



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 320 OF 2013

WILSON KIBET CHEPKWONY.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable H. Nyaga, Senior Principal Magistrate,

delivered on 27th November, 2013 in Molo Chief Magistrate's Court

Criminal Case No. 1464 of 2010)

JUDGMENT

1. The Appellant, Wilson Kibet Chepkwony, was arraigned before the Chief Magistrate's Court at Molo charged with a single count of defilement of a child contrary to Section 8(1) as read together with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 24th day of January, 2010 in Kipkelion District within the Rift Valley Province, he is alleged to have intentionally and unlawfully caused his penis to penetrate the vagina of MCK, a child aged 7 years.
2. The Appellant also faced an alternative count based on the same facts: that he indecently assaulted the same child on the same day and at the same place.
3. The Appellant pleaded not guilty to the charge and the case proceeded to full hearing. Trial commenced before Honourable S. Soita. He heard five witnesses before he was transferred out of the station. The Learned Honourable H. Nyaga took over the hearing. He heard the final witness. Upon complying with section 200(3) of the Criminal Procedure Code, the Appellant elected to recall four witnesses (PW1; PW3; PW5 and PW6) for cross examination.
4. At the conclusion of the trial, the Learned H. Nyaga convicted the Appellant and sentenced him to life imprisonment.
5. The Appellant is dissatisfied by both the conviction and sentence and has appealed to this Court.
6. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.
7. The evidence that emerged from the trial was as follows.
8. *The Complainant testified as PW1. She testified that she was about four years old. Both Magistrates concluded that she did not sufficiently understand the nature of oath to be sworn. She told the Court that on the material day she was sent by her mother in the evening to buy paraffin. She met the Appellant, who she knew before. He held her by the hand and took her to his house. He then removed her panties and proceeded to do "tabia mbaya" to her. The Appellant allegedly told her that if she screamed, he would kill her.*
9. *The Complainant told the Court that she slept in the Appellant's house. The Appellant woke up early in the morning and left her. He locked her in the house. She remained in the house until she heard her mother passing by looking for her. She yelled out and her mother opened the door for her. She told her mother what had happened. Her mother then took her to Kedowa Police Post and then to the hospital.*

10. SK, the Complainant's mother, testified as PW3. She confirmed that on 24/01/2010 she sent the Complainant to buy paraffin at the shop near their home. That was around 7:30pm. The Complainant did not return home that evening. By 9:00pm, the mother got worried and went looking for her at the trading centre. She did not find the Complainant. She went home and slept. She resumed her search the following morning. That was when the Complainant heard them when she was inside the Appellant's house. The Complainant screamed to attract her attention. She ran to the house and pushed open the door. She found the Complainant inside the house on the bed. The Complainant narrated what had happened.

11. S told the Court that she observed the Complainant's private parts and noted that there was blood. She then reported to the Police and took the Complainant to a hospital in Londiani. She also reported to the village elder. She said that immediately after that, the Appellant disappeared from the area and only returned four months later – in May of that year; and that is when he was arrested and charged.

12. The elder S had reported to was Wilson Marindany Kiptoo. He testified as PW6. He testified that after receiving news of the disappearance of the child, he got further news the following day that the child had been found in the Appellant's house. He reported the matter to the Area Chief. Later on, in May of that year, he was alerted that the Appellant had returned to the area. He mobilized the villagers who arrested the Appellant and took him to the Police.

13. The Area Chief, Kenneth Kiprof Korir, testified as PW2. He confirmed receiving news about the defilement. He went to the scene. He found the Complainant and her mother. The Appellant was nowhere to be seen. He advised Sarah to take the Complainant to the hospital and report to the Police. In May of that year, he received a report that the Appellant had been arrested by members of the public. He escorted him to Kedowa Police Post.

14. Back on 25/01/2010, it was PC Joseph Ndonga at Londiani Police Station who received Sarah and the Complainant when they reported. PC Ndonga testified as PW4. He told the Court that he was on duty at around 2:00pm on that day when the two went. They were accompanied by a village elder. He supplied them with a P3 Form and referred them to hospital. Later, on 31/05/2010, the Appellant was brought to the Police Station by members of the public. PC Ndonga re-arrested him and preferred charges against him.

15. At Londiani Hospital, it was Philip Rotich, a Clinical Officer, who attended to the Complainant. Philip testified as PW5. He testified that he received her on 25/01/2010 upon complaints that she had been defiled. He approximated her age as seven years old. On examination, he found laceration on the labia majora and minora. The hymen was freshly torn. Although he did not see any spermatozoa, he also saw a whitish discharge in the vagina. Specimen taken revealed epithelial and puss cells. He filled the P3 Form which he produced as evidence in the case.

16. When put on his defence, the Appellant told the Court that he was in Narok at the material time. He gave an account of how he was arrested on 31/05/2010. He claimed that he had disagreed with the Complainant's family when he crashed their tractor. The innuendo was that the family framed him with the charges as a revenge.

17. On appeal, the Appellant raised the following grounds:

1) That the Hon. Learned trial magistrate erred in law in fact when he convicted him in reliance of medical examination that was not inclusive and credible given that:

a. PW2 states that PW1 was bleeding yet the doctor denied the same.

b. Section 36(1) of the Sexual Offences was not complied with

c. Treatment documents were not produced.

2) That the Hon. Trial Magistrate erred in law and facts when he convicted me in reliance to contradicting evidence of the prosecution witnesses.

3) That the Hon. Trial magistrate failed to note that there existed a grudge between me and PW6 who was PW1 uncle and the village elder.

4) That Hon. Learned trial magistrate erred in law and fact when he failed to note that the case lacked an independent witness as it was a family dispute and misunderstanding.

5) That it was prejudicial to me as none of my arresters was called to testify, hence contravening Section 144(1) of CPC.

6) That it was burden of proof shifted to me contrary to Section 107 and 109 of the Evidence Act.

7) That the Hon pundit magistrate erred in law when he rejected my truthful defense without any cogent reason contrary to Section 169(1) CPC

8) That the Hon trial magistrate erred in law when he rejected to admit my submission contrary to Section 213 of the CPC

9) That the Hon trial magistrate erred in law and in fact when he convicted me in absence of sufficient evidence.

18. The Appellant expounded on these grounds in his written submissions. At the oral hearing, the Appellant highlighted that the Court

should note that the doctor said that there was vaginal discharge but the P3 form does not say so. He also wondered why there was no spermatozoa and yet the Complainant was taken to the doctor in the morning of the alleged assault. The Appellant further complained that the investigating officer never visited the scene of crime. He submitted that the P3 was fabricated. To demonstrate this, he pointed out that the P3 form does not have a reference number of the hospital. Additionally, he claimed that the rubber stamp has the name of the doctor which he thought was unusual.

19. Ms. Nyakira, the State Counsel, opposed the Appeal. She argued that there was sufficient evidence to support the charge of defilement. She submitted that the Trial Court properly convicted and sentenced him. Ms. Nyakira submitted that:

- a. The complainant was a young child of 7 years. The age is indicated in the P3 form. The mother of the complainant also stated that the daughter was 8 years old – a few months after the incident. The child also said she was in class 3. She was therefore a child of tender years. So age was properly proved.
- b. The girl testified twice. She was consistent in her evidence. She said Appellant grabbed her hand took her to his house and did 'tabia mbaya' to her. She says she was warned not to scream. Upon cross examination she says she was threatened she would be stabbed with a knife if she made noise. She identified the Appellant by name as the person who defiled her. It is evidence of recognition. This was proper identification. In fact Appellant disappeared from the neighborhood for 5 months after the incident.
- c. The P3 form and the evidence of the clinical officer shows that there was penetration.
- d. On sentence, Ms. Nyakira submitted that the Court imposed the only sentence allowed under the statute.

20. I have now re-evaluated the full trial record and scrutinized it in light of the complaints raised by the Appellant about the trial.

21. The Learned Trial Magistrate identified the three elements the Prosecution was required to prove beyond reasonable doubt in order to prevail in obtaining a guilty verdict:

- i. That there was penetration of the Complainant's genitalia;
- ii. That it was the Appellant who caused the penetration (i.e. identification of the Appellant as the assailant); and
- iii. That the Complainant was less than twelve years old.

22. The age of the Complainant is hardly in question. While the Complainant seemed unsure of her age given her tender years, her mother testified that she was seven. The examining Clinical Officer also approximated that she was seven. Finally, the Trial Court ruled that she was young enough to not understand the meaning of oath. There is no reasonable doubt that the Complainant was below twelve years old.

23. Was there evidence of penetration? The Complainant gave straightforward evidence of penetration and how it happened. The Trial Court believed here. Her testimony was eminently credible. I find no reason to doubt it. The mother of the Complainant said she observed the physical injury to the genitalia immediately after it happened. Finally, the treating Clinical Officer was categorical that there was penetration.

24. The Appellant complains that the medical evidence was insufficient because the examining Clinical Officer did not find any spermatozoa to prove penetration. There is no requirement in our law that defilement can only be proved beyond reasonable doubt when medical evidence shows positively that semen or seminal fluids of an Accused Person was found in the genitalia of the victim. Indeed, the position in our law is that the Prosecution does not have to prove by medical evidence that any fluids found in the Complainant's genitalia was the Appellant's spermatozoa as the Appellant argues on appeal. As our decisional law has established many times, rape or defilement is proved by evidence, not by way of DNA test. See *AML v Republic [2012] eKLR*. In the present case, medical evidence established there was defilement; and oral testimony of the Prosecution witnesses connected the Appellant to the rape.

25. The complaints that the P3 Form was fabricated are un-availing. The Clinical Officer who filled the form testified in Court and the Appellant had an opportunity to cross examine him.

26. As for identification, the Complainant was categorical who it was that defiled her. She gave lucid testimony of how the Appellant led her by the hand to his house. The Appellant was a distant relative and well known to her. Besides, the Complainant was found in the Appellant's house in the morning after the attack. Finally, the Appellant disappeared from the village immediately afterwards. There is little doubt that he was the assailant.

27. Before I consider the Appellant's complaint on sentence, I should point out that I have re-considered, as I am required to do, the sworn testimony of the Appellant whose main tenet was alibi defence. The Learned Trial Magistrate simply did not believe him. She found, instead, the Prosecution narrative believable and the Complainant to be telling the truth. Looking at the totality of circumstances, I am in agreement with the Learned Trial Magistrate that the Appellant's narrative has no inherent possibility that it is might be true. This means that it is not capable of raising any reasonable doubts in the mind of a reasonable Tribunal. The Appellant did not place enough credible evidence before the Court to trigger the Prosecution duty to displace the alibi defence. Under those circumstances, the Learned Trial Magistrate was correct to dismiss the alibi defence as improbable.

28. The Court of Appeal had this to say about a finding on credibility of a witness by a Trial Court:

Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence

and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not.

29. This was in ***Keter v Republic [2007] 1 EA 135***. There is nothing in this case to suggest that it was an abuse of discretion for the Learned Trial Magistrate to disbelieve the Appellant; and, on the other hand, believe the Prosecution witnesses. Indeed, there is enough on the record to affirm that Learned Trial Magistrate's finding of incredulity of the Appellant's narrative: consistency of the Prosecution witnesses' narratives even under scrutiny in cross examination; their points of convergence; evidence of first report naming the Appellant; and lack of motive to lie and/or frame the Appellant.

30. Consequently, it is my finding that all the elements for the offence of defilement were proved beyond reasonable doubt. The conviction was safe and free from errors.

31. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve life imprisonment in line with Section 8(2) of the Sexual Offences Act. That section provides that:

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

32. This is what the law provides and it is what the Learned Magistrate used to impose the sentence she did. However, in a recent decision, in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

*In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015***], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*

Being so persuaded, we 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.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

33. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

34. In the present case, the Appellant offered mitigation in the Trial Court. He told the Court that he was a first offender. He was also the sole bread winner for his family. He pleaded for leniency. The Prosecutor confirmed that the Appellant had no previous record. These are mitigating circumstances. There are, on the other hand, serious aggravating circumstances in the case. First, the victim was a child of really tender years: seven years old. She will likely be scarred for life by this traumatic sexual assault. Second, the Appellant was a distant relative to the Complainant; the Appellant abused his relationship of trust with the victim.

35. Considering the age of the victim and the circumstances of the offence (which did not involve use of sadistic or gratuitous violence on the victim), life imprisonment in the circumstances of this case would be disproportionate. Considering the mitigating and aggravating factors, I am of the view that a sentence of thirty years imprisonment would properly serve the sentencing objectives in this case.

36. The upshot of all this is that the Appellant's appeal against conviction fails. However, the appeal against the sentence is hereby allowed. Accordingly I set aside the sentence of life imprisonment and substitute therefor a sentence of thirty (30) years imprisonment with effect from the date of sentence by the Trial Court.

37. Orders accordingly.

Dated at Nakuru this 8th day of November, 2019

JOEL NGUGI

JUDGE

Delivered at Nakuru this 11th day of November, 2019

J. N. MULWA

JUDGE