



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.1 OF 2015

(An appeal from original conviction and sentence of Ogembo SPM'S C Criminal Case No. 1029 of 2012 by Hon. C.R. Ateya Resident Magistrate dated 27TH November, 2014)

S O OAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein S O O was charged with the offence of defilement contrary to Section 8 (2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that on 27th June 2012 in Gucha District within Kisii County unlawfully committed an act which causes penetration of his penis to the anus of KMO (name withheld) aged 9 years.

3. The appellant pleaded not guilty to the offence and a trial ensued in which the prosecution presented the evidence of 5 witnesses in support of its case. At the close of the prosecution case, the trial court found that a prima facie case had been made against the appellant who was then placed on his defence and at the end of the trial, the appellant was found guilty of the offence of defilement, he was convicted and sentenced to the mandatory sentence of life imprisonment.

4. Aggrieved by his said conviction and sentence, the appellant filed the instant appeal on 13th January 2015 wherein he set down the following grounds of appeal.

1. THAT, I pleaded not guilty to the charges of defilement of a girl.

2. THAT, the magistrate did not allow me back to retrial so that I can attend the witnesses of the victim.

3. THAT, the term imposed to me was harsh, the trial magistrate did not grant me fair sentence which will allow me to assist the family members who are suffering of insecurity and food since I was the bread winner.

4. THAT, I be provided with High Court and law court proceedings to assist me adduce grounds during court of appeal submissions.

5. When the appeal came up for hearing before me on 30th March 2017, the appellant opted to rely

entirely on his handwritten submissions and grounds of appeal listed hereinabove while Miss Ouko for the state opposed the appeal through oral submissions made in court. Miss Ouko submitted that the prosecution proved its case against the appellant beyond reasonable doubt as the all three ingredients of defilement namely; age, penetration and identification were proved.

6. Miss Ouko added the prosecution tendered the complainant's birth certificate which showed that he was 11 years old at the time he was defiled and that PW4 the clinical officer confirmed that the complainant had been sodomized as his anus was lacerated and a swab done on the anus showed that there were sperms. On identification, Miss Ouko submitted that the appellant was positively identified by the complainant as he (appellant) was the complainant's own father and therefore he knew him very well.

7. This is a first appeal and this court is therefore under an obligation to re analyze and reevaluate the evidence tendered before the lower court with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. See **Okeno vs Republic (1973) E.A 353**.

8. I have perused the proceedings of the trial court and in summary the prosecution's 5 witnesses testified as follows:-

9. PW1, KMO (name withheld) was the complainant herein testified that he was 11 years old and that the appellant was his own father. He stated that on 27th June 2012, he was sleeping in his grandmother's house together with his younger brothers at about 10 p.m. O O and M when his father (the appellant) who was also sleeping in a different room in the same house called him to go to sleep in his bed. His father then told him to remove his clothes and asked him to kneel down after which the appellant also removed his clothes and inserted his penis in his anus. He then went back to sleep but that at about 5 a.m., the appellant called him again to go to his bed but he ran outside and hid himself inside a sugar cane farm where he stayed till morning when he decided to report the incident to the assistant chief but that along the way, he met an old man who took him to a pastor at a nearby church. The pastor was informed of the defilement and he washed the complainant and gave him food to eat. The complainant then went to school where the teachers examined him after which they called the village elder who was also informed of the attack. The appellant was then arrested by elders who took him to the police at Mosesi.

10. The complainant stated that he was then taken to Gucha Level 4 Hospital where he was examined and treated. The police at Ogembo also issued the complainant with a P3 form which was filled by the doctor. The complainant informed the court that the appellant and his mother were not living together due to the differences that they had.

11. PW2 J R testified that on 28th June 2012, at about 7 a.m. while going to his sugarcane farm in [particulars withheld] , he met the complainant coming out of the farm and he did not have any shorts but was wearing only a T-shirt and was frightened. On taking a closer look at complainant, PW2 noted that he was walking in pain and upon enquiring from the complainant what was wrong, the complainant informed him that his father had defiled him the previous night. PW2 then decided to take the complainant to the school headmaster who then gave him a letter to take the child to Migesi dispensary. He later took the complainant to Misesi AP Post where they found the appellant who had by then been arrested by members of the public. The child was then taken to Ogembo District Hospital and Ogembo police for further assistance.

12. PW3 F M was the mother of PW1. She testified that the complainant, who is her eldest son, was born on 11th October, 2003. She produced a copy of his birth certificate as MFI-1. She narrated how on 28th June 2012, while at Misesi, she was informed that the complainant had been defiled by the appellant and she went to Ogembo Police station where she found PW2 and school committee members. She stated that at the time of the defilement, she was not staying with the appellant as he had chased her away from the matrimonial home and she had gone to live with her parents after the appellant pulled down their house. She added that because she had no house, the appellant and her children lived in the appellant's mother's house but that the said mother was not present during the incident as she had also been chased away by the appellant.

13. PW4 WYCLIFFE ATAMBO was the medical officer who produced the P3 form in respect to the injuries sustained by the complainant. He testified that PW1 was treated at Gucha Level 4 Hospital as outpatient No. 11720/012 with a history of having been sodomized by his father. He produced the P3 form as Pexhibit 1. He stated that the patient who was aged 9 years had sustained laceration of the anus and that a swab done turned positive meaning that there were sperms inside the complainant's anus.

14. PW5 was NO. 36033 CPL. ALEX NDEGWA who took part in investigating the case. He took the complainant to the hospital for treatment and added that the child had blood on his legs.

15. The appellant gave an unsworn statement in his defence. He denied committing the offence and blamed his arrest on the differences he had with his wife (PW3) who he accused of having an affair with the person who gave her a letter following the alleged defilement of the complainant.

16. This is a first appeal and therefore the duty of this court is to analyze the evidence tendered before the trial court afresh and re-evaluate the same with a view to arriving at its own conclusion while bearing in mind the fact that I neither heard nor saw the witnesses testify. In the case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR** it was held:

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

17. As I have already stated in this judgment, the prosecution called a total of 6 witnesses as follows:

18. I have carefully considered and evaluated the evidence adduced at the trial by both the prosecution and the defence together with the parties' rival submissions. The issues for determination are:

a. Whether the ingredients of the offence of defilement were proved. age of the complainant was proved.

b. Whether the sentence meted against the appellant lawful.

19. With regard to the issue of whether the ingredients of defilement were proved, the critical ingredients that need to be proved for a successful conviction of defilement are age of the complainant, penetration and positive identification of the appellant. On the age of the complainant, it was not disputed by the appellant that the complainant was aged 9 years at the time that he was defiled. PW3, the complainant's mother produced a copy of the complainant's birth certificate which showed that he was born on 7th October 2003 and the offence was committed on 27th June 2012.

20. In addition to the birth certificate, the complainant's P3 form, which was also produced as an exhibit in court (see Pexhibit 1) also showed that the complainant was aged 9 years. I therefore find that the prosecution established that the complainant's age at 9 years.

21. In the case of **Francis Omuroni –vs- Uganda Court of Appeal in Criminal Appeal No.2 of 2000** observed as follows:-

“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.....”

On penetration I find that the prosecution tendered credible, consistent and uncontested documentary and oral evidence to prove that the complainant was defiled. PW1 gave a very compelling account on how the appellant, who was his own father and whom he knew very well, lured him to his bed on the fateful night and defiled him by inserting his penis into his anus and before allowing him to go back to sleep but that on the following morning at about 5am, the appellant tried to defile him again thereby prompting the complainant to escape from the house and seek refuge inside a sugarcane plantation till morning. PW2

found the complainant coming from the sugarcane farm at about 7am on 28th June 2012. He narrated how he found the complainant frightened and walking with difficulty. He stated that the complainant informed him that he had been defiled by his father the previous night. PW4, the medical officer, produced the P3 form which revealed that the complainant had been defiled as he had lacerations of the anus and added that a swab of the anus turned positive of sperms. bleeding from her private parts and unable to walk, just a few minutes after she had been defiled. The complainant's testimony that he was defiled was supported by the medical evidence of PW4 and the testimony of PW2 who were all independent witnesses. I find that the prosecution proved, beyond reasonable doubt, that the complainant was defiled.

22. On identification of the appellant and whether or not it was established that the appellant indeed defiled the complainant, PW1 identified his defiler as the appellant who was his own father with whom they shared their the same house. It is therefore abundantly clear to me that the complainant knew the appellant very well and I have absolutely no doubt in my mind that the complainant positively identified the appellant in this case. It is therefore my finding that the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant.

23. I find that the appellant's defence that he was framed in this case by his estranged wife and her alleged lover was an afterthought and an open lie that did not dislodge the credible and consistent evidence tendered by the prosecution witnesses. The said defence is farfetched and consists of mere denial that which does not displace the watertight evidence presented by the prosecution witnesses that placed him at the scene of the crime. I reject his defence and his claim that he was set up or framed up in the case by his wife and her alleged lover.

24. Turning to the appeal on sentence, **Section 8 (2) of the Sexual Offences Act No. 3 of 2006** stipulates as follows:

“ 8 (2) 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.”

25. The appellant was charged with defilement contrary to section 8(1)(2) of the Sexual Offences Act. The sentencing provided by the Sexual Offences Act is a minimum mandatory sentence which is usually pegged on the age of the victim in which case the younger the victim the stiffer the sentence. Therefore once the trial court was satisfied that all the ingredients of defilement had been proved beyond reasonable doubt, as I have already found in this judgment, there was no room for court to exercise discretion and the only minimum mandatory sentence provided for under the Sexual Offences Act was life imprisonment.

26. In the end, I find that the instant appeal lacks merit and it is hereby dismissed.

Dated, signed and delivered in open court this 25th day of May, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Appellant in person
- Omwoyo court clerk