



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM; CHERERE-J)

CRIMINAL APPEAL NO. 84 OF 2017

BETWEEN

CHARLES OMUKUKU PAPA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 05 of 2015 in the Principal Magistrate's court at Kimilili by Hon. D.O.Onyango (SPM) on 19.12.16)

JUDGMENT

The trial

1. **CHARLES OMUKUKU PAPA (hereinafter referred to as the Appellant)** has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

On 19th December, 2014 at [Particulars Withheld] Village n Bungoma North District within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of J.M a girl aged 14 years

THE PROSECUTION'S CASE

2. The prosecution called 4 witnesses in support of the charges. **PW1 J.M**, the complainant stated that she was born on 06.06.00 and was in class 4 at [Particulars Withheld] Primary School. She recalled that on the material date, she was collecting firewood near the Appellant's family farm when the Appellant found her there and defiled her. **PW2 AAO**, the complainant's aunt and guardian recalled that on 20/12/14, she heard a boy namely VW say that the complainant had been defiled by the Appellant the previous day. She stated that she escorted the complainant to hospital and she was examined and issued with a P3 form. **PW3 PC SUDI ROMA** the investigating officer received complainant's report on 21.12.14 and after investigations caused Appellant to be charged. He produced the complainant's age assessment report **PEXH. 1** which shows that her age was probably 15 to 17 years. **PW4 MICHAEL OKUMERUT**, a clinical officer examined complainant on 29.12.14 found that her hymen was broken. He produced her P3 form as **PEXH. 2**.

THE DEFENCE CASE

3. When the appellant was put on his defence, he opted to remain silent.

4. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 20 years' imprisonment.

The Appeal

5. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 21st July, 2017. From the 4 grounds of appeal and written submissions filed by the appellant on 24th July, 2019, I have deduced the following issues: -

1. That the prosecution case was not proved beyond reasonable doubt

2. That defence was not considered

3. That court relied on circumstantial evidence

4. That the P3 form was not produced by the maker

6. When the appeal came up for hearing on 06th August, 2019, Appellant submitted that he was wholly relying on submissions. Mr. Akello, learned Counsel for the state opposed the appeal and submitted that the complainant's age was proved by way of an age assessment report and penetration by way of a P3 form that was produced by its maker. It was additionally submitted for the state that there was no defence to be considered since Appellant did not give any and further that the sentence of 20 years was lawful.

7. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are:

i. Age of the victim.

ii. Identity of the offender

iii. Penetration.

8. Together with the ingredients, I will also consider the grounds of appeal raised by the appellant.

9. The complainant's age was proved by an assessment report **PEXH. 1** which shows that her age was probably 15 to 17 years.

10. The complainant told court that she knew the Appellant before the material date since he was their neighbour. There is therefore no possibility that she might have mistaken him for someone else.

11. Concerning the question of penetration, the law under **Section 2 of Sexual Offences Act** defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

12. The P3 form **PEXH. 2** produced by **PW4 MICHAEL OKUMERUT**, who examined the complainant on 29.12.14 which was 10 days after the incident found that she had no injuries in her genitalia but that her hymen was broken. The clinical officer failure to tell court if the hymen was freshly broken and the absence of any other injury casts a doubt on the prosecution case that the complainant had been defiled.

13. While it is indeed true that the trial court had no defence to consider since none was offered, the court had an obligation to ensure that the prosecution case was proved beyond any reasonable doubt considering that the Appellant was facing a term of 20 years' imprisonment which is a substantial length of time. Reasonable doubt is logically derived from the evidence or the absence of evidence and if a single circumstance creating reasonable doubt in a prudent mind exists about the guilt of an accused, the same is sufficient to give an accused the benefit of doubts. This case fell short of that threshold of proof and the conviction cannot therefore be sustained.

14. Having said that, I agree with the Appellant that there are good grounds for allowing this appeal. Had the appeal not succeeded, I would have been obligated to interfere with the sentence of life imprisonment imposed on the Appellant for the reason that mandatory sentences have been declared unconstitutional. (See the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** and Court of Appeal decisions in **B W 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 **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**)

15. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

DATED AND DELIVERED IN BUNGOMA THIS 09th DAY August 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Brenda

Appellant - Present

For the State - Mr. Akello