



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 39 OF 2018

SAMWEL ONDENG APIYOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 8.8 2018, in Bondo Principal Magistrate Criminal case SO- (Sexual Offence) No. 40 of 2017 before Hon. E.N. WASIKE – Senior Resident Magistrate)

RULING

1. The appellant Samwel Ondeng Apiyo was charged, tried and convicted of the offence of **Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.**
2. It was alleged that on the 13th day of April 2016 at 11.00 a.m. at [particulars withheld] village in Rarieda Sub-County within Siaya County, unlawfully and intentionally caused his penis to penetrate the vagina of JAY, a girl aged 14 years.
3. The appellant pleaded not guilty before Hon. E. N. Wasike and after a full trial, he was found guilty of the charge of defilement. He was convicted and sentenced to serve 20 years imprisonment on 8.8.2019.
4. The Appellant was aggrieved by the said judgment, conviction and serve so he filed this appeal on 18.8.2018 contending that:
 - (1) *I pleaded not guilty to the charge,*
 - (2) *There was no eye witness who testified in the case.*
 - (3) *None of the witnesses was at the scene though the incident is said to have taken place at 11.00 a.m. by the road side.*
 - (4) *PW1 told the court that she could only identify the victim if arrested and this case was planted on me after I had been arrested of another case of creating disturbance at home.*
 - (5) *No identification (sic) was conducted to enable Pw1 to identify exactly who did this to her.*
 - (6) *I plead for original court proceedings to enable me adduce more grounds.*
5. The appellant prayed that this appeal be allowed, the conviction be quashed and sentence be set aside and he be set at liberty.
6. This appeal was heard by way of written submissions and oral highlights on 30.10.2019 after the court recalled the hearing from 18.11.2019 as the appellant had another Criminal Appeal No. 61 of 2018 which was being heard on 30.10.2019.
7. As this is a first appeal, this court is bound by the principles espoused in **Okeno V. Republic [1972] E.A. 32** that this Court must reassess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it never saw nor heard the witnesses as they testified.
8. When this appeal came up for hearing on 30.10.2019, the appellant told this court that he did not challenge the conviction because he committed the offence. He only prayed to the court to reduce for him the prison term of 20 years imposed. His appeal against conviction was therefore withdrawn. He asked for leniency.
9. Mr. Ngetich Prosecution Counsel for the Respondent supported the sentence meted out and submitted that it was lawful and meted out

after mitigation and circumstances of the case were considered.

10. I have considered this appeal against sentence only, the appeal against conviction having been withdrawn. It is true that the appellant was sentenced to serve 20 years imprisonment on 8.8.2018 after being found guilty and convicted of the offence of defilement of a child aged 14 years under **Section 8(1) as read with Section 8(3) of the Sexual Offences Act**. This was after he mitigated saying he prayed for leniency, he had a family and that he had been in custody for quite some time.

11. The trial court record also shows that he was a first offender. However, this court is now aware that the appellant has another pending Appeal HCCRA 61/2018 where he was convicted for attempted defilement of a child aged 11 years and he was arrested on 20.10.2017. That offence allegedly occurred on 27.9.2017 while in this case, the offence occurred on 13.4.2016.

12. Under **Section 8(3) of the Sexual Offences Act**, a conviction for the offence herein attracts a minimum of 20 years imprisonment, owing to the age of the complainant. This Court therefore finds that the sentence imposed by the trial court was lawful.

13. Sentencing, however, is in the discretion of the trial court, having regard to the circumstances of each case, and the mitigation. The Sexual Offences Act sets out Mandatory minimum sentences which therefore takes away the discretion of the court in sentencing. Whereas the said law was intended to deter Sexual predators especially as against children, there is however no evidence that harsh sentences have deterred the would be offenders as 98% of the Criminal Appeals in this Court relate to Sexual Offenders who are all serving between 10 years imprisonment and life imprisonment.

14. In my view, this is what must have informed the decision by the **Court of Appeal in Jared Koita Injiri V. R. [2019] eKLR (Kisumu Court of Appeal)** where the Court of Appeal, applying the principle set out in **Francis Karioko Muruatetu Vs. R. Supreme Court Petition 15 and 16 of 2015** held that the Mandatoriness of death sentence in Robbery with Violence cases and by extension, to Murder convictions was unconstitutional as it deprived the accused persons of the opportunity to mitigate before being sentenced and further, that such mandatoriness of sentences deprived the trial court of the judicial discretion to mete out appropriate sentence having regard to the circumstances of each case.

15. Following the above decisions from the Apex Court and Superior Court of Appeal, which decisions bind this Court as far as the applicability of those principles are conceived, this court has had to deal with an avalanche of cases for resentencing where convicts had exhausted the appeal mechanisms.

16. Even where the appeals are pending before this Court as a first appellate Court, some appellants have been motivated to withdraw their appeals against convictions and urged the Court to consider reducing Mandatory Minimum sentences imposed on them.

17. In this case, the appellant has admitted committing the offence although he denied before the trial court leading to a full trial. The Birth certificate No.208493 for the complainant issued on 23.11.2013 shows that she was born on 24.3.2003 in Rarieda, S. Ramba Sub-Location to Sospeter Yalo Okumu and Penina Auma Oyugi.

18. Accordingly, the child was 13 years and within the provisions of **Section 8(3) of the Sexual Offences Act** for purposes of sentencing. Obviously, no one could confuse a 13 year old girl for an adult capable of consenting to sexual encounters.

19. The child testified that she was 15 years old but this was at the time of hearing on 4.4.2018. She was a class 8 pupil at [particulars withheld] Primary School and that on 13.4.2016 at about 11 a.m, she was going to Sara Didi Dispensary for treatment of Malaria on foot when she met Samuel Ondeng Opiyo the appellant carrying a panga. He grabbed her neck and dragged her into a nearby thicket and told her that he would cut her with the panga if she cried. He then removed his trouser, took out his penis and removed her pant and he inserted his penis into her vagina twice. He then left her. She got up and went to a certain homestead and explained herself to the person she met there and the person led her to the scene of crime but the appellant had vanished so the person (a man) took her to Sara Didi Dispensary and later she was referred to Ongiello Health Centre.

20. The person then called for the complainant's mother who went and took her to Ongiello Health Centre. The following day a report was made to Ndori Police Station where she was issued with a P.3 form and it was filled at Rera Health Centre. The P.3 form produced in evidence showed the complainant had tenderness and bruises on the anterior aspect of the neck and swelling on the right parietal region of the head. She also had a ruptured, inflamed hymen and fragile vaginal mucosa. The discharge was foul smelling, urinalysis showed numerous red blood cells, epithelial cells were numerous and penetration was achieved. The Clinical Officer also produced treatment notes for the child. He confirmed that the minor had been defiled for the first time.

21. From the above evidence, no doubt the appellant used a lot of violence against the complainant child. He used a lethal weapon, a panga to threaten her to submit to the heinous orgy. She was injured on her head and neck because of the force he applied on her. He penetrated her very violently. The degree of injury was assessed as grievous harm.

22. In my humble view, there is absolutely no justification for such a child to be violated as was the case here by an adult like the appellant who could have provided protection to the young child who was, in the first instance, sick and going to seek for medication. The appellant behaved like a wild animal not a human being. He did not deserve the mercy of the court or discretion to sentence him leniently.

23. Although he has now admitted the offence, he took the minor child through motions of a hearing to prove that she was indeed defiled by the appellant, a person she knew very well.

24. The appellant deserves to be kept away from the community, to protect children from such sex pests, He is a disgrace to the Society and to humanity.

25. In my humble view, 20 years imprisonment though mandatory minimum, was deserved. I take cognizance of the fact that on 27.9.2012 after he had committed this offence, the appellant herein accosted another child S.A.O. and attempted to defile her. He was charged vide Bondo Principal Criminal Case Number 39 of 2017, tried, convicted and sentenced to serve 10 years and the trial Court ordered that sentence to run consecutively with sentence of 20 years imprisonment imposed in Bondo Principal Magistrate Criminal Sexual Offences case No. 40 of 2017 subject of this appeal. It therefore appears that the appellant cannot be helped outside prison. Only prison can rehabilitate and reform him. The appellant is no doubt a recidivist as far as sexual offences against children are concerned.

26. I have considered the above circumstances of the offence and the fact that the appellant is a repeat offender. In my humble view, the sentence imposed was appropriate. The appellant must be kept away from the society long enough for him to learn his lesson and to protect children from being preyed upon by him. Sex Offenders traumatize their victims besides being a threat to health in this era of HIV/AIDS scourge. For the above reasons, I find no reason to interfere with the sentence of 20 years imprisonment imposed on the appellant by the trial Magistrate. I decline to interfere and uphold it. As the appeal against conviction was withdrawn, I dismiss the appeal against sentence.

27. The appellant to serve his full sentence and subject to his good character and discipline in prison, he may benefit from remission.

28. Accordingly, this appeal is dismissed.

Dated, Signed and Delivered at Siaya this 18th day of November, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Ngetich Prosecution Counsel for Respondent/State

CA: Winnie and Modestar