



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 58 OF 2019

SHK alias BABA H.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrates Court at Hola

by Hon A. P. Ndege (PM) delivered on 5th December, 2019 in MCSO Case No. 14 of 2018)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

J U D G M E N T

The appellant herein **SH** was charged with sexual assault contrary to Section 5 (10 (a) (i) as read with Section 5 (2) of the Sexual Offences Act. The particulars of the charge were that on the 2.11.2018 at [Particulars Withheld] village, in Tana River, the appellant unlawfully used his finger to penetrate the vagina of **SK** a child aged four (4) years old. On taking plea, the appellant pleaded not guilty.

As a consequence the appellant, was tried, convicted sentenced to thirteen (13) years imprisonment. Being dissatisfied with conviction and sentence he lodged an appeal based on the following grounds:

(1). That the Learned trial Magistrate erred in both Law and facts by failing to consider that the sentence imposed to I the appellant was manifestly harsh and excessive in all the circumstances.

(2). That the Learned trial Magistrate erred in both Law and facts by failing to consider no certified original P3 form asp. Exhibit MF1-2 and the age assessment report as P.Exhibit MF1-3 were produced as evidence by (PW6) and (PW8) respectively in compliance to Section 64 and 66 of the Evidence Act.

(3). That the Learned trial Magistrate erred in both Law and facts by failing to consider that the legal provision providing for a mandatory minimum sentence under Section 5 (1) (a) (i) as read with Section 5 (2) of the Sexual Offences Act No. 3 of 2006, conflict, contradicts and violates the provisions of Section 216 and 329 of the CPC by denying the judicial officers the legitimate jurisdiction to exercise of discretion in sentencing not to impose and appropriate adduced and recorded there by violating Article 27 (1) (2) (4) of the Constitution of Kenya 2010, hence the sentence imposed is unlawful.

Submissions on Appeal

The appellant in canvassing the appeal entirely relied on the written submissions in which he contended as follows. First, that in terms of Article 50 (2) (p) and 159 (2) (a) of the Constitution, the appeals Court should consider a lesser sentence besides the thirteen years imposed by the Learned trial Magistrate. Further, the appellant contended that by the enhancement of the sentence to thirteen (13) years, he suffered prejudice and a failure of justice.

Second, the appellant submitted and argued that the crucial elements of penetration and age were never proved beyond reasonable doubt as required by the constitution and statute Law. The appellant significantly pointed out the documentary evidence in support of age was neither

admissible nor reliable. He cited the provisions of Section 64 and 66 of the Evidence Act as the basis upon which the trial Court should have rejected that piece of evidence by the prosecution. In the same breadth, appellant cited the legal propositions in **Hadson Ali Mwachongo v R {2016} eKLR and Alfayo Gombe Okelloh v R CR Appeal No. 203 of 2009: Eliud Waweru Wambui v R CR Appeal No. 102 of 2016: RWG v R {2015} eKLR** in view of non-proof of age. The appellant submitted that the sentence passed against him was not justified.

Third, the appellant submitted on the mandatories of the sentence which denied him a chance to offer mitigation before the final verdict on sentence is passed by the trial Court. In lieu with those concerns, appellant argued and urged the Court to be persuaded with the provisions under Article 25 (c), 50 (2), 27 (1) (2) of the Constitution, Section 216 and 329 of the Criminal Procedure Code. Keeping view of those submissions appellant urged the Court to set aside the conviction and sentence forthwith. On the side of the state prosecution counsel **Mr. Mwangi** opposed the appeal on the strength of the evidence presented at the trial Court.

Resolution of the Appeal

Taking into account the grounds of appeal and submissions made for and against the aforesaid appeal, I am however required to consider the entirety of the evidence afresh. It is from that position I can draw relevant conclusions on the matter. The Judgment of the Court in **Okeno v R {1973} EA 332** premises the main principles on the duty of the first appellate Court. The crisp issue in this matter is whether the appellant defiled the complainant in committing the act of sexual assault. Before endeavoring to find out whether or not the prosecution in the Court below proved its case, against the appellant I reiterate the following principles.

First, the prosecution bore the sole responsibility to prove the charge against the appellant beyond reasonable doubt. That burden never shifts at any one time save in very few circumstances statutorily outlined under Section (111) of the Evidence Act.

Secondly, on emphasis the standard of proof required of beyond reasonable doubt is very high and must be reflected on all the ingredients of the offence that appellant was the one who committed the offence (**See the case of Miller v Minister of Pension {1947} 2 ALL ER 372**).

Thirdly, in cases of sexual offences like, in the instant case, where the victim alleges that the appellant committed a sexual act, against her, before a Court acts upon such evidence, it must warn itself as provided under Section 124 of the Evidence Act, if the findings are based on uncorroborated evidence. In this regard the warning and caution must contain the reasons why the session Judge/Magistrate has satisfied herself or himself on the truthfulness of the witness giving rise to a conviction on uncorroborated evidence. The above guidelines would form the rationale of this appeal.

In order for this Court to comply with the principles in **Okeno case (supra)** it will consider each of the ingredient in relation with the Law and the evidence on record with regard to the first ingredient that is to say the victim was a girl under the age of eighteen (18) years as at 2.11.2018. The trial Court received evidence from (**PW2**) – the biological mother. Apart from the evidence of the mother, the prosecution did produce an age assessment medical report from (**PW8**) – **Jared Omangi** of Hola District Hospital. The Learned trial Magistrate, therefore relied on those two pieces of evidence to satisfy the criteria on the age of the victim beyond reasonable doubt.

With regard to the second ingredient that is to say that the victim was sexually assaulted on 2.11.2018 by the appellant inserting his fingers to the genitals. It is clear from the record that (**PW1**) gave graphic details on the unlawful acts committed on the material day. She explained through an intermediary (**PW2**) that the acts took place when she sent her to pick a panga from **R**. It was during her return journey (**PW2**) saw the victim walking with difficulties. That condition raised suspicion which necessitated a physical examination of the genitalia, only to notice some inflammation. This caused her concern and on inquiry the victim narrated the story in which the appellant inserted his fingers to the said private parts.

When the session Magistrate examined the evidence in respect of these two ingredients, a finding was made that the victim told the truth and the offence in question was committed by the appellant.

On the ingredient, of identification of the appellant the only evidence implicating him was that of the victim herself. In her testimony given through the intermediary (**PW2**) she narrated the circumstances upon which the offence was committed. The appellant in his defence denied that he committed the offence in question. He explained that the complainant (**PW1**) had vowed to do something bad if he does not take the child back. That was the threat which took effect following his arrest by police officers being charged with the instant charge before the trial Court.

I have reviewed the entire evidence on record as presented by both the prosecution and the defence, it is important to point out that there are no contradictions or inconsistencies to impact negatively the prosecution case. At the time the incident occurred, (**PW2**) had just sent the victim to **R** to go and pick a panga. It happened that the appellant was the last person to be seen with the victim prior to her complaining of the sexual assault.

All in all the trial Court had no choice to find the appellant guilty of the offence of sexual assault contrary to Section 5 (1) (a) (i) of the Sexual Offences Act. In the circumstances, I reject the appellant's appeal on both conviction and sentence.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant
2. Mr. Mwangi for the state