



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 93 OF 2018

STEPHEN ODHIAMBO JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case S.O Number 17 of 2018 in the Senior Resident Magistrate's Court at Tamu by Hon. P.K.Rugut (SRM) dated 3rd October, 2018)

JUDGMENT

Background

1. The Appellant herein, **STEPHEN ODHIAMBO JUMA** has filed this appeal against conviction and sentence on two charges of defilement contrary to section 8(1) as read with section 8 (3) and 8 (4) of the Sexual Offences Act (*hereinafter referred to as the Act*).

The prosecution's case

2. The prosecution called 7 witnesses in support of the charges. **PW1, BAO**, the first complainant stated between 12.1.17 and May 2017, the Appellant who was her science teacher at [Particulars withheld] defiled her three times. She recalled one morning when he found him in class and defiled her and then disappeared from the school and she did not see him again until he was arrested.

3. **PW2 JOO**, a teacher at [Particulars withheld] stated that he identified the Appellant to the police who arrested him on 20.6.18 concerning several complainant of defilement of girls including the complainants herein.

4. **PW4, CAM**, the second complainant recalled that Appellant who was her science teacher at [Particulars withheld] was her boyfriend from November, 2017 and that he defiled her at Kisii during December, 2017 school holidays as a result of which she became pregnant and gave birth to a baby boy.

5. **PW5 PC LILAIN KIRUNJA NZILANI**, the investigating recalled that she received a complainant from the complainant's who were pupils at [Particulars withheld] that they had been defiled by their teacher. She stated that she escorted complainants to hospital for age assessment and the first complainant's age was assessed as being 15 years while the second complainant who was pregnant was 16 years old and the Appellant was subsequently arrested and charged.

6. **PW6 JARED OKOTH OLALA**, a clinical officer examined both complainants on 20.6.18. He found that the first complainant's genitalia was normal but stated that she had urine inconstence which according to him was as a result of repeated sexual activity. He produced her P3 Form and clinical notes showing that her age was between 14 and 15 years as **PEXH. 2 (a)** and **(b)** respectively. He also second complainant's P3 Form, age assessment report showing that she was 15 years old and Antenatal card since complainant was 20 weeks pregnant as **PEXH. 3 (a)** and **(b)** and **PEXH. 4** respectively.

7. **PW7 POLYCARP LUTA KWEYU**, a Government Analyst examined samples collected from the Appellant, the second complainant and her baby (ADC) and made a report **PEXH. 5** in which he concluded from the analysis that the Appellant and the second complainant were 99.99+ % the biological father and mother of the baby respectively.

8. When he was put on his defence, the Appellant gave an unsworn testimony and denied the charges.

9. In a judgment delivered on 3rd October, 2018, appellant was convicted and sentenced to serve 20 years and 15 years imprisonment in the 1st and 2nd counts respectively.

The Appeal

10. The conviction and sentence provoked this appeal. In the amended grounds of appeal filed on 7th March, 2019, Appellant raised four (4) grounds as follows: -

- 1) *That the trial magistrate erred in law by failing to find that there was an irregularity in the charge*
- 2) *The trial court erroneously failed to find that Article 50(2)(j) of the Constitution was not complied with*
- 3) *That the prosecution case was full of contradictions and inconsistencies*
- 4) *That the defence was not given due consideration*

11. When the appeal came up for hearing on 07.03.19, appellant relied wholly on the amended grounds of appeal and submissions filed on 07.03.19.

12. Ms. Gathu, learned State Counsel opposed the appeal and urged the court to find that the ingredients of the charges of defilement of the two minors were proved. It was contended that age was established by way of age assessment reports; P3 forms and birth of a child by the second complainant proved penetration and that the Appellant who was the victims' science teacher was well known to them and there was no possibility of mistaken identity. It was also submitted that the DNA results proved that the Appellant was the father of the second complainant's baby.

Analysis and Determination

13. The duty of the 1st appellate court was explained by the Court of Appeal in the case of *Kariuki Karanja Vs Republic [1986] KLR 190* that:

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

14. I have considered the amended grounds of appeal and submission by both parties and I will address the grounds as hereunder.

15. In the first ground, the Appellant contends that the charge was defective for the reason that the names of the complainants were initialed and not written in full. There are certain widely accepted practices in charge drafting and judgment writing which include withholding of the names of victims in sexual assault cases because of the continuing stigma that they can face and to avoid public shaming that comes from their names being published.

16. There is no evidence that the initials of the complainant's names used in the charge sheet and the proceedings misled or caused any prejudice to the Appellant. The charges in this case were properly drafted and not irregular.

17. In the second ground, the Appellant contends that he was not supplied with witness statements. Article 50 of the Constitution underscores the right to a fair hearing and provides that:

(2) Every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

18. In *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR*, the court held that:

The right to be provided with" material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.

19. I have perused the record of the trial court and the Appellant did not raise the issue of non-availability of statements during the trial. Had he raised it; I have no doubt that the learned trial magistrate would have given such orders and directions as are necessary to give effect to appellant's right under Article 50 (2) (j) of the Constitution. I therefore find no merit in this ground of appeal.

20. In the third ground, the Appellant contends the evidence by the first complainant that she was defiled was inconsistent with the evidence by the clinical officer **PW6 JARED OKOTH OLALA**.

21. Penetration is a main ingredient in a charge of sexual offence. Section 2 of *the Act* defines "penetration" to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

22. It is on record that upon examination of the first complainant, the clinical officer **PW6 JARED OKOTH OLALA** found that her genitalia was normal. In other words, he did not find any evidence of penetration and his opinion that urine inconsistency that the first complainant was suffering from was as a result of repeated sexual activity cannot therefore be sustained. Consequently, I find that the Appellant ought to have been given the benefit of doubt in the first count.

23. In the last ground of appeal, the Appellant argues that his defence was not considered. **PW7 POLYCARP LUTA KWEYU**, a Government Analyst that examined samples collected from the Appellant, the second complainant and her baby (ADC) found that Appellant and the second complainant were 99.99+ % the biological father and mother of the baby respectively. The Appellant's denial that he did not defile the second complainant could not stand in view of the overwhelming evidence implicating him. With that kind of evidence, I am convinced that the trial magistrate rightfully rejected the Appellant's defence.

24. In view of the foregoing analysis, the appeal on the first count succeeds and the conviction arising thereof is quashed and the sentence set aside. The appeal on the second count is however dismissed and the conviction and sentence of 15 years imprisonment is upheld.

DATED, DELIVERED AND SIGNED THIS 8th DAY OF May 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Felix

Appellant - Present in person

For the State - Ms. Gathu