



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: E. K. O. OGOLA, J.

CRIMINAL APPEAL NO. 162 'B' OF 2018

KEVIN INGUTIA THOMAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Dennis Ogal, RM, dated 31st October, 2018 in Hamisi Magistrates Court Sexual Offence Case No. 20 of 2017)

JUDGMENT

1. The appellant was charged with offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.
2. The appellant pleaded not guilty, and was tried with the prosecution availing six (6) witnesses to prove its case. Upon the conclusion of the case the trial court found the appellant guilty under the main count and sentenced him to mandatory twenty (20) years imprisonment stating that the court had no option in sentencing.
3. Being not satisfied with the judgment the appellant has preferred this appeal against both the conviction and sentence.
4. The appeal is premised on the following grounds:-
 1. ***THAT the learned magistrate erred in law and fact by convicting the appellant without proper evidence on record and without considering the fact that there was no evidence to corroborate the evidence of the complainant.***
 2. ***THAT the learned trial magistrate erred in law and fact by disregarding the accused submissions.***
 3. ***THAT the trial magistrate erred in law and fact in finding that the complainant was a minor without any evidence in support and the sentence was manifestly excessive, irregular and unconstitutional.***
 4. ***THAT the learned trial magistrate erred in law and fact by failing to appreciate that the appellant's constitutional rights were violated.***
 5. ***THAT the learned trial magistrate erred in law and fact in failing to appreciate that the prosecution's witnesses contradicted and their evidence was inconsistency, full of lies and doubtful.***
 6. ***The trial magistrate erred in law and fact in convicting the appellant notwithstanding that the medical evidence produced in court was inadequate and do not support the charges of defilement Act.***
5. The appeal is opposed by the State.
6. The appellant filed submissions to this appeal on 4.9.19 and further submissions on 6.9.19, while the prosecution led by Mr. Ongegi submitted orally.
7. This being the first appeal it is the duty of this court to re-evaluate the evidence adduced at the trial court and to reach its own finding in the matter. Accordingly I will take a review of the evidence at the trial.

8. PW1 – MK, the complainant, testified that on the 2nd April, 2017 at about 4.00 p.m. she went to fetch water from the river in the company of PW2, another minor. On their way they met the appellant who was cutting grass outside a house. The appellant requested the girls to also fetch some water for him and the girls agreed and went to the appellant's house to get the container. At this stage, the appellant and another man pulled the girls into the house, locked them in and raped them, one in the bedroom, the other in the sitting room. After the incident they were beaten and chased away. They reported the matter to their mother who reported the matter to the police. The police arrested the appellant and the other man and the girls were taken to Mbale Hospital and a P3 form filled. The PW1 testified that she was raped in the sitting room, but on cross-examination she changed and said she was raped in the bedroom.

9. PW2 LK was the other girl. She gave similar testimony except that she was raped in the sitting room by the other man, while PW1 was raped in the bedroom.

10. PW3 testified that on the material day around 6.00 p.m. he arrived home when his wife lamented that PW1 had taken too long at the stream. His wife got up to look for the girl and found her at a neighbour's. The complainant said she had been raped by a person she could identify. The witness on cross examination said the appellant was a person he had seen in the village.

11. PW4 – Sammy Chelule was a Clinical Officer attached to Mbale Referral Hospital. He had examined PW1 and found her private parts and her hymen was freshly torn and there was reddening around the area. Her labia was bleeding. The labia were bruised, swollen and reddish. The witness said that the sex was forceful. He produced the P3 form, treatment notes and Post Rape Care form as exhibits 2, 1, 3 respectively.

12. PW5 APC Thomas Khamasi testified that on 2nd April, 2017 at 7.00 p.m. he was at the camp when 2 families arrived and complained that PW1 and PW2 had been defiled by 2 boys. The complainant knew the boys by name. PW5 together with his boss Abuneri went to the house and arrested the two (2) boys. He testified that PW1 and PW2 identified the persons who raped them. The appellant was later escorted to Mbale Police Station.

13. PW6 Maina was a police officer attached to Mudete Police Station. He was the Investigating Officer who received the PW1's complaints. He was not the 1st officer who received the report.

14. The court after the close of the prosecution's case put the appellant to his defence. DW1 gave sworn evidence. He testified that PW1 was not known to him, and that on that day he was working in one Indangasi's home and that at no time did he see the complainant. He denied committing the offence and wondered why PW1 was implicating him in the offence.

15. DW2 was Mark Savalla; the Executive Officer of Hamisi Law Court. He produced proceedings in relation to Criminal Case No. 204/2017. Those proceedings were produced as defence exhibit No. 1. On cross examination DW2 stated that he was the one who had certified the documents. These were the proceedings where the other man was charged in Criminal Case No. 204. At this stage it is important to note that the other man who was charged in Hamisi Case No. 204/2017 was acquitted under S. 215 of the Criminal Procedure Code on the basis of inconsistency of evidence.

16. M/s Change, learned Counsel for the appellant submitted that there was inconsistency in the evidence produced by the prosecution and that in any event penetration was not proved. Counsel submitted that the grounds of the appeal herein raise issues of inconsistency of evidence and lack of proof of penetration. Counsel referred the court to trial proceedings as follows:-

At page 3 of the proceedings at paragraph 13 PW1 testified that she was defiled by the appellant in the sitting room. At page 4 paragraph 13-14 of the proceedings PW2 testified that –

“The person raped me in the sitting room while the accused said PW1 went to the bedroom ... I did not see what happened there”

M/s Change submitted that PW1 and PW2 allege to have been at the same place when the incident happened yet they give contradictory evidence. Further PW1 at page 3 paragraph 14-15 said –

“... After that we went to the stream and thereafter home. On reaching home we told my mother.”

17. In contradiction to the above PW3 the father to PW1 stated as follows at page 5 paragraph 2-6.

“On arrival my wife told me that my child (PW1) had gone to the river with PW2 to fetch water and were not yet back. I then decided to go look for them. I found them in Kivizi house. He is a neighbour. Kivizi called me to his house. I then asked PW1 where she was from and she told me that she had been defiled by one boy. . .”

18. M/s Change submitted that this is major and glaring contradiction in the prosecution evidence. PW3 found the victim in the house of Kivizi, and not at their home. That it was at Kivizi's house that PW1 told him that she had been defiled by the appellant. That it is not their mother who told PW3 that she had been defiled.

PW2 at page 4 paragraph 14-15 said –

“We went home PW1 is my neighbour. I told my mother what had happened. She called my father and thereafter we went to Chamakanga A. P. Post”

19. Counsel submitted that the age of PW1 was not proved. The trial court failed to consider that there was no proof that PW1 was a minor. No medical evidence of birth certificate was produced. Counsel submitted that PW4 a Doctor while giving his testimony in examination in chief states that he approximated the minor's age as 14 years. Just like that; no methodology or criteria was advanced by him to establish or demonstrate that indeed the minor was 14 years. Counsel submitted that the sentencing therefore used by the trial court was premised on the wrong and utterly prejudicial findings on the appellant, and this is against the appellant's right to a fair hearing. Counsel submitted that the medical examination report as PMF 2 and the prosecution's exhibits and documents evidence that the minor was 14 years. The other prosecution's exhibit and documents evidence, the baptismal card marked as MFI.P4 (a) shows that the minor was 15 years at the time of the offence. Counsel submitted that this is inconsistent and contradictory with the age filed on the medical examination report. Counsel submitted that these inconsistencies are not minor as they robbed the trial court the opportunity of giving out a fair and informed judgment. This has also prejudiced the appellant. Counsel submitted that the sentencing based on the inconsistencies and contradictions of age was misguided, wrongful, prejudicial, misleading, unfair and excessive and invited the court to disregard the same and to set aside conviction and sentence.

20. Counsel further submitted that sentencing based on mandatory nature of the provision of the Sexual Offences Act was unconstitutional as it deprives courts of their legitimate jurisdiction to exercise discretion not to impose sentence in an appropriate case. That a mandatory sentence fails to conform to the tenets of the fair trial that is provided under Article 25 of the Constitution. Counsel cited Court of Appeal case at **Eldoret Criminal Appeal Number 312 of 2018. Evans Wanjala Wanyonyi –Vs- Republic**, and urged this court to find that sentence by the trial court against the appellant was excessive.

21. M/s Change also submitted that the trial court was biased against the Appellant. Citing Criminal Case No. 204 of 2017 which has similar circumstances as Criminal Case No. 205 of 2017, Counsel submitted that the accused was acquitted by the court for reasons that the evidence was contradictory. M/s Change referred to the text of Judgment in Criminal Case No. 204 of 2017 as follows:-

“I however find a problem as to who exactly defiled the complainant herein, whereas she carefully stated that it was the accused person, PW2 when cross examined by court also said it was the accused person who was standing at the door but she was defiled by the other man found inside the house. PW1 on her part said when cross examined that in fact; the man at the door was the one that defiled Millicent”

“So if the man at the door, according to PW2 was the one that defiled her, when its their evidence that the defilers were two, I find that there exists an inconsistency in the evidence of the two minors which I hold as doubt in favour of the accused person.”

22. Counsel submitted that the trial court in Criminal Case No. 204 of 2017 made the correct finding that PW1 and PW2 were inconsistent in their evidence and proceeded to acquit the accused in Criminal Case No. 204 of 2017. That is why counsel urged this court to find that the trial Magistrate was biased against the appellant and to allow this appeal.

23. I have carefully considered this appeal and submissions by parties. The first thing to note is that PW1 and PW2 were complainants in Criminal Cases No. 204 and 205 of 2017 Hamisi. PW1 and PW2 testified in support of each other's case. However, these cases were not tried by the same Magistrate. Case No. 204 of 2017 was tried by Hon. M. L. Nabibya who delivered a Judgment on 21.2.18 while case No. 205/2017 was tried by Hon. D. Ogal (RM) who delivered a Judgment on 16.10.18. Both Honourable trial Magistrates were entitled to reach their own conclusions on the matters as they did.

24. The Honourable learned Magistrate D. Ogal in his Judgment dated 16th October, 2018 in this matter observed as follows:-

“... As to whether PW1 was defiled. PW1 testified that she was defiled. The matter was reported to the police who referred PW 1 to hospital for treatment. PW1 went to Mbale Referral Hospital where she was examined by PW4. PW4 testified that she examined PW1 vagina. He saw that her hymen was freshly torn. Her area around her vagina was red. She was bleeding from her labia which was also swollen and bruised. In light of the injuries he concluded that there PW1 was forcefully penetrated.

I considered PW1 statement was also the evidence adduced by PW4 who is a Clinical Officer. There is no contradictory story about the examination conducted. I have also failed to say evidence to show bias on the part of PW4. He reduced his findings into various reports which he produced and were admitted into evidence as exhibit 1, 2 and 3. I have looked at the documents and noted that the contents are the same and consistent with the testimony of PW4.

From the fact that PW1 hymen was freshly torn, bruised labia and bleeding around the region clearly shows that PW1 was penetrated. The injuries were consistent the suggested act.

In light of this evidence I am convinced beyond doubt that PW1 was penetrated. There is no indication from the defence that they deny the fact that PW1 was penetrated. The defence is based on the notion that it was not the Accused that penetrated PW1. He denied that he saw the complainant on the day.

PW1 testified that it was the accused that pulled him to the house. He pulled her on the floor in the sitting room and proceeded to defile. She however changed her story on cross examination. She stated that she was the one who was taken to the bedroom and defiled therein.

In re-examination, she reiterated that she was the one who was in the bed room, while PW2 was in the sitting room. This therefore shows that there is contradiction of where the scene of crime was. That the court must ask itself whether the contradiction was grave enough to reach a conclusion that the evidence of PW1 was so contradictory hence unreliable in the circumstance. To resolve this I have looked at several decisions in the (1) Twenangwe Alfred –Vs- Uganda a case that was cited with approval in Criminal Appeal No. 5 of 2013 (Erick Onyango Ondeng –Vs- Republic 2014...) Where it was held that with

regard to contradictions in the prosecution case the law as set out in numerous authorities that grave contradictions unless satisfactorily explained will usually and necessarily lead to the evidence of the witness being rejected. The court will however ignore minor contradictions unless the court thinks that they point to the deliberate untruthfulness or if they do not affect the main substance of the prosecution case.

In the case of Erick Onyango Ondeng –Vs- Republic 2014 the court observed that alleged contradictions on where a defilement took place did not amount to which when it is borne in mind that the change and the evidence adduced points related to the defilement in the accused house.

In this case the only contradiction that I saw was with regard to the scene where the act took place. The evidence of PW1 was that she was defiled on the floor in the sitting. She corrected herself on cross examination and reiterated the same in re-examination that she was defiled in the bedroom. I am of the view that the correction was sufficient to show that the scene of the actual incidence was inside a bedroom. Her statement is corroborated by the evidence of PW2 who states that the incident happened in the bedroom while she was defiled in the sitting room.

I heard the 2 witnesses and they both appeared truthful to me. I therefore believed their version of events. They both stated that the Accused was the person they met cutting grass outside a compound where they were later arrested from. It was the Accused that took PW1 to the bedroom.

PW1 said she was defiled inside the room and the evidence of PW4 shows that injuries she sustained were consistent with forceful penetration. The evidence of PW1 therefore links the Accused to the Act.

The Accused in his defence denied committing the offence. He says that he had never seen the accused prior to his arrest. He told the court how he was arrested. I have considered this defence and I am of the view that it does not amount to much. It has further failed to dislodge the otherwise watertight case presented by the prosecution. All in all I am convinced that the Accused defiled PW1. This incident happened during the day when there was proper lighting. PW1 and PW2 saw both accused persons. They later identified the person who defiled each of them. The Accused were arrested almost immediately after the incident and it cannot be said that they had forgotten their assailants.”

25. I have considered all circumstances of this case. Like the learned trial Magistrate stated, the minor contradiction of the exact space of defilement cannot out do the fact of defilement which was proved. The appellant was identified as the person who defiled PW1. PW1 also reaffirmed that she was in fact defiled in the bedroom. This court believes the evidence of the prosecution witnesses and upholds the conviction by the trial court.

26. M/s Chungu submitted that the prosecution failed to prove the age of the complainant. Counsel submitted that the document filed in court contradicted themselves, with some showing the age to be 14 years while others showing it to be 15 years. Counsel submitted that the age variation would amount to unfair trial for purposes of sentencing.

27. I have considered this submission. However, age for the purpose of sentencing under Section 8 (3) of Sexual Offences Act is relevant. The section states:-

“8 (3) 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.”

28. This court finds that since the complainant herein was between twelve and fifteen years, there was no prejudice in sentencing which the court granted. However, that notwithstanding, this court accepts submissions by M/s Chungu for the appellant that the mandatory twenty (20) years given by the trial court is excessive and did not consider mitigation. I have considered the submissions in sentencing, and herewith reverse and set aside the term of 20 years given by the trial court. Instead I sentence the appellant to a term in prison of fourteen (14) years from the date of conviction.

Right of appeal in fourteen (14) days.

Delivered, dated and signed in open court at Kakamega this 13th day of September, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Ongige - State Counsel

M/s Chungu for the Appellant

Appellant

Court Assistant – Mr. Erick