REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 185 OF 2018

GODFREY AMBONGO ESHIKUMO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(from the original conviction and sentence in Butere SRMC Sexual Offence Case No. 5 of 2018 by Hon. F. Makoyo, SRM, delivered on 4/12/2018)

JUDGMENT

1. The appellant was convicted of the offence of defilement of a person with mental disability contrary to Section 7 (1) (c) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal are in summary that:-

(1) That the trial did not meet the threshold of a fair trial as stipulated by Article 50 (2) (g) (h) and (j) of the Constitution of Kenya.

(2) That the charge was incurably defective.

(3) That Section 36 of the Sexual offences Act was not complied with.

(4) That the appellant was convicted on the evidence of a single witness without corroboration of the said witness.

(5) That the evidence adduced before the trial court was unsatisfactory.

(6) The trial court did not give due consideration to the appellant's defence but instead shifted the burden of proof to the appellant.

2. The grounds of appeal were expounded by the written submissions of the appellant. The prosecution counsel did not make any submissions in the appeal.

3. The particulars of the offence against the appellant were that on the 6th day of March, 2018 in Butere Sub-County within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of JKO (herein referred to as the complainant/victim) a child aged 14 years being a person with mental disabilities.

Case for Prosecution –

4. The case for the prosecution was that the complainant was at the material time aged 14 years as indicated by her birth certificate, P.Ex 4. She was living with her mother PW2. She was mentally challenged.

5. That on the material day at 6 p.m. the complainant's mother PW2 left the complainant at home and went to the nearby shops. The appellant went to the home of the complainant and found her preparing vegetables. He asked her to accompany him to his house for him to give her some money. The complainant went with him. On getting to his house he undressed her and defiled her.

6. Meanwhile the complainant's mother returned home after a short period of time and did not find the complainant at home. She was told by a neighbour that her daughter had been seen in the company of the appellant. She went to the house of the appellant. She called at the complainant. The complainant answered her from the house. She entered into the house and found her daughter struggling to dress up. The appellant was dressed in a shirt and an underwear. Some of her daughter's clothes were torn. She took them. She escorted her daughter to Butere Sub-County Hospital and reported at Butere Police Station. She was examined by a clinical officer PW3 who found her with a bruise on the vaginal, redness on the same, broken hymen and whitish discharge. A laboratory examination revealed large number of epithelial

cells. The clinical officer completed a P3 form and Post Rape Care form. Later the appellant was arrested by APC Nyaosi PW3 of Mumias sub-County AP office. PC Miriam Akwama PW5 investigated the case. She visited the house of the appellant. She picked the appellant from the AP offices and took him to Butere Police Station. She escorted the girl to Kakamega County Referral Hospital where she was examined by a psychiatrist doctor PW5 who diagnosed her to suffer from organic brain syndrome. The appellant was charged with the offence. During the hearing the clinical officer PW3 produced the P3 form, the treatment notes and the Post Rape Care form as exhibits, P.Ex 1, 2 and 5 respectively. The psychiatrist doctor PW6 produced the mental assessment report as exhibit, P. Ex 3. The investigating officer PW5 produced the birth certificate as exhibit, P.Ex 4. It indicated that the complainant was born on 10/7/2003.

Defence Case –

7. When placed to his defence the appellant stated in a sworn statement that he was working for a person called Lutta at Bushianda Village. That on the 16/3/2018 he was at work at the compound of the said person. That at 8 p.m. policemen went to the home and arrested him. They did not tell him the reason for his arrest. He was taken to the police station. He was charged.

8. In cross-examination the appellant stated that PW2 was his neighbour but that he did not know the complainant. That he came to see her in court.

Submissions –

9. The appellant stated in his submissions that the section he was charged under, Section 7 (1) (c) of the Sexual Offences Act does not exist. Therefore that the charge was defective.

10. The appellant submitted that there was no medical evidence to link him with the offence and especially that there was no test conducted under Section 36 of the Sexual Offences Act to ascertain whether there was anything to link him with the offence.

11. The appellant further submitted that he was placed in police custody for three days before he was arraigned in court. That he was not taken to court within 24 hours as required by Article 49 (1) (f) of the Constitution.

12. The appellant submitted that the trial court failed to consider his defence.

Analysis and Determination –

13. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Kiilu & Another –Vs- Republic (2005) I KLR 174**.

14. The appellant was charged under Section 7 (1) (c) as read with Section 8 (3) of the Sexual Offences Act. There is actually no Section 7 (1) (c) under the Sexual Offences Act. The charge of defilement of a person with disability is provided for in Section 7 of the Sexual Offences Act that reads that:-

> ***"A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."***

15. The punishment for the offence is provided for under the same section. The charge was therefore defective in that there is no section such as 7 (1) (c) of the Sexual Offences Act. It was also wrong to further charge the appellant under Section 8 (3) when the punishment was provided for in Section 7 of the Act.

16. This court however has power under Section 382 of the Criminal Procedure Code to rectify an error or irregularity committed by a lower court where such an error does not occasion a failure of justice on an accused person.

17. Section 134 of the Criminal Procedure Code requires a charge to consist of the statement of the offence and particulars of the offence. In the appellant's case the statement of the offence was stated to be defilement of a person with mental disability. The particulars of the charge were further stated. The two gave the appellant clear information as to the charge that he was facing. The fact that the wrong section of the law was cited did not occasion a failure of justice to the appellant. The appellant defended himself without any prejudice. The defect in the charge is thereby curable under Section 382 of the Criminal Procedure Code. That ground of appeal does not stand.

18. Defilement can be proved not only by medical evidence but also by way of oral and circumstantial evidence – See **AML –Vs- Republic (2012) eKLR** and **Kassim Ali –Vs- Republic in Mombasa Criminal Appeal No. 84 of 2005**. The fact that there is no medical evidence to link an accused person with the commission of an act of defilement does not mean that defilement cannot be proved as the offence can be proved by other ways other than medical evidence.

19. Section 36 of the Sexual Offences Act grants a court trying an accused person of an offence under the Sexual Offences Act power to order for a test, including a DNA test to be conducted on the accused person to ascertain whether or not he has committed an offence under the Sexual Offences Act. However it is clear from reading of the section that the same is not couched in mandatory terms. This was emphasized by the Court of Appeal in **Hadson Ali Mwachongo –Vs- Republic (2016) eKLR**. The fact that the section was not complied with in the case against the appellant was not fatal to the case.

20. The appellant submitted that he was convicted on the evidence of a single witness which was not corroborated.

21. Section 124 of the Evidence Act provides that:-

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***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."***

22. In face of the above corroboration of evidence of children in Sexual Offence cases is not a mandatory requirement of the law. A court can convict on the single evidence of a child if it is satisfied that the child is telling the truth.

23. The appellant stated that he was arrested on 16/3/2018 and placed in custody for 3 days before being arraigned in court. APC Nyaosi PW3 confirmed that he arrested the appellant on 16/3/2018. The court file indicates that the appellant was arraigned in court on 19/3/2018. It is therefore correct that the appellant was not brought to court within 24 hours as required by Article 49 (1) (f) of the Constitution. There was thereby a breach of the appellant's right in not being brought to court within the time stipulated by the constitution. However the recourse of the appellant is to sue the state for damages for breach of his rights – See **Julius Kamau Mbugua –Vs- Republic (2010) eKLR** and **Fappy Mutuku Ngui –Vs- Republic (2014) eKLR**. A breach of the said right does not thereby warrant for acquittal in a criminal matter.

24. When convicting the appellant of the offence the trial magistrate stated that penetration was proved by the evidence of the clinical officer. That the appellant was a person well known to the complainant. That the complainant's mother found the appellant in his house with the complainant. That the complainant and his mother were truthful witnesses. That there was no truth in the appellant's defence that the complainant's mother had framed up the case against him over a sore love affair.

25. On my own analysis of the evidence I have no reason to fault the trial court's findings. The clinical officer found the complainant with bruises on the vagina. The complainant's mother found the complainant in the appellant's house with the complainant trying to dress up while the appellant was wearing an underwear. These facts corroborated the evidence of the complainant that the appellant had indeed defiled her. For the appellant to have been found dressed in an underwear with the complainant in his house puts credence to the evidence of defilement. The trial court considered the insinuated defence of the appellant and found it wanting. There was indeed no truth in that defence. The trial court rightly dismissed the appellant's defence.

26. A Psychiatrist doctor PW6 examined the complainant and found her to suffer from a mental disability. The upshot is that the appellant was convicted on sound evidence. The appeal on conviction is thereby dismissed.

27. The minimum sentence for the offence of defilement of a girl with a disability is 10 years imprisonment. The appellant was sentenced to 20 years imprisonment. Recently in the case of **Evans Wanjala Wanyonyi –Vs- Republic (2019) eKLR**, the Court of Appeal held that the minimum sentence under Section 8 (4) of the Sexual Offences Act is not mandatory and that the court has discretion to impose a lesser sentence in an appropriate case. I consider the same principle to be applicable for the minimum sentence under Section 7 of the Act.

28. The appellant defiled a girl aged 14 years who was mentally challenged. I am of the view that the sentence of 20 years imprisonment was harsh. I consider a sentence of 10 years imprisonment to be sufficient for the offence committed. The sentence meted out by the lower court is therefore set aside and reduced to ten years imprisonment commencing from the date of sentence by the lower court.

Delivered, dated and signed in open court at Kakamega this 14th day of May, 2020.

J. NJAGI

JUDGE

In the presence of:

Mr. Mutua for State/Respondent

Appellant – present through video link to Kakamega G.K. Prison

Court Assistant - Polycap

14 days right of appeal.