



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 13 OF 2016

**(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 802 OF 2012 OF SENIOR RESIDENT
MAGISTRATE'S COURT AT MUMIAS)**

YUSUF WAMUKOYA WESONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. SK Ng'etich, Senior Resident Magistrate (SRM), Mumias, of defilement contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to fifteen (15) years imprisonment. The particulars of the charge against the appellant were that on 15th September 2012 at about 19.20 hours at [particulars withheld] Village Township Sub-Location Nabongo Location Mumias District in Kakamega County he intentionally caused his penis to penetrate the vagina of CAM a child aged twelve (12) years.

2. He had also been charged with an 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 of the alternative charge were that on the same date and the same place stated in the main count, he had intentionally caused his penis to touch the vagina of CAM a child aged twelve (12) years.

3. The appellant pleaded not guilty to the charges before the trial court, whereupon the primary court had to conduct a trial. The prosecution called five (5) witnesses.

4. CAM, the complainant, testified as PW1. She explained that the accused was their neighbour. On the material day, he found her at home alone and forcibly took her to his house where he forcibly removed her under clothes and inserted his penis into her vagina. She screamed. Her father, JOO, PW2, came and the accused ran and hid under the bed of a neighbor. PW1 informed him what had transpired, he locked up the appellant in his room and called neighbours who came and roughed him up. PW1 was later taken to the police to report the incident, and the police referred her to a hospital for examination.

7. JOO, PW2, came to the scene when the assault was underway, and it was he who interrupted the process, forcing the accused to hide. He stated that he found his daughter, PW1, in the house of the accused, who he identified as a neighbour, and she informed him of what had happened. He found the accused under his bed, he locked him in his room and called neighbours. He was pulled from under the bed, he had no shirt on, his trousers were unzipped and his penis was exposed. He was taken to the police. PW2 took PW1 to a medical facility for examination and treatment. BOO (PW3), was the mother of PW1 and the wife of PW2. She was present when the accused was pulled out from under his bed. She said that she found PW1's underwear in the room of the accused on the floor near his bed. Corporal Vincent Ngeiwa (PW4) was the police officer involved in the matter. He received the first report, took the complainant for medical examination, investigated the matter and recorded statements from the witnesses.

George Watila (PW5) was the clinical officer who attended to the complainant and prepared the Police Form 3 which was put in evidence. He concluded that the complainant had been defiled.

6. The court found that the appellant had a case to answer and put him on his defence. He did not appear in court on the date appointed for defence hearing, a warrant of arrest was issued, which was effected at Kisii and he was brought to court under escort. He alleged that he had thought that the case had come to an end. He denied committing the offence saying that he was arrested and assaulted by the public for no reason.

7. After reviewing the evidence, the trial court convicted appellant of the main charge of defilement contrary to Section 8(1) of the Sexual Offences Act, and sentenced him to fifteen (15) years imprisonment.

8. The appellant being dissatisfied with the conviction and sentence appealed to this court and raised several grounds of appeal-

- a. That the evidence on record could not sustain a conviction;
- b. That the tests conducted on PW1 had not established who had committed the offence;
- c. That the trial court had shifted the burden of proof to him;
- d. That he was not medically tested to confirm whether he was the one who committed the offence;
- e. That the court had relied on the discredited evidence of a single witness;
- f. That his alibi defence had been disregarded; and
- g. That the sentence meted out was harsh.

9. This being a first appeal, I have taken time to re-evaluate all the evidence on record and to draw my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic (1972) EA 32*** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 magistrates' findings can 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.”

10. The appeal was canvassed on 27th September, 2018. The appellant relied on written submissions that he had placed before me, whilst Mr. Juma, Prosecution Counsel, made oral submissions.

11. In his written submissions, the appellant urged matters that were not set out in his petition of appeal. He submits that the charge was defective to the extent that it was brought under section 8(1) (3) of the Children Act, which provision did not exist. Secondly he argues that the trial was unfair to the extent that he was not informed of his rights to a fair trial. He says he was not furnished in advance with the evidence that the prosecution was to rely on meaning that he was subjected to a trial by ambush. He further submits that the language used in the proceedings is not stated in the record of the trial court, and that the testimony of the complainant, PW1, was not on oath. He submits too that section 200 of the Criminal procedure Code was not complied with. He argues that the medical evidence was doubtful as the complainant had taken a bath after the incident before she was examined by the clinical officer. He points

at various inconsistencies in the testimonies of the prosecution witnesses. He also argues that the penetration and the age of the complainant were not sufficiently proved.

12. In his address, Mr. Juma asserted that the charges were not defective, and the appellant understood the charges that he faced. He submitted that he was accorded a fair trial as the trial was conducted in his presence and he was accorded the opportunity to cross-examine witnesses and to testify. On language, he submitted that it was clear from the record that the trial was conducted in Kiswahili, a language that he understood to the extent of being able to cross-examine witnesses. He submitted that the complainant gave unsworn evidence as she was a minor. He argued that section 200 was complied with. Directions were taken, but the court declined to start the trial afresh as the first three witnesses had since relocated to Uganda. On penetration, he submitted that the medical evidence was sufficient to establish the same. On the age of the complainant, he submitted that the same had been adequately proved. On reliance on the evidence of a single witness, he stated that the evidence of the single witness had been sufficiently corroborated. He submitted that there was sufficient evidence to sustain the conviction.

13. On whether the court placed undue reliance on the testimony of a single witness, I have carefully scrutinized the record. The charge of defilement is a sexual offence. Sexual offences are usually not committed in public, they almost always happen in privacy or secrecy or away from the public eye. It should not be expected that there would be eyewitness evidence to such events. Consequently, the only available account would be that of the victim complainant. It is for that reason that the law requires corroboration of the testimony of the sole witness of the incident. In the instant case there is evidence tending to support the testimony of the complainant. PW2 happened to the scene when the defilement was in progress, and indeed it was his sudden appearance that brought PW1's ordeal to an end. The accused was more or less caught in the act. He was apprehended immediately and handed over to the police, and the complainant was seen by medical personnel the same day. The evidence of the single witness was no doubt sufficiently corroborated. The trial court cannot be faulted on that score.

14. On the complainant's age, I note from the record that her parents testified. They would know better than anybody else about her age. They said that she was 12 at the time of trial, having been born on 1st November 2000. That was the age that PW1 herself told the court she was, and it was also the age that the parents gave to the police. It was also the age that the clinical officer cited. She testified that she was in Standard 4 of primary school. I note too that the court conducted a *voire dire* examination on her, and decided to let her give unsworn evidence. From the material before I do not find anything that would suggest that the child was not of the age stated in the charge. If anything it would appear that she was even younger than twelve at the time of the commission of the offence, if she was twelve at the time of trial. The appellant should count himself lucky that he was not charged with defiling a minor below the age of eleven. There is an age assessment report on record that put the complainant's age as between eleven and twelve years. The appellant also appears to raise the issue that he was also a child at the time of the commission of the offence, and that he ought to be dealt with as a child, meaning that his sentencing should be subject to the provisions of the Children Act. There is also on record an age assessment report on him, and his age was assessed at eighteen years. He was therefore not a child at the time, and he was properly treated as an adult.

15. He submits that he was not supplied with the evidence that the prosecution was to rely on. I am alive to the constitutional requirement that an accused person is entitled to access to information. I have carefully perused through the record, I have not come across anything on the record that indicates that the appellant herein applied to be supplied with information and that that plea was turned down by the court. It was his duty to apply to be supplied with the information if he wished to rely on it at the trial. The fact that there is nothing on record showing that he asked for such records is an indication that he either had been supplied with it, and therefore it was not necessary for him to ask for it, or if it had not been supplied by the prosecution, he did not need it hence he did not apply for it. A constitutional right is a matter of law, both sides are deemed to be aware of the law, and the principle remains that ignorance of the law is no defence. I do not think that anything turns on this.

16. Related to that is the right to translation of the proceedings into the language that the appellant was familiar with. These are issues of law. It is a trite law that all are expected to be aware of the law, and

ignorance thereof is not a defence. On the language used, it is clear that at the time plea was taken the language used was Kiswahili. The language that PW1 used when she testified is not indicated but it is to be presumed that she used Kiswahili as that was the language that was used at the time of taking plea. The appellant does not appear to have raised objection at whatever language that she might have used as the record is silent on that. In any event he does not appear to have been prejudiced in any way as he cross-examined her extensively. The record indicates that PW2, PW3 and PW4 testified in Kiswahili, a language that the appellant appeared to be familiar with going by the events at the plea-taking stage. He equally cross-examined them at length, which suggests that there was no language hitch. The language used by PW5 is not indicated. There is nothing to indicate a protest by the appellant to the use of whatever language by the witness. In any event I note that the appellant cross-examined the said witness. The appellant has not indicated the language that was being used at the trial and which he now claims limited his cross-examination of the witnesses. In any event, there is nothing on record to show that he ever protested at any stage to proceedings being conducted in a language that he was not familiar with. I am not persuaded that there was any language hitch.

17. On the medical evidence, the appellant argues that the fact the complainant had taken a bath had rendered the evidence of the clinical officer unreliable. The suggestion implicit in that is that some of the evidence of defilement might have been lost in the process. According to the witness he was able to obtain material that would have helped him to conclude that there had been defilement. He talked of finding a whitish discharge, a torn hymen, epithelial cells and spermatozoa. I note that the appellant did not challenge the witness on that aspect, that is with regard to the consequence of the victim having a bath before medical examination. Whether taking a bath *per se* washes away the evidence of sexual assault is a matter that he should have taken up with the witness. It is not something that the court can presume or take judicial notice of. He should have confronted it at the trial. The appellant has not at all demonstrated that the said evidence was not reliable. He also raised issue that the tests done on PW1 did not disclose who committed the offence. That is true, and such tests are not expected to specify who might have committed the offence. It would suffice if there is adequate corroborative evidence.

18. On the issue that his *alibi* defence was not considered, I have perused the record of the trial court. I have read and re-read his statement on defence, and I do not get the impression that the appellant gave any *alibi* defence. There is no account of where he was on the material day at the material time of the commission of the alleged offence, that is to say the 15th September 2012. It cannot therefore be said that the trial court erred in not considering the appellant's *alibi* defence.

19. On the sentence being harsh, I note that the trial court convicted the appellant on a charge of defilement of a minor aged twelve, and sentenced him to serve fifteen years imprisonment. The relevant provision would be section 8(1)(3) of Sexual Offences Act, under which the appellant was convicted and sentenced, which provides as follows:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) ...

(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.”

20. I do find that the offence with which the appellant was charged is a serious offence and deserves very stiff punishment. Clearly from the provisions that I have cited above, the age bracket that the complainant fell in, if she was twelve at the time of the commission of the offence, would expose the offender to imprisonment for a term not exceeding twenty years. The trial court awarded him fifteen years believing that that was the minimum. The appellant should count himself lucky. Indeed, the evidence before me suggests that the complainant might have been younger at the material time, which suggests that the accused person should have been charged under section 8(2) which attracts a penalty of life imprisonment upon conviction.

21. The appellant raises issue with the charge as drafted and argues that it was defective to the extent that it cited subsection (3) which he alleges does not exist. I have perused the Sexual Offences Act and noted that section 8 has eight subsections, and that the offence charged fell under subsection (3). He also points at inconsistencies and contradictions in the evidence. I have considered this ground and noted the contradictions and the inconsistencies cited, and noted that they are minor, and do not go to the heart of the matter. They are not such as to undermine the trial process and to render it deficient.

22. He argued that the element of penetration was not proved with sufficient particularity. PW1 testified that the appellant lay on top of her and that she experienced pain from her private parts. I note that although she talked of being raped she never mentioned that the penis of the appellant penetrated her vagina, but the reference to pain in her private parts suggests penetration. Her evidence is however, reinforced by corroborative evidence provided by the other witnesses. She testified that she informed her father, PW2, that the appellant had raped her. PW2 himself testified that PW1 had informed him so. PW5, the clinical officer, attended to her the same day. She had spermatozoa in her vagina. The same was not linked to the appellant, but the appellant had been literally caught in the act. I believe that there was sufficient material to conclude that there had been penetration of the genitalia of the complainant.

23. The offence of defilement is established when it is proved that the genitalia of a minor had been penetrated by the genitalia of another. In the instant case, there is ample proof that the complainant was a minor and that her genitalia had been penetrated. The appellant was caught in the same compound with her. He was the only male around there at the time. He was apprehended at the scene and taken to the police. I am satisfied that the available evidence could sustain a conviction.

24. He has also raised the issue of compliance by the court with section 200 of the Criminal Procedure Code. That provision allows an accused person to demand a rehearing where a new magistrate has to take over the matter. The provision does not make it mandatory for the trial court to order such a rehearing in the circumstances. The provision is in permissive language, which leaves it at the discretion of the trial court. In the instant case, the appellant did indicate that he wanted a rehearing which was denied as the complainant and her two principal witnesses were said to have moved back to Uganda, and therefore unavailable to testify afresh. He complains that there was no proof of such relocation. The same provision allows the High Court to order a fresh trial where a fresh trial is not allowed by the trial court. However, ordering retrial is discretionary, and may be allowed only in cases where the accused person was materially prejudiced. In the instant case, a plausible reason was given by the court for declining to allow the hearing to restart, and the appellant has not demonstrated that he was prejudiced in a material by such refusal.

25. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Mumias PMCCRC No. 802 of 2012 was safe. I shall accordingly confirm the said conviction and uphold the sentence imposed. The appeal herein is hereby dismissed. The appellant has a right to challenge this judgement at the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF DECEMBER 2018

W MUSYOKA

JUDGE