REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 25 OF 2010

BRIAN KIPKEMOI KOECH .... APPELLANT

VERSUS

REPUBLIC …..

(Being an appeal from the original conviction and sentence contained in the decision of the Hon. D. M. Machage (Resident Magistrate) delivered on 8th February, 2010 in Eldama Ravine Resident Magistrate's Criminal Case No. 640 of 2009)

JUDGMENT

In Count 1, the Appellant was charged with the offence of defilement of a child contrary to Section 8 (4) of the Sexual Offences Act No. 3 of 2006.

Particulars of the charge were that on the 28th day of June, 2009 in Koibatek District of the Rift Valley Province committed an act which caused penetration of his genital organ (penis) into genital organ of F J K a girl aged 16 years.

In the alternative to Count 1, he was charged with indecent act of a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

Particulars of the offence were that on the 28th day of June, 2009 in Koibatek District of the Rift Valley Province, unlawfully and indecently touched the private parts of FJ K a girl aged 16 years.

In Count II, he was charged with deliberate transmission of a sexually transmitted disease contrary to Section 26 (1) of the Sexual Offences Act No. 3 of 2006.

Particulars of the same were that on the 28th day of June, 2009 in Koibatek District of the Rift Valley Province, deliberately, intentionally and knowingly infected F J K with sexually transmitted disease namely Urethritis Bacteria which affected her urinal system.

Judgment of the lower court was delivered on 8th February, 2010. The Appellant was convicted in the main charge of Count I and was sentenced to serve ten (10) years imprisonment.

He was dissatisfied with the said Judgment and has now appealed both against the conviction and sentence. Initially, he was represented by the law firm of M/s. Gordon Ogola and Associates who compiled the record of appeal. But on 20/6/2013, the date of the hearing of the appeal, the Appellant applied to amend the grounds of appeal vide the amended grounds of appeal filed in court on 2nd November, 2012. He has raised five grounds of appeal, which I duplicate as under:-

1. That the learned trial Magistrate erred in law in sentencing the Appellant on a defective charge sheet, which does not reflect or disclose the definition clause and only reflects the penalty.

2. That the pundit trial Magistrate erred in both law and facts while relying on prosecution case which was not proved beyond reasonable doubt as the doctor examined the complainant a month before the alleged complaint.

3. That the pundit Magistrate erred both in law and fact by not observing the contradictory and uncorroborated evidence adduced by prosecution.

4. That the learned trial Magistrate erred in both law and facts by rejecting the Appellant's sworn defence in which he rejected the name Brian Kipkemoi Koech as his name and produced evidence to prove that the alleged name was not his.

5. That the learned trial Magistrate erred in law in convicting the Appellant on a judgment that did not disclose the section of the law that prescribed the penalty thus contravening Section 169 (2) of the Criminal Procedure Code.

The appeal was canvassed before me on 20th June, 2013. The Appellant relied on written submissions filed in court on 20th June, 2013. He also applied to withdraw the services of his Lawyers and act in person. The State Counsel, Mr. Mulati made oral submissions in response thereof. I have accordingly considered the submissions of both parties.

With regard to ground of appeal No. 1, the Appellant submitted that he was convicted and sentenced on the basis of a defective charge sheet as the same did not reflect the definition clause. I get the Appellant to say that Section 8 (1) of the Sexual Offences Act which defines the offence of defilement was not referred to in the statement of the charge; in this case the charge should have been drawn under Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act.

What constitutes a defective charge sheet was spelt out in the case of **YOSEFU AND ANOTHER -VS- UGANDA (1960) E.A., 236**. The East Africa Court of Appeal held:-

"The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act."

And in **SIGILANI -VS- REPUBLIC (2004) 2 KLR, 480**, it was held that:-

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that hecan understand. It will also enable the accused to prepare his defence."

On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particularsas may be necessary for giving reasonable information as to the nature of the offence charged.

From the onset, the Appellant knew that the charge facing him was one of defilement. Its particulars were clearly spelt out, which included the date of the offence, the place of the offence, the act constituting the offence and the name of the victim.

The definition of the offence is given in Section 8 (1) of the Sexual Offences Act as:-

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

The word "***penetration"*** is the operative word in the above definition which is defined in Section 2 of the Sexual Offences Act as:-

"***Means the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

In effect, in a charge of defilement, all the prosecution requires to prove is the "***penetration"***. The mere omission of inclusion of the definition section in the statement of the charge would not render the charge sheet defective. After all, the inclusion of the definition section is not a major component of a charge sheet as outlined under Section 134 of the Criminal Procedure Code. Moreover, such omission is curable under the provisions to Section 382 ofl the Criminal Procedure Code which reads:-

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

I will combine the 2nd and 3rd grounds of appeal. The Appellant submitted that the case of the prosecution was not proved beyond all reasonable doubts. He stated that the doctor who examined the complainant gave evidence which he indicated that the complainant was examined long before the offence was committed. He argued that he was convicted on uncorroborated and contradictory evidence.

The Clinical Officer who examined the complainant testified as PW1. He is named as one Zadrack Kiplimo from Koibatek District Hospital. His testimony was that he examined the complainant on 30th May, 2009 and that the offence was committed on 29th June, 2009. He also produced the complainant's P3 form as P. Exhibit II.

The compiled record of appeal does not contain a copy of the P3 form. What is marked as P. Exhibit 2 in the original lower court record is a treatment chit from Eldama Ravine District Hospital. The same bears the date 29/6/2009. However, I have noted the number 9 on the date is superimposed on number 6. The contents of this treatment chit appears to form the basis of the record in the P3 form, save for the conclusion remarks.

A Clinical Officer is an expert who is versed with a P3 form. He would not refer to a treatment chit as a P3 form. The court would not, in the absence of the P3 form conclusively say that there were positive findings corroborative of PW1's evidence. In any event, the treatment chit has not made any remarks as to whether the complainant was defiled or not.

Again, even assuming that the treatment chit had such remarks, I would still poke holes into it on the ground that its date has been altered. PW1 did not make any reference to it and thus made no attempt to explain who altered the date to read from 26th June, 2009 to 29th June, 2009.

Further, the proceedings do clearly show that there is evident discrepancy of the testimony of PW1 with regard to the date he examined the complainant and the date he said the complainant was defiled. According to him, he filled the P3 form on 30th May, 2009 while the complainant was

defiled on 29th June, 2009. What this ultimately means is that the examination of the complainant was done before the offence was committed.

It is also clear that the date on the charge sheet was 28th June, 2009, and not 29th June, 2009. PW1's varied evidence on these dates should have raised eye brows in the mind of the trial court. He should have critically evaluated these discrepancies and resolved them in the favour of the Appellant.

As regards the substantive evidence, the complainant testified as PW2. Her testimony was that on 28th June, 2009 at 10.00 a.m. she was sent by her grandmother to Ravine town to fetch her school fees from her uncle one S who operated a taxi in the town. That on arrival in the town, as she was inquiring of the whereabouts of her uncle's house, the Appellant approached her and offered to show her the way. That together, they boarded a vehicle that had no other passenger except the driver. They were driven to Maji Mazuri but she did not find her uncle. At 4.00 p.m., the driver whom she referred to as "Mukorino" took her back to Ravine where the Appellant was waiting for her. The Appellant offered to take her to her uncle's house. Instead he took her to a forest where he forced her to have sex with him. The Appellant abandoned her at 7.00 p.m. at her uncle's house where she spent the night.

PW3 P K named as PW2 stated that PW2 did not show up in his house until the following day, that is 29th June, 2009. He stated that he was informed by one T that PW2 had been seen with the Appellant in the town.

PW4, D K T (indicated as PW3) confirmed having carried PW2 in his vehicle and dropping her at the Appellant's house. He said that PW2 had requested him to take her to the Appellant's house.

From the above analysis, it is clear that the Appellant was indeed in the company of PW2 on 28th June, 2009. What is doubtful is whether the offence with which he was charged is one and the same that was committed on 28th June, 2009. It is my view that court cannot convict on mere suspicion but on basis of concrete evidence. The testimony of a medical officer is sufficient to corroborate that of a victim. But in the instant case, it shattered the prosecution's case into pieces. For this one reason, I would give the Appellant the benefit of doubts.

On the 4th ground of appeal, the Appellant has argued that the trial court disregarded his evidence. He testified on 29th October, 2009 and gave a very brief sworn statement of defence. He said that he was arrested on 28th June, 2009 and taken to the Police Station. That earlier on, D K (referring to PW4) had been arrested. That after three hours K was released. He further said he was not taken to any hospital and did not know why he was arrested.

On cross examination he denied that his name is Koech.

I have noted the Appellant introduced himself as "Brian Kipkemoi Mamet". On cross examination the prosecution asked him for his National Identity Card but the court did not record what name the Identity Card read. But in the Judgment the trial court noted that the Identity Card read "Mamit Brian Kipkemoi". But it also noted that the Appellant gave his name to the police and the doctor who treated him as Brian Kipkemoi Koech. The court therefore rightfully disregarded that discrepancy.

PW6 Felix Boiywo a clinical officer at Eldama Ravine District Hospital on the other hand examined and treated the Appellant. He produced the treatment chit in this regard as P. Exhibit 4. At the time PW6 testified, the Appellant did not raise any objection to the production of the treatment chit. He neither denied that he was treated. Therefore, although the trial Magistrate did not give regard to his defence in the Judgment, the same is not corroborated by the Appellant's submission to the effect that he was never taken to a hospital for treatment.

Finally, with regard to the fifth ground of appeal, the Appellant submitted that the trial court erred

in convicting him based on a Judgment that did not state the section of law under which he was convicted as provided by section 169 (2) of the Criminal Procedure Code.

The said section of the law provides as follows:

"***In the case of a conviction, the Judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."***

The trial Magistrate made final verdict in the following words:-

"I therefore find the accused guilty of the offence of defilement contrary to Section 8 (4) of the Sexual Offences Act and proceed to convict under Section 215 of the Criminal Procedure Code accordingly. I will acquit him on count II since the same was not proved under Section 215 of the Criminal Procedure Code."

The foregoing demonstrates that the trial court fully complied with the provisions of S. 169 (2) of the Criminal Procedure Code. It stated the offence of which Appellant was convicted as that of "defilement under S. 8 (4) of Sexual Offences Act" and convicted him under Section 215 of the Criminal Procedure Code. He also stated the punishment handed to the Appellant as "a jail term of 10 years".

As for the sentence, under Section 8 (4) of the Sexual Offences Act:-

"A person who commits an offence of defilement with a child between the age of twelve (12) and eighteen (18) years is liable upon conviction to imprisonment for a term of not less than fifteen years."

The trial Magistrate therefore prescribed a penalty that was not provided by the law. Section 8 (4) of Sexual Offences Act is framed in mandatory terms such that if an accused is convicted, no less than fifteen (15) years of jail term should be handed. This court has powers to correct an illegal sentence. Therefore, if I were to find that the prosecution proved its case beyond all doubts, I would correct the illegality accordingly.

However, having carefully evaluated the evidence, I find that the prosecution's case was riddled with inconsistencies which did not warrant a conviction. In the end, I uphold the appeal, quash the conviction and set aside the sentence. I order that the Appellant be forthwith set free unless he is otherwise lawfully held.

DATED and **DELIVERED** at **ELDORET** this 22nd day of November, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Appellant in person

Mr. Mulati for the State/Respondent