



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 63 OF 2015
(DEFILEMENT)
(CORAM: J.A. MAKAU – J.)

G O O.....APPELLANT

VERSUS<

REPUBLIC.....RESPONDENT

(Being an Appeal against conviction and the sentence dated 31.10.2014 in Criminal Case No. 519 of 2014 in Ukwala Law Court before Hon. C.N. Wanyama - R.M.)

J U D G M E N T

1. The Appellant **G O O** faced a charge of **Defilement contrary to Section 8(1)(2) of the Sexual Offences Act No. 3 of 2016**. The particulars of the charge are that on the 25th day of September 2014 at [Particulars withheld] Sub-location, in Ugenya Sub County within Siaya County, intentionally caused his penis to penetrate the vagina of **J A O**, a child aged 11 years. The Appellant faced alternative charge of **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2016**. The particulars of the alternative charge are that on the same date, same place and time within the same county, intentionally touched the vagina of **JA O**, a child aged 11 years.

2. After full trial, the Appellant was found guilty, convicted and sentenced to imprisonment for life.

3. The conviction and sentence provoked the Appellant to prefer this appeal setting out 12 grounds of Appeal. However, at the hearing, he relied on the supplementary grounds being as follows: -

a) The charge sheet was defective.

b) That the trial court erred in fact and in law in failing to consider glaring inconsistencies in the Prosecution evidence and failing to consider the evidence as a whole especially for the defence.

c) That the Appellant's right to fair hearing was infringed as enshrined in Article 50(2)(b)(c) (g) and (j) of the Constitution of Kenya 2010.

4. I am first Appellate Court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of

Appeal held thus:-

“an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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.”

5. The Prosecution case forms part of the record of Appeal and I need not reproduce the same but briefly summarize both the Prosecution and defence case.

6. The Prosecution case is that on 25th September 2014 at night, George, the Appellant herein; went to the Complainant's house and offered to buy alcohol for JAO's grandmother. He then held JAO (PW1), removed her panties, blocked her mouth and put his penis into PW1's genitalia. That another person came with a motorbike and JAO (PW1) bit the Appellant's hand and he left her. PW1 then screamed as the Appellant offered PW1 Kshs. 25/= . She ran home crying and her grandmother asked her why she was crying. That one of PW1's teacher's husband, told PW1's teacher of the incident and she informed other teachers. The following day, JAO (PW1) was taken to Ambira Hospital, was treated and then reported the incident at Ligega Police Station. JAO's skirt was torn during the incident as she had two with her. The panty white in colour was marked as MFI-P1, P3 form as MFI-P2(a), Health pass book as MFI-P3. JAO (PW1) identified the Appellant as he used to visit her home.

7. PW2, A A A, testified the Appellant who she referred to as her grandchild and a teacher at Got Nanga went to her place on 25th September 2014 wanting to give her something small. That after they had eaten, he left with JAO (PW1) who returned back crying; and told PW2 that George had defiled her. JAO (PW1) refused to go to school at 1:00pm. A teacher called PW2 to find out what had happened to JAO (PW1) to which PW2 told the teacher that she had been slept on by George. The teacher told PW2 that JAO (PW1) had been defiled by someone. That PW2 took JAO (PW1) to the hospital then to Ukwala Police Station. PW2 stated that she stays with JAO (PW1), who is aged 11 years. She produced a Child Health Card marked as MFI-P3. PW2 identified the accused as her grandchild in Court.

8. PW3, L A O, a teacher at [Particulars withheld], testified that on 26th September 2014 at around 9:00am as she was going to the class, she saw JAO and another out, and enquired why JAO's face was swollen and she started crying. She told her in Kiswahili, “*teacher [Particulars withheld] amenishika, alilala na mimi*”. She told her she knows him and gave her his name as George. PW3 found the issue weighty and handed it to the Senior Teacher, and a decision was made for the child to be taken to the hospital and a report was made at Ligega AP Post. PW3 took JAO (PW1) to Ambira Hospital where she was examined and treated. She then reported to Ukwala Police Station where she was given a P3 Form. PW3 had not met the said George before.

9. PW4, No. 69126 Cpl Nixon Lukwa Ukwala, testified that on 26th September 2014, he received PW3 in company of JAO (PW1), a minor aged 11 years; who told him that on 25th September 2014, JAO (PW1) had been defiled by someone known to her, when they went to get *chang'aa* for her grandmother. PW4 gave P3 Form to PW3 and the child was taken to Ambira Hospital. That subsequently, the Appellant was arrested and charged with the offence. He produced the Child Health Card as Exhibit P3. He identified the accused. PW4 was recalled later and produced clothes worn by JAO (PW1) as Exhibit P1.

10. PW5, Howard Okeyo, a Clinical Officer, from Ambira Sub-District Hospital testified that on 26th September 2014, he examined JAO (PW1) who gave history of being defiled on 25th September 2014 at 7:00pm. She complained of lower abdominal pain on urination. She complained of seeing stains of blood on her panty. He observed she had pain on the labia minora and hymen not intact. He noted she

had tender vaginal walls, he did lab test and spermatozoa were seen, HIV negative. He made findings of defilement and filled the P3 Form. P3 Form was produced as Exhibit P2(a) and a Health Passbook as P2(b).

11. Upon the Appellant being called upon to defend himself, he opted to give unsworn statement. He averred that on 25th September 2014 at around 20.00hours, he received a call from JAO (PW1's) grandmother to go and assist her. He went and had supper with them. She explained the problem she had with her mobile phone and he resent it. Then she asked him to leave with one of grandchildren to get her airtime. That on their way, someone who was smoking cigarette appeared, and due to darkness and the person being a stranger, the child ran back to the house. The Appellant found the person was known to him and both went back to JAO (PW1's) home to explain why she went back. That on 27th September 2014 at 8:00 am, three police men arrested him from his house without disclosing to him why they had arrested him. He was then taken to Ukwala Police Station and he, was beaten by police in civilian clothes. He urged the charge against him was planned and made in bad faith.

12. At the hearing, the Appellant relied on his written submission which he handed over to the court. M/S Odumba, the Learned State Counsel, on her part made oral submissions urging that the Prosecution proved all the essential ingredients of an offence of defilement and urged the Court to dismiss the appeal and confirm the sentence.

13. The Appellant in his first ground of appeal contends that the Learned Trial Magistrate, erred in law and fact by failing to find that the charge sheet was defective. The Appellant faced the charge of defilement under **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006** which provides: -

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

(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.”

He urged that he ought not to have been charged with an offence under **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006** but under **Section 20(1) of the Sexual Offences Act No. 3 of 2006** which provides: -

“20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:”

14. The Appellant's argument that the charge is defective is based on the fact that PW2 in her evidence, she stated as follows: -

“the accused, my grandchild came to say Hello”.

He argues by virtue of PW2 having called him his grandchild and the complaint being PW2'S grandchild, he ought to have been charged with an offence of incest and not with the offence of defilement. In this case, there is no sufficient evidence for me to draw the actual relationship between PW2 and the Appellant. She might have referred to the Appellant as her grandchild because she is elderly or because she comes from closer tribe with that of the Appellant, but be as it may, if both the Appellant and the Complainant JAO (PW1) are grandchildren of PW2, the Appellant and the Complainant would be cousins.

15. Under **Section 22(1)(2) of the Sexual Offences Act No. 3 of 2006**, the test of the relationship is well spelled out. It is provided as follows: -

“22. (1) In cases of the offence of incest, brother and sister includes half-brother, half-sister and

adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act -

(a) “uncle” means the brother of a person’s parent and “aunt” has a corresponding meaning;

(b) “nephew” means the child of a person’s brother or sister and “niece” has a corresponding meaning;

(c) “half-brother” means a brother who shares only one parent with another;

(d) “half-sister” means a sister who shares only one parent with another; and

“adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.”

In view of the above, I find that the charge of defilement was properly preferred against the Appellant and failure to charge the Appellant under **Section 20(1) of the Sexual Offences Act No. 3 of 2006** did not in any- way make the charge fatally defective. I further find the Appellant was not prejudiced by the charge under **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006** as the sentence under **Section 20(1) of the Sexual Offences Act No. 3 of 2006** where the victim is under the age of 18 years is the same as the one provided for under **Section 8(1)(2) of the Sexual Offences Act. Section 20(1) of the Sexual Offences Act No. 3 of 2006** provides as follows: -

“20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

16. The Appellant contents that the learned Trial Magistrate erred in fact and in law in failing to consider glaring inconsistencies in the Prosecution evidence and in failing to consider the evidences as a whole and especially for the defence. He urged that under **Section 107(1)(2) of the Evidence Act** provides that: -

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

He urged the Prosecution evidence had numerous contradictions which included the question of when the complainant and Appellant were away; the identity of one “another man, a teacher, husband”; and the exhibits tendered by the Prosecution. He urged due alleged contradictions, the accused ought to have been given the benefit of doubt. I have very carefully considered the Prosecution evidence. There is no evidence of how long the Complainant and the Appellant were away and as such, I find no contradiction on the duration taken by the two while away. PW1 in her evidence testified that a husband of one of the teachers informed of the incident and she informed other teachers. PW1 did not disclose the name of the husband of the teacher and the teacher she was referring to however, that notwithstanding, the Appellant did not point out any evidence contradicting what PW1 stated in her evidence. As regards exhibits, PW1

identified the clothes she had on the material night which included panty marked MFI-P1. She also identified P3 Form MFI-P2(a); Health Passbook MFI-P2(b). PW2 identified a Child Health Card as MFI-P3. PW4 produced the Child Health Card as exhibit P3. PW5 produced P3 Form as exhibit P2(a) and Health Passbook as exhibit P2(b). PW4 produced PW1's assorted clothes as exhibit P1. PW5 in his evidence testified PW1 saw stains of blood on her pant. That there is no evidence on record as to whether PW1 had put on the panty but PW5 stated what PW1 told him she saw, meaning she must have put on the panty after the incident, but all the same, I find the relevant exhibits were produced by the Prosecution and none of the exhibits contradicts the Prosecution case.

17. Whether the Learned Trial Magistrate erred in law by failing to observe the Appellant's right to a fair hearing as enshrined in **Article 50(2)(b)(c)(g) and (j) of the Constitution of Kenya 2010**. The said **Article** provides as follows: -

”50. (2) Every accused person has the right to a fair trial, which includes the right:-

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(j) to be informed in advance of the evidence the Prosecution intends to rely on, and to have reasonable access to that evidence;”

18. The Appellant urged that immediately after the plea, the Trial Court directed that the matter be heard before Court No. 2 immediately. He urges that he was not given time and facilities to prepare himself for the trial. The Appellant urges **Article 50(2)(b)(c)(g) and (j) of the Constitution of Kenya 2010** was violated. In support of his submissions, he relied on my judgment in **D.O.O V Republic (2015)eKLR** in which I had stated as follows :-

“Accordingly, the Trial Court is under Constitutional duty to ensure an accused person has fair trial. A fair trial is a constitutional right for any accused person which is guaranteed by the constitution. The Court is also supposed to be impartial in determining dispute and ensure level playing ground is laid down before commencement of the trial for both the Prosecution and the accused. The fair trial includes the right to be informed of the charge, with sufficient detail to answer it, to have adequate time and facilities to prepare a defence, to choose and be represented by an advocate, and to be informed of this right promptly, to be informed in advance of the evidence the Prosecution intends to rely on and to have reasonable access to that evidence. To avoid such lapses by trial Court, it is important and desirable for trial Court to inform the accused of such rights and ensure the Prosecution complies with the provisions of Article 50 before trial commences. It is in my view not enough to enquire whether accused is ready without going further to establish that Article 50(2)(b)(c)(g) and (j) has been complied with and the accused is informed of the charge with sufficient detail to answer it. I have adequate time and facilities to prepare a defence, choose and be represented by advocate and even if he cannot choose one to be informed of this right promptly and lastly to be informed in advance of the evidence the Prosecution intends to rely on and to have reasonable access to that evidence. This in my understanding means before a matter proceeds to hearing, the Prosecution is supposed to give opening remarks in which it is supposed to state the nature of the offence and how they are going to prove the same, the kind of witnesses and number to be called so that the accused at least remains informed in advance of the evidence the Prosecution intends to rely on and be furnished with witness' statements. It is important for the Trial Court to note prompt and fair trial may not be achieved if an accused is not supplied in advance with witness statements and adequate time and facilities to prepare defence. Preparation includes getting a legal opinion as well.”

19. The Court record reveals that the Appellant was not supplied with witnesses' statements nor was he given adequate time to prepare his defence. The court record shows that the Appellant was arrested on 29th September 2014 and arraigned before Court on the same day. Plea was taken and upon plea of not guilty being entered, the case was referred to another court to continue with hearing immediately. The Prosecution proceeded to giving evidence without the Appellant being supplied with witnesses' statements, he was not given adequate time and facilities to prepare his defence; nor time to choose, and be represented by an Advocate nor was he informed of his right promptly. The trial court's record clearly reveals the Appellant's unpreparedness as he was unable to put question to JAO (PW1) and other witness who gave evidence on the same day. I note of great interest is that when the case came up for further hearing on another day the situation did not change as the accused was not supplied with copies of witnesses' statements at all.

20. In view of the above, I am satisfied that **Article 50(2)(b)(c)(g)and (j) of the Constitution of Kenya 2010** was breached, thereby making the proceeding a mis-trial. I therefore, for that reason quash the conviction and set aside the sentence.

21. In view of my finding, I now turn to consider whether I should order a retrial. I note in this case, none of the parties rooted for a retrial. The principle which should guide the Court on this issue is not new as it has been settled long time ago by the Court of Appeal. In **Benard Lolimo Ekimat V Republic, CRA No. 151 of 2014 (UR)**, the Court expressed itself thus: -

“the principle that has been accepted to Courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interest of justice require it”

22. The Court emphasized further the principle by enumerating some specific consideration which a court should take into account in deciding whether a retrial should be considered, these include the determination: -

(i) whether a retrial may occasion injustice or prejudice the Appellant.

(ii) whether it will accord Prosecution an opportunity to fill up gaps in its evidence in the first trial and

(iii) whether upon consideration of the admissible or a potentially admissible evidence, a conviction may result.

23. The trial in this case commenced on 29th September 2014 and the witnesses are likely to be available. Having considered the Prosecution's evidence and on consideration of admissible evidence, a conviction may result. That I have also considered the fact that if a retrial is ordered, it will not occasion injustice or prejudice the Appellant. I therefore order a retrial in this case before SRM, Ukwala Law Courts.

24. The upshot is that the appeal is allowed following violation of Article 50(2)(b)(c)(g)and (j) of the Constitution of Kenya 2010. The conviction is quashed and set aside. The Appellant should be sent back to Senior Resident Magistrate's Court at Ukwala on 31st July 2017, for plea on the same charges. In meantime, the, Appellant should remain in prison custody pending plea taking.

DATED AND SIGNED AT SIAYA THIS 27TH DAY OF JULY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. Laban Odhiambo
2. Leonidah Atika
3. Brenda A. Ochieng

Appellant: in person, present

M/S Odumba: for State

J.A. MAKAU

JUDGE