



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 6 OF 2017

BETWEEN

ELVAS ANALO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence by Hon. E. W. Muleka, Senior Resident Magistrate dated 27/6/2016 in Hamis SPM's Court Criminal Case (S0) Number 92 of 2015)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

The appellant herein, ELVAS ANALO was arraigned before the Senior Principal Magistrate's Court at Hamisi on one count of **defilement** contrary to **Section 8(1) (3) of the Sexual Offences Act, No. 3 of 2006**, the particulars thereof being that on the 25th day of January, 2015 at [particulars withheld] village, Mulundu sub-location, Mulundu location in Hamisi sub-county within Vihiga county, intentionally caused his penis to penetrate the vagina of SK, a child aged 13 years.

The appellant faced the alternative count of committing an **indecent act with a child** contrary to **Section 11(1) of the Sexual Offences Act, Number 3 of 2006**, the particulars being that on the 25th day of January, 2015, at [particulars withheld] village, Mulundu sub-location, Mulundu location in Hamisi sub-county within Vihiga county intentionally touched the buttocks, breasts and vagina of SK, a child aged 13 years with his penis.

The appellant pleaded not guilty to the charges and the case went to trial during which the prosecution called 5 witnesses. After the 5 witnesses testified the learned trial magistrate was satisfied the prosecution had established a prima facie case against the appellant and placed him on his defence. The appellant elected to give unsworn evidence and did so. He did not call any witnesses.

Judgment of the Learned Trial Court

At the close of the hearing the Learned Trial Magistrate carefully analyzed the evidence on record and reached the conclusion that the prosecution had proved the charge of defilement against the appellant beyond reasonable doubt, and accordingly found him guilty as charged and convicted him. The appellant was sentenced to 15 years imprisonment as by law prescribed.

The Appeal

The appellant felt most aggrieved by both conviction and sentence and brought this appeal. The self-drafted petition of appeal sets out the following grounds:-

- 1. THAT, I pleaded not guilty to the alleged offence.***
- 2. THAT the sentence is harsh, given the fact that I am a first offender.***
- 3. THAT I have children who fully depend on me together with their mother and therefore they are likely to suffer due to my***

incarceration.

4. THAT due to my adverse old age and health I am likely to suffer and even lose my life given the harsh conditions in the prison.

5. THAT I wish to be present during the hearing of this appeal and pray to be served with court proceedings.

At the hearing of the appeal the appellant collapsed the 5 grounds of appeal filed earlier into 3 grounds:-

1. THAT the medical evidence adduced by PW1 was shoddy hence [did] not lead the court to a sound decision.

2. THAT may the Honourable Court be pleased and uphold the provisions of Section 36(1) of the Sexual Offences Act.

3. THAT the Learned Trial Magistrate erred in law and fact by failing to consider the fundamental rights of an accused person under Article 50 (2) (j).

The appellant prays that his appeal be allowed in its entirety so that he can be set free.

As this is a first appeal this court has an obligation to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, without forgetting that it has no opportunity of seeing and hearing the witnesses who gave evidence during the trial and to make an allowance for that fact. Generally see **Pandya -vs- Republic [1957] EA 336.**

The Prosecution Case

PW1, SK, is the complainant in this case. She testified that she was 13 years old and went on to say that she was a class 7 primary school pupil. On 25/1/2015 at about 3.00 p.m., she had gone to pick firewood at Kaimosi forest when she noticed the appellant approaching from the opposite direction. The appellant was armed with a panga. PW1 was one of 9 girls who were looking for firewood. The appellant started chasing all of the 9 girls. As the other girls ran to safety PW1 stumbled and fell down and the appellant got hold of her, took a scarf and tied her mouth. He also took a nylon net string and tied her hands with it, then took the panga and put it on her neck, while threatening to kill her.

The assailant then put PW1 down the ground, removed her under pant, removed his penis and thrust it into her vagina. After 2 hours of defilement, the appellant left. PW1 ran home and told her mother what had befallen her. She was bleeding as that was her first sexual encounter. PW1 was accompanied by the mother back to where the incident had occurred and found the appellant still cutting trees for firewood. PW1's father was informed and he in turn called a forest officer by the name Kondolo who went and arrested the appellant. The appellant was taken to Cheptulu police station. PW1 recorded her statement at the same police station and was also issued with a P3 form. She was later taken to Kaimosi hospital for treatment. The P3 form was marked as PMFI 4 while the age assessment report was marked as PMFI 6. PW1 confirmed that she had no prior knowledge of the appellant.

During the cross examination PW1 testified that she did not struggle with the appellant for fear that he would kill her. She also testified that the appellant was with his friends. She denied a suggestion by the appellant that she had framed him.

PW2, a girl aged 13 years, was JK also a class 7 pupil in her local school. She testified that while she was in the forest with PW1 and other children collecting firewood, she saw the appellant herein and other people cutting eucalyptus trees. Then the men started chasing the children. As PW2 ran, she heard PW1 screaming but she could not respond to the screams for fear of being killed. She later saw PW1 going home as she cried. Later PW1 returned to the forest with her mother and uncle. PW1's uncle started beating the appellant after the appellant had been pointed out by both PW1 and PW2. According to PW2, PW1 did not say what the appellant had done to her. In cross examination, PW2 stated that though she did not know the appellant before, she identified him as the person who chased the children. He was dressed in a black trouser and a black vest with white stripes, and further that since the incident took place at 2.00 p.m., there was no mistaken identity.

JAI was PW3. She testified that on Sunday 25/1/2015 she was at her home between 3.00 – 4.00 p.m. when she heard PW1 screaming. PW3 rushed to check on PW1 and found her bleeding. PW1 also informed PW3 of what had befallen her as she and other children collected firewood. PW1 gave a description of the clothes which her attacker was wearing. Later the appellant was arrested by PW1's father and taken to Cheptulu police station. PW1 was taken to the hospital for examination and treatment. PW3 confirmed to the court that she had no grudge with the appellant.

Ronald Sakwa, clinical officer at Kaimosi Jumuiya Friend's hospital testified as PW4. He testified on behalf of Fred Taya. According to the testimony when PW1 went to the hospital at around 17.51 hours she had with her a torn and blood-stained under pant. On examination it was noted that there was whitish discharge from PW1's private parts. These discharges were sperms. Her inner cervix was broken with lacerations. The vaginal swab revealed spermatozoa. The HIV test was negative.

The appellant was also examined for HIV, but the test was negative. The P3 form was produced as Pexhibit 5 while the treatment notes were produced at Pexhibit 4.

The last witness PW5 was number 70213 Sgt Habati Majani of Serem police station hospital. He stated that while he was on duty on 25/1/2015, he received a report from members of the public that a man had detained a girl in the forest. Together with other police officers, PW5 rushed to the scene but found when the appellant had already been arrested. PW5 recounted the incident as given to him by PW1. PW5 issued a P3 form to PW1 and at the hospital it was confirmed PW1 had been defiled. Later PW5 took PW1 to Mbale hospital for age assessment which confirmed PW1 was 17 years old. The scarf allegedly used to tie PW1's mouth, the nylon string with which her hands were tied and the white torn panty were produced as Pexhibits 1, 2, 6 and 3 respectively.

The defence Case

In his brief unsworn statement, the appellant testified that on the material day at about 11.00 a.m., some 3 women went to his place of work and asked for permission to pick firewood from the forest but he declined to grant them permission. The women then started making noise. One woman returned around 1.00 p.m. and took one tree. Later on in the day, the same woman returned with some people who started beating him. He was taken to the police station and later to court. He denied committing the offence.

The appellant did not call any witnesses.

Issues for Determination

From the appellant's submissions and the grounds of appeal, the issues for determination are:-

- a. Whether there was breach of the appellants fundamental rights to a fair trial under Article 50 (2) (j) of the constitution.*
- b. Whether the prosecution proved all the 3 ingredients of the charge of defilement under Section 8 (2) of the Sexual Offences Act.*

Analysis and Determination

With regard to the first issue *Article 50 (2) (j) of the Constitution* makes provision for fair hearing and sub-article 2 thereof 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.”

In this case the appellant contends that he was not supplied with witness statements in time to enable him prepare for his defence. The record shows that on the 25.8.2015 when the case came up for hearing, the appellant informed the court thus:-

“Accused – I am not ready to proceed since I do not have witness statements. I pray for 2 weeks.”

There is no record as to whether the trial court considered the appellant's application for adjournment and for him to be provided with witness statements which he made clear he did not have. Instead the trial court proceeded with the first prosecution witness, this was on that same 25/8/2015.

From that date until 22/3/2016 when PW2 testified, there is no indication that the appellant was at any point supplied with witness statements. On the 22/3/2016 PW2 and PW3 testified again. There is no mention thereafter of whether or not the appellant was ever supplied with witness statements and the position remained the same until PW4 and PW5 testified.

Clearly and in my considered view, the appellant was never supplied with witness statements during the entire trial. He made one request for the same and it was thus the duty of the trial to ensure that the appellant was supplied with the statement after he made the request. In *Simon Githaka Malombe –vs- Republic [2015] eKLR*, a Court of Appeal decision at Nyeri, the court quashed the conviction on the ground that the prosecution had failed to furnish the appellant with witness statements despite the fact that the appellant had asked for same. In the words of the court, *“The denial of witness statements in the present case reduced the trial to a farcical sham.”* I would hold the same view in the present appeal, and conclude that the trial herein was no trial at all, since the trial court did not bother to address the appellant's request for statements before proceeding with the case.

The second issue for determination is whether the prosecution proved all the ingredients of the offence of defilement. As I considered this issue, it is my view that in light of my finding on the first issue, any discussion on this second issue would only be one of the academic interest. However, regarding the issue of penetration, there is medical evidence adduced by PW4, the clinical officer that PW1's vagina had been penetrated. PW1 was examined about one hour after the alleged ordeal and a high vaginal swab test revealed the presence of spermatozoa.

The appellant submitted that forensic and scientific tests including DNA analysis ought to have been done to ascertain whether indeed it was him who had committed the offence. While in advanced jurisdictions, the carrying out of more detailed forensic and scientific tests in criminal cases is a matter of course, as a country Kenya is still far from achieving that level. So, while DNA testing is desirable in criminal cases, it is not mandatory, because the trial court may, if it so finds order for the test. In the instant case, I am satisfied that the tests be carried out by the hospital where PW1 was referred served the purpose of establishing whether or not PW1 was defiled as defined under Section 2 of the Sexual Offences Act, No. 3 of 2006.

What about the age of PW1? Was it established? According to PW1 herself, she told the court she was 13 years. Her mother who testified as PW3 said nothing about PW1's age. The courts have accepted that a mothers testimony concerning the age of a child would be taken as gospel truth. It is surprising to me that the prosecution did not lead PW3 to give evidence on the age of PW1.

Pw5 took PW1 for age assessment and the report, produced as Pexhibit 6, showed that PW1 was about seventeen years of age. In my considered view the age of the complainant, PW1 was not proved beyond reasonable doubt. Section 8(3) of the Sexual Offences Act, No. 3 of 2006 provides that:-

“(3) A person who commits an offence of defilement with a child between the age twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

In effect, the evidence on record does not support the charge of defilement under **Section 8(3) of the Sexual Offences Act**, though if all the other parameters touching on the trial were in place, this court would have had no problem charting a way out regarding the age of the complainant and dealing with the appellant appropriately.

I also find that the sentence imposed by the learned trial court was not the prescribed sentence, and the trial court offered no explanation for the same. The appropriate sentence was 20 years imprisonment, since the trial court was made before the Supreme Court decision in **Francis Karioko Muruatetu & Another versus Republic [2017] eKLR** and subsequent Court of Appeal decisions on mandatory minimum sentences.

The final issue for determination is whether the prosecution proved that it was the appellant who defiled PW1. PW1 herself gave graphic details of how the whole ordeal unfolded. Both PW1 and PW2 confirmed that the incident occurred in the afternoon between 2.00 – 3.00 p.m. and that the person who accosted PW1 was dressed in a black trouser and a black vest with white stripes. It was the said description by PW1 to PW2 that eventually led to the arrest of the appellant on the very day the incident occurred. I am satisfied that he appellant was clearly identified by the two witnesses.

There is however an issue with the evidence of both PW1 and PW2. Both of these witnesses told the court that they were 13 years of age. In the circumstances of this case, the trial court should have taken the two witnesses through a *voir dire* examination, the fact of their having been cross examined notwithstanding. The omission to conduct a *voir dire* examination on both PW1 and PW2 prejudiced the appellant because it was not clear whether those two witnesses understood the nature of an oath.

Conclusion

For the reason that the appellant’s trial was farcical and for the further reason that the prosecution did not clearly prove the age of the complainant, this appeal ought to succeed. I accordingly allow the appeal on both conviction and sentence. The **conviction is quashed and sentence of fifteen years’ imprisonment is set aside.**

Unless there is another lawful reason for holding the appellant in custody, he shall be released therefrom forthwith.

It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019.

WILLIAM M. MUSYOKA

JUDGE