



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 53 OF 2018

PATRICK ZINGA OPANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Eldoret (Hon. C. Obulutsa, CM) delivered on the 21st day of September 2015 in Eldoret Chief Magistrate's Court Criminal Case No. 2436 of 2012)

JUDGMENT

[1] This is an appeal by **Patrick Zinga Opanga**, the Appellant herein, from the conviction and sentence recorded in **Eldoret Chief Magistrate's Criminal Case No. 2436 of 2012: Republic vs. Patrick Zinga Opanga**. The Appellant had been charged before the Chief Magistrate's Court on **5 June 2012** with the offence of Defilement of a Girl contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No. 3 of 2006**. He was, in the alternative, charged with the offence of **Indecent Act with a Child**, contrary to **Section 11(1)** of the **Sexual Offences Act**. The Appellant denied those Charges.

[2] The Main Charge was thereafter amended at the instance of the Prosecution on **14 November 2014** and replaced with the Charge of Defilement of an Imbecile contrary to **Section 146 of the Penal Code, Chapter 63** of the **Laws Kenya** after it became apparent that the Complainant is a child with special needs. After the conclusion of the trial, the Learned Trial Magistrate found that the Main Charge had not been proved to the requisite standard; but that there was sufficient evidence to sustain a conviction in respect of the Alternative Charge. Consequently, the Appellant was found guilty of the Alternative Charge, convicted thereof and sentenced him to 10 years' imprisonment.

[3] Being aggrieved by the sentence imposed on him, the Appellant preferred this appeal on the following grounds:

[a] That the trial court erred both in law and fact by convicting him on unsupported evidence;

[b] That the Learned Trial Magistrate erred in law and fact when he sentenced him to 10 years' imprisonment on uncorroborated evidence;

[c] That the trial court erred both in law and fact by convicting him without considering his defence;

Thus, the Appellant prayed that his appeal be allowed, the conviction quashed and the sentence passed against him set aside.

[4] The Appellant thereafter filed Amended Grounds of Appeal reiterating his earlier contentions that the Prosecution evidence did not support the charges; that his fundamental rights to a fair and impartial trial were violated; that the case against him was not proved beyond reasonable doubt; and that the trial court failed to consider his testimony in his defence. The Appellant argued his appeal by way of written submissions under three broad grounds: namely, whether the ingredients of the Charge of Indecent Act were proved; that he was not accorded a fair trial; and that his defence was not considered.

[5] On behalf of the State, **Ms. Mumu** opposed the appeal. Her submission was that all the ingredients of the Alternative charge were proved by the Prosecution beyond reasonable doubt; and that the Appellant's defence was an afterthought and should therefore not be entertained. On sentence, it was the submission of **Ms. Mumu** that the same was lawful. She therefore prayed for the dismissal of the appeal.

[6] The Court has carefully considered the Appellant's Grounds of Appeal, the submissions made by either side, as well as the record of the lower court. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. This principle was aptly expressed in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

[7] Before the lower court, the Prosecution called a total of 5 witnesses in proof of the allegations levelled against the Appellant. The Complainant, as **PW1**, told the lower court that she had been left sleeping at home by her aunt when someone went into the bedroom, carried her and removed her pant before inserting his finger into her vagina. The person then removed his pair of trousers and wanted to penetrate her vagina with his penis when she screamed for help. That her aunt who was nearby came into the room and found the person red-handed with her in the room. She caused the arrest of the person who she identified before the lower court to be the Appellant herein.

[8] **PW2** before the lower court was **Dr. Joseph Imbenzi**, a Senior Medical Officer at **Moi Teaching and Referral Hospital**. He attended court on behalf of **Dr. Kibet** who examined the Complainant and filled her P3 form. He explained that in **Dr. Kibet's** findings, the Complainant had no physical injuries, save for the redness on her genitalia. As her hymen was found intact, **Dr. Kibet** came to the conclusion that there was an attempt to defile her. He produced the P3 Form that **Dr. Kibet** filled and signed on **31 May 2012** as the **Prosecution's Exhibit No. 1** before the lower court.

[9] **PW3**, told the lower court that she is the mother of the minor; and that she is a special needs child. It was her evidence that she had left her sleeping and when she returned, she found the door open and on entering the house, she found the Appellant lying on top of the child in the sitting room, having removed her pant and his clothes. She screamed to raise alarm for help and had the Appellant locked up inside the house. Some neighbours came and assisted her in handling the situation; including notifying the Police of the incident. She added that the Complainant was thereafter escorted to **Moi Teaching and Referral Hospital** for examination.

[10] **PW4, AS**, told the lower court that he was at his place of work when he received a telephone message from his wife (**PW3**) that their 9 year old daughter had been defiled; and that she had reported the matter to the Police. **PW5, P.C. Mwando**, a Police Officer then attached to **Baharini Police Station**, testified that he was on duty on **29 May 2012** when the mother of the Complainant went there to report that the Appellant had been found defiling the subject minor. He further testified that, because the minor was said to be a special needs child, she was escorted to **Moi Teaching and Referral Hospital** for examination; and that a report to that effect was prepared, which was presented before the lower court along with the minor's Certificate of Birth as Exhibits.

[11] The Appellant, in denying the Charges, told the lower court that he had done some work for the Complainant's aunt, **R**, and that when he went to claim his payment, **R** offered sex in lieu, saying she had no money. That when he declined that offer, **R** hit him on the head and ordered him to leave. He further stated that the Village Elder was then called and he was arrested and taken to the **Police Station**. He denied having known the minor before, and said he saw her for the first time in court.

[12] From the foregoing summary of evidence, the Learned Trial Magistrate cannot be faulted for finding that the Main Charge of Defilement had not been proved beyond reasonable doubt. That Charge was brought pursuant to **Section 146** of the **Penal Code**, which provides that:

"Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony..."

[13] Whereas there is credible evidence that the minor has mild to moderate mental retardation vide the Medical Report dated **10 July 2013** (at page 11 of the Record of Appeal), there was no proof that the Appellant had carnal knowledge of her as was alleged before the lower court. Her evidence was that the Appellant had first inserted his finger in her vagina before removing his pair of trousers and exposing his penis with the intention of penetrating her vagina when she screamed for help; and that it was at that point that her aunt, who happened to have returned home in the nick of time, came into the room and found the person red-handed with his pants down literally. **PW3** corroborated the minor's testimony and confirmed that she found the Appellant lying on top of the child in the sitting room, having removed her pant and his clothes. That evidence was in accord with the findings of **Dr. Kibet**, on whose behalf **Dr. Imbenzi** testified. He told the lower court that, in **Dr. Kibet's** findings, the Complainant had no physical injuries, save for the redness on her genitalia; and that, since her hymen was found intact, **Dr. Kibet** came to the conclusion that there was an attempt to defile her.

[14] It is manifest that there was sufficient evidence that the offender had begun to put his intention to defile the Complainant in motion; and, although **Section 146** aforesated provides for attempts as well, the particulars of the Main Charge as laid were specific; namely, that there was carnal knowledge. In the premises the trial magistrate cannot be faulted for coming to the conclusion that the Main Count had not been proved to the requisite standard. Hence, the question to pose is whether there is sufficient evidence to support the Alternative Charge of Indecent Act with a Child. The Alternative Charge was brought pursuant to **Section 11(1)** of the **Sexual Offences Act**, which states that:

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

[15] For purposes of **Section 11(1)** of the **Sexual Offences Act**, "**Indecent act**" is defined in **Section 2** of the Act to mean:

"...an unlawful intentional act which causes-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does

not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will."

[16] Thus, the Prosecution needed to prove that the Complainant was a minor; and that there was indecent contact in her case, and that the offending act was committed by the Appellant.

[a] On the age of the Complainant:

[17] There was credible evidence before the lower court as to the age of the Complainant. Her Certificate of Birth was produced and it confirms that the girl was born on **2 December 1999** and was therefore a minor for purposes of **Sections 2** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[b] On whether the Complainant was subjected to indecent contact involving her genital organ:

[18] In this regard, the Complainant's evidence that the Appellant inserted his finger in her vagina was corroborated by the medical evidence adduced by **PW2**. He produced the P3 Form that was filled and signed by **Dr. Kibet** on **31 May 2012**. That evidence showed that the minor's genitalia had reddened, which in her view was proof of attempted defilement. For purposes of **Section 11(1)** of the **Sexual Offences Act**, the contact need not be by the offender's genital organ; for the Section reads:

"... any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration..."

[19] A finger therefore qualifies as such body part for purposes of **Section 11(1)** aforesaid. Hence, the evidence proved beyond reasonable doubt that there was indecent contact between the and the Complainant's genital organ. In any case, there was evidence that he was lying naked with his penis exposed on the minor who was also naked; and was ready for penetration. Clearly there was indecent contact in the circumstances. Hence, the conviction in respect of the alternative count was based on sound reasoning and evidence.

[20] The Appellant took issue with the fact that he was not presented before the lower court within 24 hours of his arrest; and that whereas he was arrested on **29 May 2012**, it was not until **5 June 2012** that he was taken to court for plea. He also complained that his rights to a fair trial were violated by the Amendment of the Main Charge; which was done some 2 years and 5 months after commencement of the trial. He relied on **Articles 25(c), 27 and 49(1)(f)(i)** of the Constitution and the cases of **Republic vs. Johal; Njuguna vs. Republic [2007] 2 EA 370; William Sebugenyi vs. Republic [1959] EA 411; Albanus Mwasia Mutua vs. Republic [2006] KLR** in support of his arguments.

[21] A careful perusal of the lower court record does confirm that the Appellant was first presented before the lower court for plea on **5 June 2012**. In their evidence both **PW3** and **PW5** confirmed the contention by the Appellant that he was arrested on **29 May 2012** and handed over to the Police immediately. Accordingly, it was the duty of the trial court to find out why the delay. This appears not to have been done. Similarly, **PW5**, in his evidence before the lower court made no attempt to explain the anomaly, granted the constitutional mandate at **Article 49(1)(f)** that an arrested person be taken before a court as soon as reasonably possible, **"...but not later than twenty-four hours after been arrested..."** However, it is not correct to say, as did the Appellant, that the breach would vitiate the entire trial process that took place before the lower court.

[22] Likewise, whereas it is true that the Main Charge was amended and substituted with a Charge of Defilement of an Imbecile contrary to **Section 146** of the **Penal Code**, the Prosecutor is on record as stating that he was not made aware of the fact until **12 June 2013**. He then promptly sought a medical opinion and the Report by **Dr. Edwin Nyaura** dated **10 July 2013** was thereafter availed. Under those circumstances, the late amendment is excusable. In any case, no conviction ensued in respect of that Charge and therefore no prejudice can be said to have been visited on the Appellant. Moreover, the record further shows that when the proceedings were taken over by **Hon. Obulutsa, CM**, he complied with the provisions of **Section 200** of the **Criminal Procedure Code** and involved the Appellant in the process; and that the Appellant opted to proceed with the matter from where it had reached. In the premises, it cannot be said that his right to a fair trial was violated.

[23] The Appellant also faulted the fact that the Village Elder who arrested him was not called to testify before the lower court. *However*, **Section 143** of the **Evidence Act, Chapter 80** of the Laws of Kenya, does provide that:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

[24] Hence, in **Keter vs. Republic [2007] 1 EA 135**, it was held, *inter alia*, that:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

[25] In the premises, the Prosecution was only obliged to avail such witnesses as were sufficient to establish the charge beyond reasonable doubt. This was emphasized by the Court of Appeal in the case of **Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)** thus:

"The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA

[1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:

“... There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

[26] And there was sufficient cogent evidence to inculpate the Appellant in respect of the Alternative Charge, having been found in the act by PW3. The Trial Magistrate made it clear in his Judgment that he considered the entirety of the evidence presented in arriving at his conclusion, including the Appellant's defence that he was being framed by Rose for demanding for his money; which defence was considered at page 54 of the Record of Appeal and found unbelievable.

[27] In the result therefore, I am satisfied that the Appellant's conviction was based on sound evidence, and that the sentence was also proper. This appeal is therefore devoid of any merit and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MARCH, 2019

OLGA SEWE

JUDGE