



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 36 OF 2020

JORAM SIMUYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. In an Amended Charge Sheet dated 26/01/2018, Joram Simiyu (the Appellant) faced a charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on 2nd day of January 2018 at [particulars withheld] Estate he unlawfully and intentionally pulled the penis of BM a child aged 3 years thereby causing him actual bodily harm.

2. On 2/1/2018 BM (PW 2) complained to his mother MA (PW 1) of a headache that forced her to take him to a hospital at Burnt Forest to seek treatment. The following day, on 3/01/2018, she noticed that the boy's penis was injured and had pus and blood. On inquiry, the boy told her that the Appellant had pulled his penis while he was in his house.

3. The Complainant was later treated and Okinamu Peter (PW 3), a Doctor at Burnt Forest, filled a Police Form 3 in respect to the Complainant's condition. The Doctor noted that the Complainant had swollen glands to his penis.

4. In Defence, the Appellant stated that he was a neighbour of the Complainant and is known to him but he denies the offence. He stated that he did not see the Complainant on the day of the alleged offence.

5. The Appeal is against both conviction and sentence and raises six grounds:-

i. That the charge sheet was defective.

ii. That the case was not proved beyond reasonable doubt.

iii. That the Learned Magistrate erred in law and fact in failing to observe that the circumstantial evidence did not link the Appellant to the offence.

iv. That the evidence of identification and recognition was not conclusive.

v. That the prosecution evidence was contradictory and inconsistent.

vi. That the Trial Court rejected the Appellant's defence.

6. The duties of a first appellate court are set out in the decision of Okeno –vs- Republic[1972] EA 32:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 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 findings and conclusions; 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 v Sunday Post [1958] EA 424.”

7. Was the charge sheet defective? The Appellant argues that charge sheet reads that the offence was committed on 02/01/2018 when in fact no offence was committed on this day. This argument is hardly tenable because although PW 1 realized the injury of the complainant's penis on 3/1/2018, he (the Complainant) told her that Joram had assaulted him. He did not tell her when the assault occurred nor did he testify on that in Court. There is no evidence as to when exactly the offence took place but the clear evidence is that as at 3/2/2018 the Complainant had some injuries to his penis.

8. I turn to the medical evidence adduced by the Doctor (PW 3) and in the P3 Form. The evidence is that although PW 3 did not attend the patient initially, the patient was treated at Burnt Forest Hospital where PW 3 was the medical superintendent. He nevertheless examined the victim and on the basis of both physical assessment and the treatment sheets he was able to fill the P3 Form. Both the treatment sheets and P3 Form were produced in evidence.

9. Although the Appellant states that neither the P3 Form nor the sheets indicate that they are from the medical facility where the Complainant was attended, this Court has looked at them and sees that they are both stamped although the stamp is faded and unclear for both. In respect to the treatment sheet the date is unclear but for the P3 form it is 05/01/2018.

10. I doubt whether anything can turn on the arguments of the medical evidence as PW 3 was unequivocal that the Complainant was treated and attended to at Burnt Forest Hospital. Further, while he did not expressly attest to his acquaintance of his colleague's handwriting, the physical examination he carried out and observation he captured in the P3 Form is sufficient to establish that the Complainant had sustained injuries to his penis on or about 2nd January 2018. Put differently, even without the treatment sheets, there was sufficient medical evidence of the injuries.

11. The more substantial ground is that the age of the Complainant was not conclusively proved. PW 1 testified that at the time of her testimony, the Complainant was 5 years turning 6. The Complainant himself says he was 5 years old. Other than this oral evidence, there was no documentary evidence such as a birth certificate or such similar document in support of the evidence. That said when it is so obviously clear by observation that a victim is a minor, then a Trial Court cannot be faulted for finding that he or she is indeed minor. What, however, may be more difficult is for a Court to establish the exact age of a minor by simply looking and observing.

12. In the matter at hand the Trial Magistrate stated:-

“Though the prosecution did not produce any document to show the age of the Complainant, PW 1, PW 2 and PW 3 testified that the Complainant is 5 years old, and during trial it was apparent that he was a child of tender years. Without any other evidence to the contrary, I found the Complainant was a minor at the time of the alleged offence.”

13. The Trial Magistrate did not attempt to place an exact number on the Complainant's age and this Court is unable to fault the Trial Court for holding him to be a minor. It must be remembered that the Court had carried out a voir dire examination on the Complainant and that would have been a good opportunity for the Court to observe if the person in front of it was indeed a minor.

14. As to the quality of evidence given by the Complainant he was clear and firm on his evidence. He testified:-

“I was in the house, which I live with mum. Mum was not there. She had gone to the market. He called me to the house, I felt pain when he pulled me. I cried I was wearing clothes, he put his hand inside my clothes. He said that I should not tell anyone.”

This evidence was not shaken in the least in cross-examination. The Complainant knew the Appellant. He testified:-

“I know where Joram leave (sic), he took me there near our home.”

No less than the Appellant himself confirmed that he was a neighbour to the victim.

15. This Court is unable to find any hint of coaching in this evidence as suggested by the Appellant. Nor can the Court find that much can be made from the variation of names of the Complainant found in the charge sheet (BM), in the treatment sheet (BMN), in the P3 Form (BB) or in by his mother (BM). There is commonality of the name B and from the evidence of the prosecution witnesses it is clear that the name referred to one and the same person, the Complainant.

16. In the end this Court cannot fault the finding of conviction by the Trial Court.

17. As to the sentence, the Trial Magistrate imposed a prison term of 10 years after observing:-

“... I note that this offence has a maximum sentence.”

Case law has recently held that a sentencing Court has discretion to impose a lesser sentence than that expressed by statute to be the minimum. (See Francis Karioko Muruatetu & another v Republic Supreme Court Petition No. 16 of 2015 [2017] eKLR and Solomon Limangura v Republic Court of Appeal Criminal Appeal No. 187 OF 2018 [2019] eKLR)

18. This Court will therefore not feel constrained as to the sentence to be imposed. I reduce the sentence from 10 years imprisonment to 3 years with effect from the date the sentence at Trial was imposed, that is 31/08/2018.

Dated, Signed and Delivered in Court at Nairobi this 1st Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Joram Simiyu (the Appellant) in person.

Miss Muhonja (D.P.P) for State