



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 41 OF 2019

BETWEEN

JOO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tamu Criminal SO Number 05 of 2015 by Hon. S.A Opande (SRM) on 10th August, 2015)

JUDGMENT

Background

1. **JOO (Appellant)** herein 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*) and deliberate transmission of HIV contrary to section 8(1) (a) of *the Act*. The offences were allegedly committed on 28th March, 2015 against SA a girl aged 09 years.
2. The prosecution called 6 witnesses in support of the charges. **PW1** the complainant herein stated that she was 9 years old and a pupil at [Particulars Withheld] Primary School. She recalled that on a certain Saturday, her mother sent her to buy omena and on the way back, he passed the house of T who called her to his house but she refused. That the said T then held his hand, covered her mouth and took her to his house where he defiled her and then released her after giving her 10/-. She stated that the matter was reported to her mom by one Jasembo and she was taken to hospital two days later where she was examined.
3. **PW2 CHARLES OCHIENG**, a caretaker of the house where Appellant lived stated that one Velma informed her that there was a young girl that used to frequent Appellant's house. That on 28.03.15 at about 07.00 pm, he heard screams coming from Appellant's child and a short while later, complainant emerged from that house and went away. He stated that he followed complainant to her home and reported the matter to her mother.
4. **PW3 SAO**, complainant's mother stated that complainant was born on 22.07.05 as evidence by her immunization card **PEXH. 3**. She recalled sending the complainant to the shops at about 6.30 pm on 28.03.05 and she overstayed and returned to say that she had lost the cash. That she gave her money to go buy charcoal and after she left, PW2 went to her house and informed her that her daughter used to frequent the house of one T which was identified to her. She stated that complainant did not return home on that night and when she saw her the following morning noticed that her vagina was swollen and bleeding and she washed her with salty water and later reported the matter to the chief and the complainant was taken to hospital and examined.
5. **PW4 VELMA ONGAI** stated that on 28.03.15, he saw the Appellant take the complainant to his house and she reported the matter to her two neighbours including PW3. She stated that complainant used to frequent Appellant's house and that on that day, she heard her screaming from inside the house and a short while later the child emerged from the house.
6. **PW5 ROBERT OMUSULA**, a clinical officer at Muhoroni Sub Count Hospital examined complainant on 31.03.15 and found she had a bruise in her genitalia with fresh bleeding and hymen was missing. He produced her P3 form and PRC form filled by her colleague Edna Koech as **PEXH. 1** and **PEXH. 2** respectively. He also produced the Appellant's P3 form with lab test results that stated that he was HIV+ and further that Appellant was on ART treatment at Muhoroni Sub Count Hospital but had defaulted in taking his medication.
7. **PW6 PC FREDRICK MULI** took over the case long after accused was arrested and charged.

8. In his unsworn defence, the Appellant denied the offence but conceded that he was also known as T.

9. In a judgment dated 10th August, 2015, the Appellant was convicted and sentenced to 100 years' imprisonment in count 1 and 30 years in respect of count number 2.

Appeal

10. Being dissatisfied with the sentence, the Appellant lodged the instant Appeal on 06.08.19. From the amended grounds of appeal and submissions filed on 11.12.19, the Appellant raises the following issues for determination:

1) His rights under Article 49(1) of the constitution were violated

2) Section 214 of the Criminal Procedure Code was violated

3) Section 26(1) of the Sexual Offences Act was not proved

4) That the sentence is harsh

11. The state submitted that the prosecution case was proved and urged that the appeal be dismissed.

Analysis

12. 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."

13. 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.

14. To begin with however first deal with the violation of the Constitution.

15. Article 49 (1) provides that:

An arrested person has the right (f) to be brought before a court as soon as reasonably possible, but not later than—

i. twenty-four hours after being arrested; or

ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day

16. I have considered the case of **Albanus Mwasia Mutua v Republic [2006] eKLR** where the Court of Appeal quashed the conviction and sentence on the ground that the deprivation by the police of Appellant's right to liberty for a whole eight months before bringing him to court so that his trial could begin resulted in his trial not being held within a reasonable time.

17. There is evidence that appellant was arrested on Tuesday 31.03.15 and was arraigned in court the following day on Wednesday 01.04.15. Clearly, Appellant was arraigned in court promptly and I therefore find that this ground has no merit.

18. Complainant's immunization card **PEXH. 3** established that she was born on 22.07.05 and was therefore 9 years when the offences were allegedly committed.

19. 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."

20. Both the P3 form and the PRC forms marked as **PEXH. 1** and **PEXH. 2** respectively showed that complainant had a bruise in her genitalia with fresh bleeding and hymen was missing. The finding by the trial court that penetration was proved was therefore well founded.

21. Complainant's evidence that she was defiled by the Appellant in his house was corroborated by **PW2 CHARLES OCHIENG** and **PW4 VELMA ONGAI** both who were Appellant's neighbours and who saw complainant enter and leave the Appellant's house on the material date and time that she was allegedly defiled. Infact, PW4 stated that he heard complainant screaming from inside that house.

22. From the foregoing, the trial court's finding that the Appellant had been positively identified as the assailant and that count had been proved beyond any reasonable doubt was well grounded.

23. On the second count of deliberate transmission of HIV contrary to section 8(1) (a) of *the Act*, the only evidence adduced in support of this charge was that of the **PW5**, the clinical officer who stated that Appellant was on ART treatment at Muhoroni Sub Count Hospital. The Appellant's P3 form **PEXH. 4** confirms that the Appellant was HIV+ and had defaulted in taking his medication.

24. From the evidence on record, it is evident that at the time of defiling the complainant, the Appellant had actual knowledge that he was infected with HIV yet he intentionally, knowingly and willfully defiled complainant well knowing that he was likely to infect her with HIV. From the foregoing, the conviction on the second count was also well grounded.

25. Section 214 of the Criminal Procedure Code **Cap 75 Law of Kenya** states:

Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(1) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(2) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

26. The court record shows that the charge sheet was amended on 9.06.15 introducing an alternative count of indecent act with a child contrary to section 11 (1) of *the Act* and a second count of deliberate transmission of HIV contrary to section 26(1)(a) of *the Act*.

27. As at the time of the amended, evidence concerning Appellant's status had been adduced by **PW5** whom the Appellant chose not to cross-examine.

28. Whereas the record demonstrates that the Appellant was called upon to plead to the amended charges, there is no evidence that his right to recall witnesses was explained to him and this was clearly a serious omission on the part of the trial magistrate. From the totality of the evidence however, I find that the omission did not affect the substance of the evidence on the record and was not prejudicial to the Appellant.

29. The mandatory sentence under Section 8(1) as read with Section 8(2) of *the Act* is life imprisonment. The trial magistrate sentenced the Appellant to 100 years which in my considered view is indeed a life sentence since it is highly unlikely that the Appellant will live 100 years in prison.

30. As mandatory sentences were declared unconstitutional by 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.

31. Even though Appellant was a first offender, the psychological effect of the offences on the 9-year-old complainant cannot be underestimated.

32. From the foregoing, the Appeal fails except on the issue of sentence.

Considering Appellant's health status, the 100-years and 30 years' imprisonment sentence imposed on him are set aside and substituted with sentences of 15 years in each count which shall run concurrently from 10th August, 2015 when he was sentenced.

DELIVERED AND SIGNED IN KISUMU THIS 18th DAY OF December 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Appellant - Present in person

For the State - Ms. Gathu