



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HIGH COURT CRIMINAL APPEAL NUMBER 43 OF 2018

SAMUEL KOROS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kilgoris Principal Magistrate's Court

Criminal Case No. 743 of 2013, RM Oanda, SPM on 21st June, 2018)

JUDGMENT

1. The appellant **Samuel Koros** was charged in the Principal Magistrate's Court at Kilgoris in Criminal Case No. 743 of 2013 with two counts and an alternative count. The first count was in respect of the offence of defilement of a girl contrary to Section 8 (1) as read with section 8 (2) of the **Sexual Offences Act. No. 3 of 2006 (the Act)**. The particulars were that on diverse dates between 2nd and 4th of September 2013 in Transmara West District in Narok County caused his penis to penetrate into the vagina of MC a girl aged 15 years. The alternative count was for the offence of indecent act with a child contrary to section 11 (1) of the Act. The facts being that on diverse dates between 2nd and 4th September 2013 the appellant unlawfully and indecently assaulted MC, a girl aged 15 years by touching her private parts namely vagina. The second count was that of the offence of child trafficking contrary to Section 13 (a) of the Act. The particulars were that on the 25th August 2013 in Transmara West District of the Narok County knowingly and intentionally took MC, a girl aged 15 years out of the custody of her parents with the intention of facilitating the commission of sexual offences against the said MC.

2. The trial court acquitted the appellant on the second count and found him guilty on the first count. The appellant was convicted of the offence of defilement and was sentenced to 20 years imprisonment. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

- 1. That, the evidence brought forward by the prosecution was not sufficient and had glaring gaps therefore incapable of sustaining a conviction.**
- 2. That the prosecution failed to prove the age of the complainant as there was no birth certificate or an age assessment report produced.**
- 3. That the Leaned Trial Magistrate failed to consider the Appellant's defence.**
- 4. That the sentence was manifestly harsh and excessive.**

3. As a first appellate court, this court's duty is to re-evaluate the evidence adduced in the lower court as a whole and to the render this court's own decision on the evidence (*See Okeno vs. R {1972} E.A, 32at page 36*). This court is required to weigh conflicting evidence and draw its own conclusions, only then can it decide whether the Magistrate's findings should be supported. In doing so, this court should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses (*See Peter vs. Sunday Post {1958} EA 424*).

4. The prosecution called 7 witnesses. Pw1 **MC**, the complainant testified that she was 15 years old. She recalled that on 25/08/2013 as she was going to the shop she was grabbed by two men one of whom was the appellant. She recalled being carried to the appellant's house where she was locked in the appellant house where she and the appellant later had sex. The following day she recalled being left with a lady and her children at a different house. She was later taken back to the accused home but did not have sex on that day. On the third day in the morning the appellant was arrested.

5. Pw2 **JKN**, testified that on 28/09/2013 he was asked the whereabouts of CM by a neighbour. Upon asking his wife (Pw4) where the child

was, Pw4 remained silent. He reported the matter to the chief. The chief and the Administrative Police Officers later arrested the appellant.

6. Pw3, Paul Kipnetich Ngeno s the assistant chief of Angata Baragoi sub-location recalled that on 27/08/2013 Pw2 reported that his daughter was missing. On 30/09/2013 appellant informed him that the child was in his house. On 5/09/2013 the appellant was arrested after the child was found in his house.

7. Pw4 VN testified that on 29/08/2013 Pw1 left home to go to the neighbour. The following day she looked for Pw1at the neighbour's house. They asked Koros where CM was and he put on a surprised look before leaving. CM was later found and taken to Lolgorian hospital.

8. Pw5 Johana Kirui gave evidence that Pw2 told him of Pw1's disappearance. He called Joshua Koros who is the brother of the appellant who confirmed Pw1 was at their home with the Appellant. Pw1 had gone to their house and said she wanted to stay with the appellant. Shortly after he heard the appellant had been arrested.

9. Pw6 No. 70653 PC James Saurei, Pw6 the investigating officer based at Kilgoris Police station received the report and narrated what he was informed. The appellant was arrested by the area chief and the Administrative Police officers. The complainant was taken to the hospital and a P3 form filed.

10. Pw7, Dr. John Emejens, a medical officer based at Lolgorian sub-county hospital stated that he had worked at the hospital since November of 2014 and was familiar with Dr. Mitei's handwriting as well as his signature. Pw1 had a history of defilement. On the genitalia hymen was broken but not fresh. There was no evidence of vagina bruise and no tear, and no presence of any discharge. Lab test indicated no spermatozoa but there were pus cells and epithelial cells. Pw1 had no infection and HIV test was negative.

11. When put on his Defence the appellant gave sworn evidence and recalled that he was arrested without any cause. He also admitted to defiling Pw1 on cross examination by the trial court.

Dw2, Joshua Arap Koros, recalled that in August 2013 he found Pw1 in their home. His wife informed him that Pw1 had refused to go back to their home. He informed Pw2 of the situation, but unfortunately Pw2 did not act on it. Later on 05/09/2013 the appellant was arrested and charged with defilement.

Dw3 Joseph Kirui stated that the appellant's mother had sought advice from him on what to do in regard to the girl living in their home to which Dw3 advised her that he should report the same to the assistant chief. Later the appellant was arrested and taken to the police station.

12. The appellant filed written submission and made oral submissions through his Counsel Mr. Kiprotich. Mr. Kiprotich entirely relied on their written submissions. The state conceded the appeal for reasons that the age of the child was not proved.

13. Upon evaluating the evidence and the parties submissions, I find that the following issues are for determination, namely:-

a. *Whether the age of the minor was established.*

b. *Whether the offence of defilement was proved to the required standard.*

Whether the age of the minor was established.

14. Section 8(1) of the Act provides that:

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

The section provides the key elements of the offence of defilement. These are "Penetration," and "Child." In this instance case the appellant have submitted that Pw1 merely stated that she was 15 years having been born in 1998. The prosecution failed to table documentary evidence(a birth certificate) to ascertain the age of Pw1. They further submitted that the sentence where the victim is 15 years is different from that where the victim is 17 years.

15. I agree with the Appellant that the age of the complainant in an offence of defilement is an important element that must be established by the prosecution. The Act defines a child as "child" has the meaning assigned thereto in the Children's Act Cap 141 Laws of Kenya. The Children's Act defines a "child" as any human being under the age of eighteen years. The onus of proving the age of the victim lies on the prosecution. In the case of ***Francis Omuroni vs Uganda Criminal Appeal no 2 of 2000***, the Court of Appeal held thus:-

"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..."

16. Pw1 gave evidence that she was 15 years old. In the charge sheet the age is shown as 15 years. Pw6 also gave evidence that Pw1 was 15 years. The learned Magistrate in his judgment came to the conclusion that minor was aged 15 years. Pw7 also produced a P3 form in which the estimated age of Pw1 according to Dr. Mitei was 15 years. It is clear from the foregoing, that the minor was a child within the definition given under the Children's Act. The age given falls within the definition of a child as defined in the Children's Act. The learned magistrate found Pw1 to be 15 years after seeing Pw1 and conducting a preliminary examination. The doctor who examined Pw1 gave her age as 15 years. It is my finding that the age of the child was sufficiently proved to be 15 years.

Whether the offence of defilement was proved to the required standard.

17. The following excerpts from the minor's evidence is worth reproducing verbatim. She stated:-

“He locked me in his house. I sat there alone. They left. He brought me supper. We slept. We slept with him on the bed. Same beddings and mattress. We had sex. He removed my clothes and inner pants. We went to another house, we met a lady and her children. He left me with the lady, I stayed with her up to Sunday 01/09/2013. He took me to his home again. Same home. We ate lunch. We slept with him again that night. We didn't have sex this time.”

18. The minor's testimony as reproduced above is that the appellant had sex with her. This evidence was not rebutted. The above evidence is supported by the testimony of Pw2 and Pw4 who gave evidence that Pw1 was missing. Further corroboration was provided by the evidence of Pw2 and Pw3 that the child was found at the appellant's home. Pw7, the medical officer gave evidence that the minor had a history of defilement and upon examination, she was found to have a broken hymen but not fresh.

19. On the issue of identification I concur with the findings of the trial magistrate that Pw1 was with the appellant for a number of days and the appellant was a person well known to her. Identification of the appellant was therefore positive in the circumstance.

20. The above evidence weighed against the appellant's defence leaves me with no doubt that the appellant did not rebut the allegations against him. His defence did not address these key allegations. It is my finding that the evidence tendered by the prosecution sufficiently proved the offence and irresistibly pointed to the appellant's guilty. I also note that cross examination of the appellant by the learned Magistrate to which the appellant stated that he defiled Pw1.

21. The Appellant also submitted that the evidence presented by the prosecution in the trial court was not credible as it was riddled with contradictions. It is a settled principle of law that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it. In this appeal the inconsistencies identified are in relation to the dates on which the offence occurred and when Pw1 went missing. I find that the contradictions have not watered down the case laid by the prosecution. The contradictions are insufficient to set aside the prosecution case against the appellant.

22. After perusal of the record before me and I note that the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. I have considered whether the charge was defective in light of the fact that the complainant was 15 years and not aged 11 years or less. This court must ask itself whether it is appropriate to find that a charge sheet was fatally defective. The case of *Yosefu v. Uganda [1969] E.A. 236 – a decision of the Court of Appeal* and *Sigilani v. Republic [2004] 2 KLR 480* both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. *Sigilani v. Republic* (supra) held;

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

23. In this case, the Appellant was charged under section 8(1) as read with section 8 (2) of the Sexual Offences Act. Did this prejudice the Appellant and occasion a miscarriage of justice? I do not think so. The Appellant clearly understood the charges facing him and understood the ingredients of the crime charged so that he could put his defence. The trial magistrate in sentencing took into consideration the provisions of Section 8(3) of the Act which provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. This is the minimum sentence allowable by the law upon conviction for an offence of defilement under section 8 (3) of the Act. Therefore, no appeal against sentence is possible here. In conclusion this court finds that the appeal has no merit it is dismissed and the conviction is hereby affirmed. The sentence imposed by the trial court of twenty (20) years' imprisonment is affirmed.

Dated and Delivered at Kisii this 8th day of January 2019.

R.E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Kaba h/b Mr. Kiprotich For the Appellant

Mr. Otieno Senior Prosecution Counsel

Rioba Court clerk