REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 18 OF 2018 [SOA]

(CORAM: R. E. ABURILI - J.)

JOHN OKECHI OGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in a judgment delivered on 23/2/2018 at Bondo PM's Court vide Sexual Offence Cr. Case No. 12 of 2017, before Hon. E.N. Wasike, SRM)

JUDGMENT

1. The appellant **JOHN OKECHI OGUNA** was charged with the offence of **Defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence are that on the **10.3.17** at about 1800 hours at [particulars withheld] village in Rarieda sub-county within Siaya County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of M.A.O. a girl aged 11 years.

2. The appellant also faced an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.**The particulars of the offence are that on the 10.3.17 at about 1800 hours at [particulars withheld] village in Rarieda sub-county within Siaya county, the appellant intentionally and unlawfully touched the vagina of a child namely M.A.O. with his penis.

3. The appellant denied the Charges and the prosecution called 5 witnesses in a bid to prove the charges against the appellant.

4. After a full trial, the appellant was found guilty of the main charge. He was convicted and sentenced to serve twenty (20) years imprisonment.

5. Being dissatisfied with the said judgment, conviction and sentence, the appellant who was unrepresented filed this appeal setting out the following grounds of appeal:

> ***i. That; the trial magistrate erred in law and facts by convicting me though contradictions were made by medical officer who exonerated upon testifying in court.***
>
> ***ii. That; I pray to be present before court during hearing of this appeal.***
>
> ***iii. That; I pray to be supplied with court proceedings to adduce more grounds of appeal.***

6. The appellant prayed that his appeal succeeds in its entirety and conviction be quashed and the sentence set aside.

7. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Pandya vs. R (1957) EA 336** and **Ruwala vs. R (1957) EA 570** which is to subject "the evidence as a whole to a fresh and exhaustive examination and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

8. On transpired before the trial court, the Prosecution called 6 witnesses in support of its case against the appellant herein. Revisiting the evidence before the trial court, PW1, M.A.O. [full name withheld] minor complainant gave sworn evidence after voire dire examination and stated she was aged 12 years and in class 4 at [particulars withheld] Primary School. She recalled that on the 10.3.17 at about 6 pm, she was looking after their cattle when the appellant went to where she was and started undressing her. That he also undressed himself, took out his penis and placed it in her vagina. She then said that after the incident, the appellant left and she also went home and told her mother of what

had transpired. Her mother took her to the village elder to report the matter and the appellant was arrested. The complainant was later taken to Akala Health Centre where she received treatment. On being cross examined by the appellant, PW1 stated that she told him not to undress her as that would put her in trouble. Further, that when she was about to scream, the appellant ran away.

9. PW2 **CA** testified that she was the mother of the complainant minor, PW1. She recalled that on the 10.3.17 at about 9.00pm, she was at the market selling vegetables and upon her return home she found the complainant but not with the child that she had left under the complainant's care. It was her evidence that when she threatened to cane the complainant, the latter told her that she had gone to look after the cattle leaving behind the child and that when she returned home, she did not find the child. PW2 further stated that the complainant told her that as she was looking after the cattle, the appellant went where she was and defiled her. PW2 took the minor to the village elder where they reported the matter after which they proceeded to the appellant's home and had him arrested and he was escorted to Lwala Kotiende Police Station and later transferred to Ndori Police Patrol Base. She stated that she later took the minor to hospital for medical examination and treatment. PW2 confirmed in cross examination that PW1 had been tethering cattle in the shamba (farm).

10. PW3, **Simon Aloo Ogola** the village elder from West Asembo testified that on the 10.3.17 at about 11.00pm, he was at his home sleeping when the complainant and her mother (PW2) reported to him that the complainant had been defiled by one John (the appellant). He accompanied the complainant and her mother to the appellant's home where they found him sleeping and arrested him and escorted him to Lwala Kotiende Police Station.

11. P.C **David Warutumo** a police Officer attached to Ndori police Patrol Base testified as PW4 and stated that he was the Investigating Officer in the case. He recalled that on the night of 11.3.17 at about 3.00am , he was at Ndori Police Patrol Base when the complainant, her mother (PW2) and the village elder (PW3) went to the station with the appellant and reported that the complainant had been defiled by the appellant on 10th Mach 2017 while the complainant was taking care of cattle. The officer re-arrested the appellant, booked the report and issued the complainant with a P3 form and she was referred to hospital where it was filled. The officer further testified that he recorded the witnesses' statements and at the conclusion of his investigations, he charged the appellant with the offence. He produced a Clinical Health Card (P.Exh.1) showing the date of birth of the complainant M.A to be 4.3.2005. The name of PW2 is stated thereon as the complainant's mother. On being cross examined by the appellant, PW4 stated that the child was able to walk. That he was brought to the Base by Officers from Lwala Kotiende Police Station and the village elder.

12. **Jared Obiero Opondo** testified as (PW5) and stated that he was a Clinical Officer working at Siaya County Referral Hospital. He stated that the complainant patient went to their facility with a history of having been defiled by a person well known to her and upon conducting a medical observation and examination, he observed that the ***vaginal mucosa and the vulva were bruised and there was increased vaginal discharge. He concluded that the minor was defiled and infected with a sexually transmitted disease.***

13. At the close of the prosecution's case the appellant was placed on his defence and he gave unsworn statement of defence. He denied the charge. He stated that on the 10.3.17 at about 11.00pm, he was in his house sleeping when he heard a knock on his door and when he opened it, the village elder entered into his house, slapped him after which he tied him with a rope while telling him that he was an impediment to the people and an enemy of prosperity in the village.

14. He stated that he was escorted to Lwala Kotiende Police Station and later transferred to Ndori Police Patrol Base after which police officers from Aram Police Station went and picked him up and arraigned him.The appellant vehemently denied ever committing the offences with which he was charged. He then closed his defence and filed his written submissions.

15. The trial Magistrate after considering the prosecution and defence cases was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt on the main count. He convicted the appellant and sentenced him to serve 20 years in prison.

SUBMISSIONS

16. The appellant filed written submissions on 12/2/2019 which he highlighted at the trial by adopting them as canvassing his appeal. In his written submissions, the appellant asserted that in any sexual offence, determination can only be done by the doctor in corroboration with the victim's evidence. That the P3 form is an integral part of the prosecution case in a defilement case since it is the document prepared almost immediately after such alleged offence. He submitted that as per the records, the matter was booked as OB NO. 3 of 11th March 2017, but surprisingly, the OB numbers in the P3 form is not relating to the one in the initial report. In his opinion, these are two different OB numbers which draw an inference that the cases must have been two different ones.

17. In addition, the appellant submitted that in every P3 form there must be a rubberstamp which bears the names of the station from which it originated. In the instant case, it was submitted that the P3 form does not have such. He added that the victim also must be issued with a receipt to withstand (sic) his or her ownership but that nothing shows in the entire proceedings if the complainant was supplied with such a document.

18. The appellant further submitted that PW4 testified that on 11th March, 2017 at around 03:00 hours while on duty, the complainant accompanied by her mother and village elder brought in the complainant. He booked the matter and issued the complainant with a P3 form. That the said P3 form indicates that it was issue on 11th March, 2017 at around 03:00 hours which was almost 3 hours later hence urging this court to intervene.

19. It was the appellant's further submission that PW4 further stated that after issuing them with a P3 form, he referred them to Akala Health Centre, which evidence was also confirmed by the mother of the victim who narrated that from Ndori, she later took the daughter to Hospital. According to the appellant, nothing in the proceedings indicate whether the victim was referred to any other hospital apart from Akala Health Centre.

20. He submitted that the P3 form which was produced in court indicate that it was filled by a doctor from Siaya County Referral Hospital on

the same day of 11th March, 2017. He contended that a P3 form cannot be filled and signed without the medical notes. He also contended that it was not possible for the P3 form to have been filled on that very date that the offence is alleged to have been committed.

21. The respondent's counsel Miss MAKOKHA Prosecution Counsel submitted orally opposing the appeal and urging the court to dismiss this appeal entirely on the evidence adduced before the trial court. She maintained that there are no contradictions in the medical evidence which corroborated the minor's evidence. That the minor who was aged 11 years had no reason to fix the appellant and that the appellant never raised any issue with the complainant's mother on whether she wanted to have sex with him. On sentence counsel argued that the offence was serious calling for deterrent sentence. She urged the court to dismiss the appeal and uphold the judgment of the trial court.

DETERMINATION

22. I have considered the appeal herein, the grounds and submissions for and against the appeal. I have also reassessed the evidence before the trial court as adduced by the prosecution witnesses and the appellant in his defence.

23. In my view, the following issues emerge for determination:

1. Whether the ingredients of the offence of defilement were fully established.

2. Whether the prosecution's case was riddled with contradictions which were material

3. Whether there were two Occurrence Bookings and if so whether there is any prejudice to the appellant

4. Whether the complainant's P3 Form should have had a rubber stamp of the Hospital where it was filled and whether lack of such rubber stamp is fatal to the prosecution case

5. Whether the complainant should have produced a receipt for filling of the P3 Form and the consequences of non-production of the receipt

6. Whether absence of letter of referral of the complainant to Siaya County Referral Hospital is fatal to the prosecution's case as far as the P3 ids concerned.

7. Whether the appellant established a sustainable defence.

8. Whether the prosecution proved its case beyond reasonable doubt.

24. On whether the offence of defilement was proved as charged, the appellant was charged under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Section 8(1) of the Act provides:

"A person who commits an act which caused penetration with a child is guilty of an offence termed defilement."

25. Section 8(3) of the Act provides:

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

26. From the above provisions of the law, it is clear that for the offence of defilement to suffice, the elements/ingredients that must be established are: ***Age of the victim; whether penetration was achieved: and Identity of the perpetrator.***

27. On proof of age, the Health Card (P.Exh.1) for the complainant produced shows that the minor was born on 4.3.2005. The charge sheet states that the date of the alleged offence was on 10.3.17. Thus, at the time of the alleged offence, the complainant was a child aged 12 years old. This age perfectly falls into the age bracket as envisaged in the subsection (3) of section 8 of the Act.

28. On proof of penetration, the P3 form (P.Exh.2) produced by the Clinical Officer revealed that the minor had a bruised vaginal mucosa and the vulva and the laboratory test on the urinalysis disclosed presence of pus cells and the Clinician concluded that the minor had been defiled and infected with a sexually transmitted disease. Accordingly, I find and hold that penetration of the minor's genitals had been achieved and therefore penetration as defined under section 2 of the Sexual Offences Act was proved.

29. On the identification/recognition of the offender, the minor stated that as she was looking after their cattle at around 6.00pm, one John, the appellant, went to where she was and after undressing her and himself, he took out his penis and inserted it into her vagina thereby defiling her. The minor gave a clear description of the events that took place on that evening at 6.00pm and the trial court observed that she did not waiver even on cross-examination. The incident happened in day light and she was able to clearly identify the perpetrator whom she knew well as he used to look after her neighbour's cattle. She also told PW2 that it was the appellant who defiled her. The trial court which had the opportunity to see and hear the minor as she testified stated as ffollows:

"She appeared firm and truthful and I have no reasons to doubt her testimony. I therefore find that the accused person was positively identified as the person who committed the offence."

30. Having found that all the essential elements of the main offence were established, I find that the trial court correctly rejected the alternative charge.

25. On whether the evidence by prosecution witnesses was riddled with material contradictions, the appellant simply raised this ground but made no submission on it. I have nonetheless reexamined the evidence on record as adduced by the prosecution witnesses and I find no material contradictions or inconsistencies worth of mention or reconciliation in this appeal. Accordingly, the ground of appeal fails and it is hereby dismissed.

26. ***Whether there were two Occurrence Bookings and if so whether there is any prejudice to the appellant,*** the appellant submitted that the matter was booked as OB NO.3 of 11/3/2017 but surprisingly, the OB numbers in the P3 form does not relate to the one in the initial report and that in his view those are two different cases.

27. I have perused the Charge sheet dated 13/3/2017. It has OB No. 3/11/3/2017. On the P3 form, the OB Reference is simply stated No. 2 dated 11/3/2017. The appellant never sought for clarification during the trial and neither did he request for initial report to be availed and the same was declined. The OB number on the charge sheet refers to the same offence with which the appellant was charged and the P3 is for the victim in the said charge sheet. There is no prejudice occasioned to the appellant by the difference in the two OB numbers which I find minor. The attack by way of submission therefore fails and is dismissed.

28. On whether the P3 form for the complainant should have been rubber stamped, I find that this argument is too trivial and misplaced as there was no question put on the Clinical officer to suggest that the P3 form was a forgery or not authentic. Accordingly, I find the argument unsustainable as the Clinical Officer testified that he filled the P3 form and there was no contrary evidence. Further, I have perused the P3 for Exhibit 2 and I find that it was rubber stamped by Deputy Clinical Officer Siaya County and dated 11/3/2017. The maker thereof testified in court as a witness and produced it in evidence and there was no challenge to the document which was from a public Hospital.

29. On whether the complainant should have been issued with a receipt, again, there was no issue regarding the charges for filling of the P3 form hence the argument does not make any factual or legal sense. Whether or not the complainant child paid for the services of filling of her P3 form in a public Hospital is not an issue for determination as it does not prejudice any of the parties.

30. On whether the complainant should have been referred to Siaya County Referral Hospital before filling of the P3 form as she was treated at Akala Health Centre and that there was no indication as to whether she was referred to Siaya County Referral Hospital, I find this argument by the appellant to be pedestrian as there was nothing wrong with a P3 form being filled at Siaya County Referral Hospital, a public institution, without any referral from Akala Health Centre, an equally public hospital, as the appellant did not state what prejudice that non referral caused him.

31. On the defence put forward by the appellant, he stated that on the material date he was sleeping in his house when the village elder in the company of other people went and arrested him and escorted him to the police station. He then closed his defence and gave a detailed submission in which he discredited the prosecution's case.

32. I have perused and considered the appellant's defence. The prosecution is under a duty to prove its case beyond reasonable doubt throughout the trial. In this case, I find the defence tendered by the appellant to be very rudimentary, mainly restating the events of his arrest and nothing more about the time when the offence is alleged to have taken place, compared to the overwhelming evidence adduced by the prosecution witnesses, which irresistibly connects the appellant to the offence. Accordingly, I find his defence not sustainable. I dismiss it.

33. On whether the prosecution proved its case against the appellant beyond reasonable doubt, I have considered the entire evidence on record both for the prosecution and the defence. I have also considered the trial courts' observations on the general conduct of the proceedings and the opinion on demeanour of the witnesses and I agree that the prosecution's witnesses were consistent in their testimonies and their evidence corroborated each other well; I find that the essential ingredients of the offence of defilement under section 8(3) of the Sexual Offences Act were clearly established. The evidence adduced by the prosecution witnesses connected the appellant to the offence as he was positively recognized by the complainant child to have accosted her while she was herding cattle. I have also found that the defence by the appellant is a sham.

34. For the above reasons, I am satisfied that the prosecution proved its case against the appellant beyond reasonable doubt and therefore the conviction of the appellant was sound and safe. I have no reason to interfere with it. I uphold the appellant's conviction and dismiss his appeal against conviction.

35. On sentence, I note that the appellant was handed the minimum mandatory sentence stipulated under section 8(3) of the Sexual Offences Act. The sentence meted was as by law established and therefore the trial court cannot be faulted. This was after considering the appellant' mitigation that he was a first offender, he was an orphan and a casual labourer, and as he prayed for forgiveness.

36. However, following the successful challenge to the lawfulness of minimum mandatory sentences, it is now trite that whereas such sentences may be imposed in appropriate cases and circumstances, but that such law deprives the trial court of judicial discretion in sentencing, and that they also deprive the accused persons an opportunity to mitigate for the court to consider before sentencing them. For that reason, and on the strength of the decision in **Jared Koita Injiri v Republic [2019] e KLR (Kisumu CA),** I hereby accord the appellant a second chance to mitigate for purposes of considering whether to resentence him afresh. I therefore order for a pre resentencing social inquiry report to be filed by the Siaya County Probation Officer for consideration by this court.

37. The appeal against conviction is dismissed.

38. Orders accordingly.

Dated, signed and Delivered at Siaya this 29th Day of October, 2019.

R.E.ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for the Respondent/ State

CA: Brenda and Modestar