



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
(CORAM: CHERERE-J)
CRIMINAL APPEAL NUMBER 108 OF 2016

BETWEEN

KELVIN SIMIYU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 1112 OF 2015 in the Senior Resident Magistrate's Court at Sirisia by Hon. Kimani Mukabi (RM) on 24.03.16)

JUDGMENT

Background

1. (*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 offence is alleged to have been committed against C.A aged 15 years on 18th October, 2015.

THE PROSECUTION'S CASE

2. The prosecution called 5 witnesses in support of the charges. **PW1 C.A** the complainant recalled that on the material date she went to fetch water from the house of Mwalimu George when the Appellant who was a hose servant there took her to her employer's sons bedroom and defiled her. Two days after the incident, complainant was sent by her mother **PW2 CA** to fetch water and she refused and said that she had been defiled. The mother then reported the matter to police and escorted complainant to hospital. On the same date, 20.10.15, the complainant's father **PW3 MT** and Nyumba Kumi elders arrested the Appellant from the house of Mwalimu George and handed him over to the police. On 21.10.15, the complainant was examined by **PW4 PHILEMON YOMBA** a clinical officer and he found her with no bruises in her genitalia but hymen was missing. He produced complainant's P3 Form as PEXH. 1 and age assessment form which shows that complainant was 15 years as PEXH. 3. The investigating officer **PW5 PC SAMUEL ORINGO** received the Appellant on 20.10.15 and after investigations caused him to be charged.

THE DEFENCE CASE

3. When the appellant was put on his defence, he denied the offence

4. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 15 years' imprisonment.

The Appeal

5. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 29.04.16. From the 6 grounds of appeal and written submissions filed by the appellant on 20.11.18 in which he challenges conviction and sentence.

6. When the appeal came up for hearing on 05th August, 2019, Appellant submitted that he was wholly relying on submissions. Ms. Nyakibia, learned Counsel for the state opposed the appeal and submitted that the complainant's age was proved by an age assessment report, penetration by a P3 form and identification by the fact that Appellant was known to complainant.

Analysis and Determination

7. The duty of the 1st appellate court was explained by the Court of Appeal in the case of *Kariuki Karanja Vs Republic [1986] KLR 190* that: -

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the Appellant and on behalf of the State.

9. Complainant's age assessment form PEXH. 3 which shows that she was 15 years. Complainant knew the Appellant before the material date.

10. 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."

11. The P3 form **PEXH. 1** produced by **PW4 PHILEMON YOMBA** examined complainant on 21.10.15 about 3 days after the alleged last encounter of defilement found that complainant had no bruises in her genitalia but hymen was missing. With due respect, the clinical officer's failure to clarify 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.

12. Appellant denied the offence and the trial had an obligation to ensure that the prosecution case was proved beyond any reasonable doubt considering that the Appellant was staring at a term of 15 years' imprisonment which is a substantial length of time.

13. 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 am convinced that the prosecution case was not proved to the required standard of prove beyond any reasonable doubt. 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 - Brendah

Appellant - Present

For the State - Ms. Nyakibia