REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 28 OF 2019

SAMMY JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.79 of 2017 of the Chief Magistrate's Court at Busia by Hon. S.O Temu– Principal Magistrate)

JUDGMENT

1. Sammy Juma, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (3) [sic] as read with section 8(3) of the Sexual Offences Act No. 3 0f 2006.

2. The particulars were that on the 16th day of July 2017 in Teso-North sub County of Busia County, he caused his penis to penetrate the vagina of PM, a girl aged twelve years.

3. The appellant was sentenced to serve twenty years imprisonment. He appeals against both conviction and sentence.

4. The appellant was in person. He raised six grounds of appeal which can be summarized as follows:

a) That the learned trial magistrate erred in law and in fact by disregarding gross violations of Article 50 of the Constitution.

b) That the learned trial magistrate erred in law and in fact by convicting the appellant on hearsay and contradictory evidence.

c) That the learned trial magistrate erred in law and in fact by not appreciating the contradictory evidence by the prosecution.

d) That the learned trial magistrate erred in law and in fact by relying on medical evidence that lacked probative value.

e) That the learned trial magistrate erred in law and in fact by failing to consider his evidence.

5. The appeal was opposed by the state through Mr. Mayaba, learned counsel who contended that the prosecution proved its case to the required standards.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Section 8 (1) (3) of the Sexual Offences Act does not exist. The charge to that extent was erroneously drafted. It ought to have read:

…contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act …

Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the Criminal Procedure Code.

8. Article 50 of the Constitution of Kenya provides for fair hearing. On this ground the appellant contended that he was not supplied with the documents the prosecution was to rely on and that he was not advised that he could ask for an advocate to represent him.

9. The appellant did not indicate which documents he was not supplied with. On 15th April 2019 he requested for time to go through witnesses' statements for he had just received them. The matter was therefore adjourned upon his request. I find that he was supplied with the necessary documents.

10. In the case of **David Njoroge Macharia vs. Republic [2011] eKLR** the Court of Appeal in addressing the right of an accused to be represented said:

> **Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of *Article 2 (6)*. Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.**
>
> **We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.**

It is clear that this is not one of the cases where the appellant would have been entitled to an advocate at the expense of the state.

11. The medical evidence, contrary to the averment by the appellant was produced by the maker and it is erroneous to say that it lacked probative value. Medical evidence or any other evidence on record is never taken in isolation but together with the entire evidence on record.

12. What was the evidence at the disposal of the learned trial magistrate on which to make a finding? The complainant **PM** (PW1) gave a history of two previous sexual liaisons with the appellant other than the one complained of in this case. This first two encounters may only be relevant to explain the absence of the hymen in the instance that gave rise to this case.

13. The complainant's evidence was that when her mother sent her and her sister, the appellant got hold of her. She screamed but he asked her to stop. Her sister ran home and reported to their mother. The appellant ran away on seeing her mother who found him defiling her. She said she also ran away for fear of her mother.

14. GNW (PW2) testified that while lighting a brazier she heard a scream. Soon thereafter her daughter ran to her and reported that the complainant had been pulled into a church. She went and found a man defiling her daughter and both ran away on seeing her.

15. Section 8(1) of the Sexual Offences Act defines defilement in the following terms:

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

An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

a) Whether there was penetration;

b) Evidence must show that the accused is the perpetrator; and

c) The age of the victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

> **Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.**

These are the ingredients I will endeavour to find if the prosecution proved against the appellant.

16. The identity of the appellant was not in issue. He was known to the complainant prior to the incident complained of. She knew him by name.

17. The complainant was taken to hospital for examination on 19th July 2017 and the following were the observations:

a) Normal external genitalia;

b) No lacerations;

c) No hymen present; and

d) Whitish vaginal discharge.

These findings and the contention of the complainant were not sufficient to make a finding that the appellant had defiled her on the occasion

complained of. The learned trial magistrate was influenced by the history to find that defilement was proved. The charge was very specific when the offence was committed.

18. I therefore make a finding that penetration on the incident of 16th day of July 2017 was not proved. I however find that the prosecution proved the offence in the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. I quash the conviction in the substantive charge and set aside the sentence thereof and substitute it with conviction under section 11 (1) of the Sexual Offences Act and sentence him to ten years imprisonment. The sentence will run from the time he was sentenced by the trial court. His appeal succeeds to that extent.

DELIVERED and SIGNED at BUSIA this 8th Day of April, 2020

KIARIE WAWERU KIARIE

JUDGE