



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION - MILIMANI

CRIMINAL APPEAL NO. 24 OF 2020

JOHN NJENGA NGIGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence in Sexual Offences Case No. 97 of 2017

at the Chief Magistrates' Court Makadara by Hon. M. A. Opondo – PM

on 29th November 2019)

JUDGMENT

1. **John Njenga Ngigi**, the appellant, was charged with defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. Particulars being that on the 3rd day of June, 2017 at [Particulars Withheld] Area of Embakasi Division within Nairobi Area County, intentionally caused his genital organ to penetrate the anus of **JOO** a child aged 11.

2. In the alternative, he faced the charge of Committing an Indecent Act with a child contrary to **Section 11 (1)** of the Sexual Offences Act **No. 3 of 2006**. Particulars being that on the 3rd June, 2017 at [Particulars Withheld] area in Embakasi within Nairobi County, intentionally touched the anus of **JOO** a child aged 11 years with his penis.

3. He was taken through full trial, convicted and sentenced to serve twenty years (20) imprisonment.

4. Aggrieved, he appeals on grounds that: the perpetrator of the offence was not properly identified; the complainant was not credible; there was variance between information given to the police and evidence adduced in court hence making the charge defective and the weight of the defence was not considered.

5. In a nutshell, the prosecution's case was that the appellant herein was a caretaker of the plot where **JOO** and his parents lived. On several occasions he would ask the complainant to go to a house downstairs where he would molest him, give him Ksh.50/- that he would spend on buying pens and chips; then warn him not to tell anyone and especially his father who would beat him if he knew what he was indulging in. However, eventually he confided in his science teacher, **CM** who notified the school management about the sexual harassment. **PW2 EEA**, the complainant's mother received a call from his son's school, [Particulars Withheld] Embakasi, requiring him to go and see the Headmaster, Mr. Onditi. She went only to be informed that according to the report they had, the caretaker at their plot was sexually harassing her son. The complainant now opened up and told her about what was happening to him. This was on a Thursday. They went back home as advised.

6. On the following Saturday, the day the appellant was stated to have been doing the act, **PW2** found the complainant and the appellant inside the house where it was alleged the act of indecency was being committed. She confronted the appellant seeking to know what they were doing but he did not answer her. When she alleged that he was sodomizing the complainant, the appellant challenged her to take the complainant to hospital so as to confirm the allegation. She reported the matter to the police who arrested the appellant.

7. In the meantime, the complainant was taken to hospital for examination. **PW4 Doreen Muia**, a Registered Community Health Nurse examined the complainant and found no injuries on his body or penis but, according to her, the anus had loose muscle. He alleged that he had been molested in June 2017 but he was unable to specify the exact time of the incident.

8. The complainant was also examined by **PW5 Doctor Kizi Shako** on 3rd July, 2017 who found him having a normal external genitalia, the penis and anus were normal. No injuries were noted.

9. PW6 No. 53602 Corporal Leah Muthoni, investigated the case, visited the scene of the incident and caused the appellant to be charged.

10. Upon being put on his defence the appellant denied having committed the offence. He stated that he went to the Police Station on his own volition. That he posed a question to the complainant as to whether he had slept with him and he denied. That he has dealt with minors for long and there is no way he could be allowed to participate in their Ministry had he been guilty of such a conduct.

11. The trial court analyzed evidence adduced and took note of the fact of medical evidence having not confirmed that the complainant was defiled but considered the complainant's demeanor and guided by **Section 124** of the Evidence Act believed him. It concluded that the appellant who was positively identified defiled the complainant.

12. The appeal was canvassed through written submissions. It was urged by the appellant that the prosecution had a duty of proving the case. He cited the case of *Sekitoliko -vs- Uganda (1967) EA 53*, and pointed out a contradiction in evidence adduced as to which floor the complainant lived.

13. That if the complainant was defiled it would not have taken him long to report the matter. That evidence regarding when the act occurred was contradictory as the complainant stated that it happened between March to October 2016 contradicting what he stated in hospital and what is captured in the charge sheet. That if indeed the complainant had been defiled after reporting the matter he would not have gone back to the same room and there was no evidence that he had been attacked. In this respect he relied on the case of *Laurent Kelvin Mboya Criminal Appeal No. 60 of 2015* where the court stated that:

“All in all, there was no plausible explanation why a sixteen (16) old boy would continue living with a potential defiler for four (4) days without escaping from the jaws of such an evil man. This court also took his evidence with a pinch of salt.”

14. The appellant faulted the trial court for misapplying **Section 124** of the Evidence Act as it did not state reasons why it believed the complainant. That the date when the offence is alleged to have occurred varied with the date indicated on the charge sheet which was a defect that was not curable and that since the word “unlawfully” was missing in the charge sheet, no offence was disclosed.

15. He faulted the trial court for not finding that a vital witness, the owner of the house where the incident was alleged to have occurred was not called as a witness and that investigations carried out were shoddy.

16. This being a first appellate court I am duty bound to re-evaluate evidence adduced at trial afresh and draw independent conclusions bearing in mind the fact of not having seen or heard witnesses who testified. In the case of *Okeno vs. Republic [1972] EA 32*, the Court stated that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424.”

The Appellant contends that the charge sheet was defective as it was not amended to reflect that the offence was committed on diverse dates between 2016 and 2017. According to the complainant, the act of indecency used to be committed on Saturdays and that he was molested between March to October, 2016, but he did not disclose what was happening out of fear. PW4 stated that it occurred on diverse dates between 2016 and 2017 and the medical examination was done about one month after the last incident. It is in evidence of both PW1 and PW2 that on the Saturday when PW2 found the appellant and complainant in the house he had not been molested. It was important for the alleged diverse dates from 2016 until 2017 to have been reflected on the charge sheet to enable the appellant prepare adequately for his defence.(See *Sigilai and Another. Vs Republic (2004) eKLR*).

17. It was erroneous for the State to state a date when it was stated that the complainant was molested . In the case of *Yongo -vs- Republic (1983) eKLR 319*, it was stated that:

“In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

b. It does not, for such reasons, accord with the evidence given at the trial; or

c. It gives a misdescription of the alleged offence in its particulars.”

19. The material contradiction in evidence as to the date when the offence was alleged to have been committed go to the root of the prosecution’s case as to whether the incident occurred.

20. On the question whether failure to indicate the word ‘unlawful’ in the charge makes the charge sheet defective; the act of defiling a minor perse is unlawful because such a child is incapable of consenting to the act of sexual intercourse or an indecency of whatever nature. Section 43 of the Sexual Offences Act defines intentional and unlawful acts to include an act committed in respect of a person who is incapable of appreciating the nature of an act which causes the offence. Circumstances in which a person is incapable in law of appreciating the nature of the act includes being a child. Therefore, failure to include the word “unlawful” in the particulars of the offence was inconsequential.

21. To prove the charge of defilement the prosecution was required to prove beyond reasonable doubt ingredients of the offence as set out in **Section 8(1)** of the Sexual Offences Act which provides thus:

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

22. This was well captured in the case of *Hillary Nyongesa -vs- Republic (2010) eKLR* where the court stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim”

23. In the case of *Francis Omuroni -vs- Uganda, Criminal Appeal No.2 of 2000*, the Court of Appeal stated that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”

24. On the question of penetration it is defined by **Section 2** of the Sexual Offences Act as:

The Partial or complete insertion of the genital organs of a person into the genital organs of another person;

25. Following medical examination, the complainant did not have any scars or bruises such that the anal region was normal. PW4 however formed the opinion that the muscles around the anus were slightly loose. PW4 was a nurse, her expertise was not interrogated. But, PW 5, a medical Doctor was of the opinion that the anal area was normal. An anal sphincter becoming loose could be caused by any other act other than penetrative sex. The question of penetration was therefore not proved.

26. In the case *Kassim Ali vs Republic (2006) eKLR* it was held that:

“Examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

27. In the case of *George Kioji -vs- Republic, Nyeri Cr. Appl. No. 270 of 2013:*

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

28. The proviso to **Section 124** of the Evidence Act provides that:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

29. The trial court indicated that it observed the demeanor of the complainant and was satisfied that what he stated was the truth. However, it fell into error by concluding that medical evidence was proof of penetration.

30. There seemed to be a warm and friendly relationship between the appellant and complainant such that they would be together, suggesting the possibility of anything happening, but, the duty was upon the prosecution to prove the charge beyond reasonable doubt. Based on evidence adduced, it was not sufficient to prove either the main count or the alternative. The trial court failed to address the question as to when the offence was allegedly committed, therefore, the conviction was unsafe.

31. The upshot of the above is that the appeal succeeds and is allowed. The conviction is quashed and sentence set aside. The appellant shall

be released forthwith unless otherwise lawfully held.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 9TH DAY OF DECEMBER, 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Appellant

Ms. Chege for ODPP