



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 10 OF 2019

AKIBA KARISA KAZUNGU.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Shanzu in the Sexual Offences Case No. 819 of 2014 delivered by Hon. D. Mochache (SPM) on 22nd August 2017).

JUDGMENT

Background

1. Akiba Karisa Kazungu, the Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that on 6th day of August 2014 at [Particulars Withheld] area in Kilifi County within Coast region, intentionally caused his penis to penetrate the anus of SA a child aged eight (8) years.
2. In the alternative, the Appellant was charged with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that on the same day and place, he intentionally and unlawfully touched the anus of SA a child aged 8 years with his penis.
3. He pleaded not guilty to the charges. Upon trial, he was convicted of the offence of defilement contrary to S. 8(1) of the Sexual Offences Act as read with S. 215 of the CPC Act. He was sentenced to life imprisonment. Aggrieved by both his conviction and sentence, he preferred the appeal.
4. The Appellant raised the following four (4) amended grounds of appeal together with submissions filed on 25th February 2021:
 - a. That the learned trial court magistrate erred in law and fact in convicting him without considering that the appellant was denied the right of a fair trial.
 - b. That the learned trial court magistrate erred in law and fact in in convicting the appellant without considering that the no *voir dire* was carried out to the alleged minor to ascertain his ability to give evidence on oath.
 - c. That the learned trial court magistrate erred in law and fact in convicting the appellant without considering that the medical evidence adduced in court did not prove the offence of defilement.
 - d. That the learned trial court magistrate erred in law and fact in convicting the appellant without considering that the sentence meted on him was harsh, unfair, unjust, unconstitutional and unproportional to the offence committed.

Appellant's Submissions

5. The Appellant submitted by calling upon parties in the case to consider judicial notice under Section 60(1) of the Evidence Act for the appellate court to reevaluate and reexamine the evidence where the learned trial magistrate committed a litany of errors of procedural irregularity during the hearing which cannot be cured under provisions of Section 382 of the CPC. The Appellant went further to quote the decision in the unreported case of *Harrison Mirungu vs Republic* Criminal Appeal No. 90 of 2004. The Appellant pointed out that it is the duty of the court to enforce provisions of the law.
6. The Appellant submitted that the court coram is established by law and shall be regular, legal, expressed, clear and properly entered, and

being a fundamental pillar in any proceedings, the same shall reflect a fair hearing. The Appellant stated that the proceedings were recorded in the English language and that the coram is not in order. The Appellant quoted Criminal Case No. 11 of 2004 *Francis Macharia Gichangi & 3 Others vs Republic* where the Court of Appeal said, "Regarding the first issue, trial court is silent on the language of the proceedings and how it was conducted." Additionally, the Appellant relied on Criminal Appeal No. 170 of 2006 *Fredrick Kizito vs Republic* that held a similar position. As a result there was non-compliance which led to unfair trial.

7. The Appellant further submits that *voir dire* examination was not properly conducted and did not meet the standard required under Section 19(1) of the Oaths and Statutory Declaration Act. The Appellant contends that it was difficult to determine whether the minor was telling the truth and possessed of sufficient intelligence to understand the meaning of oath. The Appellant quoted the court decision in the Court of Appeal at Nyeri where Section 125(1) of the Evidence Act was cited which states, "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them..."

8. The Appellant submitted that PW3 alleged that the complainant further reported the matter to the village elder. However, the village elder was not called in to testify. Also, Dr. Rukia who filled the P3 form did not present the evidence in court. The PRC form was filled on 27/8/2014 by an unknown doctor who never came to court to testify.

Respondent's Submissions

9. The Respondent through the learned Prosecution Counsel opposed the appeal. On the issue of the right to fair trial, the Respondent submits that it is not a matter in which the Appellant was convicted on a guilty plea as to require an examination on the equivocalness of the plea. The Appellant pleaded not guilty and the case went on to full trial. The Appellant was given an opportunity to cross examine each of the 7 prosecution witnesses but failed to do so. He was also given an opportunity to defend himself but chose to remain mute. He did not say a word. He went through the whole trial mute of his own volition. After conviction he was again asked to mitigate and his only plea was that he was sick. It is therefore dishonest for him to claim that his constitutional right to a fair trial was infringed.

10. The Respondent submits on the issue of *voir dire* examination of the complainant that the minor was taken through a proper examination. It is sufficient that the trial court was convinced that the child was possessed of sufficient intelligence to testify and that he understood the duty of speaking the truth. At page 6 of the proceedings, the trial court made the finding that the minor could understand the questions being put to him but was not able to give sworn evidence. The child gave an unsworn statement.

11. The Respondent submits on the issue that the medical evidence did not prove defilement that the doctor testified on page 39 of the proceedings. He had a PRC Form from Vipingo Health Centre indicating the Complainant was examined on 27/8/2014 and the anus showed lacerations at position 12 O'clock. The P3 Form was filled on 4/9/2014 but showed that the matter was reported on 27/8/2014 through the OB Number. The doctor who filled the P3 was out of the country and had permanently relocated. However, PW7 had worked with the doctor for one year and knew his handwriting and signature. PW7 was therefore permitted to produce the form on behalf of the colleague. The P3 also made the conclusion that the minor had been defiled as there were lacerations on the anus. PW7 produced all the three medical reports though they were not all prepared by the same medical facility. However, even if the court was only to rely on the P3 Form filled by the doctor who worked at Mtwapa Health Centre and was standing in for his colleague, the evidence would still corroborate the version given by the complainant and the other prosecution witnesses.

12. The Respondent submits on the issue of the sentence being harsh and excessive that it is unclear from the typed record what the sentence handed by the lower court is. The trial court intended to sentence the appellant on a date indicated as 31/8/17 but the proceedings do not cover the portion. However, the state believes that this court will look at the circumstances of the case and consider that this sexual crime was committed against an innocent little boy of 8 years. It is unimaginable the effect sexual assault can have on his mind and future life. The state prays that the court considers a heavy custodial sentence commensurate with the offence.

Brief Facts

13. The Appellant approached SA who was playing with S and K and asked that they go pluck coconuts from the bushes. The Appellant followed SA into the bush where there were many trees. He ordered SA to lie down which he complied. The Appellant then removed SA's trousers, covered SA's mouth, removed a knife, and threatened SA not to tell anybody or else he would stab him. SA felt sharp pain in his anus but could not scream as the accused had covered his mouth. When he was done defiling the complainant, the Appellant ran away. SA told Ngombeko about the incident who eventually told SA's father who took SA to hospital.

Analysis and Determination

Whether the Appellant had the right to fair trial

14. Section 211 of the **Criminal Procedure Code** was explained to the accused person as a result of which he had the opportunity of cross-examining 7 prosecution witnesses but only cross-examined the first prosecution witness, the complainant herein. When a prima facie case was established and the accused placed on defense to testify, he expressly stated that he will not give evidence.

15. In *John Wakabiu Cini v. Republic* [2016] eKLR the court stated as follows: -

"The Appellant chose to remain silent willingly and he had the right to do so. However, the fact that he chose to remain silent in my view had no bearing in the case because the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt and not to perhaps leave some gaps to be filled by the defense. An accused person does not assume any burden to prove his innocence."

“It is therefore immaterial whether an accused person chooses to remain silent or not upon being called to defend himself pursuant to Section 211 of the Criminal Procedure Code. What is material is that the prosecution is under a duty to prove their case and upon proving their case, an accused person cannot be heard to turn back and say the case was not proved because he chose to remain silent or that he did not understand the proceedings when all along the trial evidence abound like in this case that he had fully participated. See JULIUS KIPSANG -VS- R [2014] eKLR & R -VS- ANTONY NGANGA WANJIKU & ANOR [2014 eKLR]. The Appellant in this case cannot say he did not understand the language used at the trial and I find no basis for that.”

Whether there was *voir dire* examination of the complainant

16. Section 19 of the **Oaths and Statutory Declarations Act** provides for administration of *voir dire* on minor witnesses before reception of their testimonies especially in criminal trials. However, no specific format is provided by the provision on how *voir dire* should be conducted.

17. In *Sula v. Uganda* [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter.

18. *Voir dire* was conducted on the complainant, PW1 as well as other minors, PW4 and PW5 who also testified. The court established that PW1 understood the questions put to him but he was not of sufficient intelligence to give sworn evidence. He therefore gave unsworn statement. PW5 also gave an unsworn statement because he was of sufficient intelligence but did not understand the meaning of an oath. For PW4, the court tested his intelligence from the way he understood the questions put to him and established that he is of sufficient intelligence and understood the meaning of oaths. He therefore gave sworn evidence. In all the three cases, the trial court wrote down the questions put to the witnesses and answers of the witnesses in first person in words spoken by the witnesses in a dialogue form then made its conclusion after the dialogue.

19. Sections 208 and 302 of the **Criminal Procedure Code** conclude that cross-examination of a witness who had given evidence not on oath is permitted by law. The Appellant only cross examined PW1.

Whether the medical evidence adduce in court proved the offence of defilement

20. The PRC form OB No xxxx from Vipingo Health Centre dated 27/8/2014 shows that the minor was examined on 27/8/2014 at 10:17 am. As at 27th, the defilement had occurred 3 weeks back. The survivor had changed clothes that were not given to the police. The survivor had also had a bath, gone for a long call and the outer genitalia was normal. However, the anus had lacerations at 12:00 o'clock and the conclusion was sodomy. A blood test was also done. HIV and VDRL were tested and all were negative.

21. The P3 form with OB No. xxxxx dated 27/8/2014 but filled on 4/9/2014 by Doctor Rukia indicated that the patient had changed clothes and sodomy was by a person known to the minor who threatened to kill him. The patient was calm and the approximate age of the injury was 3 weeks. The probable type of weapon was blunt and there was lacerations at 12:00 o'clock and the conclusion was that the minor was defiled. Doctor Abdullahi Hussein testified on behalf of Doctor Rukia who had relocated to Oman. Doctor Abdullahi had worked with her for a year and was familiar with his handwriting.

22. Treatment notes of Vipingo OP No. xxxx at 10:17 am showed lacerations at 12:00 o'clock. The lab test also revealed HIV and VDRL negative where the patient was put on anti-biotics at New Barani Medical Centre where the patient presented with vomiting and diarrhea for 3 days. This was on 4th August 2014. *George Opondo Olunga v. Republic* [2016] eKLR stated that identification or recognition of the offender, penetration and the age of the victim as ingredients of an offence of defilement.

23. The element of identification and recognition of the offender is not disputed. The appellant was someone who was well known to the complainant. PW4 and PW5 confirmed the identity of the appellant as they indeed saw him go to the bush with the complainant. No issue was raised by either party as to the identity of the appellant. The medical evidence adduced in court proved that there was penetration. The PRC form OB No xxxx from Vipingo Health Centre dated 27/8/2014 shows that the minor was examined on 27/8/2014 at 10:17 am and the anus had lacerations at 12:00 o'clock with the conclusion that there was sodomy.

24. The P3 form with OB No. xxxx dated 27/8/2014 but filled on 4/9/2014 by Doctor Rukia indicated that the probable type of weapon was blunt and there was lacerations at 12:00 o'clock with the conclusion that the minor was defiled. Further, treatment notes of Vipingo OP No. xxxx at 10:17 am showed lacerations at 12:00 o'clock. On the element of the age of the victim, an age assessment was done and it was established that the complainant was indeed 8 years old. To this end, all ingredients of defilement have been proved by the prosecution beyond reasonable doubt.

25. Additionally, under **Section 77** of the **Evidence Act**, an expert who did not prepare the report is allowed to testify in respect to the report on condition that the presumption of authenticity is met. The provision states as follows:-

1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

2. The court may presume that the signature to any such document is genuine and that the person signing it held the office

and qualifications which he professed to hold at the time when he signed it.

3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

Whether the sentence meted on the Appellant was harsh, unfair, unjust, unconstitutional and unproportional to the offence committed

26. The sentence of life imprisonment imposed by the trial magistrate was not harsh, unfair, unjust, unconstitutional, and unproportional as **Section 8(1) and (2) of the Sexual Offences Act** hold the following position: -

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

2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

27. However, in *David Wafula Kilwake & Another v. Republic* (2018) eKLR, the court expressed as follows: -

“[w]e hold that the provisions of section 8 of the sexual Of-fences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the Society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it.”

Conclusion

28. After consideration of the aggravating and mitigating circumstances where a weapon was used to frighten the victim, the physical and psychological effect on the victim, targeting the victim who is a vulnerable child, and abuse of the position of trust in the aggravating circumstances, and the appellant being a first offender in the mitigating circumstances, the sentence of life imprisonment imposed on the Appellant is hereby set aside and substituted with a sentence of 25 years imprisonment from the date of 29.8.2014.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 16TH DAY OF SEPTEMBER 2021

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Mohamed- Court Assistant

Ms. Keya for Respondent

Appellant- present in person (From Shimo La Tewa Prison virtually)

HON. LADY JUSTICE A. ONG’INJO

JUDGE