



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 85 OF 2015

BETWEEN

CYRUS OMBACHI OMOLLO.....APPELLANT.

AND

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No.95 of 2012 delivered by Hon. E. K. Nyutu, PM delivered on 13th May, 2015).

JUDGMENT

Background.

The Appellant was charged with seven counts of attempted defilement contrary to **Section 9(1) of the Sexual Offences Act**. The offences were all committed on unknown dates in the month of December 2011. For purposes of this judgment, the identity of the complainants shall not be disclosed. They were aged four, six, seven, six, five, four, seven and three years respectively. It was alleged that the Appellant unlawfully and intentionally attempted to cause penetration of his penis into the vagina of the respective complainants. Each of the counts carried an alternative charge of indecent act contrary to Section 11(1) of the Sexual offences Act in that he unlawfully and intentionally committed an indecent act by touching the breasts and vagina of the respective complainants. All the offences were committed at Mathare Area 1 within Nairobi County.

The Appellant was convicted for the alternative charges in respect of each of the counts and sentenced to serve ten years imprisonment respectively. The sentences were to run consecutively. He was however dissatisfied with both the sentence and the conviction as a result of which he preferred the instant appeal. In a supplementary memorandum of appeal filed on 13th September, 2017 which he relied on, he raised nine grounds of appeal which I have summarized as follows: he was dissatisfied that the offences for which he was convicted were not proved beyond a reasonable doubt, that the learned trial magistrate failed to analyze and evaluate the evidence of the minor victims so as to satisfy himself as to the honesty of the same, that the court failed to make a finding that the evidence of both PW8 and 10 was fabricated, that the prosecution evidence was marred with inconsistencies and contradictions, that his alibi defence was not considered, that the trial court erred in ordering that sentences run consecutively and that the sentence was harsh and excessive in the circumstances.

Submissions.

The Appellant was represented by Prof. Hassan whereas Ms. Nyauncho represented the Respondent. The parties agreed to proceed by way of written submissions which were filed on 15th September and 10th October 2017 respectively. The parties highlighted the submissions in question on 23rd October 2017.

In summary, Prof. Hassan submitted that the evidence of the complainants was contradicted by the evidence of the medical practitioners who examined the them. That is to say that the government doctor, PW12, Dr. Kamau found that the complainants' hymens were intact and their genitals had no injuries whilst the Clinical Officer at MSF Clinic concluded that all the complainants had their hymens missing. He also questioned the credibility of both PW8 and 10 whom he submitted fabricated the Appellant because of personal grudges. This was in view of the fact that they owed the Appellant some money and when he demanded that they pay, they instigated the charges against him. Accordingly, it was clear that PW9, PW13 and PW14 were under the influence of PW8 and PW10 which pointed to a conspiracy against the Appellant orchestrated by the two.

He was of the view that the trial magistrate failed to assess the evidence of the minors so as to satisfy himself that their testimonies were worth believing. That although Section 124 of the Evidence Act provides an exception to the admissibility rule where no corroboration exists

in cases of minors the court must state why it believed the evidence taken in such circumstances. He submitted that the offences were committed separately and therefore the testimonies of the complainants could not be deemed to be corroborative of each other. He relied on the cases of **Elias Kiamati Njeru v. Director of Public Prosecutions[2015] eKLR**, **Peter Kimanzi v. Republic[2013] eKLR**, **Dennis Osoro Obiri v. Republic[2014] eKLR** and **FOD v. Republic[2014] eKLR** to buttress this submission.

Counsel submitted that the trial magistrate failed to consider the alibi defence raised by the Appellant which if it had would have arrived at a different finding. He relied on **Victor Mwendwa Mulinge v. Republic[2014] eKLR**, and **Elias Kiamati Njeru(supra)** to buttress this submission.

Counsel also cited that there existed irreconcilable contradictions in the testimony of the witnesses. He submitted that the testimony of the complainants when the matter was first heard was different from the evidence when the matter was started *de novo*. He was of the view that the inconsistency of the testimony of the witnesses was evidence of an orchestrated plot to implicate the Appellant.

The next submission related to the sentence. He was of the view that the consecutive sentence was manifestly harsh and excessive in light of the Appellant's mitigation and the circumstances of the case. Counsel submitted that the court failed to consider that the Appellant was a first offender and elderly and that there were no aggravating circumstances. As such the appropriate punishment was the minimum statutory sentence of 10 years.

Learned State Counsel, Ms. Nyauncho opposed the appeal. She submitted that sufficient evidence was adduced to prove the charges. She submitted that all the complainants identified the Appellant as their neighbor. That they all testified that he showed them pornographic videos and touched their genitals. She submitted that the offences which the Appellant was charged with did not require proof of penetration and in the circumstances the evidence of the doctors was not necessary. She submitted that under Section 124 of the Evidence Act no corroboration was necessary as long as the trial court was satisfied that the victim was talking the truth which was the case in the instant appeal.

With regard to the Appellant's contention that PW8 and PW10 influenced other witnesses, she submitted that the two witnesses were the first to find out what had transpired and informed the parents of the other children. With regards to the alibi defence offered by the Appellant, she submitted that the trial magistrate considered it but found that the complainants' evidence placed him at the scene of the crimes.

On sentencing, she submitted that the trial court considered the circumstances of the offence and found that he was a threat to children. She submitted that the consecutive sentence was merited as each child was abused separately. She relied on **Peter Mbugua Kabui v. Republic [2016] eKLR** to buttress this submission. She concluded by urging the court to dismiss the appeal.

Evidence

All the complainants gave unsworn statements of evidence. The learned trial magistrate having conducted *voire dire* examination on each of the child, ruled that the victims would give unsworn statements of evidence. Each of them gave a similar narrative of what transpired between herself and the Appellant. All the complainants testified that the Appellant was their neighbor and they knew him very well. In fact, some of them referred to him as Baba Carol. In the respect of **PW1, S.A.**, she was the complainant in Count II and at the time of her testimony, she was in standard three. She testified that sometime in December, 2011 Baba Carol called her into his house where he played some CD which showed pornographic pictures of people doing bad manners which he described as a man putting his genital organs into genital organs of a woman. He then asked her to do what she had seen. She refused but the Appellant told her to suck his penis which she also refused. He called her a second day when he only gave her sweets. He also promised to take her abroad when she grew up. On a third occasion, he defiled her and warned her not to disclose to anyone what had happened. He also gave her money and sweets to silence her. Her further testimony is that she reported the incidence to one I who in turn informed her mother one C. It was thereafter that the matter was reported to the police. Her mother took her to Nairobi Women's Hospital for examination. She was also examined at MSF Clinic. She also identified her birth card which proved her age. In addition, she identified the Appellant in court as the culprit.

With respect to **PW2, QA**, she was the complainant in count V. Her evidence was also that the Appellant showed her pornographic movie of a man sucking a woman's genitalia. He then carried her to the bed and asked her to do the same but she declined. The appellant then inserted his fingers into her genitalia and warned that she should not tell anyone. He then gave her tea and bread and sent her away. She did not disclose to any one except only her sister who in turn told her mother. She was taken to MSF Clinic where she was treated and thereafter to Nairobi women's Hospital. She was also examined by a police doctor. She also identified a birth card in respect of her age. She identified the respective medical treatment cards.

PW3, S.A. testified that the Appellant called her into his house where he showed her pornographic video of women sucking men and dog genitalia and asked her to do the same with him. She declined. He warned her not to tell anyone what had happened. On a separate day, she was with her sister one I when they found the Appellant watching pornographic videos. She then informed her (I) what the Appellant had done to her. When other children heard PW3 narrating the story, they also came up to confess that similar incidences had happened to them. The witness identified medical reports from MSF Clinic, Nairobi Women's Hospital and the P3 Form.

A similar scenario obtained with respect to **PW4, S.A.A.** Her testimony was that the Appellant touched her genitalia with his fingers. On a second incident he placed her on the bed and wanted to defile her but when she was about to cry, he withdrew his intention. He warned her not to tell anyone after giving her Ksh. 10/-. She later informed her sister, I after she and I found the Appellant watching a pornographic movie. Later her mother enquired from her about it and she confessed. She was taken hospital and respective medical reports filed.

PW5, S.A. was also asked to practice what she had seen in a pornographic movie. After the Appellant was done with her, he asked her to go and call PW1. The incident became public after PW1 informed her mother what had happened. The Appellant warned PW5 not to disclose to anyone what had happened.

The evidence of **PW6, F.O.** was that the Appellant called her into her house where he defiled her on his bed. He then gave her sweets and warned not to tell anyone. Her mother learned about the incident through the mother of one Irene. She was thereafter taken to hospital and

treated. The testimony of **PW7, C.O.** on the other hand was that the Appellant only touched her genitalia with his fingers.

PW8, J.O. was the mother of both PW2 and PW3. She testified that she was informed of the incident by her elder daughter, I. The latter told her that she had witnessed the Appellant watching pornographic videos in his house and had also displayed them to both PW2 and PW3. Both PW2 and 3 confessed to the same. They also told their mother that the same had happened to other children in the neighborhood. PW1 and PW4 also admitted to the incident. PW8 informed the mother to PW1 and other parents who confronted the Appellants. After he was identified by the victims, the matter was reported to the police. Each of the children identified the respective medical reports. In cross-examination she denied that she fabricated the Appellant because his wife had given her some Kshs. 500/= which she had declined to refund. Instead, she stated that the Appellant's wife gave her 500 as a gift after she gave birth. She confirmed that the Appellant's wife moved from their house after the incident.

PW9, H I M was the mother to PW7. She confirmed that she was informed of the incident on 2nd January, 2011 by one of the parents of the victims. She suggested that the matter be escalated to the police. **PW10, C A O** was mother to PW1. She recalled that she was informed of the incident on 1st January, 2012 by PW8. She corroborated the evidence of PW8 and 9. In cross examination, she denied that she bought a television set, DVD, a mobile phone and carpet from the Appellant or ever borrowing any money from him. She denied framing the Appellant because she owed him a debt which she did not intend to pay.

PW11, E A the mother to PW5 recalled that on 2nd January, 2012 at about 6.00 p.m. when she returned from work, she found her daughter being interrogated by her cousin in relation to the incident. She joined other parents of the victims in confronting the Appellant about it and escalating the matter to the police station. **PW13, C A** mother to PW6 in corroborating the evidence of other witnesses testified that on the 1st January, 2012, she heard a commotion on the 5th floor of the apartment she lived in. Her house was on the 4th floor. On rushing to the scene, she found the victims and their parents discussing the incident. PW6 admitted what had happened to her and PW13 took her to hospital.

PW12, Dr. Kamau of Police Surgery examined all the complainants on 5th January, 2012 and filled their respective medical examination (P3) Forms which he produced as exhibits. According to his examinations, the victims had no history of vaginal bleeding, their external genital organs were normal there was no evidence of injury to the vulva, vagina and perianal areas. The hymens were intact and none of the children had discharges. The victims had first been seen at MSF Blue House Hospital and at Nairobi Women Hospital.

PW15, IGori Nyangwaci was a Clinical Officer at MSF Hospital. She examined all the victims who had a history of sexual assault and filled respective medical examination report. According to her examinations, she concluded that there was interference with the vaginas of the respective victims as attested by the reddening of the vaginal walls. The examinations were done on 3rd January, 2012. She also confirmed that the victims had broken hymens except in respect to one of them, C.A. who was the complainant in Count I. She also confirmed that owing to the age of the children, she was not able to confirm the exact date of the offences but recalled that it was before Christmas 2011.

PW16, PC Caroline Keter of Ruaraka Police Station investigated the case. She summed up the evidence of all the witnesses and identified the respective medical examination reports. She also preferred the charges against the Appellant.

After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was therefore called to tender a defence. He gave a sworn statement of defence and called two other witnesses in support of the same.

The Appellant gave a sworn statement of defence in which he denied committing the offences. He attributed his woes to PW8 and 10. He stated that both owed him money which after they failed to return fabricated him with the offences. In respect of PW8, he stated that he borrowed him Kshs. 500/= after she gave birth and later refused to refund. As for PW10, he said that he sold her some electronic goods including a Television set and CD player for which she only made partial payment of Kshs. 2000/=. The balance had not been realized by the time he testified. **DW2, Margaret Wangui**, his wife and **DW3, Caroline Wacuka**, his daughter corroborated his evidence.

Determination

It is now the duty of this court to reanalyze all the evidence afresh before arriving at its own independent finding. The court must however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Okeno v. Republic[1972] EA 32.**

I have demarcated the issues for determination to be, whether there was sufficient evidence to prove the charge to the required standard, whether the Appellant's defence was tenable and whether the sentence was harsh and excessive in the circumstances.

On proof of the case, I will first address myself to the question of the medical evidence. The trial court found that there were contradictions in its respect. The court found that the evidence of Dr. Kamau, PW12, and the Clinical Officer, PW15, was at variance. This is a fact as the evidence varies fundamentally. PW12 found that the hymens of the complainants were all intact and that the vaginas did not indicate any signs of interference. On the other hand PW15 found that the hymens of all the complainants, except PW7, were broken and that in all the cases there was reddening of the vaginal walls which was an indication of bruising. The trial court concluded that the evidence of the clinical officer was not credible as "the contradictions pointed to deliberate untruthfulness as to whether she physically examined the children."

My re-examination of the evidence drives me to conclude that most of the children were initially examined at Nairobi Women's Hospital and P.Exhibits 1,5,7, 13,17 and 21 were medical reports produced pursuant to those examinations. The complainants were also examined at Medicins Sans Frontieres (MSF) Clinic Blue House Recovery Centre. The medical reports by Dr. Beatrice Kirubi were produced in court as P Exhibits 30 to 36. The court has scoured the record of appeal and the trial court file and the reports from Nairobi Women's Hospital do not seem to be part of the record. However, the reports from MSF are on the record and seem to corroborate the evidence of PW15 as set out in the Post Rape Care forms. The fact that Dr. Kamau did not even acknowledge that the complainants had received prior medical attention before he saw them, as per the forms, calls into question his whole approach to the examination. In the circumstances, it appears that the

reasoning of the trial magistrate to exclude the evidence of the clinical officer was a gross misdirection as the evidence was corroborated by the records from MSF. I will not thus hesitate to make a different finding with respect to the medical evidence.

The Appellant did question the learned magistrate's finding that the evidence of each of the victims was corroborative to the other. According to the Appellant, each testified to separate incidences and more so gave unsworn statements of evidence which in that case could not act as corroborative evidence. The court concurs with the submission of the Appellant in view of the fact that the victims were not sexually assaulted at the same time and the presence of each other. As such, the court ought to have considered each victim's respective testimonies separately and arrive at an independent finding. I do however fault the Appellant's submission that the fact that the victims gave unsworn statements of evidence, their evidence required corroboration. It is trite that under the proviso to Section 124 of the Evidence Act, the court can convict an accused in a sexual offence in the absence of corroboration of a minor's evidence as long as it believes in his/her testimony.

Needless to say, it now behoves the court to dissect the evidence pertaining to each complainant. Count I related to the evidence of PW7. Her evidence was that one day at night in December 2011 the Appellant asked her to remove her panties before touching her genitalia. The Appellant was charged in the main count with committing the offence of attempted defilement. The question is whether the overt acts by the Appellant constituted an offence of attempted defilement. In **R v. Khan & others[1990] 2 All ER** the court held thus;

“The only difference between the two offences is that in rape sexual intercourse takes place whereas in attempted rape it does not, although there has to be some act which is more than preparatory to sexual intercourse. Considered in that way, the intent of the defendant is precisely the same in rape and attempted rape and the mens rea is identical, namely an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent... A man does not recklessly have sexual intercourse, nor does he recklessly attempt it.”

The offences of rape and defilement have similar elements except the additional element of age and dispensation with consent in a defilement case. Guided by the above case law, it suffices to say that to prove an offence of attempted defilement the prosecution must prove that the Appellant's goal was to have sexual intercourse with the complainant and that he did an act that was more than preparatory to attain the goal.

In count 1 however, the evidence did not prove that this was the case. PW1 was candid that the Appellant only touched her genitals with his hand which only establishes an offence under Section 5(b) of the Sexual Offences Act. The same reads;

Any person who unlawfully-

Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the person's body,

Is guilty of an offence sexual assault.

The penalty for the offence of sexual assault is provided under sub section (2) which is imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

I then ask, was the alternative charge of committing an indecent act with a child proved? The same is provided for under Section 11(1) of the Sexual Offences Act as follows;

“any unlawful intentional act which causes-

a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;

b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration.”

In the respect of PW7 the Appellant had contact with her genitalia with his hand. The definition of genital organ in the Sexual Offences Act:

“includes the whole or part of male or female genital organs.”

With respect to count II the complainant who was PW1 recounted how the Appellant had made her watch a pornographic movie and urged her to do the acts that were shown in the movie. She refused and he urged her to suck his genitals. She also declined. On the third occasion he did bad manners to her by inserting his genitalia into hers and then gave her sweets. Clearly the main charge of attempted defilement was not proved. There was however sufficient evidence that established the offence of sexual assault under Section 5(b).

In Count III, the complainant gave evidence as PW4. Her testimony was that the Appellant called her to his house and he started touching her genitalia with his fingers after which he gave her Kshs. 10/-. Equally an offence under Section 5(b) was established. I am alive to the fact that the medical evidence at MSF indicated that there was absence of the hymen but in view of the PW4's evidence, the penetration could only have been occasioned by the hand and not a genital organ. Hence, the absence of sufficient evidence for proof of an offence under either Section 8 or 11(1) of the Sexual Offences Act.

With regard to the Count IV the complainant gave evidence as PW6. She recalled that the Appellant called her to his house and offered her tea and afterward asked her to remove her clothes and lie on her bed. He then inserted his genitalia into her genitalia. Afterwards he asked her to dress up and leave. He asked her not to tell anyone. In light of the evidence regarding her missing hymen, and in view of her age, I find

that the offence of defilement was proved.

As for Count V the complainant was PW2. She recalled being called by the Appellant to his house then showed her a pornographic video and tried to get her to suck his genitalia which she refused. He then sent her away after giving her some tea and bread. In cross examination she said that he did bad manners to her but did not expound on it. Given the evidence it is clear that the exposure of the child to the pornographic material constituted an indecent act and as such the alternative count was established.

As for count VI the complainant was PW5. Her testimony was that the Appellant called her to his house where he showed her a pornographic movie and then touched her private parts. The Appellant then told her to leave the house. The medical evidence relating to her was that her hymen was broken which clearly indicated penetration. In view of the absence of evidence pointing to the intention to defile and what was used to touch the complainant's genitalia, I conclude that only the alternative charge of indecent act was established

In Count VII, the complainant testified as PW3. She recalled that the first time the Appellant called her over he showed her a pornographic movie and asked her to mimic what was done in the movie but she refused. That on a different day the Appellant called her again and showed her a pornographic movie before touching her genitalia using his fingers. On the third occasion he called her to his house and put her on his bed and lowered her panties and when he was about to put his genitalia in her genitalia he noticed that she was about to cry and he stopped. He then gave her money and asked her to leave. This clearly demonstrates that there was an intention to defile the victim save that she attempted to scream, hence the main charge was established.

In summary, I find that with regard to Counts V and VI the alternative charge of indecent act was proved and I uphold the sentences passed. Equally, in Count VII, I confirm the conviction for the offence of attempted defilement and the sentence passed thereunder.

With respect to Counts II, III and IV, I have arrived at a finding that the evidence established offences other than those charged. Section 186 of the Criminal Procedure Code confers upon the court the power to convict for the offence other than the one charged. I also have regard to the fact that the offences established are cognate to those charged. It states;

When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.

In addition, under section 354(3)(a)(ii) of the Criminal Procedure Code this court has powers in an appeal on conviction, to alter the finding of the trial court. Accordingly, in Counts II and IV, I substitute the convictions for the offence of an indecent act with a child under section 11(1) of the Sexual Offences Act with convictions for the offence of defilement under section 8(1) as read with Section 8(2) of the Sexual Offences Act. In Counts I and III, I substituted the offence of indecent act with the offence of sexual assault under Section 5(b) of the Act.

On sentence, I sentence him to life imprisonment in Counts II and IV. I sentence him to the minimum ten years imprisonment in respect of Count I and III whilst I uphold the sentences passed Counts V, VI and VII. In view of the life sentences in Counts II and IV, the sentences in Counts I, III, V, VI and VII shall remain in abeyance.

DATED AND DELIVERED THIS 11TH DAY OF DECEMBER, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Prof. Hassan for the Appellant
2. M/s Sigei h/b for M/s Nyauncho for the Respondent.