



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 137 & 139 OF 2015 (CONSOLIDATED)

BETWEEN

MARKO REUBEN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 1st December, 2015 by Hon. M. L. Nabibya, Senior Resident Magistrate in Butali PMC. Cr. Case No. 288 of 2014)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, MARKO REUBEN was arraigned before the Butali Principal Magistrate's Court on a charge of defilement contrary to **section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**, the particulars thereof being that on the 14th day of April, 2014 at [particulars withheld] location, Kakamega North District within Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of AAJ a child aged 15 years.
2. The appellant faced the alternative count of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. It is alleged that he committed the said offence on the same date and at the same place against the same complainant AAJ by intentionally and unlawfully touching the vagina of the said AAJ a child aged 15 years with his penis.
3. The appellant pleaded not guilty to the charge when he appeared for plea on 15/5/2014. The prosecution called six witnesses to support the charge against the appellant.
4. The complainant, AAJ testified as PW1 (the complainant) while her mother, J C was PW2 (J) and her father J M was PW3 (J). Jacklyne Khabali a neighbour of both J and J was PW4 (Jacklyne). The clinical officer at Malava district hospital, Sifuna Kizito was PW5 (Kizito). Number 88412, Cpl Margaret Kwamboka of Malava district hospital testified as PW6 (Cpl Kwamboka).
5. At the close of the prosecution case, the appellant was found to have a case to answer and was placed on his defence. The appellant elected to remain silent and asked the court to decide the matter on the evidence that was before it.
6. After a careful analysis of the evidence presented to it, the learned trial court was satisfied that the prosecution had proved all the three ingredients for the offence of defilement. The court thus found the appellant guilty of the said offence, convicted him and sentenced him to serve 20 years in prison.

The Appeal

7. The appellant was aggrieved by the said judgment and consequently instructed the firm of Elizabeth Chunge & Company Advocates to file this appeal. The petition of appeal was filed on 14/6/2015 and set out the following grounds:-

1. ***THAT the trial magistrate erred in law and fact in convicting the appellant without proper evidence in record.***

2. THAT the learned trial magistrate grossly erred in law and fact in convicting the appellant without considering the fact that there was no evidence to corroborate the evidence of the complainant.

3. THAT the learned trial magistrate erred in law and fact in finding that the complainant was a minor without any evidence in support.

4. The trial magistrate erred in sentencing the appellant which sentence was manifestly excessive, irregular and unconstitutional.

8. In effect, the complainant is saying first that there was no evidence to support the charge against him to warrant a conviction and secondly that the sentence was manifestly excessive irregular and unconstitutional. He prays that the appeal be allowed.

9. As this is a first appeal this court is under strict duty to treat the appeal as a rehearing of the appellant's case by reconsidering and evaluating the evidence afresh with a view to reaching its own conclusions in the matter. The only thing the court has to do in this regard is to make an allowance for the fact that in its appellate jurisdiction, it has no opportunity of seeing and hearing the witnesses. This then means that any of the learned trial magistrate's findings on the demeanor of the witnesses ought not to be interfered with. **See Okeno versus Republic [1972]EA 32.**

The Prosecution Case

10. The complainant, AAJ testified that on 14.4.2014 she was in their church when the appellant beckoned to her to board a boda boda. She did so and the two of them took off to some place which had a partially constructed house. It was in that building that the appellant undressed her and then defiled her. The appellant then told her to go home and on arrival home, the complainant met with the wrath of her parents. She was later taken to hospital. The complainant identified both the P3 form Ref. No. 4508/014 – PMFI 1(a) and also the hospital treatment notes – PMFI – 1(b).

11. When cross examined, the complainant told the court that she was alone at church after she had taken an axe to the pastor.

12. PW2, J is the complainant's mother. She stated that at some unidentified time on 14/4/2014 the complainant left home with an axe which she was taking to the pastor. At about 3.00 p.m. the unidentified pastor returned the axe. While at a merry-go-round meeting, J was informed that the complainant had been seen on the road, looking dirty and crying. J rushed home where she found the complainant still crying. The complainant informed her mother that she had been defiled by a motorbike rider. At 9.00 p.m., together with her husband J, J took the complainant to hospital. The matter was later reported to the police.

13. J testified that on 14/4/2014 while he was on duty, he got information that J was sick. He immediately hired the appellant to take him home on motorbike between 10.00 a.m. and 11.00 a.m. The appellant agreed to return at 1.00 p.m. and take J back to work. J also stated that on the way home with the appellant he saw the complainant carrying an axe and walking towards the church.

14. Since the appellant did not return to take J back to work at 1.00 p.m., J made other arrangements. On his way back from work that evening, J met the complainant near Maliwa Primary School. The complainant's clothes were soiled. The complainant informed him that the appellant had taken her to some place and defiled her. J walked the complainant home and together with J they went to hospital and later reported the matter to the police. J's description of the appellant led to the appellant's arrest.

15. Jacklyne, PW4 testified that at about 11.00 a.m. on 14/4/2014, she saw the appellant ferrying J on the motorbike. A little while later, at around 12.00 noon, she saw the appellant carrying the complainant on the same motorbike. Jacklyne was categorical that when the appellant passed with J as the pillion passenger, J was wearing the helmet. On the way from J's home, the appellant was carrying the helmet at the front part of the motorbike.

16. The complainant was examined by Kizito, the clinical officer at Malava district hospital. His findings were that the complainant's skirt was dirty with soil while the vaginal swab examination revealed the presence of epithelial cells as well as moving spermatozoa. The epithelial cells were also seen in the urine. Neither HIV nor syphilis was detected. The clinician concluded that the complainant had been defiled.

17. Cpl Kwamboka of Kabras police station received the defilement report from the complainant and J. The two were said to be accompanied by one male, an uncle to the complainant. After recording statements, she arrested the appellant and charged him. During cross examination, Cpl Kwamboka stated that the appellant was arrested by members of the public.

Defence Case

18. At the close of the prosecution case, the appellant was placed on his defence on the 29/9/2015. He asked for an adjournment to give him time to reflect on the provisions of Section 211 of the Criminal Procedure Code before deciding on the nature of his evidence. When the matter came up for defence hearing on 21/10/2015, the appellant told the court thus

"I will remain silent and court to decide."

Issues for Determination

19. On this appeal, like it was during the trial, the following are the issues for determination:-

a. Penetration; and

b. Age of the complainant and

c. Identity of the perpetrator or of the person who caused the penetration.

Analysis and Determination

20. With regard to the issue of penetration, I have no doubt in my mind that the same was proved beyond reasonable doubt. This is mainly through medical evidence produced by Kizito who on examination of the complainant's private parts established that the vagina was open enough to allow two phalanges to pass through. He also testified that epithelial cells as well as spermatozoa were visible in the appellant's vagina and in the urine. **Section 2 of the Sexual Offences Act No. 3 of 2006** defines penetration as either partial or complete insertion of a person's genital organs into the genital organs of another person. In the instant case the presence of spermatozoa and epithelial cells in the complainant's vagina denotes that the penetration was complete.

21. The next issue is one of age of the complainant. The evidence on this issue though not consistent, shows that in the worst case scenario, the complainant was not over 18 years of age as at 14/4/2014. In her testimony on 24/4/2015, the complainant told the court that she was 18 years old. It was therefore safe, in my considered view for the trial court to assume that the complainant's age fell between the age bracket of 15 – 17 years. This age bracket is the one envisaged under Section 8 (4) of the Sexual Offences Act which reads as follows:-

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

22. In the premises the offence with which the appellant was charged should have been under **section 8 (1) as read with Section 8 (4) of the Sexual Offences Act**. It is my considered opinion that if the prosecution counsel had been vigilant, he/she would have asked for leave to amend the charge sheet. That failure to amend however did not prejudice the appellant.

23. The last issue is whether the appellant was positively identified as the perpetrator of the offence. It is not in any doubt that the alleged offence took place during the daytime. The complainant said so. Even Jacklyne testified that at about 11.00 a.m. she saw the appellant ferrying J on his motorbike. At about 12.00 noon, she saw the appellant ferrying the complainant on the same motorbike. There is therefore corroboration from those circumstances that the appellant and the complainant were together on the motorbike. The complainant stated that the appellant rode with her into a partially built house and there defiled her. All this evidence given against the appellant was not controverted by the appellant. I therefore find no reason to doubt those testimonies.

24. One of the grounds of appeal is that the learned trial magistrate grossly erred in law and fact in convicting the appellant without considering the fact that there was no evidence to corroborate the evidence of the complainant. The answer to this ground is found in the proviso to Section 124 of the Evidence Act which states:-

“Provided that where in criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling truth.”

25. In the instant case, the learned trial court who saw the complainant and observed her demeanor as the complainant testified had the following observation:-

“Having had (sic) the opportunity to look at the victim, she was focused and believable, she didn't cast any doubt on her evidence even on cross examination by the accused.”

26. I have nothing more useful to add to the observations of the learned trial magistrate.

27. There is one more point raised by appellant's counsel in her further submissions and this is that the appellant's rights under **Article 49 (f) of the Constitution** were violated and that the prosecution did not explain why the appellant was kept in police custody for 18 days before being arraigned in court. Though this complaint may be genuine it is worth noting that the same is being brought up on appeal and as such the prosecution had no opportunity of responding to the same.

28. Finally is the issue of sentence. After considering a probation officer's report the learned trial court sentenced the appellant to 20 years imprisonment. The appellant has complained that the sentence was harsh and excessive in the circumstances. The said sentence is what is provided under **section 8 (3) of the Sexual Offences Act**, but this court having concluded that the sentencing section in this case should have been **section 8(4) of the Sexual Offences Act**, I agree with the appellant that the sentence was excessive in the circumstances. In this regard, the proper sentence should have been 15 years imprisonment.

29. Now considering the Supreme Court decision in **Muruatetu & Another -vs- Republic [2017] eKLR** and the subsequent Court of Appeal decisions on strict minimum sentences, and further considering the circumstances of this case, I would reduce the sentence to ten (10) years imprisonment with effect from 1/12/2015.

30. As I conclude this judgment I would like to sound a warning to young women, especially teenagers, to be wary of sexual pests and predators in our midst. I could read in between the lines of the complainant's evidence that there was some communication between the complainant and the appellant before the unfortunate incident happened. In our country today some of the most monied people within are

motorbike riders, who frequently use their financial muscle to mislead and misguide young girls by promising and/or giving them money in exchange for sex. It is the girls themselves who can put an end to this menace by telling themselves that sex, and especially irresponsible sex can wait.

Conclusion

31. In light of the above, I make the following final orders in this matter:-

1. The appellant's appeal on conviction be and is hereby dismissed.

2. The appellant's appeal on sentence succeeds only to the extent that the 20 years imprisonment is set aside and in lieu thereof, I sentence the appellant to 10 (ten) years imprisonment with effect from 1/12/2015.

3. Right of appeal to Court of Appeal within 14 days from the date of this judgment.

32. 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