REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO 69 OF 2018 [SO]

SAMWEL ONGOK ONGOK..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an Appeal against conviction and sentence in Bondo PM's Court Cr case No. 25 of 2018 dated 5.11.2018 by Hon. M. Obiero, Principal Magistrate)

JUDGMENT

1. The appellant herein **SAMWEL ONGOK ONGOK** faced the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act no. 3 of 2006. The particulars are that on the 5th day of June, 2018 at around 1500 hours at [particulars withheld] Sub-location in Bondo Sub-County, within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of CAO [full name withheld] a child aged nine (9) years. The appellant further faced the alternative charge of Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act no. 3 of 2006.n it was alleged that on the 5th day of June, 2018 at 1500 hours at [particulars withheld] Sub-location in Bondo Sub-County within Siaya County he intentionally and unlawfully caused is penis to touch the vagina of CO a girl aged nine (9) years.

2. The appellant denied both charges and the Prosecution called four (4) witnesses who testified in support of their case.

3. The trial court after hearing the prosecution and defence case found the appellant guilty of the main charge and convicted him accordingly and sentenced the appellant to serve life imprisonment.

4. Aggrieved by the said conviction and sentence, the appellant filed this appeal on 18th December , 2018 claiming that:

i. That no medical evidence was adduced in court linked the appellant to the said offence as he was not medically examined;

ii. That the trial magistrate erred in law by relying on the sole evidence of the complainant without noting that no other witnesses corroborated her evidence;

iii. That the trial magistrate failed to observe that there was no medical evidence linking me with the alleged offence;

iv. That the trial magistrate erred in law and fact by not considering that the age of the complainant was not proved beyond reasonable doubt;

v. That I be served with the trial court records to enable me erect more grounds.

5. The appellant also filed supplementary grounds of appeal which he relied on at the hearing of this appeal, supported by his written and oral submissions. In his supplementary grounds of appeal, the appellant claims that:

i. That, the sentence imposed upon me is no manifestly harsh and excessive as to amount to a misdirection.

ii. That the charge was incurably and fatally defective as the particulars of charge were ambiguous and equivocal contrary to the provision of the law.

iii. That there was no circumstantial evidence to prove to empress the point and place where the alleged offence was committed.

iv. That, the learned trial magistrate erred in both point of law and facts in failing to appreciate the glaring and looming

contradictions in the Prosecution key witnesses.

v. That the Prosecution set of evidence fell far shot below the degree of accuracy required to justify a conviction in the absence of very essential witnesses who were not availed in court to clear doubts placed upon them yet they were mentioned in the evidence.

vi. That, the learned trial magistrate erred in both point of law and facts by failure to comply with Section (169)(1) of the CPC during the delivery of the courts findings and in the manner in which he disapproved my defence.

vii. That the learned trial magistrate did not meticulously treat circumstantial evidence with greatest care to secure his decision.

viii. That, the learned trial magistrate failed to consider that I was not given charge sheet during Pleas as required by the law.

ix. That, the learned trial magistrate erred in both point of law and facts in failing to consider that the investigations done in this matter was shoddy.

6. This being a first appeal, this court is called upon to reevaluate, reassess and reexamine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind that it did not hear or see the witnesses as they testified. This is a principle espoused in several decisions as pioneered by ***Okeno v Republic [1972] E.A. 32.***

7. Revisiting the evidence before the trial court, PW1 CAO a minor [full name withheld] testified on oath after *voire dire* examination that she was 9 years old. She stated that on the 5th day of June, 2018, she was herding their cows and also fetching firewood while the appellant was also herding his cows. She stated that a certain lady called her mother and her mother went away with one RA, leaving PW1 at the place where she was fetching firewood after the appellant asked to assist her cut a dry tree near a bush. In the process, the appellant called PW1 and took her into the bush. While in the bush, the appellant removed her dress and pant, told her to lie on the ground which she complied , he removed his clothes , lay on her and put his penis into her vagina. and put his penis into her vagina. She stated that she experienced pain during the incident but that she did not scream for help because the appellant threatened to kill her and told her not to inform anybody. She therefore went to her home but never informed her mother immediately even after her mother suspected that the complainant had a problem after going for a short call. The following morning, she explained to her mother what had happened to her and her mother told her to shower then she escorted PW1 to Nango hospital where she was treated and examined. She stated that her mother also took her to the chief's home where they found the appellant and made a report. Later, they went to Bondo Police station where her mother made a report. After that, her mother took her to Bondo Sub-County hospital where she was treated and examined. She identified the appellant in court as the person who defiled her saying that she knew him by the name Luoch.

8. In cross examination she stated that she did not know the appellant prior to the date of the incident. She reiterated that at the time of the incident, the appellant was herding his cows and that he called her when she wanted to cut a tree after her mother left to another farm which was a few meters away. She denied knowing or going to the appellant's home.

9. **PW2 JULIUS NYERERE** the Chief of Central Sakwa Location testified and recalled that on the 6th day of June, 2018, he was in his office when one Wasonga Odongo went and reported that the appellant had defiled the complainant herein who was being treated at Uyawi Health Centre. PW2 accompanied the reportee to the appellant's home where they found him and arrested him. Later, he escorted both the girl and the appellant to Bondo Police Station. He learnt that the incident took place on 5/6/2018.

10. On cross examination, PW2 stated when they went to the appellant's home they found him grazing his cattle in an open field.

11. **PW3 RAO** the mother to PW1 testified that on the 5th day of June, 2018, she was grazing her cows in her shamba and the appellant was also grazing his animals therein. She stated that in the process, a certain lady by the name N passed by and she accompanied her to her farm to get cowpeas and PW3 sent the complainant to go and collect a panga from home so that the complainant could use it to fetch firewood.

12. It was her further testimony that later in the evening, PW1went for a short call and PW3 suspected her to be having a problem. She stated that at night she again suspected that the complainant was having a problem but when she asked the complainant what had happened, the complainant refused to tell her. She stated that she also saw black stains on the complainant's pant and when she inquired further the complainant told her that she had soiled her pant after along call. That she told PW1 to bath and that at night she noticed that PW1 was continuously releasing some sound. The following day in the morning, PW3 persisted and the complainant opened up and told her that the appellant defiled her the previous evening. She stated that she took PW1 to Uyawi Health Centre where she was treated and examined and that the doctor told her that PW1 was defiled and removed sperms from PW1'ds genitalia. Later, she took her to Bondo Police Station where she made a report. The complainant was issued with a P3 form which she took to the hospital and was filled by a doctor. She stated that the complainant was nine (9) years at the time of the incident. PW3 identified age assessment report pf the complainant from Bondo District Hospital.

13. In cross examination by the appellant, PW3 stated that she had lived in the Uyawi for two years and that she had known the appellant for some time. Further, that her home and that of the appellant were near each other. She stated that she did not know if the appellant was related to PW3's employer.

14. **PW4 PC (W) JULIAN OTIENO** investigated the case. She stated that she received a report on the morning of 6/6/2018 and commenced investigations oin the matter as the suspect appellant herein was already in custody the appellant was already in custody. She stated that during the investigations, she recorded the complainant's statement and that the complainant explained to her that the appellant defiled her when she was fetching firewood on the 5th day of June, 2018.

15. **PW4** stated that upon recording the complainant's statement, she issued her with a P3 form which was filled by a doctor. She also took the complainant to the hospital for age assessment and she received a report d**ated 26/6/2018** which she produced as exhibit 2 herein.

16. **In cross examination he denied taking the appellant to hospital for examination and stated that the complainant identified the appellant as her defiler.**

17. **PW5 DAVID ODIERA** a clinical officer based at Bondo Sub County Hospital examined the complainant aged 9 years and filled the P3 form on the 7th day of June, 2018. He stated that on examination on the complainant's genitalia revealed multiple deposit of epithelial cells and multiple lacerations on both *labia minora and majora* and there was also severe tenderness. The hymen was also broken. He formed the opinion that there was defilement and he produced the P3 form as exhibit 1. He also produced treatment notes from Uyawi Health Centre which he used to fill the P3 Form, as PEX 2.

18. On being placed on his defence, the appellant The testified on oath as DW1 and stated that on the 5/6/2018, he was herding his cows. He saw the complainant and her mother. The complainant's mother sent her to go and collect a panga from home. He stated that at 4.00 p.m, he went back to his home and on the following day the chief went and arrested him. He denied the allegations that he defiled the complainant.

19. In cross examination he denied being known by the name Luoch and stated that he indeed saw the complainant and her mother on 5th June 2018. He stated that he used to herd the cows for the complainant's family but he quit. He vehemently denied defiling or touching the complainant.

Submissions

20. In support of his grounds and supplementary grounds of appeal, the appellant filed written submissions which he adopted as canvassing the appeal and added in response to the oral submissions by the Respondent's Counsel Mr. Okachi Prosecution Counsel that he did not defile the complainant and that he was grazing cows and that it was raining.

21. He submitted in his brief written submissions that the trial magistrate failed to weigh the strength of the prosecution evidence and misdirected himself to convict (1) the appellant, the issue which arose for determination is to confirm whether (I) the appellant was involved in the respective offense or not. That the prosecution based his involvement in alleged crime on unreliable, incredible, and insufficient evidence tabled before the trial court.

22. Opposing the appeal, the Prosecution Counsel relied on the evidence adduced for the prosecution in the trial court adding that the evidence was clear that the complainant was defiled during the day at about 4pmwhen the appellant was grazing cattle and that the complainant knew the appellant and so did the appellant hence they were not strangers to each other. He urged the appeal to be dismissed.

Determination

23. I have carefully considered the evidence on record together with the grounds of appeal and submissions for and against this appeal. In my humble view, the issues for determination can be drawn for the appellant's supplementary grounds of appeal which he argued in person and therefore I shall deal with each of those material grounds as the submissions were so skeletal that one can hardly establish anything in it to support the appeal.

24. The first issue is whether the sentence imposed on the appellant was manifestly harsh as to amount to misdirection. The appellant was charged and convicted under section 8(1) as read with section 8(2) of the Sexual Offences Act. In the latter subsection, upon conviction for the offence of defilement where a child is under the age of 11 years, the mandatory minimum sentence is life imprisonment. The trial court after finding the appellant guilty of the main charge of defilement and after satisfying himself that the child was aged 9 years s per the age assessment report of 26/6/2018 sentenced the appellant to a mandatory sentence of life imprisonment. This sentence is lawful and therefore there was no misdirection. However, the Court of Appeal has made it clear in the **Jared Injiri Koita v Republic [2019]e KLR** decision, applying the principles espoused in the Francis Muruatetu v R case that mandatory minimum sentences are unconstitutional hence the trial court now have discretion to mete out any other sentences other than mandatory minimums having regard to the mitigations and circumstances of each case. In this case the appellant in mitigation pleaded for leniency saying he was a first offender and maintaining his innocence before he was handed mandatory life imprisonment.

25. The appellant maintained his innocence on appeal. In my humble view, there is no reason who a grown up man would prey on a small child like the complainant and defile her, he deserved deterrent sentence. I will however return to the question of sentence later.

26. **On the ground that the charge was incurably defective**, there was no submission on it but I have perused the charge sheet dated 8/6/2018 and I find no defect therein as to vitiate the appellant's trial and conviction. I find no substance in this ground of appeal. The same is dismissed.

27. **On the ground that the trial court did not give the appellant the charge sheet during plea as required by law,** the appellant never raised this issue at the trial and neither did he ask for copy of charge sheet to be supplied to him before the plea and he was denied. In addition, the trial court record shows that on 8/6/2018 the court ordered that the appellant be given witness statements and all documents intended to be relied on by the prosecution after plea of not guilty was entered. The appellant does not say that he did not understand the charge facing him nor does he show any prejudice occasioned to him as there was no plea of guilty entered against him. I find the ground of appeal an afterthought and farfetched, I dismiss it.

28. **On whether the prosecution failed to call all crucial witnesses** who were mentioned by other witnesses, and therefore whether the prosecution proved its case against the appellant beyond reasonable doubt, the appellant did submitted relying on the decision **in Bukenya v Uganda[1972] EACA 341, 549** where the court held that failure to call crucial witnesses entitled the court to infer that had the witnesses in question been called, they would have given adverse evidence to the prosecution's case hence the court should acquit the appellant.

29. According to the appellant, the Clinical Officer and the Laboratory technician who attended to the victim at Nango Hospital should have

been called as witnesses to support the allegations of first report and defilement.

30. The holding in Bukenya V Republic is clear that failure to call all witnesses necessary to establish the truth even if their evidence may be inconsistent is imperative. In addition, that the court itself has a duty to call any person whose evidence appears to be essential to the just decision of the case.

31. However, section 153 of the Evidence Act Cap 80 Laws of Kenya provides that in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. Further, section 124 of the Evidence Act the proviso thereof allows a court in sexual offences to convict on the sole evidence of the complainant if it is satisfied that the victim is being truthful.

32. It follows that the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not called.

33. I have perused the evidence adduced before the trial court and in my view, there was evidence adduced by PW1 the minor who testified on oath after voire dire examination and stated how she was defiled in broad daylight by the appellant whom she recognized as the person who had been grazing his animals next to where she was grazing theirs and fetching firewood. PW2 too saw the appellant at the place taking care of his animals before she left behind PW1 cutting firewood. The appellant himself in his defence admitted to being at the scene taking care of his animals and that indeed he saw the complainant and her mother and even stated how the complainant's mother send her to go back to her home and collect a panga and that he returned home at 4pm only to be arrested the following day. He denied defiling the complainant.

34. PW5 the Clinical Officer Mr. David Odiera based at Bondo Subcounty Hospital who filled the P3 form Exhibit 1 and also produced Exhibit 2 treatment notes from Uyawi Sub county Hospital and laboratory tests for the complainant. The appellant did not object to the Clinical Officer producing the treatment notes and laboratory results which he used to fill the P3 form.

35. In my view, the appellant had the opportunity to require the laboratory technologist and doctor who first attended to the victim to produce the said documents. The Clinical officer having used the said documents to fill the P3 form for the complainant, and after he had himself examined the complainant, I find no prejudice occasioned to the appellant who did not object to the production of the said documents. The Clinical Officer also made his own independent findings after examining the complainant hence it cannot be said that the prosecution failed to call essential witnesses.

36. I find that the failure to call the laboratory technician and the doctor who first attended to the complainant was not fatal to the prosecution's case as there was sufficient evidence explaining the circumstances under which the complainant was defiled. The evidence of PW1 was corroborated by PW5 and PW2, and to some extent, as far as the appellant being at the scene of crime was concerned, by the appellant himself admitting that he was grazing cattle at the place and time in question. The appellant cannot therefore in his submissions claim that he was not at the scene as that would be raising the defence of alibi in submissions. Submissions are not evidence and one cannot adduce fresh evidence in submissions. The trial court which had the chance to see and hear the complainant and her mother testify. He believed in the complainant's testimony and stated that he believed that she was telling the truth, after analyzing her evidence which did not require corroboration. I find no reason to differ with that finding by the trial court. Furthermore, the allegation of a grudge between the appellant and the employer of the complainant's mother was never an issue raised at the trial and there was no evidence to show that her employer had engineered the complainant and her mother to frame a case of this nature against the appellant. I find the ground of appeal by the appellant devoid of merit and dismiss it.

37. The appellant also submitted alleging that the evidence by prosecution witnesses was contradictory and that the clothing worn by the complainant on the material day were not produced and that the color of the said clothing was not stated and that the complainant bathed hence there was no evidence of defilement, although PW2 stated that the doctor removed sperms from PW1'vagina, the Clinical Officer did not observe any spermatozoa.

38. I have examined the evidence adduced by the prosecution witnesses and I find no inconsistency of material contradiction. Failure to state the colour of the pants or to produce the said pants as exhibits was not fatal to the prosecution's case. In addition, the fact that the complainant's mother stated that the doctor removed sperms from the victim's genitalia whereas the Clinical Officer never stated that he observed spermatozoa in the victim's vagina is not a contradiction as PW5 was clear that laboratory tests showed epithelial cells in the genitalia and further, that he found the hymen of the victim perforated. The labia majora and minora had multiple abrasions and severe tenderness. He concluded that the child was evidently defiled.in my view, it matters not that it was never stated whether the child had difficulties walking after defilement as the mother stated that she observed unusual sound from the child on her passing of urine and in the night that is why she insisted to establish from the child what had happened to her and the child who testified that she had been threatened by the appellant with death revealed to her what the appellant had done to her.

39. The fact that the complainant was examined on 7th June 2018 two days after the occurrence of the offence on 5th June 2018 in my view was not fatal to the prosecution's case. The victim's stated that she was defiled on 5th June 2018. Her mother too stated that that is the day they were to be found at the scene of crime and that is the day the appellant conceded to have been grazing his animals at the scene. The child did not disclose to her mother of what had happened to her until the morning of 6th June 2018. That same day her mother reported the incident to the local administration and to the police as per the P3 form produced as exhibit 1 and treatment notes from Uyawi-exhibit 2. The child was also taken to hospital on 6th and treated and the P3 form filled on 7th June. 2018. There is no legal requirement that the P3 form must be filled the same day the offence is committed. The challenge by the appellant therefore fails and is dismissed.

40. The allegation by the appellant that the investigating officer or assistant chief never visited the scene of crime is in my view baseless as the visitation was not going to unravel anything material to this case.

41. Albeit the appellant claimed that investigations were shoddy and that the he gave alibi defence, I find that attack devoid of merit as the defence evidence was not that of alibi. The appellant placed himself at the scene of crime the time the victim stated that she was defiled just after her mother had left. It was about 4pm. The appellant stated that he left at about 4pm after grazing his animals. PW3 stated that she left the farm at about 4.30 pm. In my view, the evidence on record by PW1and PW3 shows that the appellant could only have left the scene after defiling PW1.

42. There was sufficient evidence from PW1 which was believable by the trial court that she was telling the truth. The age assessment report dated 26th June 2018 showed that she was 9 years old and there was evidence of penetration. Accordingly, I find and hold that the evidence against the appellant sufficiently proved the offence of defilement beyond reasonable doubt. The conviction of the appellant for the offence was sound. The investigations conducted established that the appellant was responsible for the offence. they were proper investigations. I uphold the conviction of the appellant by the trial court.

43. Back onto sentence, although the appellant never attacked it in his submissions, the appellant was handed mandatory life sentence as stipulated in section 8(2) of the Sexual Offences Act as the child was aged between 8-9 years old. The sentence was lawful. However, the Court of Appeal in **Jared Injiri Koita v Republic [2019]e KLR** has since held that mandatory sentence, applying the principles espoused in **SC Pet 15 and 16 of 2015 Francis Muruatetu and another v Republic** is unconstitutional. Nonetheless, the appellant was given an opportunity to mitigate and he prayed for leniency. He stated that he was a first offender and denied committing the offence. The trial court sentenced him to life imprisonment as provided by law.

44. It is clear from the trial court record that the trial court did not have any discretion to sentence the appellant to any other sentence other than life imprisonment. That has since changed.

45. The trial magistrate has since been transferred to a different court and completely out of jurisdiction. For that matter, I shall exercise discretion to accord the appellant an opportunity to mitigate for resentencing. I order for a social inquiry report on the appellant to be filed by Siaya County Probation Officer who shall also file a victim impact statement in this matter for consideration before resentencing is done.

46. On the whole, the appeal against conviction is dismissed.

Dated, signed and delivered at Siaya this 10th day of February 2020.

R.E.ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi Snr Principal Prosecution Counsel

CA: Brenda and Modest