



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 108 OF 2018

BETWEEN

ELIJAH OTIENO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Winam SO

Criminal Case Number 07 of 2017 by Hon. C.Njalale (SRM) on 29th November, 2018)

JUDGMENT

Background

1. The Appellant herein **ELIJAH OTIENO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*) which was allegedly committed on 19.02.17 against **SAO** a girl aged 13 (Thirteen) years.
2. The prosecution called 6 witnesses in support of the charges. **PW1** the complainant herein stated that she was born on 03.08.03. She recalled that on a certain Saturday at about 03.00 pm, she went to fetch water from [Particulars Withheld] school which she was attending and there she met the Appellant who was the school watchman and he defiled her and gave her Kshs. 30/-. She reported the matter to her aunt but Appellant upon being questioned by the school headmistress denied it. She recalled that Appellant defiled her a second time when she went to fetch water and gave her Kshs. 40/-. She told court that a woman she did not know found her and the Appellant at the scene and reported the matter to the headmistress and when she was summoned she said that Appellant had defiled her again. The matter was reported to police and she was taken to hospital and Appellant was arrested.
3. **PW2 JOO**, the complainant's mother stated that complainant was 13 years old. She recalled that on 24.02.17, she was informed that her daughter had been defiled. She reported the matter to police who escorted complainant and Appellant to hospital for examination.
4. **PW4 Dr. Mathews Oluoch** produced complainant's P3 form **PEXH. 2** filled by his colleague Dr. Juliana on 02.03.17 which showed that complainant's genitalia was normal with remnants of hymen.
5. **PW6 Collins Odongo** a clinical officer produced complainant's PRC form **PEXH. 1** filed by his colleague Moses Oyoo on 24.02.17 which showed that complainant's genitalia was normal with remnants of hymen.
6. **PW6 Steven Wafula Wanjala**, the investigating officer stated that after receiving complainant's report, he arrested Appellant and sent him and complainant to hospital after which Appellant was charged.
7. In his sworn defence, the Appellant conceded that he used to work at [Particulars Withheld] primary school where the complainant was a pupil but denied the offence.
8. In a judgment dated 29th November, 2018, the Appellant was convicted and sentenced to 20 years' imprisonment.

Appeal

9. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 05.12.18. From the grounds of appeal and supplementary grounds of appeal, the Appellant raised the following main issues THAT:

1) The prosecution did not call crucial witnesses

2) Penetration was not proved

3) His right under Article 50(2)(p) of the Constitution was violated

10. When the Appeal came up for hearing on 23.07.19, Appellant opted to wholly rely on his grounds of appeal, supplementary grounds of appeal and submission filed on 26.09.19.

11. The state submitted that there was evidence that the complainant was 14 years old, that the P3 for proved penetration and that Appellant had been identified as the assailant.

Analysis

12. 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."

13. I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of both parties and I will address the issues for determination as hereunder.

14. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are the same grounds that the Appellant has raised in his appeal. These are:

i. Age of the victim.

ii. Penetration.

iii. Identity of the offender

Age of the victim.

15. Complainant herein stated that she was born on 03.08.03 and was therefore 13 years when the offence was committed. Her mother PW2 told court that complainant was 13 years old. That the complainant's age was 13 years as stated in the charge sheet was indeed proved. Although no documentary evidence was produced, *the age of the victim is a matter of fact which can be proved by evidence other than birth certificate and age assessment report.* In the case of **Richard Wahome Chege v Republic [2014] eKLR**, the Court of Appeal held as follows:

"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. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth" It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself".

16. The trial court found as a fact that the complainant's evidence that she was 13 years old had been corroborated by her mother. From the foregoing, I find that the trial court arrived at a correct conclusion when it found that the complainant's age had been proved to be 13 years.

Penetration

17. Appellant complained that penetration was not proved. **Section 2 of Sexual Offences Act** defines penetration to entail: -

"partial or complete insertion of a genital organ of a person into the genital organ of another person."

18. The P3 form **PEXH. 2** produced by **PW4**, shows that complainant's genitalia was normal with remnants of hymen. The trial court found as a fact that there was evidence of penetration and from the foregoing, I have no reason to interfere with that finding. For that that reason, I find and hold that the prosecution proved penetration beyond doubt.

Identity of the offender

19. Concerning the identity of the offender, the Appellant conceded that he was not a stranger to the complainant but denied defiling her.

20. Appellant complained that the prosecution did not call some crucial witnesses. **Section 143** of the Evidence Act, Chapter 80, Laws of Kenya

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”

21. Further, in **Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005**, the Court of Appeal held,

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

22. The foregoing notwithstanding, a prosecution that fails to call crucial witnesses stands the risk of failing to prove the charges if doubts are raised by other evidence adduced in the trial as to the commission of the offence.

23. Complainant was the only witness to the alleged defilement. Appellant denied the offence. There not being any corroboration of the allegations of defilement by the complainant, conviction may only be founded on a finding under section 124 of the Evidence Act, that the complainant victim of sexual offence was, for reasons to be recorded telling the truth as to the allegation of offence.

24. Section 124 of the Evidence act is in the following terms:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a 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 the truth.

25. The trial court recorded its findings as to the believability of the complainant concerning the allegation of defilement to justify reliance on her uncorroborated evidence and I have reason to interfere with that finding.

26. Having considered the evidence in its totality, I find that the trial court’s finding that the prosecution was proved beyond any reasonable doubt was well founded and the conviction merited.

27. Concerning sentence, Appellant stated that Article 50(2)(p) of the Constitution violated. Article 50(2)(p) provides that:

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

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

28. Appellant was sentenced to the mandatory minimum sentence for an offence of defilement contrary to section 8(1) as read with section 8(3) of **the Act**.

22. The Court of Appeal has in several cases including **B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR** considered the constitutionality of mandatory sentences. The court has adopted the holding of the Supreme Court held in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that mandatory sentences are unconstitutional as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion to impose an appropriate sentence.

29. From the foregoing, I am bound to re-examine the sentence meted on the Appellant having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the sentence prescribed by the legislature. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under **the Act**. It observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

30. The Appellant is a first offender. The 20 years’ sentence imposed on the Appellant is substituted with an imprisonment term of **7 years** which will run from **29th November, 2018** when he was sentenced.

DELIVERED AND SIGNED IN KISUMU THIS 07th DAY OF November 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Appellant - Present in person

For the State - Ms. Gathu