



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 112 OF 2017 [SOA]

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

MOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence on a judgment delivered on 7/11/2017 at Bondo PM's Court vide Cr. Case No. 984 of 2016, before Hon. M. Obiero, PM)

J U D G M E N T

1. The appellant herein **MOO ALIAS BABA L** 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 are that on the 26th day of June 2016 at around 5.00 pm at Bondo sub-county within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of ERA (full name withheld), a child aged eleven (11) YEARS. The appellant was further charged with the 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 are that on the 26th day of June 2016, at around 5.00 pm at Bondo sub-county within Siaya County, intentionally touched the vagina of ERA a child aged eleven (11) years with his penis. The appellant denied the charge and the prosecution called five (5) witnesses who testified in support of their case.

2. The appellant on being placed on his defence denied the offence. The trial magistrate found the appellant guilty of the offence and convicted him. He sentenced the appellant to serve life imprisonment as stipulated in section 8(2) of the Sexual Offences Act.

3. Being dissatisfied with the judgment, conviction and sentence, the appellant filed this appeal setting out the following grounds of appeal:

GROUND OF APPEAL

1. *That: I pleaded not guilty to the charges.*

2. *That: The Learned trial magistrate relied on evidence that was not corroborative in passing judgment.*

3. *That: I was not given chance to cross examine the witness by the trial court.*

4. *That the age of the child was not properly proved in the court of law.*

5. *That I was not given statement by the witnesses before the beginning of case.*

6. *That sentence awarded is excessive in the circumstances.*

4. In determining this 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 decision 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. Revisiting the evidence before the trial court, PW1 ERA a child testified after voire dire examination and recalled that on the 26th day of June, 2016 at about 5.00pm, she went to fetch firewood. On her way back home, she met with L 's father that is the appellant herein. She stated that the appellant did not talk to her and that the appellant pushed her and she fell down. While on the ground, the appellant removed her skirt and her pant. The appellant also removed his pair of trousers, lay on her and removed his "fly" and put his "thing" into her "thing". She stated that she experienced pain during the incident.

7. She further testified that she did not scream for help because the appellant threatened to kill her and also caught her on the neck. She stated that she saw a whitish substance and blood on her pant after the incident. She further stated that she did not inform any of her parents and during the night, her parents disagreed and her mother took her and her siblings to their godmother's home at Akala. She explained that after some time, she started feeling pain on the leg and stomach ache. Her grandmother also started complaining about some smell. She further stated that she discovered that she had developed a wound, she was feeling pain while passing urine.

8. PW1 further explained that her grandmother took her to Rera Health Centre where she was treated. She stated that the doctor asked her what had happened and she explained to him that a certain old man used to have sex with her. It was her further testimony that her mother later took her to Bondo District hospital where she was examined and treated. She was also issued with a P3 form which she took to Rera Health Centre and was filled by a doctor. She further explained that the appellant had sexual intercourse with her on other occasions.

9. PW2, **HARUN CHEBON** a clinical officer attached to Bondo District hospital testified that he treated the complainant and also examined her and prepared a P3 form on the 25th day of August 2016. He stated that when he examined her, he noted multiple bruises on the labia minora and labia majora. He stated that laboratory investigations revealed that the child had been infected with HIV. He also noted that the hymen was broken. He filled the P3 form which he produced as exhibit 3 herein. He also produced the treatment notes for the complainant as exhibit 4.

10. PW3 **LA** testified that complainant herein is her daughter. She stated that on the 16th day of August 2016, her mother took the complainant to the hospital. On the 17th day of August 2016, the doctor called her to go to the hospital. When she went there, the doctor told her that the complainant had been defiled and the doctor advised her to take the complainant to another hospital for further treatment. She stated that when she interviewed the complainant, the complainant explained to her that she had been defiled by L's father who threatened her not to disclose to anybody. After that, she took the complainant to Bondo District hospital where she was again treated and examined. Thereafter, she went to the police station where she made report and recorded a statement.

11. **PW4, PAO**, testified that on the 29th day of June 2016 at 10.00 am, the complainant and her mother went to visit her. After that, the complainant's mother went to her place of work but left the complainant under her custody. She further stated that, on the 16th day of August 2016, she realized that the complainant had a foul smell. When she checked her private parts, she realized that she had injuries. She took her to Rera Health Centre where she was examined and treated and the doctor told her that the complainant had been defiled. When she interviewed the complainant about what had happened, the complainant told her that she had been defiled by L's father. She called the complainant's mother and informed her about the incident.

12. **PW5 CPL GODFREY NGAIRA** investigated the case. He testified that he commenced the investigation on the 24th day of August 2016, when this matter was reported by the complainant and her mother. He stated that he recorded the witness statements and he issued the complainant with a P3 form which was subsequently filled by a doctor. He further stated that he obtained the certificate of birth in respect of the complainant which he produced as exhibit 5 herein.

13. At the close of the prosecution's case, the appellant gave sworn evidence and called three witnesses who testified in support of his defence. In his sworn testimony, the appellant **MO** testified as DW1 that on the 26th day of June 2016, which was a Sunday, he went to church in the company of his wife and children and that they returned home at 5.00 pm. He denied the allegation that he defiled the complainant. He stated that he was arrested and taken to Lwala Kotiende police station. Later, he was taken to the hospital where he was examined. He produced his P3 form as an exhibit in this case. On cross-examination, he stated that he did not go to herd his cows on that day.

14. The appellant also called **DW2, SA** who testified that the appellant herein was her husband. She stated that on the 26th day of June 2016, they went to church together and they returned home at about 5.00 pm. She stated that nothing happened on that day. She stated that on that day, the appellant did not go to herd the cows as it was her son who went to herd the cows.

15. DW3, **RA** testified that the appellant herein was her father. She stated that on the 26th day of June 2016, they went to the church in the company of her father, mother, other siblings and the complainant herein and that they went back home at 5.00 pm. She stated that on that day, her father did not go to herd the cows as it was one Fredrick who went to herd the cows.

16. DW4, CA testified that the appellant herein was her father. She stated that on the 26th day of June, 2016, they went to church and went back home at about 5.00pm. She stated that they were also with the complainant. She stated that after church, they went to fetch firewood with the complainant. She stated that after fetching firewood, she escorted the complainant to their home at about 6.00pm.

17. After considering the evidence before him and submissions filed by the defence counsel, the trial court was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt. He convicted the appellant and after mitigation, he sentenced the appellant to serve life imprisonment.

SUBMISSIONS

18. In support of the appeal herein, the appellant who was self-represented filed written submissions which he adopted as canvassing the appeal and which I have considered in my determination herein below.

19. In his oral submissions, he urged this court to forgive him because he had sinned before God and before fellow human beings. He prayed for a prison term which he can serve and return back home.

20. The Respondent represented by Mr. Okachi opposed the appeal and stated that the prosecution proved its case against the appellant beyond reasonable doubt. He submitted that the appellant was represented by an advocate and that elements of defilement were proved and that he mitigated. Further, that he was sentenced in accordance with the law.

21. On identification of the appellant, counsel submitted that the victim knew the appellant very well as Baba L and that her evidence was corroborated by expert witness who examined her. Counsel further submitted that the appellant infected the child with HIV and Aids hence there is no reason for this court to tamper with the conviction and lawful sentence meted out. He prayed that this court upholds the conviction and sentence.

DETERMINATION

22. I have considered the appeal herein, the evidence before the trial court, the submissions for and against the appeal and authorities cited. In my humble view, the main issues for determination emanate from the grounds of appeal namely: -

(1) Whether the appellant was denied witness statements before the trial commenced and the effect thereof.

(2) Whether Section 200(3) of the Criminal Procedure Code was complied with.

(3) Whether the medical evidence was sufficient to sustain a conviction.

(4) Whether the appellant was denied an opportunity to cross examine the witness by the trial court.

(5) Whether the complainant's age was properly proved.

(6) Whether the defence of alibi was valid and believable.

(7) Whether the sentence imposed was excessive in the circumstances.

23. I will determine the above issues in the following order as submitted by the appellant in his written submissions:

1. **Whether the prosecution never supplied the appellant with witness statements before the trial commenced and the effect thereof.**

2. The appellant submitted contending that he was not accorded a fair trial as stipulated in **Article 50(2)(b)(c)** of the Constitution because the prosecution failed to supply him with witness statements in advance to enable him prepare for the trial. He relied on **R Vs. Ward (1993) 2 ALL ER 557**.

3. I have perused the trial court record. On 30/8/2016 when the appellant appeared in court and plea was taken, the trial court made an order that the accused person who was prose (unrepresented) be supplied with witness statements and other relevant documents in the case at his own cost.

4. The appellant was also granted bond of Kshs 200,000/= plus one Surety of a similar amount and on 5/9/2016, the accused's surety one **Samuel Abong Omeny** was approved to stand surety for the appellant. The case was then fixed for hearing for 1.11.2016 on 13.9.2016. On 1.11.2016, the case could not proceed because the trial magistrate was on official duties and so the hearing was adjourned to 13/12/2016. On the latter date, there were 3 prosecution witnesses present but the appellant sought an adjournment until 11.00 am because his advocate was to be available at 11.00 am.

5. On the same date, his advocate appeared, an amended charge was availed and read to him afresh and upon him taking a fresh plea, the hearing proceeded at 3.00 pm in the presence of the appellant and his advocate Mr. Dola.

6. On the subsequent hearing dates, the appellant was on bond and ably represented by Mr. Dola Advocate and never complained that he had not been supplied with witness statements throughout the trial and only raised it in this appeal.

7. For the above reasons, I find and hold that the appellant's claim that he was not accorded a fair trial by being denied witness statements is false and uncalled for. It is an afterthought and not supported and therefore the claim and ground of appeal is rejected and dismissed.

2. On whether the prosecution failed to comply with Section 200(3) of the Criminal Procedure Code. The appellant claims that on 30/8/2016 the first plea was taken by Resident Magistrate and a second plea taken by a Principal Magistrate on 13/12/2016 without considering the importance of **Section 200(3) of the Criminal Procedure Code** hence the prosecution was rendered a nullity as it occasioned a miscarriage of justice.

8. I have perused the trial court record. I find that the appellant was arraigned on 30/8/2016 before Hon. E.N. Wasike, RM when the plea was taken and a hearing date fixed for 1.11.2016 in Court 1. The magistrate taking the plea did reallocate the matter to be heard before the

PM, Hon. M. Obiero who even approved the surety and when the charge was amended, a fresh plea was taken before him on 13/12/2016 and a hearing date fixed and indeed hearing commenced and was concluded before Hon. M. Obiero PM.

9. It is therefore not true as claimed by the appellant that **Section 200(3) of the Criminal Procedure Code** was flouted as the record does not show that the case was ever heard by Hon. E.N. Wasike and transferred to Hon. M. Obiero PM to conclude.

10. Accordingly, as the case was never heard and or concluded by two different magistrates, the requirement for compliance with **Section 200(3) of the Criminal Procedure Code** was not necessary and therefore the ground of appeal and submission by the appellant on that ground must fail. The same is hereby dismissed.

3. Whether medical evidence was sufficient to sustain a conviction.

11. According to the appellant, the witnesses especially PW2 was not credible and or trustworthy and that his evidence created doubt as he could not tell whether the police officers who brought the patient to him were males or females, that he did not classify as to when the hymen went missing, that penetration was not established and that it was not known where the patient got HIV as the suspect was not examined to establish whether he was of the same HIV status, that the clinical officer confessed that the hymen can be planted by anything other than a penis and that the victim was examined after 72 hours and over two months hence there was no evidence of defilement.

12. I have considered the ground of appeal and the evidence adduced before the trial court. PW1 testified that she was 12 years and in class 5 at [particulars withheld] Primary School. She stated that on 26.6.2016 at 5.00 pm while she was from the church, she alighted at Gobei with her younger brother O and on reaching home she prepared a place for chicken then went to fetch firewood and on her way back home, she met L's father with cows. That he pushed the firewood which caused PW1 to fall down and then he removed her shirt and pant then he removed his trouser and lay on her and removed his '*thing*' and put it into her thing which she uses to pass urine and she felt pain. He held her on the neck so she could not scream as he threatened to kill her if she told anyone. He then dressed up and led away his cows towards his home. The girl put on her skirt and pant and went away. She saw white substance and blood on her pant and that on reaching home, her parents were absent so she warmed water and took a bath. Her parents returned at night but due, to the fear of being killed if she disclosed to them what had happened to her, she did not tell them anything. Her parents disagreed and so she went to live with her grandmother at her grandmother's place at Akala. While there, she wasn't going to school so started ailing and despite medication, she got worse. She was having foul smell despite changing her pants. She felt pain when urinating and on being treated at Rera Health Centre, the complainant disclosed to the doctor after being asked, that a certain old man used to have sex with her.

13. Her grandmother then informed her mother who recalled her back to her home and she was escorted to Bondo District Hospital where she was treated and the matter reported to the police and children's department. She identified the appellant as L's father who had had sex with her earlier and that he used to be their herdsman. In cross examination, she maintained that the accused used to have sex with her whenever he met her.

14. PW2 Harun Chebon, a clinical officer at Bondo Hospital examined PW1 on 25/8/2016 with a history of having been defiled on 26/6/2016. He found her with multiple old bruises on the *labia minora* and *labia majora*. The hymen was broken, she had a milky discharge from the vagina. Laboratory investigation revealed HIV positive but that there was a spermatozoa. There was a deposit of pus cells in the urine, pregnancy test negative and confirmed that there was defilement of PW1. He produced the P3 form, lab report and treatment sheet as exhibits 2, 3 and 4.

15. In his testimony, the clinical officer stated that the patient was taken to hospital by two police officers but that he could not tell if they were males or females. He also stated that hymen can be ruptured by anything other than a penis. He further stated that he examined her 2 months after the incident and that he also examined the accused person on 29/8/2016 and filed his P3 form.

16. From the above evidence, it is my humble view that the medical evidence as produced by PW2 confirmed that PW1 was defiled. Despite the offence being discovered 2 months after it occurred, PW1 was emphatic that the assailant threatened to kill her if she disclosed the incident to any other person, until she fell ill and on being treated following foul smell and persistent illness is when she disclosed to the doctor that she had been defiled. The doctor did not say that the delay in reporting or examination affected the results or investigations as the patient had multiple old bruises in her vagina, foul smell and a ruptured hymen. In my view, there was more than sufficient evidence of penetration and therefore defilement of a person of the complainant and no other evidence could have corroborated that evidence of PW1 and PW2.

17. In my humble view, it is immaterial that PW2 did not know the gender of police officers who escorted PW1 to hospital. It is also immaterial that the doctor in cross examination and in answer to specific question he stated that the hymen can be ruptured by anything other than a penis because he did not say that in this particular case the hymen was ruptured by something else other than a penis, in view of the firm evidence by PW1 that she was defiled on 26/6/2016 at about 5.00 pm and on other different occasions by the appellant whom she knew very well as L's father and the fact that he was also their herdsman.

18. The appellant was not a stranger to the victim hence the question of mistaken identity does not even arise. Furthermore, the appellant in his defence owned up to knowing the complainant and stated that her father was his uncle, meaning they were cousins with the complainant and he also conceded that he used to herd cattle for the complainant's grandfather by the name Odera. The appellant admitted in cross examination that he was known as Baba L.

19. The trial magistrate who heard and saw the witnesses as they testified tested their demeanor and concluded that the evidence of the complainant was firm and was not shaken during cross examination which was rigorously done by the defence counsel. He also observed that there was nothing suggestive that PW1 was telling lies and he was persuaded that she was telling the truth.

20. Therefore, albeit the appellant's HIV status was unknown, I find and hold that PW1's evidence was well corroborated by PW2's evidence and even in the absence of corroboration, PW1's evidence was sufficient to prove that she was defiled by the appellant, a person well known to her, and I am in total agreement with the conclusion reached by the trial court that in sexual offences, it is not the outcome that matters but the proof of defilement which involves partial or complete penetration of the complainant's genitalia, proof of age of the complainant and positive identification of the perpetrator.

21. Accordingly, the fact that the victim was found to be HIV positive whereas there was no report on the status of the appellant is immaterial in this case of defilement.

22. In the end, I find and hold that there was more than sufficient medical evidence to prove that the victim was defiled. The clinical officer having found that there was proof of defilement, it was not material that he had to say that the injury was harm or maim or grievous harm, in the P3 form filed on 26th August 2016.

23. Further, the fact that examination of the victim was done 2 months from date of defilement in this case, did not erode the evidence of defilement as the victim was found to be truthful and there was still physical evidence of defilement through complete penetration of her vagina as evidenced by multiple old bruises in her *labia majora*.

4. On the allegation that the appellant was denied an opportunity to cross examine the witness (sic) by the trial court, the appellant did not elaborate on this ground on which witness he was denied a chance to cross examine. However, the trial record shows that throughout the proceedings, he was represented by Mr. Dola Advocate who cross examined all the witnesses who testified for the prosecution. There is no request on record for the appellant to further recall for cross examination any of the prosecution witnesses by himself and or that such request was denied by the trial court. Accordingly, I find and hold that the allegation by the appellant is totally unfounded and dismissed.

5. On whether the age of the complainant was proved, the prosecution produced in evidence a Birth Certificate No. **** issued on 31/8/2016 showing that one E.R.O. was born in Nairobi district on 7.2.2005 vide Entry No. ***** and the registration done on 18.2.2005.

24. Albeit the Birth Certificate was issued on 31/8/2018 after the offence was committed, it is clear that the registration of birth was done barely three weeks after the victim was born and her mother is listed as LAO whereas her father is SOO. No contrary evidence was adduced to discredit the Birth Certificate. Accordingly, the age of the victim was proved to be 11 years as per the provisions of **Section 8(2) of the Sexual Offences Act** for the purposes of sentencing.

25. **On whether the defence of alibi was valid**, the appellant claimed that his alibi defence clearly states how he spent the day of 26/6/2016 and was supported by his defence witnesses but was overruled as an afterthought by the trial court.

26. I have considered the prosecution evidence and the defence evidence on record, I find that the complainant gave firm evidence that she knew the appellant as Baba L who had been their herdsman and who defiled her on the material day. It was not at night. There is no reason

on record to suggest that the complainant was lying or framed the charge against the appellant. I find the alibi defence a sham and unbelievable. I dismiss it.

27. **On whether the sentence imposed on the appellant was excessive in the circumstances**, this court observes that under **Section 8(2) of the Sexual Offences Act**, where the victim of defilement is aged 11 years and below, on conviction, the minimum sentence is life imprisonment which the trial court imposed. That sentence in my view is lawful. This is so, notwithstanding the successful challenge to the mandatory nature of life imprisonment as the minimum sentence as was stated in **CRA 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR**.

28. In this case, I observe that the appellant before being sentenced was given an opportunity to mitigate and his counsel stated that he was married with 7 children, was an old man aged 48 years (although his P3 form shows he was 54 years old), that the family depended on him, for his children's fees and was remorseful and sought for a non-custodial sentence. He was also a first offender. The trial court considered the mitigation and observed that the mandatory penalty was life imprisonment.

29. The question is whether I should interfere with such sentence in view of the recent development where the Court of Appeal has set a trend applying the principles espoused in the **Francis Muruatetu** case.

30. Here is an 11 year old innocent child going about domestic chores meeting a 54 year-old man, old enough to be her grandfather, a relative by the appellant's own admission that she was his uncle's daughter and therefore this is a child who would have depended on the appellant for protection. Instead, he preyed on her, and destroyed her innocence. The trauma experienced by the defiled child cannot be underestimated. The appellant is a person who does not deserve to live in the society. He deserves to be kept away so that he does not reoffend by preying on innocent human beings. He is a big threat to the life of humanity. Humanity.

31. Although the appellant in his oral submission tended to be repentant and was confessing for having sinned before God and before fellow human beings and prayed for a prison term so that he can return home, and asked for forgiveness and leniency of the court, I am of the view that the appellant deserved no leniency and forgiveness of the court, considering that he is a married man who also has children and should have been more concerned about the consequences of defiling an 11 year old child who looked out to him to protect her as he used to herd their animals and knew her very well.

32. This court also observes that albeit the appellant's P3 form produced as his exhibit, dated 29/8/2016 stated that there were lab results attached, he did not produce those lab results and therefore although he claimed that his status was not known, in my view, he must have deliberately withheld his lab results in his defence knowing that had he produced them, they would have revealed his real HIV status. The victim was found to be HIV positive at that age and although there was no evidence to show that she was infested by the appellant, this court finds that there is very high risk of one contracting HIV after an unprotected sexual encounter. The appellant exposed the young girl to very high risk of HIV /AIDS infection. She was found to be HIV Positive and has to take medication the rest of her life. That in itself is a death knell to the child who will grow up feeling stigmatized for no fault of her own. The offence of defilement of very young children is also very prevalent in this part of the country. Deterrent sentence is therefore necessary.

33. In the premises, I find that the sentence imposed on him by the trial court was merited. However, as life imprisonment is so indefinite, I hereby substitute the life imprisonment with a prison term of Seventy Five (75) years imprisonment, to be calculated from the date of conviction and sentencing on 7/11/2017.

Dated, signed and delivered at Siaya this 29th day of October 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar