



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 104 OF 2017[SOA]

CORAM: R.E.ABURILI J

GOO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original Judgment in the Principal Magistrate's Court at

Bondo Criminal case number 1104 of 2016 dated 19th October, 2017 by Hon. M. Obiero, PM)

JUDGMENT

1. The appellant **GOO** was charged with the offence of defilement contrary to section 8(1) as read with subsection (3) of the Sexual Offences Act No. 3 of 2006. The particulars are that on the 7th day of October, 2016 at about 04.00 hours in Gem Sub- County within Siaya County, intentionally and unlawfully caused his penis to penetrate the anus of GAO a child aged 13 years. In the alternative charge, the appellant is charged with the offence 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 7th day of October, 2016 at about 0400 hours at Gem Sub- County within Siaya County intentionally and indecently touched the anus of GA. with his penis a child aged 13 years.

2. The appellant denied the charges and the prosecution called five (5) witnesses who testified in support of their case.

3. After a full trial, the trial court found the appellant guilty of the main charge. He was convicted and sentenced to serve 20 years imprisonment.

4. Aggrieved by the said conviction and sentence, the appellant filed this appeal setting out the following grounds of Appeal:

1. THAT: the learned trial magistrate erred in law and fact by relying on contradictory evidence to convict me;

2. THAT: The trial learned magistrate erred in law and the fact by allowing the evidence of the prosecution which was contradictory;

3. THAT: The learned trial magistrate erred in law and the fact by failing to observe that I was under the age of eighteen years by the time of the committal of the alleged offence;

4. THAT: I cannot recall all that transverse during the trial and hence pray for the trial records to adduce sufficient grounds.

5. This being a first appeal, this court is obliged to reassess and reevaluate the evidence adduced in the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See **Okeno v Republic [1972] E.A. 32.**

6. Revisiting the evidence before the trial court, PW1 **JARED OBIERO OPONDO** a Clinical Officer based at Rera Health Centre gave evidence on oath and stated that he examined the complainant aged 12 years and filled a P3 form on 8/10/2016. He stated that on examination, he noted tenderness on the anus and bruises on the anal opening. He filled P3 form which he produced as exhibit 1. He stated that the injuries were less than 24 hours and that the weapon used to inflict the injuries was blunt object. She was put on PEPS and antibiotics drugs and classified the injuries as grievous harm. Laboratory tests conducted were negative. He concluded that the complainant was sodomised.

7. **PW2 GAO** [full name withheld] testified on oath after *voire dire* examination and stated that she was aged 12 years as she was born in June 2003 and was a class six pupil at **[Particulars withheld] Academy**. [full name of school withheld] She recalled that on 7/10/2016 at 10pm she was at her home in Akala and was sleeping with her sister's young child when she was awakened by somebody who was in her bed on her back. She sensed some pain in her anus and that she used a spotlight and saw the appellant herein whom she called G. She then screamed for help and her grandmother responded as the latter was in the house and that her grandmother saw the appellant running away. She slept until the following morning when her father took her to Akala Police Station and then to Akala Health Centre where she was treated and examined and she returned to Akala Police Station. She stated that she knew the appellant very well as G as he was their neighbor at [Particulars withheld]. She identified him in court. She also identified her birth certificate showing she was born on 7.6.2003.

8. In cross examination by the appellant she stated that they were 4 people in the house and that the door was closed so she did not know how the appellant entered the house. She stated that she screamed and flashed the torch and that her grandmother also flashed the torch. She also stated that the appellant was their relative. She maintained that she saw him very well.

9. **PW3 DN** testified that on the 8th day of October, 2016 at About 4.00 a.m., she was sleeping in the house but in a different room together with the complainant who is her grandmother. That she heard the complainant screaming and on asking her whether the cat had entered the net, the complainant told her that G had entered into the house. PW3 stated that she woke up and took a spotlight and flashed it and saw the appellant herein and that she spoke to the appellant but that he did not respond. That G ran away. She stated that the complainant continued crying asking her whether G the appellant was infected with HIV and when PW3 asked her what he had done to her, she stated that he had had sexual intercourse with her when she was sleeping. PW3 went and called the father to the complainant who took PW1 to hospital. She stated that the appellant was also her grandson so she knew him. She also identified him in court.

10. On cross-examination, she stated that the appellant knew how to open her door from outside and that he was her grandson. She stated that the spotlight was very bright and that she saw the appellant's face very well. She stated that the other child who was sleeping with PW1 was very young, could not talk. She stated that she was aged and could not tell lies against him. She stated that the appellant had been going to her home prior to the incident and that her door was damaged by termites.

11. **PW4 JO** testified that on the 8th day of October, 2016 at about 5.00 am, he was in the house when his mother that is PW3 went and informed him that the appellant had defiled the complainant who is his daughter. He stated that at about 6.00 a.m. he took the complainant to the hospital and later to Akala Police Station. After that, they looked for the appellant and he was arrested and subsequently charged with the offence before court. He stated that the complainant was born on 7/6/2003. He identified her birth certificate and also identified the appellant in court.

12. In cross examination PW4 reiterated his testimony in chief and stated that he did not know if the appellant was the complainant's boyfriend. He denied the suggestion by the appellant that the appellant did not know the home of PW4. He stated that from his home to the appellant's home is 500 meters away.

13. **PW5 PC JAMES NDUNGU** testified that he investigated the case. He stated that he commenced investigations on the 8th day of October, 2016 and that during the investigations, he recorded statements of the witnesses including the complainant who explained to him what had happened. He then issued a P3 form to the complainant and he escorted her to the hospital where the P3 form was filled. He also obtained the certificate of birth in respect of the complainant and he produced the same as exhibit 2.

14. At the close of the prosecution's case, the appellant gave sworn evidence and called two witnesses who testified in support of his defence. In his testimony, the appellant denied having committed the offence. He stated that on the 7th day of October, 2016 at about 4.00 am, he was sleeping in the house. In the process an old lady went and told him that he had defiled her granddaughter.

15. The appellant also called **DW2 FLORENCE JUMA OCHIENG** who testified that on the 7th day of October, 2016 at about 4.00a.m she was in her house where she was washing clothes. That in the process, PW3 went while shouting and saying that the appellant had defiled her granddaughter. After that, she went and knocked the appellant's house and she found the appellant sleeping inside the house. She said that the appellant was sleeping with one DO in the same house.

16. **DW3 DOO** testified that on the 7th day of October, 2016, he was sleeping in the house together with the appellant who is his younger brother. In the process, one D that is PW3 went while shouting and saying that the appellant went to her house and defiled her granddaughter. He stated that he was shocked because the appellant was in the house the whole night.

17. The appeal was heard by way of oral submissions with Mr. Otieno advocate and Mr. Ochanyo representing the appellant and Mr. Namasake Prosecution Counsel representing the state.

18. In the submissions on behalf of the appellant, it was submitted that the judgment of the trial court must be vacated because first, the appellant was under-age yet the court was made to believe that he was an adult. Following the above submission, this court directed that another age assessment be carried out on the appellant and I also ordered for adduction of additional evidence in the form of production of his original birth Certificate. Secondly it was submitted that there was no sufficient evidence of identification of the appellant. It was submitted that the court relied on the evidence of the grandmother of the appellant who said that she only relied on the spotlight to see the appellant. Further, that anybody could have accessed the house because the door was eaten up by termites. That it was dark so the victim thought it was a cat that had entered the house.

19. Counsel argued that if the intruder was known to the victim and the grandmother, why did they not go to his residence yet they were related. It was submitted that the fact that the complainant's grandmother never went to the appellant's home and the victim never screamed for help leaves a lot to be desired. It was further submitted that the appellant's alibi was strong and not rebutted.

20. On the part of the respondent State, it was submitted that the age of the appellant was conclusively established by an age assessment

report which showed that he was over 18 years and that on being placed on his defence, the appellant never stated that he was a minor hence the submission was an afterthought.

21. On identification of the appellant it was submitted that both the complainant and the grandmother had torches which they lit and saw the appellant who was well known to them hence there was no mistaken identity.

22. Counsel for the Respondent also submitted that medical evidence was never controverted. Further, that the defence of alibi was not sustainable as his home was near the victims 'home and that it was possible to commit the offence and move back to his house to sleep since he was clearly identified at the scene of crime. It was submitted that there was no reason why the victim could fix the appellant with such an offence. The respondent's counsel urged the court to dismiss the appeal.

23. In a rejoinder, the appellant's counsel urged the court to make a finding that in the circumstances of this case it would not have been safe in law to find that the appellant was positively identified. Lastly that his alibi defence was ignored by the trial court.

24. After the age assessment report was filed in court, Mr. Ochanyo advocate held brief for Mr. Otieno advocate for the appellant and submitted in addition that there was no evidence of penetration and that even if the court were to find that the conviction was sound, the sentence meted out on the appellant was irregular as the appellant was a minor at the material time of offence as shown by his original birth certificate and age assessment report. Counsel also submitted that the judgment was vague because the charge sheet had the main and alternative charges yet the trial court did not mention the alternative charge in his judgment.

DETERMINATION

25. I have reassessed the evidence on record, the grounds of appeal and the oral submissions and additional evidence adduced by the appellant. The main issues in my humble view for determination are:

i. Whether the appellant was a minor at the time of alleged commission of offence

ii. Whether the prosecution proved the charge of defilement against the appellant beyond reasonable doubt

iii. Whether the defence of alibi is sustainable

iv. Whether sentence meted out was lawful

26. On whether the appellant was a minor at the time of the offence, the age assessment report filed in the lower court showed that the appellant was over 18 years at the time hence the conviction and sentence. However, during the hearing of this appeal, a further age assessment report was filed which again revealed that he was over 18 years. On production of the birth certificate No. 6071808 issued on 24/10/2016, it showed that the appellant **GO was born of RBO and MBB at Ndori** in Siaya District on 23/03/2002. What that means is that as at 7/10/2016 when the offence herein is alleged to have occurred, the appellant was aged 14 years and 7 months hence he was a minor. Accordingly, I find and hold that the appellant was and is still a minor and therefore a child as defined under section 2 of the Children's Act.

27. On whether the prosecution proved the guilt of the appellant beyond reasonable doubt, it is not in dispute that the appellant and the complainant were well known to each other prior to the date of the alleged incident and according to PW3, he was her grandson hence they were related. It is also not in dispute that PW1 and PW4 knew the appellant prior to the date of the incident. The issue is whether the appellant went to the house of PW 3 on the material night of 7/10/2016 and whether he defiled the complainant, PW1 as per the medical evidence of PW2 and testimony of PW1.

28. On whether the appellant went to the house of PW3 where PW1 and PW3 were sleeping, according to PW1, when she was sleeping she realized that somebody had entered into the house and was lying on her back. She took the spotlight which she had. She flashed it and she saw the appellant. She screamed and her grandmother that is PW3 woke up and responded while carrying a spotlight and also saw the appellant. PW3 spoke to the appellant and that the appellant never responded. Instead, he ran away.

29. According to PW3, when she heard the complainant screaming, she asked the complainant whether the cat had entered into the net. The complainant told her grandmother that it was G that is the appellant. PW3 went to check on the complainant while armed with a spotlight. When she flashed the spotlight, she saw the appellant and after speaking to him, he simply ran away.

30. The appellant denied going to the house of PW3 and he called his two brothers who testified to the effect that he was sleeping in their house at time of the alleged incident.

31. The testimony of DW2, was that when PW3 went while complaining that the appellant had defiled her granddaughter, DW2 went and knocked the appellant's door and she realized that the appellant was sleeping in the house. According to DW3, they were together with the appellant the whole night.

32. Having carefully considered the evidence of PW2 and PW 3 as against the evidence of the appellant and his witnesses, it is indisputable that the incident occurred at night and the issue of identification of the appellant at the scene becomes crucial. The appellant denied having been at the scene. On the other hand PW2 and PW3 insisted that they positively identified the appellant at the scene. The issue which arises is as to whether the conditions at the scene were favorable for positive identification.

33. According to PW2 and PW3, they had spotlights which they flashed onto the appellant and they were able to see him very well.

34. I have considered the evidence of PW2 and PW3 and I am of the humble opinion that the same is well corroborated and the same clearly demonstrates that the complainant and her grandmother used the spotlights and they were able to see and identify the appellant as the person who entered into the house.

35. On the issue of whether the prosecution proved the essential ingredients of the offence of defilement, there are three essential elements of defilement namely:

i. whether the victim was a minor as at the time of the incident;

ii. whether there was penetration of the complainant's genitalia;

iii. Whether it was the appellant who caused the penetration.

36. On whether the complainant was a minor as at the time of the incident, according to the charge sheet, the complainant was aged 13 years as at the date of the incident. According to the complainant, she was 12 years old as at the time of the incident. According to the certificate of birth in respect of the complainant that is exhibit 2, the complainant was born on the 7th day of June, 2003. The incident is alleged to have occurred on the 7th day of October, 2016. From June, 2003 to 7th day of October, 2016 is 13 years and four months. As such, I am of the finding that the time of the incident the complainant was 13 years and 4 months hence a minor.

37. On whether there was penetration of the complainant's genitalia, according to the complainant, she felt somebody on her back and she experienced some pain on the anus. PW1 examined the complainant on the 8th day of October, 2016 which was hours from the time of the incident and he noted tenderness and bruises on the anus.

38. I have considered the evidence of PW2 and PW1, I am of the opinion that the same is well corroborated and the same clearly demonstrates that there was penetration of the complainant's anus.

39. On whether it was the appellant who caused the penetration, I have already made a finding that the appellant went to the house of PW3 on the night in question and was positively identified by PW2 and PW3 hence I find and hold that it was the appellant who caused the penetration. The alibi defence in my humble view was an afterthought and not plausible as there was no material to indicate that the complainant and her grandmother framed the appellant or could have been mistaken.

40. I uphold the conviction by the trial court and dismiss the appeal against conviction.

41. On sentence, owing to the age of the appellant at the material time, which was 14 years, the appellant ought to have been sentenced in accordance with section 8(7) of the Sexual offences Act and section 191 of the Children's Act.

42. For that reason, I set aside the 20 years imprisonment imposed on the appellant minor and order for a probation Officer's report to be filed to aid this court in determining the appropriate legal sentence to be meted out on the appellant.

Mention on 22/1/2020 for sentencing. The appellant shall be held at Siaya GK Prisons pending resentencing.

Dated, signed and Delivered at Siaya this 18th Day of December, 2019

R.E. ABURILI

JUDGE

In the presence of:

Mr. Ochanyo Advocate h/b for Mr. Otieno Aluoka for the Appellant

Mr. Okachi Senior principal prosecution Counsel for the Respondent

CA: Brenda and Modestar