



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal No. 10 Of 2013

*(Appeal Arising From The Original Conviction And Sentencing Of The Principal Magistrate Court
Maseno In Cr.Case No. 1066 Of 2011 – J.Ongondo - Srm)*

Joel Omino Ngutu.....Appellant

Versus

Republic.....Respondent

J U D G M E N T

INTRODUCTION

This is an appeal from the judgment of the Senior Resident Magistrate at Maseno by which the appellant was convicted of defilement contrary to section 8 (1) (2) OF The Sexual Offences Act and sentenced to serve life imprisonment. The issues for determination are whether the offence of defilement was proved beyond reasonable doubt and secondly whether the life sentence awarded to the appellant was excessive and erroneous, This court's view is that the appeal lacks merits.

BACKGROUND

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

The particulars of the offence were that on 22.1.2010 at 4 p.m at [particulars withheld] Kisumu West District, the appellant intentionally caused his penis to penetrate the anus of F O J, a child aged 10 years.

In the alternative the appellant was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The prosecution called four witnesses to support the charge .

PROSECUTION CASE

F O J (PW1) gave a sworn testimony after *voir dire* examination by the trial magistrate. He explained how on 22.1.2010 he was at home alone when the appellant, a neighbour, came there and proposed to take him (PW1) to the hospital where his (PW1's) mother was admitted for a chopped off breast. The appellant took him to the thicket about 500 metres away and showed PW1 a knife and threatened to stab him if he (PW1) screamed.

The appellant removed the PW1's shorts and shirt. He then unzipped his trouser, removed his penis, wore a condom on his penis and then pushed the penis into the PW1's anus while the PW1 was lying down on his stomach. P.W1 felt pain as the appellant defiled him. After the act, the appellant ran away but later met the PW1 on the way and took him (PW1) to his (appellant) house where they slept until morning and PW1 went home. PW1 reported the matter to mama boy who took him home. The matter was later reported to the police and PW1 was taken to hospital. On cross-examination PW1 was very firm that he knew the appellant as his neighbours with a home just 500 meters away.

G A J (PW2) is the PW1's mother and sister in law to the appellant. On 22.1.2010, she went to the market at 4 p.m and left the PW1 and his siblings at home. When she returned she found PW1 missing until 6 a.m the following morning when he returned with a bleeding anus. PW1 explained to her that the appellant defiled him in a thicket near his home after threatening him with a knife and later took him to his (appellant) home for the night. PW2 then reported to the police and took the PW1 to hospital where a P3 was filled. She denied being the appellant's girl friend.

Mose Jobes (PW3) is the clinical officer who examined the PW1 and filled his P3 form. He noted scratch marks on the left side of the chest and tears on the anal region. In his opinion PW3 found that there was penetration on the anus. Felix Nyagah (PW4) was the arresting as well as the investigating officer. He arrested the appellant after one year 8 months at Kisumu.

After considering the foregoing evidence the trial court found that the appellant had a case to answer and put him to his defence.

DEFENCE CASE

The appellant gave a sworn defence. He denied the offence and stated that on 22.1.2010 at 4 p.m he left Ahero for home after a funeral and on the way he met PW2 whom he had inherited after the death – of her husband. According to him the evidence of PW1 was a lie because PW2 said that she went to look for PW1 and did not find him in the house of the appellant.

After considering all the evidence adduced, the trial court convicted the appellant and sentenced him to life imprisonment. The appellant being dissatisfied with the decision of the trial magistrate brought this appeal.

GROUND OF THE APPEAL

1. That the trial magistrate erred in law and facts in sentencing the appellant life imprisonment contrary to article 8 (1) (3) of the sexual Offences Act.
2. That the trial magistrate erred in law and in facts by not scrutinizing the medical report which was not thorough and comprehensive
3. That the trial magistrate erred in law and in facts by relying on the ages of the complainant's given and failed to order an age assessment as required by the law.

APPELLANT'S SUBMISSIONS

The appellant filed written submissions and also made oral argument. He submitted that the age of the PW1 was not proved and the evidence of the witnesses had material contradiction. In addition the appellant submitted that the P3 should not have been relied on to convict him because his date had been forged. He argued that the dismissal of his defence was erroneous because it had been corroborated by PW2 when she said he was her brother.

RESPONDENT'S SUBMISSIONS IN REPLY

Mr. Magoma, learned Counsel for the State opposed the appeal. He submitted that the evidence of PW1, 2, 3 and 4 proved that the offence of defilement had been committed by the appellant. He argued that the P3 showed the PW1's anus had been injured an indication that there was penetration. He further

submitted that the appellant was properly identified by PW1. The learned State Counsel cited **HCCRA NO. 106 of 2008 Hudson Luseno Travogha VS. Republic** but did not show its relevance. That is what I would call dumping of precedents to the court and saying nothing about them.

ANALYSIS AND DETERMINATION

This being the first appeal, this court has the duty to re-evaluate the evidence and make a finding on the guilty or otherwise of the appellant. The court also has jurisdiction to interfere with the sentence of the trial court if certain factors are demonstrated.

The first issue for determination in this appeal is whether the offence of defilement was proved against the appellant beyond reasonable doubt.

Section 8 (1) of the Sexual Offences Act under which the appellant was charged provides the key elements of the offence of defilement as being “**Penetration.**” and the **minority** age of the “**Victim.**”

The prosecution must therefore prove beyond reasonable doubt that there was penetration and that the victim was a child. Section 2 of said Act defines penetration as partial or complete insertion of the genital organ of a person into the genital organ of another person. The Blacks Law dictionary defines penetration as the entry of the penis or other body part or foreign object into the vagina or other bodily orifice. Section 2 of the Act then defines genital organ to include anus. Section 2 of the said Act also defines a child in terms of the meaning given by the Children's Act which is basically a person whose age is below 18 years.

The question to answer in this appeal therefore is whether the prosecution proved beyond doubt that the PW1 was a child and that the genital organ of the appellant was inserted into the genital organ of the PW1.

This court's view is that all the above two elements of the offence of defilements were not proved beyond doubt. No age assessment was done on the PW1 and no other evidence like birth certificate or postnatal clinic card for the PW1 was produced. Age in defilement charge is material and it ought to have been proved scientifically and not by common sense like in the present case. Even if common sense pointed to the minority age of the PW1, at least the PW2, being the mother of the victim should have stated the age of the PW1 in her testimony if at all she did not have birth certificate or at least postnatal clinic card for the PW1. That lapse however only become more relevant in the sentencing because the exact age of the victim is material.

As regards penetration, the parliament extended the definition thereof to include penetration into the anus as per the definition of genital organ under Section 2 of the Sexual Offences Act. In this case the evidence of PW1 on penetration was corroborated by PW2 and PW3. PW2 stated that the PW1 was bleeding from the anus. PW3 confirmed on examination that there were tears on the anus and bruises on the PW1's chest.

The appellant has challenged the validity of the P3 alleging that it was forged by altering the date of reporting the offence and date it was filled. The court agrees that the dates on the P3 appears to have been altered. However the time for the alteration has not been shown. The court however does not see any prejudice caused by the said alteration. The offence had already been proved by the consistent oral evidence by the PW1, PW2 and PW3. In any event the P3 is only the record of what PW3 witnessed while examining the PW1. This court is satisfied that the appellant defiled the PW1 as charged.

The court is however not satisfied that the trial court imposed the

correct sentence to the appellant. As earlier observed the age of the victim of the defilement is the guiding factor in assessing the magnitude of the sentence to award. In the present case, the age of the PW1 was not assessed. The

PW2, mother of the PW2 never said anything about his (PW1) age.

So where did the PW3 get the age of the PW1 when he filled his P3? He never said that he assessed the age of the PW1 or that he got it from any particular source. This court finds that the exact age of the PW1 was not proved although by a common sense assessment he was below the age of 18 years, and therefore a child. For the appellate court to interfere with the sentence awarded by the trial court, it must be shown that the trial court awarded the sentence after considering irrelevant factors or without considering relevant factors. A relevant factor in sentencing refers to facts which mitigate for a lesser sentence like the accused persons being a first offender among others.

In the present case, the prosecution said that the appellant was not a first offender and was serving sentence. In mitigation the appellant confirmed that he was serving a 3 years sentence for grievous harm. He also stated that he was an orphan. The trial court however ignored mitigation and proceeded to impose the maximum sentence of life imprisonment without first ascertaining the age of the victim.

This court finds that by ignoring the mitigation and failing to order for age assessment of the PW3, and instead awarding the maximum sentence the trial court erred. The sentence is therefore open to interference on appeal which is hereby done by reducing it to fifteen (15) years imprisonment. It is so reduced because that is the minimum sentence for defilement under the Sexual Offences Act. As a way of parting shot, this court finds that the definition given to genital organ under section 2 of the Sexual Offences Act to be scientifically and socially wrong. It is trite if not common sense that genital organ means a reproduction organ which cannot include the anus.

The foregoing reasoning leads to the question why was Section 162 of the Penal Code not repealed? Is there discretion on the part of the prosecution to whimsically chose between charging under either section 8 (1) of the Sexual Offences Act or Section 162 of the Penal Code when the offence involves penetration into the anus?

May be it is the right time the two provisions of the law are critically interrogated to see whether there is any room for abuse or conflict. It would appear that the extended and false definition of genital organ to include anus under section 2 of the sexual offences is the cause of such potential conflict between section 162 of the Penal Code and Section 8 (1) of the Sexual Offences Act.

DISPOSITION

The foregoing notwithstanding, this appeal fails in relation to the conviction but succeeds with respect to the sentence which is reduced from life imprisonment reduced to 15 years imprisonment.

Signed, dated and delivered this 22nd day of November 2013.

ONESMUS MAKAU

JUDGE