



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 124 OF 2017

JAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. M.O. Rabera, Senior Resident Magistrate delivered on 23rd day of May 2017 in Mombasa Law Courts Criminal Case S/O No. 25 of 2016 formerly criminal case No. 579 of 2016.)

J U D G M E N T

1. The appellant JAO was charged in Mombasa Chief Magistrates Court Sexual Offence Case No. 25 of 2016 formerly criminal case No. 579 of 2016 where he was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that the appellant on diverse dates between the month of July 2015 and September 2015 at [Particulars withheld] area in Changamwe Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of SAO a girl aged 12 years old.
3. In the alternative the appellant was charged with the offence of indecent act with a child contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006. In the second count the appellant was charged with the offence of deliberate transmission of HIV contrary to Section 26(1) (a) of the Sexual Offences Act No. 3 of 2006.
4. Particulars to Count II were that the appellant on diverse dates between the month of July 2015 to September 2015 at [particulars withheld] area in Changamwe Sub-county within Mombasa County having knowledge that he was infected with HIV intentionally and unlawfully had unprotected sexual intercourse with SAO which infected the said SAO with HIV/AIDS.
5. Upon taking evidence of 5 prosecution witnesses and the sworn statement of the appellant, the trial Magistrate rendered his determination finding the appellant guilty, convicted him and sentenced him to serve life imprisonment on the 2 principal courts to run concurrently.
6. The appellant was aggrieved and he lodged a petition of appeal dated 23rd May 2017 but which grounds were amended on 23rd February, 2021 as follows: -
 - i. **That the learned trial Magistrate erred in law and fact in convicting the appellant without considering that age which was an essential element in a case of defilement was not proved beyond reasonable doubt.**
 - ii. **That the learned trial court erred in law & fact in convicting the appellant without considering that the appellant was denied the right to fair hearing.**
 - iii. **That the trial Magistrate erred in law & fact in convicting the appellant without considering that the charges were of deliberate transmission of HIV/AIDS contrary to Section 26(1)(a) of the Sexual Offence Act not proved beyond all reasonable doubt.**
 - iv. **That the trial Magistrate erred in law & fact in convicting the appellant without considering that the present charges were just a fabrication.**
 - v. **That the trial Magistrate erred in law & fact in convicting the appellant without considering that the sentence mete on the appellant was harsh, unfair, unconstitutional and un-proportional to the offence committed.**

7. The appellant prayed that the appeal be allowed, conviction quashed and sentence set aside.

8. The prosecution's case in the trial court was that PW 2 MAO the mother of the Complainant on 29th February 2016 told the complainant to assist her wash utensils after she had come from school but the complainant told her that she was not feeling well as she was swollen on her private parts and buttocks. That when she examined the complainant, she saw watery wounds on her genitalia & buttocks. She took the complainant to Bokole CDF Hospital and the Complainant, PW 2 & the Complainant's younger sibling had lab tests conducted. The complainant was found to be HIV positive, whereas PW 2 & the younger sibling to the complainant were found to be negative.

9. PW 1 was interrogated by a counsellor at the hospital and she revealed that the appellant used to sleep with her. That after the counsellor had interrogated the complainant, she was told to go out and her mother PW 2 let in by the counsellor who asked her if she knew Baba K and she confirmed that she knew him. She was told that it was Baba K who had infected the Complainant. PW 2 was advised to report at the police station and she went to Changamwe Police Station and reported.

10. Treatment notes from Bokole – EXP 2, P3 form filled at Coast General Hospital – EXP 3 and Post-Rape Care form – EXP 4 were identified by PW 2. PW 2 said that the appellant was their family friend and the complainant and the other children were found of him and could visit him. She said that she had no grudge with the appellant.

11. PW 1 a standard 6 pupil by 25/7/2016 when she testified told the court that the appellant cheated her into sleeping with him on his bed in his house. She said he carried her to the bed and removed her skirt and panty and did tabia mbaya after removing his trouser and inserting his dudu into her susu. She said the appellant did that 4 times on different days when she went to greet him. She said he was their neighbor previously and he could give her money after sleeping with her. That on the 1st two occasions he gave her 50/= & 100/= respectively.

12. She said she didn't ask for the money and she didn't report to anyone as the appellant told her not to. She said her mother came to know about the defilement when she was taken to CDF Hospital at Bokole when she told the counsellor who later told her mother. She testified of having been taken to Makadara Hospital and she identified her immunization card- EXP 2 & treatment notes as well as P3 form. In cross examination, she said that she didn't raise alarm when she was defiled and no blood came out. She said appellant forced her into the act but she didn't cry and no blood came out.

13. PW 3 Dr. Gillian Njambi Muiruri testified on 28th September 2016 and produced P3 form filled by Dr. Fatuma in respect of injuries observed on the Complainant following allegations of having been defiled by a person known to her – EXP 3. The doctor observed herpes scaplex healing on thrust and abdomen with broken hymen & whitish vaginal discharge. Dr. Gillian explained that herpes is a viral infection that can be sexually transmitted and the appearance clinically is a kind of rash that has watery content. The vagina was hyper pigmented. The complainant also under went HIV test and it turned out positive. Post-rape Care form in respect of the Complainant was also produced by Dr. Njambi as EXP 4.

14. PW 4 Ann Kinuthia – a Counsellor at Bokole CDF Health Centre said that she does general counselling & HIV counselling & tests. She said she also manages positive clients by offering drugs. PW 4 testified that on 1/3/2016 a minor aged 11 years was taken to the facility by the mother and on examination she had herpes. That she counselled the minor and the mother and carried out HIV test on both together with a younger sibling of the Complainant. The results came out that the Complainant was positive while the mother and the sibling were negative.

15. That she gave support to the complainant who opened up and said that in 2015 she had sex with Baba K several times. That they used to visit Baba K after they moved out of the neighborhood where he used to stay. That PW 4 asked PW 2 if she knew Baba K and she confirmed she knew him. She advised PW 2 to go and report to the police and later she went and recorded a statement. She said she learnt later that Baba K whom the Complainant referred to was actually a client at the facility and he knew that he was HIV positive. She said she started working at the facility in 2011 and that the appellant was their client. She said they advise their clients to use protection when engaging in sexual intercourse.

16. PW 5 P.C. Lillian Adhiambo investigated the report of defilement made on 2/3/2016 at Changamwe Police Station by PW 2. She recorded statements and visited the scene at the appellant's place and arrested him from a kiosk where he was repairing a serving machine. That he was escorted to his house to pick medicine and later escorted to police station. PW 5 also testified that she escorted the Complainant to Coast General Hospital where on examination the child was found to have been defiled and P3 form filled – EX P3 together with Post-Rape Care form– EXP 4.

17. She produced immunization card for PW 1 showing she was born on 30th March 2003. PW 5 testified further that appellant requested to be taken to hospital for HIV test and he was escorted to PortReiz where tests turned out to be positive. Her investigations revealed that the appellant had been put on ARV's from 2010 and that by the time he defiled the child he knew he was HIV Positive. She said that offence was committed in 2015.

18. The appellant was placed on defence upon close of the prosecution case and he gave sworn statement denying the charges against him. He said he had never had sex with the Complainant as his neighbors would have known and would have been called as witnesses. He said he didn't know the Complainant and had never seen her. He said that he refused to give PW 2 his ID Card as he is not from their family and he didn't know her intention. The Appellant said he was not involved in the investigations conducted by the Investigation Officer. He said that he was not satisfied with evidence of the doctor. He also said that if he defiled the Complainant she would have bled. In cross examination he said that he didn't know the Complainant (PW 1) and her mother (PW 2). He said he only saw PW 2 when she went for his ID Card.

19. The appeal herein was canvassed by way of written submissions. The appellant's submissions were to the effect that age of the complainant was not proved as no documentary evidence was produced. The Appellant relied in the holdings in **Hudson Ali Mwachongo vs Republic** (2016) eKLR and **Alfayo Gombe Okello vs Republic** (2009) eKLR. He said the immunization card – Exhibit 1 was only marked and not produced. He said PW 5 produced uncertified copy of immunization card which could not be relied upon to prove age of the

complainant.

20. The appellant argued that his right to a fair trial under Article 50(2)(P) was violated by the trial Magistrate who sentenced him to serve life imprisonment on each of the 2 counts to run-concurrently. He said his mitigation was not considered and he was entitled to the least severe sentence as provided for under Article 50(2) (p) of the Constitution which is 15 years and not life imprisonment. He relied on the case of **Albanus Mwasi Mutua vs Republic** CR. Appeal No. 120 of 2004 Court of Appeal at Nairobi).

21. The appellant questioned why the Complainant did not reveal she had been defiled severally by the appellant if it is true he committed the offence. He quoted the case of **Paul Kanja Gitari vs Republic** (2016) KLR where the Court of Appeal Judges held that the Complainant having been threatened to reveal she was defiled the court was not satisfied that the evidence was tendered voluntarily and cannot be safe to find a conviction. He also relied on the holding of Warsame J in **John Cadon Wagner vs Republic** (2011) eKLR that considerable period of time having been taken before formal Complaint was made it is possible that false identification was made.

22. He argued that it was only after PW 1 had been taken to the hospital and found to be HIV positive that she revealed the identity of the person who infected her. He said no document was produced to prove that he was HIV positive. He said his right was violated by PW 5 who took him for HIV test on arrest contrary to Section 31(C) of the constitution. He said he was stigmatized and subjected to psychological torture by the production of his HIV test results by PW 5 yet she was not a medical officer.

23. The appellant submitted that the prosecution did not prove beyond all reasonable doubt that he was guilty and that charges against him were a frame up/fabrication. He said the Complainant had clear intentions to lie as she didn't reveal who defiled her even after she was found to be infected with HIV. That it was after PW 4 pestered the Complainant that she mentioned that it was the appellant who infected her with HIV. He said that he was a family man and PW 1 didn't say where members of his family were when she was defiled by the appellant on his bed.

24. The appellant submitted that excessive punishment serves neither the interest of justice nor of society. He submitted that the sentence against him was harsh & excessive and doesn't put into consideration the rehabilitation factors as he may not rejoin the society any time so even if he reforms. He stated that his sentence of life imprisonment was uncalled for and urged the court to come up with a new decision.

25. The Respondents Counsel on the other hand submitted that the holding on **Josephat Muoki vs Republic** (2016) eKLR listed ingredients for the offence of defilement as age, proof of penetration and positive identification of the assaulted. It was contended that EXP 1 was produced as proof of Complainants age and that in CR. Appeal No. 21 of 2015 – **Thomas Mwambu Wenyi vs Republic** [2017] eKLR. It was held that a medical age assessment is an acceptable means of proof of age.

26. It was argued that appellant didn't object to production of the copy of immunization card by PW 5 as to its authenticity and the appellants argument is an afterthought.

27. The Respondent also argued that evidence of PW 1 and medical evidence proved that there was penetration as a result of which PW 1 contracted herpex simplex and HIV. The Complainants human was found to be broken with an old scar. It was argued that evidence of penetration was overwhelming.

28. On issue of identification of accused the Respondents counsel argued that PW1 stated clearly he had been defiled by Baba K. That PW 2 confirmed that the appellant was indeed their neighbour and family friend. That medical history showed that appellant had had sexual relationship with the minor for a span of over one year and it is because of discomfort as a result of infection that it came to light that PW 1 had been defiled.

29. It was submitted that there was no evidence on record to suggest that PW 1 would have reason to have the appellant for the offence herein. It was argued that evidence by PW 1 was consistent and corroborated.

30. On the 2nd count the Respondent argued that there was evidence from PW 4 that appellant knew his HIV status and which PW 5 arrested him he was again taken to hospital and HIV tests were reactive and therefore he was guilty to transmitting HIV to the innocent 12 years old minor.

31. On sentencing it was argued that the trial court considered the appellants mitigation but noted that the nature of the offence and circumstances of the offence demanded deterrent sentence. The Respondents counsel argued that the trial Magistrate was right in concluding that deterrent sentence was required since the appellant out of self-gratification deliberately altered the cause of the victim minor's life for which she will bear both eyelong physical & psychological scars.

32. It was argued that minimum sentences in counts 1 & II are 20 years and 15 years respectively and that both could be enhanced to life imprisonment and the sentence passed was lawful and there is no reason to disturb as the appellant breached societal trust of caring for and protecting young ones.

33. This being a 1st appeal, the duty of this Court is well settled in **Kiilu & Another vs. Republic** [2005]1 KLR 174, where the Court of Appeal stated thus;

“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

2. 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; 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."

34. I have perused and re-evaluated the evidence on record for the prosecution and the appellant's defence as well as the trial Magistrates judgment and the issues for determination are:-

- a) Whether the age of the Complainant was proved.
- b) Whether the appellant's right to fair trial was denied.
- c) Whether the prosecution proved beyond all reasonable doubt that the appellant deliberately transmitted HIV contrary to Section 26(1)(a) of the Sexual Offences Act.
- d) Whether the appellant was fabricated.
- e) Whether sentence was harsh, unfair, unjust, unconstitutional and un-proportional.

34. Evidence as to the age of the Complainant was given by the Complainant herself – PW 1, her mother PW 2 who identified immunization card which was later produced by PW 5 the investigating officer. It was not disputed that the class 6 minor, was 12 years old and the appellant has not suggested that she was younger or older and I do find that this ground of appeal would fail.

35. That the Complainant was defiled is not in doubt. She said that Baba K who had earlier on been their neighbor defiled her severally in 2015 and it is only when she developed severe sexually transmitted disease that she told her mother she was sick with a swollen genitalia and buttocks. PW 2 took PW 1 to hospital and when PW 4 examined her, she found that the complainant had herpes and she decided to counsel her. With the consent of PW 2, PW 4 conducted HIV test on her, PW 2 & a sibling. The tests turned positive on the complainant. All this time she had not told PW 2 how she got infected and it was after due counselling by PW 4 that she revealed it was Baba K who had sex with her severally in 2015.

36. PW 1 said that the appellant used to give her money after defiling her and told her not to tell anybody. It is after PW 4 was told that it was Baba K that she asked PW 2 who was Baba K and it turned out to be the appellant herein who was a former neighbor and a family friend to the parents of the complainant. The Appellant didn't deny that he was Baba K. He claimed that he didn't know the Complainant and her mother but at the same time confirmed that PW 2 had requested to use his ID to go and look for a job.

37. I did find that there is overwhelming evidence that the appellant defiled the complainant. PW 2 may not have been happy when the appellant refused to give her his identity card but she is not the one who alleged that the appellant had defiled her daughter. It is upon medical examination that it was found PW 1 had STI and on counselling by PW 4, it was discovered it was Baba K who defiled her. PW 4 didn't know PW 1 & PW 2. She didn't even know who Baba K was until she learnt of the name later and realized he was their client at the facility and used to get ARV's from the health facility from as early as 2011.

38. It is proper to conclude that the appellant defiled the Complainant and that he knew full well that he had HIV and was therefore under a duty to act responsibly even where he engaged in sexual relationship with adults by informing them of his HIV status so that the partner makes an informed decision.

39. Having secretly lured a child to his friend into Sexual intercourse when he knew too well that he was HIV positive was not only negligent but criminal and immoral because the future of the Complainant is completely ruined.

40. This court understands the trial Magistrate when he called for deterrent sentence. However, in view of Article 50 (2) (p) of the Constitution of Kenya, 2010, the appellant is entitled to the least severe of the prescribed punishment. I do uphold the conviction and substitute the sentence with 20 years' imprisonment in each count to run concurrently.

Orders accordingly

Right of appeal 14 days

DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS, THIS 8TH DAY OF JULY, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:

Court Assistant: Ogwel

Appellant:

Respondent Counsel:

Appellant's Counsel: