellant herein met her on her way from lunch to school after lunch and that he took her to a bush where he inserted his fingers inside her vagina, after lifting up her dress and removing her skin tight and pant. Her evidence was corroborated by that of PW1 who checked her vagina and saw scratches inside there and that the bruises were painful whenever she passed urine. The evidence of PW3 and PW1 was further corroborated by that of PW2, the Clinical Officer who examined the complainant one day after the incident. He found that her vagina was hyperemic and inflamed. She also had bruises in her *labia majora*, and that PW3 had a broken hymen. PW2 concluded that there was conclusive evidence to confirm forceful vaginal penetration. From the uncontroverted evidence of PW1, PW2 and PW3, it is evident beyond doubt that there was penetration of the complainant's vagina.

33. On whether the age of the complainant was proved, PW2 stated that she was aged 8 years. However, PW5 produced the complainant's Baptism card which shows she was born on 15/8/2009. It was marked as exhibit 5. From exhibit 5, it is clear that PW3 was aged (7) seven years and (6) six months at the material time. There was no contrary evidence as to the age of the complainant. I therefore find that it was proved that she was aged 7 years and 6 months at the time.

34. On the issue of consent, it was proved that PW3 was a minor at the material time and had no capacity to grant consent to any sexual relations.

35. On whether the complainant was sexually assaulted, the medical evidence tendered by PW2, it has been confirmed that the injuries noted on the vagina of PW3, she suffered harm. The P.3 form produced as exhibit 1 herein shows the degree of injury was harm. The object used was noted by PW2 was blunt. PW3 testified that the appellant used his fingers on her. I find the evidence of PW3 and PW2 conclusive enough to confirm that PW3 was sexually assaulted.

36. On Identification of the assailant, PW3 stated that O, the appellant herein was her neighbour and that he met her while heading to school and led her to a bush where he sexually assaulted her. PW3 recognized the appellant as her neighbour and kept referring to him as O in her testimony meaning she knew the appellant well prior to the incident and was able to recognize him at the scene. In addition, the offence was committed in broad daylight at about 2.00 pm and therefore PW3 was able to visually recognize her assailant. The appellant was also identified as O by PW1 and PW4 who both stated that they are related to him, as a distant relative and a nephew respectively.

37. Further, the appellant in his testimony in defence stated that he met the complainant on the way but denied sexually assaulting her. His witness DW2 also stated that she was in company of the complainant when they met the appellant who greeted them on that day at 2.00pm. Albeit DW3 tried to assist the appellant by stating that from 3.00 pm the appellant was fetching water for her, the uncontroverted evidence from the prosecution witnesses and the appellant's own evidence in defence is that at 2.00 pm he met the complainant on her way to school.

38. The trial court which had the opportunity to hear and see the complainant testify in court believed her testimony and its truthfulness and stated: -

“I strongly believe the evidence of PW3 on identification since she had no reason to lie against the appellant. At her tender age, she was taken through voire dire examination to ascertain if she understood the consequences of oath taking. She was intelligent and gave sworn testimony. I believe that she told the truth to the court and that it is the appellant and none other than sexually assaulted her. From the evidence of PW1, 3 and herein I’m convinced that the appellant was positively identified. And that he was recognized as O, a name that is among his names indicated on the charge sheet herein. Appellant did not deny that he is called O in his sworn testimony.”

39. The trial court also considered the defence case as presented and rejected it. She rightly did so. This is because from the observation by the trial court, DW2 gave unsworn evidence which was never tested and more so, she appeared to be giving evidence as coached by the appellant because she was responding to the nodding by the appellant. She looked at the appellant all the time to get answers from him which rendered her evidence unbelievable.

40. With regard to DW3’s evidence, it never mentioned where the appellant was at 2.00 pm when the offence is alleged to have taken place hence I am in agreement with conclusion reached by the trial court that the appellant could have committed the offence and rushed to fetch water for SW3 to cover up his crime.

41. Although the appellant submitted that he is 18 years, in his defence he stated that he was aged 21 years and even gave his identity card Number which was recorded. He never stated that he was a minor at the time of committing the offence hence his submission is an afterthought and the same is hereby dismissed.

42. The appellant also claimed that he was framed by the village elder who did not want him in that village where the appellant lived with his maternal grandmother. Such assertion never arose during the hearing and therefore I find no basis for the submission.

43. The appellant also questions why the trial court believed PW3 a minor and disbelieved that of DW2 who was also a minor. I find that the trial court which had the opportunity to hear and see the witnesses give evidence observed their demeanors and therefore was the right court to comment on their respective demeanors. The trial court observed what DW3 was doing in court with the help of the appellant and chose not to believe her as her evidence was never tested in cross examination hence I have no reason to interfere with that finding.

44. On the submission that page 12 of the trial record was missing, the appellant was given a complete record in open court before the hearing of this appeal. This court confirmed that the record of appeal was complete before handing the same to him to prepare for the submissions.

45. On submissions that panties or clothing of the complainant were never produced in court, I find that the evidence adduced by PW3 as corroborated by the clinical officer who examined her and established that she had been sexually assaulted was sufficient to prove the act of penetration hence production of her panty or tights could not have added any value to the prosecution’s case.

46. On the submission that the prosecution witnesses were not present when the complainant was sexually assaulted, I find that the evidence of PW3 was clear that she was on her way to school when she met the appellant who led her in a bush and sexually assaulted her, after warning her not to cry or make noise. She cried but that when he heard footsteps of person approaching he ran away and left her. He had told her not tell her mother. The complainant knew the appellant very well prior to the incident which took place in broad daylight. There was nothing on record to suggest mistaken identity of the appellant by the complainant.

47. The above evidence did not require an eye witness to corroborate the testimony of PW3 and in any event, the requirement for corroboration of evidence of victims in sexual offences cases is not mandatory. Furthermore, a sane criminal in sexual assault would not do it in the public gallery for all to see and cheer him up!

48. **Section 124 of the Evidence Act** does not make it mandatory for corroboration of the Victim’s evidence in sexual offences. The court, once it believes that the victim of Sexual offence is telling the truth, and that the prosecution has adduced sufficient evidence in support of the charge and that they have proved their case against the Accused persons as the defiler beyond reasonable doubt, the court can proceed to convict the accused. The section provides:

“Notwithstanding the provisions for Section 19 of the Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the Prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where, in a criminal case involving a Sexual offence, the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person, if for reasons to be recorded, in the proceedings, the Court is satisfied that the alleged victim is telling the truth.”

49. Thus, whereas in criminal cases corroboration of the evidence of a child is necessary even where a voire dire examination is conducted, nonetheless, in sexual offences, there is an exception to the extent set out in the proviso to Section 124 of the Evidence Act that the Court is allowed to solely rely on the evidence of a child if the child is the victim, provided the Court first satisfies itself on reasons to be recorded, that the child is being truthful.

50. In this case, as I have stated above, the trial court believed the testimony of the complainant, PW3 and recorded reasons for believing her

and therefore I find no merit in the appellant's submission.

51. In the end, I find that the prosecution established the guilt of the appellant beyond reasonable doubt and that the conviction of the appellant by the trial court was sound. The appeal against conviction fails and the same is hereby dismissed.

52. On sentence, the trial court sentenced the appellant to serve 10 years imprisonment after hearing his mitigation wherein the appellant stated as follows after the prosecution submitted that he was a first offender:

“pardon me. The devil misled me. I will not do it again.”

53. The trial court then proceeded to sentence the appellant to serve a minimum of 10 years imprisonment as stipulated **in Section 5(2) of the Sexual Offences Act No. 3 of 2006.**

54. The question of whether the court is bound by minimum mandatory sentence in sexual offences cases was subject of a recent decision by the Court of Appeal in the case of **Jared Koita Vs. Republic [2019] eKLR** in which the Court of Appeal stated:

“This the leaves the question of the sentence. Arising from the decision in Francis Karioko Muruatetu & Another Vs. Republic, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by Section 204 of the Penal Code was unconstitutional. The Court took the view that:

Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another Vs. Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

55. On the basis of the above decision, I find and hold that the sentence of 10 years being mandatory minimum as imposed on the appellant, however lawful is capable of being interfered with by this court, having regard to the circumstances of each case.

56. In this instant case, I observe that the appellant is a young man who nonetheless committed a heinous crime against a young child and occasioned severe trauma and suffering to her.

57. Whatever the appellant was searching for from the child's genitalia thereby breaking her hymen using his fingers was only indicative of his heinous intentions. Children are vulnerable in the hands of such predators. Deterrent sentence is necessary.

58. The sentence meted out was lawful. However, the appellant in this appeal appeared remorseful and in his oral submission he mainly focused on the plea that this court should consider reducing for him sentence. During his mitigation in the lower court, he appeared to be conceding that he was cheated by the devil and promised never to do it again. The appellant, I note, has served 3 years and has 7 more years to go.

59. Sentence is discretionary. I would in the circumstances of this case exercise my discretion and reduce the sentence from 10 years to 7 years imprisonment to be calculated from the date of sentencing in the trial court on 26/6/2017. In the end, I find the appeal against conviction not merited. I dismiss it and uphold the conviction and reduce the prison sentence imposed by the trial court to 7 years imprisonment.

60. Orders accordingly.

Date, signed and delivered at Siaya this 24th Day of June, 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr Okachi SPPC for the State

CA: Brenda and Modestar