



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

HCCRA NO. 7 OF 2016

(CORAM: J.A. MAKAU – J.)

D O O APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against both the conviction and the sentence dated 12.2.2016 in Criminal Case No. 659 OF 2014 in Ukwala Law Court before Hon. R.M. OANDA – SRM)

JUDGMENT

1. The Appellant **D O O** was charged with an offence of **defilement contrary to section 8 (1) (3) of the sexual offences Act No. 3 of 2006**. The particulars of the offence are that on diverse dates between 22nd November 2014 and 14th December 2014 at *[particulars withheld]* in Ugunja District within Siaya County, intentionally caused his penis to penetrate the vagina of DA a child aged 13 years. The Appellant also faced 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 are that on the same diverse dates and same place and time intentionally and unlawfully touched the vagina of DA a child aged 13 years with his penis.

2. After full trial the appellant was found guilty of the main charge, convicted and sentenced to serve 20 years imprisonment.

3. Aggrieved by the conviction and sentence the appellant preferred this appeal setting out four (4) grounds of appeal which can be summarized as follows:-

(i) That the appellant was not accorded fair trial in accordance with Article 50 (2) (a), (b), (c), (d) and (j) of the constitution of Kenya.

(ii) That the trial court erred in convicting the appellant in absence of evidence.

(iii) That the trial court erred in convicting the appellant on a defective charge.

4. The Appellant appeared in person whereas the State was represented by M/s. Odumba, Learned State Counsel.

5. At the hearing the appellant relied on his written submissions which he submitted to the Court. The appellant urged that the trial Court based its judgment on extraneous matters other than on evidence

adduced before it, that no forensic evidence was produced to link the appellant with the commission of the offence, that the offence of defilement was not proved as the age of the victim was not stated, that the sentence imposed was illegal as of the time of the commission of the offence the appellant was a minor aged 16 years and that he was not supplied with witnesses statements.

6. M/s. Mourine Odumba, learned State Counsel, opposed the appeal urging the ingredients of the offence of defilement were proved as the appellant was well known to the victim, that penetration was confirmed as per P3 form, that age was proved through evidence though there was no birth certificate or at age assessment report produced. On sentence the learned State Counsel, submitted a report on HIV status and age assessment of the appellant is on record and record reveals that he was at the time of the commission of the offence a minor aged around 17 years. She submitted the sentence was unlawful as it was contrary to **Section 191 as the Children Act.**

7. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSAC NG'ANG'A 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:-

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)'

8. The facts of the prosecution case form part of the record of appeal and I need not reproduce the same but shall make a brief summary of the prosecution's case and the defence.

9. The prosecution's case is as follows:- PW1 DA a girl aged 13 years on 22.11.2014 took a phone for charging at **[particulars withheld]** and on her way back home she met the appellant who called her asking her to go with him to his house. She obliged, and the appellant bought her soda and chips and after eating, the appellant told PW1 that he wanted her to be his wife. She accepted and she stayed with the appellant from that day upto 14.12.2014. That her uncle found her washing clothes and took her to Sigomere Police Station. The Appellant was subsequently summoned at the Police Station and on reporting he was arrested. PW1 DA was taken to **[particulars withheld]** Health Centre, issued with P3 form and the same was filled at Ambira Sub-District Hospital. PW1 and the appellant made love three days after she had accepted his offer to be his wife. PW1 knew the appellant before and stayed with the appellant for 3½ weeks during which period PW1 became HIV+. The Appellant was charged with this offence.

10. The Appellant denied the charge. The appellant stated he was arrested on 14.12.2014, after he went to Sigomere Police Station and later charged with this offence. He stated he was surprised by what PW1, who is his neighbor told the court.

11. The Appellant in this appeal contends that the trial court based its judgment on extraneous matters other than the evidence adduced before it and that no forensic evidence was produced to link the appellant

with the commission of the offence of defilement, urging the offence of defilement was not proved. The prosecution in support of this charge called four (4) witnesses, thus PW1, PW2, PW3 and PW4. The trial Court considered the evidence of the four prosecution witnesses and the exhibits produced thereto.

12. The ingredients of an offence of defilement are recognition or identification, penetration, and prove of age of the victim. PW1 in her evidence testified that on 22.11.2014, she met the appellant, that they talked and agreed to go to the appellant's house, the appellant bought soda and chips which they ate. He asked her to be his wife which she agreed, PW1 knew the appellant before, they stayed together at appellant's house for 3 ½ weeks, they had sex during such period, PW1's uncle had information, PW1 was at the Appellant's house and reported to Police. PW2 went to appellant's house and found PW1 there and she told him the appellant was her boyfriend. PW2 took her to Sigomere Police Station. PW2 knew the appellant very well. PW1 identified the appellant as her assailant. PW2's evidence links the appellant with the offence as he knew him and found PW1 at the appellant's home. On penetration PW1, DA testified PW1 asked her to be his wife, which I understand meant he was asking her to have sex with her and perform other domestic duties as a wife. PW1 testified they used to make love during the period of 3½ weeks. PW4, Clinical Officer who examined. PW1 found she had earlier vaginal penetration. P3 form exhibit P1 showed that PW1's hymen was not intact. I therefore find from the evidence of PW1 and PW4 and P3 form the prosecution proved penetration. P3 form corroborated PW1's evidence. On the issue of age PW1 testified she was 13 years old and in standard five (5), the P3 form stated her age was 13 years. PW4 who examined PW1 noted she was 13 years old. The trial court noted PW1 was a minor, however no Birth Certificate was produced to confirm her age but the trial court which observed and heard PW1 noted she was a minor, thus not above the age of 18 years. That though in this case no birth certificates was produced and the actual age of the complainant proved, I take judicial notice that a standard five pupil in *[particulars withheld]* Primary School as pupils go to standard one between the ages of 6-7 years old should be aged between 12-14 years. Anyone committing an offence of defilement with a child aged between 12 – 15 years faces an offence under **Section 8 (1) (3) of the Sexual Offences Act**. This is the section under which the appellant herein was charged under. I therefore find and hold the prosecution through the evidence on record proved the age of the victim, PW1 to have been within the range of between 12 – 15 years and the appellant herein was not prejudiced by prosecution's failure to produce Birth Certificate or any documentary evidence as to the age of the victim.

13. The appellant contends that he was not supplied with witness statements and as such he did have fair trial under **Article 50 (2) (a), (b), (c), (h) and (j) of the Constitution of Kenya**. The Appellant in this appeal contends that he was not supplied with witnesses statements. He has not stated that he was not presumed innocent. The court's record do reveal that the charge and element of the same were read and explained to him in Dholuo language which he understands. From 16th December 2014, he was given adequate time and facilities to prepare his defence as his defence was not heard until 23rd December 2015, the appellant did not ask for a defence Counsel nor did he give any reasons why he ought to have been assigned an Advocate. **Article 50 (2) (h) of the Constitution** provides:-

(2) Every accused person has the right to a fair trial, which

includes the right—

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

In this case the appellant did not demonstrate that he deserved a Counsel to be assigned to represent him. He did prove substantial injustice would otherwise result if an advocate was not assigned to him. I find that the appellant did not prove that article **50 (2) (a) (b) (c) and (h) of the Constitution of Kenya** were breached or violated and that he did not have a fair trial. I find no merits on this ground of appeal.

14. I now turn to **Article 50 (2) (j) of the Constitution of Kenya** which provides:

“Section 50 (2) (b) of the Constitution of Kenya 2010 provides:-

(2) Every accused person has the right to a fair trial, which includes the right—

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

The above Section is very crucial if an accused person is to have fair trial for without information in advance of the evidence the prosecution intends to rely on and having reasonable access to the evidence an accused person cannot be able to defend himself adequately. The Appellant in this case avers that he was not furnished with witnesses statements and as such he did not have a fair trial. I have perused the lower court proceedings which reveals that on the day of the plea taking the court ordered the case to proceed due to the nature of the matter and likelihood of disappearance of witnesses. The court ordered the evidence of the victim to be taken immediately. The record is silent as to whether the appellant was supplied with witnesses statement or not. The court should have at the same time have made an order for the accused to be supplied with the statement of the victim. The failure was not explained and might have caused some prejudice to the appellant, however I have perused the court’s record and the nature of evidence, given by the victim and note the appellant was capable of putting forward several questions to the victim. He faired well in cross-examination and I do not find that the evidence of the victim alone could have prejudiced his case for failure to have not been supplied with witness statement. I would herewith nevertheless point out that in the interest of fair trial even where the victim protection is needed the court should always balance the rights of the accused and the victim and ensure fair trial is accomplished by complying with **Article 50 of the Constitution** even without the request for statement by the accused person. The court record reveals that on 15.1.2015 the court ordered the witnesses statements to be supplied by investigating officer. That subsequently the appellant never raised the issue of having not been supplied with witnesses statements with the court. The court record reveal that the appellant was able to cross-examine witnesses with ease and he never claimed he did not have their statements. I therefore find no merits on this ground of appeal.

15. The appellant contends that the sentence meted against him is illegal as of the time of the commission of the offence he was 16 years old. The appellant at the hearing at the lower court did not raise the issue of his age nor did the court ask for age assessment report. Had the court observed the accused then while at the dock, it could have noted he appeared not to be an adult as stated in the charge sheet filed with court on 16.12.2014. The court should always have an eye for particulars and desire to do justice to all. I am sure had the court observed the accused then it would have called for an age assessment report to be filed. When the appellant appeared before me and on enquiry of his age as he looked to be either a minor or slightly older by a few months the appellant informed the court he was 18 years. The court ordered the appellant to be taken to Siaya Referral hospital for age assessment and for determination of his HIV + status in view of the victim’s claim that he was sick with HIV. The report filed on 29th September 2016 confirmed that the appellant is 19 years and HIV positive thus therefore as of the time of commission of the offence the appellant was a minor aged 17 years.

16. **Section 8 (7) of the Sexual Offence Act** provides:

“8(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children’ s Act.”

17. **Section 191 (1) (a) – (i) of the Children Act** provides:

“191. (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways -

(a) by discharging the offender under section 35 (1) of the Penal Code

;

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs,

or any or all of them

;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions

;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;"

18. Article 53 (f) (i) (ii) of the Constitution also provides:

"53. (1) Every child has the right—

(f) not to be detained, except as a measure of last resort, and when detained, to be held—

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.

(2) A child's best interests are of paramount importance in every matter concerning the child. "

19. In view of the provisions of **Section 8 (7) of the Sexual Offences Act, Section 191 of the Children Act and Article 53 (f) (i) (ii) of the Constitution of Kenya** the imprisonment sentence of 20 years meted against the accused who at the time of the commission of the offence was a minor was illegal and contrary to the Constitution of Kenya and the above mentioned statutes. The appellant should have been sentenced as provided for under **Section 8(7) of the Sexual Offences Act and Section 191 of the Children Act.**

20. **The Upshot is that the appeal against sentence succeeds. I uphold the conviction, set aside the sentence of twenty(20) years and as the appellant has served six (6) months and now is an adult I**

substitute the sentence with 2 years' probation period under the supervision of the Probation Officer Siaya County.

DATED AND SIGNED AT SIAYA THIS 17TH DAY OF NOVEMBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 17TH DAY OF NOVEMBER, 2016

IN THE PRESENCE OF:

APPELLANT IN PERSON – PRESENT

M/S. ODUMBA FOR THE STATE

C.A. 1. K. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE