



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 101 OF 2018

BETWEEN

EOO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Winam S. O Criminal Case Number 23 of 2017 by Hon. C. Njalale (RM) on 31st October, 2018)

JUDGMENT

Background

1. The Appellant herein **EOO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed against **IA** a girl aged 13 years on 12th July, 2017.
2. The prosecution called 5 witnesses in support of the charges. **PW1** the complainant herein stated she was 14 years old and in class 5 at [Particulars Withheld] Primary School. She recalled that on 12.07.17, the Appellant **EOO** whose home neighbours theirs found her alone at home and asked her to accompany him to the hill which she obliged and there he defiled her. It was her evidence that she had sexual encounters with the Appellant from 2014 and it was in 2017 that she informed her mother who reported the matter to her teachers who escorted her to hospital where she was examined and later to the police station where she recorded her statement.
3. **PW2 SAS** the complainant's mother stated that the complainant was born on 06th October, 2004. She recalled that sometimes in June 2017, she was summoned to Gita hospital and was informed that the complainant was HIV + and that it was at that stage that she disclosed that she had been defiled several times by **EOO** who is her neighbour.
4. **PW3 WILFRED AWUOR SIGOR** a clinical officer examined complainant on 14.07.17 and found no vaginal tears or bruises, there were remnants of hymen and she was HIV+. He produced complainant's PRC form as **PEXH. 2**.
5. **PW5 CPL JOYCE CHERONO**, the investigating officer received complainant's report on 14.07.17 and later re-arrested the Appellant and had him charged.
6. **PW6 Dr. Eddy Odhiambo Owour** produced complainant's P3 form filled by his colleague Dr. Owen on 14.07.17 as **PEXH. 1**. He indicated that the complainant had remnants of hymen which according to him meant that the hymen was probably broken.
7. In his sworn defence, the Appellant conceded that the complainant was his neighbour but denied defiling her.
8. In a judgment dated 31st October, 2018, *the* Appellant was convicted and sentenced to 20 years' imprisonment.

Appeal

9. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 08.11.18. From the amended grounds of Appeal and submissions filed on 08.10.19, I have deduced the following issues for determination: -

1. **There was no medical evidence to prove that Appellant infected complainant with HIV virus**
2. **Witnesses gave contradictory evidence**
3. **The judgment of the trial court did not comply with Section 169 of the Criminal Procedure Code**
4. **That the defence was not given due consideration**

10. When the appeal came up for hearing on 08.08.19, Appellant stated that he was wholly relying on the amended grounds of appeal and written submissions filed on 03.10.19. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and relied on written submission filed on 08.10.19.

Analysis and Determination

11. 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."

12. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under ***the Act***. These are the age of the victim, penetration and identity of the offender.

13. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

14. It is therefore important for the prosecution to prove the age of a victim since age determines the sentence to be meted out on the offender. Although complainant's mother stated that complainant was born on stated that the complainant was born on 06th October, 2004 and was therefore 13 years when the offence was committed, no documentary evidence in support thereof was tendered.

15. *The foregoing notwithstanding, the age of the victim is a matter of fact which can be proved by evidence other than birth certificate and age assessment report.* In the case of **Richard Wahome Chege v Republic [2014] eKLR**, the Court of Appeal held as follows:

"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth" It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself".

16. The trial court found as a fact that the complainant's mother's evidence that complainant was 13 years old was sufficient and I have no reason to interfere with that finding.

Penetration

17. Section 2 of ***the Act*** defines penetration to entail: -

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

18. The P3 form **PEXH. 1** produced by **PW6**, a doctor shows that complainant's genitalia was normal with remnants of hymen which according to him meant that the hymen was broken. For that that reason, the trial court's finding that penetration was proved was well founded.

Identity of the offender

19. The Appellant conceded that he was not a stranger to the complainant since they were neighbours. The discrepancies in the dates when complainant was defiled can be explained from the fact that she testified that the Appellant defiled her every three days from 2014. I am therefore not surprised that complainant could not accurately and the recall the dates when she was defiled. The trial court found that the complainant had by her evidence identified the Appellant as the person that defiled her and I find that the finding was well grounded.

20. Concerning transmission of HIV and other sexually transmitted diseases, Section 26 of *the Act* provides that:

1. Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know—

a. will infect another person with HIV or any other life threatening sexually transmitted disease;

b. is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;

c. will infect another person with any other sexually transmitted disease,

shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.

21. The trial court found that the Appellant had intentionally infected the complainant with HIV. Whereas there is evidence that the complainant was HIV+, no medical evidence was tendered before the court to prove that the Appellant himself was HIV+. How then could he have infected the complainant?. With respect, the trial court's finding that the Appellant intentionally infected the complainant with HIV was against the weight of evidence.

22. I have considered the judgment of the trial court and I am convinced that the trial magistrate complied with the provisions of Section 169 of the Criminal Procedure Code in that the judgment contains the points for determination, the decision thereon and the reasons for the decision, specifies the offence and the section of the Sexual Offences Act and the Criminal Procedure Code under which the Appellant was convicted, and the punishment to which he was sentenced and is dated and signed by the trial magistrate.

23. The trial court record demonstrates that the defence was considered and from the evidence analyzed hereinabove, I am persuaded that the defence was rightly rejected.

24. Concerning the sentence, Appellant was charged under Section 8(1) as read with Section 8(3)

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.

25. As was held by Makhandia J. (as he then was) in Fatuma Hassan Salo Vs. Republic [2006] eKLR:

“Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous factors”

26. Again, as was stated by the Court of Appeal (sitting in Eldoret) in the case of Shadrack Kipchoge Kogo vs. Republic CRIMINAL APPEAL NO. 253 OF 2003:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

27. The sentence in this case was influenced by the trial court's erroneous finding that the Appellant had intentionally infected the complainant with HIV a fact that was not proved.

28. Since mandatory sentences have been declared unconstitutional, I am bound to re-examine the sentence meted on the Appellant having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the sentence prescribed by the legislature. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the *Act*. It observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

29. Even though Appellant is a first offender, the psychological effect of the offence on the 13-year-old complainant cannot be underestimated.

30. From the foregoing, the Appeal fails except on the issue of sentence. The 30 years' sentence imposed on the Appellant is substituted with a sentence of **10 years** from **31st October, 2018** when he was sentenced.

DELIVERED AND SIGNED IN KISUMU THIS 28th DAY OF November 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi

Appellant - Present in person

For the State - Ms. Gathu