



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 22 OF 2019

BETWEEN

GERALD MUHIA KUNGÚ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Gatundu SO Criminal Case No. 26 of 2016

by Hon. E.Nyongesa at on 15th December, 2017)

JUDGEMENT

Background

1. On 15th December, 2017; the Appellant was convicted for the offence of sexual assault contrary to Section 5 (1) (b) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 10 years' imprisonment.

The Appeal

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the grounds of Appeal filed on 22nd March, 2019, Appellant raised 6 grounds of Appeal which I have summarized into 3 (three) grounds as follows **THAT:**

- 1) The prosecution case was not proved beyond any reasonable doubt**
- 2) The complainant's evidence was incomplete and unbelievable**
- 3) The defence was not considered**

The prosecution's case

3. Complainant, a minor of tender age testified that the Appellant whom she referred to as Gerald was a bad man. **PW2 LNG**, the complainant's grandmother stated that on 29.06/16, she left complainant sleeping and upon return did not find her. She stated she went to look for her and found her outside Appellant's shop. She indicated that she took complainant home and later in the evening complainant told her that Gerald had touched her private parts with his fingers. It was her evidence that she escorted the complainant to the police station where she reported the matter and later to hospital and was issued with a P3 form. **PW3 APC EUNICE WAIRIMU** received complainant's grand-mother's report on 30.09.19 and referred complainant to hospital for examination. **PW4 Dr. GICHAGWA MARY** stated that she filled complainant's P3 Form **PEXH. 3** on the basis of treatment notes made by her colleague which showed that she had a normal genitalia and pus cells which was an indication of inflammation. In cross-examination by the Appellant, the doctor conceded that inflammation was not conclusive evidence of penetration since an infection can cause pus cells. **PW5 PC MARY MUTOTE**, the investigating officer received complainant's report on 01.10.16 and on the same date, the Appellant was arrested and was later charged.

4. In his sworn defence, Appellant denied the offence. Appellant stated that the landlord who was PW2's step-father had raised rent for the

shop he had leased and that he was framed so that he could be evicted.

SUBMISSIONS

Submissions for the Appellant

5. When the Appeal came up for hearing on 11th September, 2019, Mr. Ngeresa advocate for the Appellant submitted that he was wholly relying on submission filed on 11th September, 2019.

6. It was submitted for the Appellant that the age of the complainant was not proved to the required standard for the reason that the prosecution only produced a copy of the certificate of birth. In support thereof the Appellant placed reliance on **Pius Mutisya Kiting'o v Republic [2015] eKLR** which cited with approval the decision in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** where the court held that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

7. Appellant also relied on **Benson Wambasi Nyongesa v Republic [2010] eKLR** where the court held that **“The only way to prove age if through age assessment by a qualified doctor or by producing a birth certificate.”**

8. Appellant similarly relied on **Hadson Ali Mwachongo vs. Republic [2016] eKLR** where the Court of Appeal stated inter alia:

“The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim.

9. In **Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu)**, the Court of Appeal stated as follows;

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).”

10. It was additionally submitted for the Appellant that the court did not satisfy itself that complainant was truthful and in support thereof relied on **James Ouma Onyango V Republic [2019] eKLR** where the Court of Appeal reiterated the trial court's duty to record in the proceedings whether it was satisfied that the victim of a sexual offence who was the only witness implicating an accused was telling the truth before a conviction could lie.

11. Finally, it was submitted for the Appellant that the sentence of 10 years was illegal and excessive.

12. Ms. Ndombi, learned State Counsel gave notice of enhancement of the sentence from 10 years since the offence under which the Appellant was charged attracts a maximum sentence of life imprisonment. It was argued for the State that the age of the victim was proved by way of a certificate of birth, penetration by finding of pus cells in the complainant's genitalia and identification by the fact that even the Appellant conceded that he was not a stranger to the complainant.

Analysis and determination

13. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (See **Isaac Ng'ang'aKahiga v Republic [2006] eKLR**).

14. Section 5 of the Sexual Offences Act (*the Act*) states: -

(1) Any person who unlawfully—

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

15. A sexual assault charge under Section 5 (1) (b) of *the Act* can be proved beyond reasonable doubt solely with credible evidence of penetration of the genital organs of another person with an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes.

16. 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.

17. Complainant's grandmother PW2 told court that complainant informed her that the Appellant inserted his fingers in her genitalia. **PW4 Dr. GICHAGWA MARY** stated that complainant's genitalia was normal but she had pus cells which was an indication of inflammation. In cross-examination by the Appellant, the doctor conceded that inflammation was not conclusive evidence of penetration since an infection can cause pus cells.

18. It is apparent that the medical evidence on record was not conclusive that there is clinical officer that the appellant inserted his that there was penetration necessary to constitute sexual assault. The prosecution was required to prove penetration of the complainant's genitalia and without corroboration, the trial court erred in concluding that the charge of sexual assault had been proved.

19. Age is not an essential ingredient in a charge of sexual assault. The foregoing notwithstanding, the trial court's finding that the complainant was a child of tender years was corroborated by the P3 form which showed that the complainant's age had been assessed to be 3 years. In any case, the Court of Appeal in **Richard Wahome Chege v Republic [2014] eKLR**, held that:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate.....”.

Disposition

20. From the preceding analysis, I have come to the conclusion that the evidence presented by the State was not watertight. The conviction and sentence entered against the Appellant was not safe and should not be allowed to stand.

21. And even if the Appeal had been disallowed, the prosecution has not established that the trial court did not properly exercise its discretion in sentencing the Appellant to 10 years and hence the prayer for enhancement of sentence would have failed.

22. I therefore allow the Appeal, quash the conviction and set aside the sentence. I order that the Appellant shall be set be at liberty unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED IN KIAMBU THIS 13TH DAY OF SEPTEMBER 2019

T. W. CHERERE

JUDGE

IN THE PRESENCE OF

Court Assistant - Nancy & Morris

Appellant - Present

For the appellant - Mr. Ngeresa

For the state: - Mr. Kasyoka