



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 56 OF 2018

IMK 1ST APPELLANT

JOZ 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Kisumu (Hon.A. Odawo SRM) dated the 29th May 2018 in Kisumu CMCCR S.O No. 13 of 2015]

JUDGMENT

Both the Appellants, **IMK** and **JOZ**, were convicted for the offence of **Defilement** contrary to **Section 8 (1) (4)** of the **Sexual Offences Act**. Each of them was then sentenced to 25 years Imprisonment.

1. In their respective appeals, the Appellants raised the following issues;

1. Defective Charge Sheet

2. As far as the 1st Appellant was concerned, the Charge Sheet was defective because the particulars of the charge sheet did not accord with the evidence adduced in court.

3. I find that when the evidence adduced by the prosecution does not accord with the particulars of the charge sheet, that does not render the said charge sheet defective.

4. The divergence between the evidence and the particulars of the charge sheet ought to lead an acquittal, on the grounds that the said evidence did not prove the case which the prosecution had set out to prove.

2. Violation of Article 49 (1) (f) of the Constitution

5. An unexplained delay in taking an arrested person to court constitutes a violation of his right to be taken to court within 24 hours of his arrest.

6. However, such a violation does not give rise to an automatic acquittal of the accused person.

7. The violation of his constitutional right should give rise to an appropriate remedy, such as compensation, which ought to be paid to the accused by the person or persons who caused the said violation.

8. In the meantime, if there is sufficient evidence to lead to a conviction, the accused person, who is culpable, should “pay” for committing the crime, through a conviction and an appropriate sentence.

3. Breach of Section 144 of the Criminal Procedure Code

9. The said section stipulates that the court has the requisite mandate to summon any person to attend court and to produce all documents and writings in his possession or power, if such a person was not ready to voluntarily attend court.

10. The Appellants described a person named [particulars withheld] *Alias* BISHOP, as an essential witness.

11. The evidence on record shows that the said Bishop was one of the persons originally arrested.
12. However, as Bishop was not charged, the Appellants submitted that there had been a breach of **Section 144** of the **Criminal Procedure Code**.
13. The Respondent submitted that the said Bishop was not an essential witness.
14. I have carefully re-evaluated the evidence on record. The role which was played by Bishop was that of persuading or procuring the Complainant, so that she was then led to the house of JOZ, the 2nd Appellant.
15. In the circumstances, I find that Bishop was not an essential witness, as there is absolutely no indication that he saw the Appellants commit the offence.
16. The failure by Bishop to testify neither diminished the prosecution's case nor prejudiced the accused persons.

4. Penetration not proved

17. The first piece of evidence about the issue of penetration was provided by the Complainant.
18. She said that the Appellants had sex with her.
19. She told the court that each of the Appellants, at different times, inserted their respective penises into her female genitalia.
20. As a result of the said acts, the Complainant became pregnant.
21. She was also infected by HIV.
22. **PW2** is a Community Health Worker. She attended to the Complainant when the incident happened.
23. During the trial, **PW2** helped the Complainant to testify, after the learned trial magistrate had declared the Complainant as a Vulnerable Witness.
24. The Complainant was found to be a person with Mild-Moderate Mental Retardation. Consequently, the court directed that the Complainant would testify through an Intermediary.
25. **PW2** was the said intermediary.
26. She testified that when the Complainant had been defiled, she went to the hospital, while walking with her legs apart.
27. **PW6**, Dr. Robert Omollo, examined the Complainant. He found that her hymen was not intact. There were no tears or lacerations on her labia and vagina.
28. However, there was white discharge. When urinalysis was conducted, it was established that the Complainant had a Urinary Tract Infection (UTI).
29. A combination of those findings provided sufficient proof of penetration.
30. I am alive to the fact that the Complainant admitted having had sex with other persons too. The issue as to the identity of the said persons is distinct from the evidence which proved that there had been penetration of the Complainant's vagina, by the Appellants' male genital organs.

5. Identity of the perpetrator(s)

31. The Complainant testified that both the Appellants were persons who had been well-known to her even prior to the incidents which gave rise to this case.
32. Therefore this was a case of recognition.
33. The mother of the Complainant also testified that the Appellants were well known to her. Indeed, the 1st Appellant, IMK, was a relative.
34. The father of the Complainant also corroborated the evidence concerning the recognition of the Appellants.
35. Therefore, there was absolutely no doubt at all that the Appellants were recognized positively by the Complainant.
36. When an accused person is not a stranger to either the Complainant or any other witness, there would be no purpose served by

conducting an Identification Parade. Such parades are necessary to ascertain whether or not an arrested person had been identified. Therefore, if the arrested person was already known by the Complainant or by any other witness, he would be picked out by virtue of such previous knowledge, and not just because he was seen when he was committing the offence.

37. In cases where the accused person was recognized, there is no requirement for the witness to give the description of the accused to the police.

38. When description is given to the police, it enables them to be on the lookout for the suspects matching the said description.

39. And after arrest, the police mounting an Identification Parade would also put together a parade comprising persons whose descriptions were in line with those given by the Identifying Witness.

40. That was not necessary in instances where the accused person had been recognized.

41. In this case, the names of the accused persons were provided. Therefore, their respective arrests were based on recognition, as opposed to some descriptions about them.

42. When the Complainant was being cross-examined, she gave clear detailed and graphic answers concerning her encounters with both Appellants. I am convinced that she not only knew them well, but also that she had ample time to clearly see each of the Appellants when they defiled her.

6. Age of Complainant

43. Neither of the Appellants took issue with the evidence adduced to prove the age of the Complainant. Therefore, the matter does not fall for determination.

44. Nonetheless, I do wish to state that the Baptismal Certificate which was produced by the Prosecution provided a solid basis upon which the age of the Complainant was determined.

45. She was born on 5th August 1998. Therefore, as at June/July 2015, the Complainant was 17 years old. She was therefore a minor.

7. The Defences

46. The learned trial magistrate noted that the 1st accused only gave a chronology of the events on the day of his arrest.

47. He was arrested on 11th August 2015: and it is correct that in his defence, he only dwelt on the things he had done on that date.

48. The offence was said to have been committed on diverse dates in June and July 2015, but the 1st accused did not put up any answer to the evidence which linked him to the said offence.

49. Similarly, the 2nd accused failed to give any evidence which could have cast any doubt on the evidence tendered by the prosecution.

8. Sentence

50. Pursuant to **Section 8 (4)** of the **Sexual Offences Act**;

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

51. The Appellants were each sentenced to 25 years imprisonment.

52. The Appellants have submitted that;

“..... the sentence should have a minimum of 15 years, and that with the evidence provided the sentence should have been lighter.

53. If the Appellants are saying that they should each have been sentenced to less than 15 years imprisonment, I must state that I find no merit in that contention.

54. Parliament has the mandate to make law. And in respect of criminal offences, parliament also passes law which stipulates the sentence which the court can hand down to a convicted person.

55. When Parliament says that the sentence shall, at the minimum, be 15 years imprisonment, the court is under a legal duty to comply with

the said law. Therefore, I find that it was not open to the trial court to sentence the Appellants to less than 15 years imprisonment.

56. The trial court had the discretion to either sentence the Appellants to 15 years Imprisonment or to enhance the term of the imprisonment.

57. By sentencing the Appellants to 25 years imprisonment, the learned trial magistrate exercised her discretion lawfully.

58. The question that now arises in the appeal is whether or not the sentence should be reduced.

59. In my considered opinion, when the Appellants defiled a child who had a history of Mild-Moderate Mental Retardation, they were taking advantage of a person who was already vulnerable. That is very unfortunate.

60. Secondly, the Appellants were not strangers to the Complainant. They ought to have been mindful of her welfare. Instead, they took advantage of her vulnerability, by physically abusing her sexually.

61. I find no reason that would warrant a reduction of the sentences.

62. Accordingly, the appeals are dismissed in every respect.

DATED, SIGNED and DELIVERED at KISUMU This 15th day of April 2020.

FRED A. OCHIENG

JUDGE