



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 101 OF 2018

BETWEEN

EK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence of J. Irura, Senior Resident Magistrate dated 23/03/2018 in Nkubu PMC Cr. Case No. 637 of 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of **defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, no. 3 of 2006**. The particulars of the offence are that on diverse dates between 10th and 11th June 2016 in Imenti South Sub-county, Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of RAM a child aged 8 years.
- 2 The appellant was charged in the alternative with committing an **indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006**, the particulars being that on diverse dates between 10th and 11th June 2016 in Imenti South Sub-county did an indecent act with a child RAM, a child aged 8 years by touching her vagina with his hands.
3. On the day of plea, the appellant pleaded not guilty to both the main and alternative counts. During the ensuing trial, the prosecution called 4 witnesses in support of its case against the appellant. After the prosecution closed its case, the appellant was placed on his defence. The appellant chose to remain silent.
4. The learned trial court thereafter carefully analyzed the evidence on record, and also considered the law and reached the conclusion that the prosecution had proved its case against the appellant to the required standard on the main count. The appellant was found guilty as charged, convicted and sentenced to life imprisonment.

The Appeal

5. Being aggrieved by both conviction and sentence, the appellant instructed the firm of Mutuma Gichuru & Associates Advocates to file appeal on his behalf. The Petition of Appeal was duly filed on 22nd August 2018 and sets out the following grounds of appeal:-
 - a. **The learned magistrate erred in fact and in law in failing to appreciate that the appellant was a minor at the time of the alleged offence.**
 - b. **The learned magistrate erred in fact and in law to take into account the age of the complainant and the appellant and/or consider any of exculpatory evidence adduced by the prosecution at the trial. (sic)**
 - c. **The learned magistrate erred in fact and in law by admitting the evidence of the prosecution witness who averred that the complainant was a minor of 8 years in absence of a birth certificate.**

d. The learned magistrate erred in fact and in law when she failed to appreciate that the complainant and the accused person were both minors and/or children living in the same neighbourhood for that matter.

e. In the further result, the learned magistrate erred by disregarding and failing to take into account the jurisprudence attaching the issue of defilement especially where both parties are minors.

f. The learned magistrate erred in both law and fact in failing to take into account the mental status of the minor at the time he was put to his defence.

g. All in all the learned magistrate so misdirected herself on matters of both law and fact as to occasion the miscarriage of justice against the appellant.

h. That in light of the foregoing the learned magistrate failed to do justice before her in the case at hand.

6. The appellant prays that the appeal be allowed and he be set free.

The Prosecution Case

7. Briefly PW2 the complainant, who gave unsworn evidence after a *voir dire* examination, testified that she was in class 2 and was aged 8 years old. She gave the name of the appellant as EK who is a neighbour. On one Friday after PW2 had come from school, the appellant went to their home and found her alone in the outer (table room) room of the two roomed house. The appellant told PW2 that he wanted to kill her then grabbed her towards his home. Neither PW2's mother nor any of her three siblings was at home.

8. On arriving at the appellant's home, PW2 noticed that there was nobody else in the compound. The appellant then took PW2 into a disused house, undressed her by removing her trousers and pants then removed his own trouser and slept on PW2. "He did bad manners to her." PW2 did not scream because the appellant threatened her and also called her 'Jabu' meaning an uncircumcised girl when she tried to resist his advances.

9. After the ordeal, PW2 dressed and went home, leaving the appellant behind in that disused house. The following morning, as PW2 went to collect milk from a neighbour's home, she took the path through a coffee plantation and on her way back, PW2 met the appellant who again told her he would kill her. He grabbed her, undressed her and then removed his long trouser. The appellant did not have any underpants. The appellant then slept on PW2 and did bad manners to her. When the appellant finished, PW2 dressed up and went home. PW2 found his older brother G at home and told him what the appellant had done to her. At the time, their mother DK, PW1, was not at home. It is to be noted that G was not called as a witness. PW2 testified that most of the time, her mother would leave her in bed in the morning and find her asleep in the evening.

10. PW1 testified that on 12th June 2016 in the morning, she woke up PW2 as she wanted her to take tea. Instead of getting up, PW2 told her mother that she was feeling pain between her legs. PW1 interviewed PW2. During the interview PW2 told PW1 what had befallen her at the hands of the appellant on 10th and 11th June 2016. That the appellant had undressed PW2 and inserted something inside her private parts both on Friday in the evening and on Saturday in the morning.

11. On receiving this information from PW2, PW1 contacted her husband and notified him of the same. PW1 also made a report to Nkubu Police Station where she was issued with a P3 form and referred to the hospital for examination and treatment. Number 96274, PC Cyclone Mwari of Nkubu Police Station, on general duties was at the police station at around 7.30pm when report officer personnel PC Aden informed her of a defilement case that had been reported to the station. PC Mwari, who testified as PW3 went to the report office where he met PW2 accompanied by her parents. She took down the witness statements after she had interrogated both PW1 and PW2. PW3 issued PW2 with a P3 form and advised the parents to take her to Kanyakine District Hospital. After the P3 form was filled, it was returned to PW3.

12. On 17th June 2016, PW1 led PW3 to the appellant's home but the appellant who was said to be a standard 7 pupil was not at home. PW3 went to the appellant's school and arrested him from there. Earlier on the 14th June 2016, PW3 visited the scene of crime in Kigane. He established that the appellant's home is only 50 metres away from the complainant's home. PW3 conceded he did not refer 'the boy' to hospital.

13. PW4 was Saberina Kaimatheri, a clinical officer at Kanyakine District Hospital. She testified that on 12th June 2016 she examined PW2 who confided in her that she had been defiled by a person who was known to her on 10th and also on 11th June 2016. PW4 also testified that according to PW2, the appellant had defiled her in a house on 10th June 2016 and in the coffee plantation on 11th June 2016.

14. On examination of PW2, PW4 made the following findings:- PW2's vulva was hyperemic, reddish and tender. Her hymen was absent and she had bruises and tears on the labia minora. She also had a brownish discharge. On laboratory tests, no spermatozoa cells were seen. However, there were red blood cells. HIV test was negative.

15. In PW4's opinion, the complainant was defiled through penetrative sexual intercourse. PW4 produced the duly filled P3 form as Pexhibit 1. In cross examination, PW4 confirmed that the appellant was examined by another doctor.

The Defence Case

16. The appellant did not offer any defence.

Issues for Determination and Submissions

17. Section 8(1) of the Sexual Offences Act (SOA) sets out the ingredients of the offence of defilement when it provides:-

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

18. The word 'penetration' is defined under section 2 of the SOA to mean **“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”** The word 'child' on the other hand is said to have the meaning assigned to it under the Children's Act (No 8 of 2001). The Children's Act defines the term 'child' to mean **“any human being under the age of eighteen years.”**

19. In this case therefore, the prosecution was under a duty to prove that the complainant herein was a child in accordance with the definition in both the Children's Act and in the SOA, and more specifically that the complainant in this case was in the age bracket of eleven years and below. The prosecution was also under a duty to prove that there was an act of penetration as defined under section 2 of the SOA and finally it needed to prove that it was the appellant who committed the act.

Submissions

20. Counsel for the appellant made oral submissions in which he pointed out that the appellant was not given a fair trial for various reasons:-

a. that the appellant was not given adequate time to prepare for his defence;

b. that the succeeding magistrate did not comply with the provisions of section 200 of the CPC when he took over the conduct of the case from the first trial magistrate. Secondly counsel submitted that the appellant who was a minor having been born on 15th May 1999 was not treated as a child during the trial. Counsel also submitted that the age of the complainant was not proved to the required standard. Finally, counsel submitted that this case was a frame-up because of a feud between the two families on grounds of marriage.

21. The appeal was opposed on grounds that the prosecution proved its case against the appellant beyond reasonable doubt. Prosecution counsel, while conceding that there was no compliance with section 200 of the CPC submitted that the non-compliance did not prejudice the appellant in any way because it was a matter of mere technicality. I must point out here that the question of whether or not the appellant had been afforded a fair trial was not one of the grounds of appeal. It is therefore not arguable.

On proof of age of complainant, prosecution counsel submitted that the complainant's age was proved to be 8 years vide PW1's evidence and the evidence of the P3 form. Regarding the age of the appellant, respondent's counsel submitted that this evidence was given only on appeal, and thus was an afterthought. On the alleged grudge between the two families counsel submitted there was no proof of such grudge.

23. In reply Mr. Shaba, counsel for the appellant submitted that non-compliance with section 200(3) of the CPC cannot be said to be a mere technicality since it is couched in mandatory terms. Counsel urged the court to find that there was a mistrial and to allow the appeal.

Analysis and Determination

24. I have now fully reconsidered and evaluated the evidence afresh. I have also considered the grounds of appeal, the submissions and the law. The first issue for determination is whether the complainant's age was proved. I am satisfied that this was done by the evidence of PW1 who is mother to the complainant. She gave the date of birth of the complainant as 29.01.2008. That evidence was not challenged by the appellant during cross examination. In any event, as a mother, it is only PW1 who had the right information as to the birth of her child. In this regard the appellant's contention that the learned trial court failed to take into account the age of the complainant does not hold any water.

25. The second issue for determination is whether there was penetration, as defined under the SOA. In her evidence in chief PW2 testified in part regarding the first encounter on 10th June 2016:-

“He took me to a house where nobody stays. He undressed me. I was in long trousers. He removed both my trousers and panties. He also removed his trousers and pants and slept on me. He then started doing bad manners to me. I did not scream. When I tried to refuse, he called me 'Jabu' (a word meaning an uncircumcised girl.) We then dressed up and I went back home. I left him in that house.

26. With regard to the second incident on 11th June 2016, PW2 testified in part:-

“The following morning, I went to collect milk from a neighbour's house.while going back home, I found him in the coffee plantation and told me again he would kill me. He grabbed me, undressed me and removed his long trouser. He did not have any underpants on he then did bad manners to me again. He slept on me in the coffee plantation. When he finished, I dressed up and went home. when I got home, I found my brother G who is in standard 4. I told him that Kimathi (accused) had done bad manners to me.”

27. So, do the words 'bad manners' mean defilement? In this jurisdiction and because of inhibitive cultural practices, the courts have understood and freely interpreted the words 'bad manners' to mean sex since children are not ordinarily expected to know about sex or to speak explicitly about sex. From PW2's evidence, it is clear that she was defiled and she said she told as much to her brother G, who was

unfortunately not called as a witness. The fact that PW2 was penetrated was confirmed by PW4, the clinical officer at Kanyakine District Hospital who examined PW2 whom she also confirmed was 8 years old. PW4 confirmed that the physical examination, revealed a broken hymen and a brownish discharge as well as tenderness on the vulva. All these, according to PW4, were signs of penetration. Even if the penetration was not deep, it would still amount to penetration as described by the Court of Appeal in *Mark Oiruri Mose versus Republic [2013] eKLR* where the court, stated *inter alia* that “.....the law does not require that evidence of spermatozoa be availed so long as there is penetration whether only on the surface, the ingredient of the offence is penetrated and penetration need not be deep inside the girl's organ.” In summary the medical evidence adduced by PW4 complied with PW2's own personal testimony show that penetration occurred.

28. The final question for determination is whether it was the appellant who defiled PW2. The appellant has complained that the learned trial court failed to properly consider the mental status of the appellant before convicting him. I must say that the context of this complaint is not clear. In my considered view, PW2's evidence on who defiled her is not in doubt. Further, though PW2 was the only eye witness the proviso to **section 124 of the Evidence Act** covers that evidence fully. In his judgment, the learned trial magistrate stated that PW2 was quite candid in her testimony as to who had defiled her on the two consecutive days. That the appellant was well known to PW2 as their two homes were separated by only a fence. And in summing up the testimony of PW2, the learned trial magistrate said, in part:-

“From the cross-examination that took place between the accused and the complainant, it is clear that the complainant was candid enough as to who had defiled her. The complainant was able to narrate in response what the accused person did to her. I have no reason to doubt her evidence.”

29. The above being the case, and having gone through the evidence myself, I have no reason to doubt that what PW2 told the court as to who her defiler was, was the truth. It was the appellant and I so find.

30. The last issue in this appeal is one of sentence. The appellant has purported to adduce evidence of his age during the appeal. However, no application was made to the court to allow production of that evidence. The above notwithstanding the appellant contends that the learned trial court ought to have appreciated the fact that the appellant was a minor at the time of the commission of the alleged offence.

31. The record shows that in his mitigation the appellant stated:-

“I am supposed to be in form one, and not going to school as I'm in remand.”

32. Thereafter, the learned trial court referred the matter to the probation officer with a view to conducting a social enquiry and making a report in respect of the appellant and also getting him a permanent placement at Kamiti Correction Centre. The matter was slated for mention on 20th March 2018.

33. Though this court has not had the opportunity of seeing the actual copy of the social inquiry report, the learned trial court referred to it in its remarks before sentence. The only omission is that the trial court did not note the age of the appellant. He only noted that the victim's family would continue living in fear if the appellant went back to the community.

34. Taking the totality of the trial court's remarks into account, and further noting the appellant's mitigation, I am prepared to give the appellant the benefit of the doubt and to conclude that he had just turned 17 years at the time of commission of the offence. The appellant was therefore a child in terms of the provisions of the **Children's Act, No. 8 of 2001**.

35. The above means that the appellant should have been punished in accordance with **section 191 of the Children's Act** and in particular **section 191(1)(g)** which provides that “*in the case of a child who has attained the age of sixteen years dealing with him in accordance with any Act which provides for the establishment and regulation of borstal institutions.*” I am certain that the above provision is what informed the trial court's decision that the probation officer finds the appellant a placement at Kamiti Correction Centre.

36. If the information the appellant gave is correct, he is now 20 years old. He was just below 19 years of age at time of conviction on 20th March 2018. In the case of *Daniel Langat Kiprotich versus State [2018]eKLR*, a case that was cited with approval by Mwangi J in Naivasha *Criminal Appeal no. 55 of 2015 – SCN versus Republic [2018] eKLR* the court held:-

“Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides such a child can only be sent to a borstal institution for no more than three years, the options are limited to trial courts even where on analysis and evidence such a court might be persuaded that the almost - adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. When the offence committed was particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.

While these dilemmas call for reform to our juvenile justice system to provide a more nuanced statutory scheme, I am persuaded, in following the Court of Appeal in the Dennis Cheruiyot Case and the JKK case, that when faced with the situation such as the one we have in this case, the solution lies in section 191(1) of the Children's Act: to deal with the offender in question in any other lawful manner. In this case, I have followed these two precedents regarding the right approach to sentencing in such cases. In addition, I have taken into consideration the following particular factors in the case at hand namely:-

a. the fact that the Petitioner was accompanied by five other people during the commission of the robbery;

b. the fact that the assailants were armed – one with a gun and the rest with pangas and clubs;

c. the fact that the Petitioner committed two separate offences of armed robbery;

d. the fact that the offences took place on the highway which poses particular threat to road users; and

e. the fact that the only mitigating circumstances are the facts that the petitioner was a minor and that he was a first offender.”

37. In another case, *Republic Versus Dennis Kirui Cheruiyot [2014]eKLR* again cited by Mwongo J in the *SCN's case* (above) the appellant committed the offence of murder when he was 15 years old. At time of sentencing, he was 20 years old, and was sentenced to life in prison. On appeal, the Court of Appeal reduced the sentence to ten years on the basis of the dilemma in which trial courts find themselves when dealing with near adult offenders. A similar scenario existed in *JKK versus Republic [2013]eKLR* in which the juvenile offender who had turned 21 years at the time of sentencing had his death penalty reduced to 12 years by the Court of Appeal. The reasoning by the Court of Appeal was as follows:-

“The purposes of the sentences provided for under the Children's Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective in the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that he appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.”

38. In the instant case, the learned trial court was minded to send the appellant to a correction facility; but did not do so. I also note that contrary to appellant's contention, PW2 was not of the same age as the appellant so as to consider the two of them as children in need of care and protection. PW2 was under 11 years of age and quite vulnerable. The appellant knew that and that is why he coerced her into submission by threatening to kill her and by referring to her as 'jabu'. I also note from the mitigation that the appellant only said he was supposed to be in form 1. He showed no remorse for what he had done. In light of the above, I am inclined to reduce the appellant's sentence from life imprisonment, a sentence that was unlawful as the time, and substitute it with ten (10) years imprisonment. This will help the appellant to appreciate the folly of his wanton and beastly behaviour against innocent young children within his neighbourhood.

Conclusion

39. In concluding this matter, I make the following final orders:-

a. Appeal on conviction be and is hereby dismissed.

b. Appeal on sentence is allowed to the extent that the same is reduced from life imprisonment to ten (10) years imprisonment with effect from 23rd March 2018.

c. Right of Appeal within 14 days from date of this judgment

40. Orders Accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 31st day of July 2019

F. GIKONYO

JUDGE

In the Presence of

Thangichia for Ashaba for Appellant

Namiti for Respondent

