



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 04 OF 2018

BETWEEN

MESHACK OMONDI ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Maseno Criminal Case No. 960 of 2012 by Hon. D. Okundi (SPM) on 31st January, 2018)

JUDGMENT

Background

1. The Appellant herein **MESHACK OMONDI ODHIAMBO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as *the Act*) which was allegedly committed on 13.08.12 against **AAO** a girl aged 10(Ten) years.
2. The prosecution called 7 witnesses in support of the charges. **PW1, MAO**, the complainant's mother stated that complainant was born on 18.06.02. She recalled that on 14.08.12, she received information that the complainant who used to stay with her nephew and his wife had been defiled by a neighbour. She stated that on 15.08.12, she found the complainant with two women she did not know and one told her that she had found the child and taken her into her custody after she said that going to look for her mother in Bondo. The witness stated that she took complainant to hospital and on the way back home met the Appellant and the complainant said he had defiled her.
3. **PW2 EAO** who used to stay with the complainant at the material time stated that she woke up on the night of 13.08.12 to find the door to her house open and the complainant was not on her bed. She said she went around looking for the complainant and when she returned home found the complainant had returned and one Joyce informed her that the complainant had been at the house of Meshack, the Appellant herein. but she returned shortly thereafter. She said that she interrogated the complainant but she remained mum. It was her evidence that the following day, complainant disappeared again and returned home with her mother the following day and when they went to the chief complainant stated that Appellant had defiled her.
4. **PW3 JAO**, a neighbour to the Appellant and PW2 stated that she saw the complainant emerge from Appellant's house on the night of 13.08.12 that PW2 was looking for her and that she informed PW2 about it.
5. **PW4 Maurice Ochieng Omosa** Assistant Chief Alwala Sub-Location arrested the Appellant on 15.08.12 after it was alleged that he had defiled the complainant and handed him over to Kombewa Police Station.
6. **PW5** the complainant herein who was 14 years when she testified recalled that on 13.08.12 at about 09.00 pm, she was returning from a short call to PW2's house when the Appellant who was their neighbour and whom he identified with the light from the moon grabbed her, took her to his house and defiled her. She recalled that she heard her aunt, PW2 looking for her and that Appellant misdirected PW2 to go and look for complainant at the video shops and while she was gone, Appellant asked complainant to go back home. She recalled that the following day, PW2 beat her up and she ran away with an intention of going to find her mother who used to stay in Bondo and it was on the way that she met a good Samaritan who took her to her house for the night from where her mother collected her the following day and took her to the chief where she disclosed that the Appellant had defiled her.
7. **PW6 PC Joseph Emuron**, took over the case long after Appellant was arrested and charged. He produced complainant's age certificate of birth as **PEXH. 1**.

8. **PW7 Samuel Ongwech** a clinical officer produced a P3 form on behalf of his colleague Victor Gichana with whom he had worked for three years. The P3 form **PEXH. 2(a)** shows that complainant was examined on 16.08.12 and was found with lacerations on the labia majora and pain on vaginal wall. Complainant's treatment notes were produced as **PEXH. 2(b)** whereas the Appellants P3 form and treatment notes were produced as **PEXH. 3(a)** and **PEXH. 3(b)** respectively.

9. In his sworn defence, the Appellant stated that he was arrested on 13.08.12 and charged with an offence that he did not commit. He stated that he was framed by **PW2 EAO** after he declined his sexual advances. His witness **GOO** last saw the Appellant on 12.08.12 and later learnt that the he had been arrested.

10. In a judgment dated 31st January, 2018, the Appellant was convicted and sentenced to life imprisonment.

11. Aggrieved by this decision, the appellant lodged the instant appeal on 08.02.18. From the written submissions both filed on 08.10.19, the Appellant's raises six issues for determination.

1) The trial court did not comply with Section 19(1) of the Oaths and Statutory Declarations Act as to recording of *voire dire* evidence

2) He was convicted on the evidence of one identifying witness

3) The prosecution case had discrepancies

4) Medical evidence did not support the charge

5) Alibi defence not considered

6) Sentence was harsh and excessive

12. At the hearing, the Appellant submitted that he was wholly relying on the grounds of appeal and written submissions filed on 08.10.19. Ms. Gathu, Senior Prosecution Counsel for the State opposed the appeal and on the basis of written submissions also filed on 08.10.19.

Analysis and Determination

13. In the case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**, the Court of Appeal stated as follows on the duty of an appellate court:

“It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision.”

14. 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.

15. 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).

16. 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. **PW1, MAO**, the complainant's mother's evidence that complainant was born on 18.06.02 was corroborated by the certificate of birth as **PEXH. 1**. That complainant was 10 years when the offence was committed was proved to the required standard.

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. 2(a)** produced by **PW7**, shows that complainant was examined on 16.08.12 which was 3 days after the offence was committed and was found with lacerations on the labia majora and pain on vaginal wall. Consequently, I find that the trial court's finding that penetration was proved was well founded and the Appellant's assertion that medical evidence did not support the charge must therefore fail.

Identity of the offender

19. The Appellant conceded that he was not a stranger to the complainant since they were neighbours. Her evidence that she was defiled by the Appellant was well corroborated by the evidence of **PW2** who saw the complainant emerge from Appellant's house on the night of

13.08.12 which was the night that she was defiled. I therefore reject the Appellant's allegation that he was convicted on the evidence of one identifying witness and find that the trial court rightly found that Appellant was properly identified as the offender.

20. Section 2 of the Children's Act defines a child of tender years to mean "a child under the age of 10 years". I have not come across any other statutory definition of a child of tender years other than the above which in our view was perhaps informed by the broad interests of protecting children from criminal responsibility and not as a test of competency to give evidence in criminal proceedings. In the leading case of **Kibangeny Arap Korir v Republic, [1959] EA 92**; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

21. Although the complainant was 10 years when she was defiled, she testified at the age of 14 years. She was not a child of tender years *voire dire* examination was therefore unnecessary.

22. I have considered the totality of the prosecution case and I did not find any the discrepancies that the Appellant alludes to. No alibi defence was raised and there was therefore none to be considered by the trial court to consider.

23. Appellant was sentenced to the mandatory life sentence for an offence of defilement contrary to section 8(1) as read with section 8(2) of *the Act*. The Court of Appeal has in several cases including **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 [2019] eKLR** considered the constitutionality of mandatory sentences.

24. Since mandatory sentences have been declared unconstitutional in line with the Supreme Court holding in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR**, 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.

25. Even though Appellant is a first offender and he had in mitigation pleaded for leniency and stated that he was elderly, the psychological effect of the offence on the 10-year-old complainant cannot be underestimated.

26. From the foregoing, the Appeal fails except on the issue of sentence. The life sentence imposed on the Appellant is substituted with a sentence of **15 years** from **31st January, 2018** when Appellant was sentenced.

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

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi & Okodoi

Appellant - Present

For the State - Ms. Gathu