



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 85 OF 2014

STAIL SAYA KANUSU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case Number 474 of 2013 in the Senior Principal Magistrate's court at Kapsabet – Hon. G. Adhiambo (SRM))

JUDGMENT

INTRODUCTION

1. The appellant herein, **STAIL SAYA KANUSU**, was charged with the main count of defilement contrary to Section 8(1) as read Section 8(2) of the Sexual Offences Act. The particulars of the charge were that on 28th February 2013 in Soimining Location within Nandi County intentionally and unlawfully caused his penis to penetrate the vagina of ZM (*particulars withheld*) a child aged 9 years.
2. The appellant also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on aforesaid date, he causes his penis to come into contact with the vagina of ZM (*particulars withheld*) a child aged 9 years.
3. The prosecution tendered the evidence of 5 witnesses in support of its case and the close of the case, the trial court found that the prosecution had proved its case beyond reasonable doubt. The appellant was consequently convicted on the main count of defilement and sentenced to life imprisonment thereby triggering the instant appeal.

The appeal

4. The appellant listed the following grounds of appeal in his petition of appeal:

1. *Penetration was not proved beyond reasonable doubt since the medical evidence is incomplete/unreliable and inconclusive.*
2. *The two exhibits were not identified by the complainant neither her parents though not availed as witnesses.*
3. *Crucial witnesses were not called nor summoned.*
4. *Prejudicial detention beyond 24 hours in police custody.*
5. *Age of the alleged minor not positively by credible evidence.*
6. *Age of the accused not considered under Section 191 Children Act.*
7. *Variance between names in the particulars if the charge and names tendered in evidence.*
8. *Some material contradictions marred prosecution case.*
9. *Life imprisonment is unconstitutional.*
10. *Failure to explain rights of being represented by counsel.*

5. At the hearing of the appeal the appellant opted to rely entirely on his written submissions in support of the appeal which I have carefully considered.

6. On her part, Miss Mumu, learned counsel for the state opposed the appeal and submitted that the prosecution proved all the ingredients of defilement, namely; age of the victim, penetration and identification of the appellant as the perpetrator.

Evidence

7. As a first appellate court, this court is under a duty to re-examine the evidence tendered before the lower court afresh with a view to arriving at its own independent findings but while bearing in mind the fact that it neither heard nor saw the witnesses testify. The principles that apply on a first appeal as were set out in the case of **Issac Ng'anga Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 Of 2005** as follows:-

in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

i. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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 (See Peters Vs. Sunday Post, (1958) EA 424)"

vii. A summary of the evidence tendered before the trial court was as follows:

ix. PW1, the complainant, testified that she was on 28th February 2013 herding cattle when the appellant called her and took her to her mother's house where he locked the door, undressed her and defiled her. She stated that the incident took place during the day at about 9pm. She was taken to the hospital the following day.

x. PW2 Timothy Murwa, the appellant's neighbour learnt about the defilement incident and went to the scene where he saw the appellant and the complainant emerge from the kitchen. He observed that the appellant was armed with a panga and that saw the complainant walk with difficulty.

xi. PW3, a village elder arrested the appellant while PW4 was the medical officer who examined the complainant and prepared the P3 form which was produced as an exhibit during the trial. PW5 PC Esirore Godfrey investigated the case, issued the complainant with the P3 form and preferred the charges against the appellant. He also produced the complainant's birth certificate at exhibit 2. The birth certificate showed that the complainant was born on 1st October 2003.

Determination

12. I have considered the Record of Appeal and the submissions by the appellant and the state. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt. The critical ingredients of the offence of defilement are; the age of the complainant; whether there was penetration and whether the appellant was positively identified as the perpetrator of the offence.

13. The appellant submitted that the age of the complainant was not proved to the required standards as the complainants parents did not testify during the trial and did not identify the birth certificate. On age, I find that the birth certificate produced at the trial showed that the complainant was born on 1st October 2003. The offence was committed on 28th February 2013 which means that the complainant was 9 years at the time that she was defiled. The P3 form also showed that the complainant was 9 years old at the time she was examined by the doctor following the sexual assault.

14. I am satisfied that the complainant's age was established to be 9 years to the required standards. Both the P3 form and the birth certificate were produced as exhibits in court without any objection from appellant. *In the case of **Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** it was held thus:*

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense"

15. On penetration, I find that the complainant's testimony on the circumstances under which she was defiled was graphic, compelling and consistent. She narrated, in great detail, how the appellant lured her into his mother's kitchen where he defiled her. Her testimony was not impeached on cross examination and was corroborated by the medical evidence of PW4. The P3 form which was produced as P exhibit showed that the complainant had a swollen labia majora and labia minora. PW4 testified that the complainant's hymen was ruptured and concluded that there was penile penetration. I am therefore satisfied that penetration was proved to the required standards.

16. Turning to the identification of the appellant as the assailant, I note that he was well known to the complainant. PW1 testified as follows on this aspect.

“I know this man. He is called Stail Kanusu....he lives at the home of grandfather, he lives with his mother. His mother is called Rose. I have known him for many days.”

17. I also note that the incident took place during the day at about 6pm in which case, the circumstances were conducive for the complainant to see and positively identify her attacker. PW2 testified that he saw the complainant and the appellant emerge from the kitchen on the material day and that the appellant was then armed with a panga and refused to explain to him why he was with the complainant. It is therefore my finding that the appellant was positively identified by the complainant.

18. On sentence, Section 8(2) of the Sexual Offences Act stipulates as follows:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.

19. In the instant case, having found that the age of the victim was established to be 9 years, I find that the sentence passed by the trial magistrate was legal and well within the limits provided for under the Sexual offences Act.

20. In sum, I find that the instant appeal is not merited and I hereby dismiss it.

Dated and signed at NAIROBI this 6th day of December 2018

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 19th day of December 2018.

OLGA SEWE

JUDGE

In the presence of:

Appellant in person

Ms Mumu for state