



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 121 OF 2018

ALEX ABDALLAH alias CHEZE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision and judgment of the Honourable D. Mochache, Senior Principal Magistrate, delivered on the 23rd day of February 2016 in Shanzu Law Court - Sexual Offences Case No. 22 of 2017).

J U D G M E N T

1. The Appellant Alex Abdallah alias Chenze was convicted and sentence to serve 20 years imprisonment in Shanzu Principal Magistrates Court CR. Case No. 22 of 2017 for the offence of gang defilement contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.
2. The prosecution's case was supported by evidence of 7 witnesses who testified that the appellant and one Javan gang defiled the complainant after taking her to an isolated house which Javan opened the padlock and she was led into a dark room which had a mattress and construction tools strewn all over.
3. Complainant said she was pushed onto the mattress and defiled by the 2 in turns and after Javan had defiled her until dawn he locked the house and left her crying. The complainant's friend – PW 2 said that the appellant carried them from Barani on his motorbike at 8pm and that after she had been dropped at her home she left the accused taking the complainant to her home. The following day when she was asked the whereabouts of the complainant she said she left her with the appellant who was to be dropped at home.
4. The sister of the complainant also reported to her father PW 3 that complainant and PW 2 had paid the appellant herein to bring them home from Barani using his bodaboda but when complainant didn't turn up PW 3 went to school the following day and also confirmed from PW 2 that appellant had carried her and PW 1 on his motorbike and that he left her at her home and was to take complainant to her home as well the same evening.
5. PW 3 went to report at Kijipwa Police Station and while there he got a report his daughter had been rescued from a locked house and she was bleeding and her clothes were blood stained. That complainant told her it was the appellant and Javan who had defiled her in turns. PW 3 said he took his daughter to hospital and then started looking for the appellant and he was only traced in February 2017 at Katango stage. He said from May 2016 appellant used to disappear wherever sited.
6. PW 4 the brother of complainant's father testified that the appellant was his cousin and was a boda boda operator. He said he learnt that PW 1 had disappeared and heard from people that she could have been hidden in a certain house. PW 4 looked for his brother PW 3 to give him the information but when he didn't find him he found the village elder and they proceeded to the house which they found was locked. That he peeped into the house and called out complainants, name but she didn't responds.
7. That PW 1 then woke up and they realized she was alive. The door was broken and complainant removed but she was crying and not talking. PW 4 said complainant was in uniform when they found her locked in the house.
8. PW 5 the Village Elder reiterated what PW 4 the uncle to complainant said. He said that on finding the complainant locked in a house they took her to Assistant Chief who referred them to Kijipwa Police Station. He said the Complainant was weak, had blood on her dress and was traumatized. PW 5 said the house which complainant was found was in the homestead of Nyamawi Sanga. PW 5 said the Complainant said that she had been defiled by the appellant and another boy. PW 5 said the appellant disappeared after the incident and he didn't know when he was arrested.
9. PW 6 Dr. Abdallahi Hussein of Mtwapa Health Centre produced P3 form filled Dr. Hadijah in respect to complainant who was defiled by 2 men that were known to her. The P3 indicated the complainant's cervix was open with bruises and blood clots and foul smelling discharge.

It was observed that the hymen was broken. The doctor observed that the complainant skirt had blood stains.

10. PW 7 Sergeant Mheshemiwa Hamisi Kombe of Kijipwa Police Station investigated the offence. He said that the complainant was taken to the station by the father on allegations she had been defiled by appellant and one Javan. He said investigations commenced and PRC form and P3 form were filled. Certificate of birth for complainant showing she was born on 9/5/2000 was also availed. He said the appellant was arrested by members of public on 11th February 2017 after seven months while Javan was still at large. In cross examination he said the house in which Complainant was defiled was rented by Javan. When placed on defence the appellant was sworn and he said the complainant was his customer. He said that on 25/5/2016 he transported 2 girls upto their homes and subsequently he took a customer to Chonyi for a funeral. He said he went back home at 3.00am. That on 26/5/2016 when he started his bodaboda work as usual he met Nyale who stopped him to ask whether he had seen his daughter and he said he had taken her home. That he continued working until 10/2/2017 when he was arrested by sungusungu and charged for an offence he didn't commit.

11. In cross examination, the appellant said he took the complainant and her friend home. He said that he was at home upto time of his arrest and it was not true that he had run from home. He said that there was no grudge between him and family of the Complainant. He said the offence against him was a fabrication. He said he was supplied with the Complainants statement but he didn't cross examine her.

12. DW 2 said appellant was his neighbour and that on 25/5/2016 at 8.00pm he called him to take him to a ceremony. He said appellant took him back home at 2.00pm. He said the next morning they learnt appellant had defiled complainant who was known to him. He said he didn't know where appellant was after taking them home at 2.00a.m.

13. DW 3 testified that appellant took him for a funeral and later 4.45am they left for Mtwapa and parted ways. He said that he and the appellant rode on one motorbike and that after that day he saw him after 2 months.

14. The Appellant being aggrieved by the conviction and sentence filed the instant appeal on the grounds:-

- i. The investigating officer did a shoddy job as far as he never visited the scene of crime.
- ii. That the evidence from P3 form did not corroborate the complainant's testimony.
- iii. That he was sole bread winner of his family after demise of his parents.
- iv. That custodial sentence of 20 years was harsh, severe and manifestly excessive punishment.
- v. He urge the court to quash conviction set aside sentence and/or reduce sentence or give opinion of fine.

15. In further grounds the appellant said the trial Magistrate erred in law and fact by not allowing, him to cross examine witnesses in regard to the amended charge. That the trial Magistrate erred in law and fact by failing to see that the medical evidence failed to corroborate allegations of PW 1 and that the trial Magistrate erred in law by imposing a sentence that is beyond what is prescribed by the relevant law.

16. This appeal was canvassed by way of written submissions. The appellant decried the fact that prosecution amended the charge against him after presenting all the witnesses and thereafter closed the prosecution case without being given a chance to cross examine witnesses in regard to the amended charge thus contravening his right to fair trial under Article 50(2) of the constitution of Kenya 2010. He relied in the holding in **Mark Wanjala Wanyama vs Republic** which E.O. Okubasu J, Onyango Otieno and Aluoch JJA cited with approval the case of **Albanus Mwera Mutha vs Republic CR. App. No. 120 of 2004** where it was stated:-

“The jurisprudence which emerges from the cases, we have cited in the judgment appear to be that an unexplained violation of constitutional rights will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge”.

17. The appellant argued that his fundamental right to fair trial was violated and compromised when the prosecution's case was closed without being afforded opportunity to cross examine especially the Complainant after the charge sheet was amended. He was of the now the entire proceeding was a nullity and illegal due to the said failure on the part of the prosecution.

18. The appellant also argued that the medical evidence was not consistent with the evidence of PW 1 that she was defiled on 25th and 26th night of May 2016 because the doctor who produced P3 form placed age of injuries at 8days.

19. On sentence the appellant argued that the complainant having been confirmed to be 16 years old at the time of the alleged defilement, the appropriate sentence was 15 years imprisonment and not 20 years as meted out by the trial court. The appellant cited the holding of **Sir Henry Webb C.J. in Kichanjele s/o Ndamungu vs Republic (1941) 7 E.A.C.A. 64** and **Opoya vs Uganda [1967] E.A. 75** at page 754 where Sir Clement Delestang V.P. held that the words “shall be liable to” do not in the ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not find it fit to impose it.

20. The appellant argued that it was not clear what record the trial Magistrate used to impose 20 years and not 15 years provided by the law. The appellant cited the cases of **Kalama Chea vs Republic H.C. CR. A. No. 94 of 2015** where Hon. Chitembwe reduced life sentence to 4 years already served and **Baraka Safari vs Republic H.C. CR. Appeal No. 75 of 2016** where Odunga J reduced life sentence to 15 years taking into account the time the appellant had taken in custody pending the trial.

21. He also cited **Yusuf Shunzi Kunani vs Republic Petition No. 24 of 2019** where E. K. Ogolla J declared that Sections 8 and 11 of the Sexual Offence Act are unconstitutional to the extent of their mandatory nature and proceeded to reduce the petitioners 15 years imprisonment to 7 years.

22. The Respondent in opposing the appeal filed written submissions and said that Section 214 of the Criminal Procedure Code gives the prosecution a wide discretion to amend the charge sheet upon an application. It was argued that there was no miscarriage of justice during the amendment of the charge sheet. It was argued that the prosecution applied for amendment of the charge sheet and the application was allowed after which the amended charge sheet was read over to the appellant and she pleaded not guilty. It was submitted that the amendment merely changed offence from gang defilement to defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. It was contended that the evidence that had already been adduced was relied upon to support the charge and there was no need to recall witness for cross examination by the appellant.

23. The Respondent relied on the case of **Joshua Karianjahi Waiganjo vs Republic CR.A [2007] eKLR** and **Joseph Karanja Muna vs Republic [2007] eKLR** where it was held:-

“opportunity to recall and cross examine witnesses would arise where the amendments would introduce fresh elements on ingredients into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made.....we do not accept that the non-compliance with the provisions of Sections 214 CPC resulted into injustice to the appellant”.

24. In regard to discrepancies in the prosecutions case, the Respondents relied in the case of Mohammed Sarah Noor vs Republic CR.A No. 14 of 2019, Jackson Mwanzia Musembi vs Republic [2017] eKLR and Uganda Court of Appeal No. 139 of 2001 (2003) UGCA6 where it was held:-

“With regard to contradictions in the Prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily lead to the evidence of a witness being rejected, the court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case”.

25. In the authorities of **Ahamed Abolfathi Mohammed & Another vs Republic (2018) eKLR** the Court of Appeal made reference to the decision in John Nyaga Njuki & 4 Others vs Republic CR. Appeal No. 160 of 2000 where it was stated:-

“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused....where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies on the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case”.

26. It was submitted that the discrepancies on the prosecution case as alleged by the appellant i.e. evidence of PW 4, is not material and the same should not warrant the court to doubt key evidence tendered by PW1. It was argued that although there was no any other eye witness who was present at the scene of crime who would be able to corroborate PW 1’s evidence the P3 form and PRC form confirm the victims hymen was broken.

27. Concerning sentencing the Respondent argued that the sentence was lawful as the law provides for mandatory minimum sentences and that the trial court had a leeway to impose any sentence over and above the minimum sentences.

28. It was contended that sections of the law prescribing minimum sentences do not give the court discretion to consider whether a lesser punishment would be more appropriate on the circumstances – See **Raphael Mutunga Mutinda vs Republic CR.A No. 92 of [2017] eKLR**.

29. Having considered the evidence in the trial court as well as the judgment of the trial Magistrate coupled with the grounds of appeal and the submissions in support as well as in opposition to the appeal, this court finds that the amendment of the charge sheet by the prosecution just before they closed their case was not prejudicial to the appellant as the evidence which had been tendered was the same one that was being relied upon.

30. The basic issue was that the complainant alleged she was defiled on a particular date. She did identify the perpetrators and her evidence was corroborated by the evidence from her friend PW 2 that the appellant transported her and the complainant late on 25/5/2016 from Barani Primary School where they had gone for school games and that after she alighted at her home the appellant was to take the complainant home but the following day she did not see complainant in class and the father of the complainant went to school to ask where she was. She told her teacher and the complainants father that she left when the appellant was taking complainant home.

31. The appellant’s cousin PW 4 who was also a bodaboda rider heard that the appellant could have hidden the complainant in a certain house and he reported to the village elder and they proceeded to the house where they indeed found the complainant PW 1 had been locked in the house. The door was broken and PW 1 rescued. They found she had been defiled. She was traumatized and weak and was bleeding.

32. This evidence was subjected to cross examination by the appellant and no other evidence was added to which the appellant was not allowed to cross examine the witnesses. I do agree with the Respondents that no prejudice was caused to warrant this court to unsettle the finding of the trial court that the appellant defiled the complainant.

33. On the issue of contradictions in Medical Report and the evidence, the Doctor was requested to examine the complainant and ascertain

degree of injury following defilement by 2 men known to her on 25th May 2016. The P3 form produced in the name of Beatrice Mwangemi Nyale is shown to have been filled by Dr. Khadija on 3rd June 2016. The claim that the doctor said that injuries were 8 days old and cannot be attributed to defilement that took place on the nights of 25th and 26th May 2016 is therefore not true.

34. The date for filling of P3 form cannot be taken to be the date the victim of sexual abuse was treated. Filling of P3 form is usually done after a victim has been treated and recovered from injuries inflicted or when they can now give their own history after recovering from trauma or ordeal they went through during the sexual attack. The ground that Medical evidence and evidence of complainant differs cannot stand. In any case the PRC form which was also produced contains the details of the complainant's medical history following the offence committed against her.

35. Concerning sentencing Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006 provides for Imprisonment for a term not less than 15 years. I do find it erroneous for the Respondent to submit that the trial court has a lee way to impose any sentence over and above the minimum provided by the law. Following the supreme court of Kenya decision is the Francis Muruatetu petition, minimum sentences imposed by the law are unconstitutional and denies the court the inherent power to exercise discretion.

36. In this case the trial Magistrate in passing the sentence of 20 years said the law does not afford her any discretion as the sentence is fixed. No reason was given why the sentence was enhanced to 20 years instead of the minimum 15 years imprisonment. I do reckon that the appellant who lived in the same village with the complainant acted in a beastly manner and that may have been the reason for severe sentencing but the law also provides that an accused person should benefit from minimum sentences.

37. The appeal on conviction fails. The appeal on sentencing succeeds and the sentence of 20 years is therefore set aside and substituted with 15 years to take effect from 28th of February 2018. The appellant has 14 days to prefer an appeal against this judgment on points of law.

Dated, signed and delivered at Mombasa this 5th day of February 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE