



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 13 OF 2019

BETWEEN

ELIAKIM JOHN SIELO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Maseno S. O Criminal Case Number 009 of 2016 by Hon. R.S.Kipngéno (SRM) on 28th May, 2019)

JUDGMENT

Background

1. **ELIAKIM JOHN SIELO (Appellant)** herein 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*). The offence was allegedly committed against SA a girl aged 13 years on 26th November, 2016.
2. The prosecution called 6 witnesses in support of the charges. **PW1** the complainant herein stated she was 15 years old and in class 6 at [particulars withheld] Primary School. She recalled that on 26.11.16, she went to buy goods from a shop at [particulars withheld] trading centre where the Appellant whom she referred to as she found KOBOLÉ pulled her into the shop, covered her mouth and defiled her. She stated that after Appellant was through with her, he wiped her genitals with a sheet, gave her 30/- and pushed her out through the back door where she met her school mate who escorted her to Opasi Police Post where her mother found her and escorted her to hospital.
3. **PW2 CAL** the complainant's mother stated that complainant was born on 28.03.03 and produced her certificate of birth as **PEXH. 3**. She stated that she sent complainant to the shops on 26.11.16 at about 04.45 pm and thereafter she was called by one Alfred and asked to go to Opasi Police Post and on arrival was informed that the complainant had been defiled and she escorted her to hospital.
4. **PW3 ALFRED OBWONDA HORI** stated that on 26.11.16 at about 05.20 pm, he was at Opasi trading centre when he was summoned to Opasi Police Post by a lady she did not know and when he got there informed police that she knew the complainant and was sent to call her mother and later accompanied complainant to hospital.
5. **PW4 CELHIR AKINYI WAMEGA** stated that on 26.11.16 at about 05.20 pm, she met complainant crying and she said she had been defiled by KOBOLÉ and later accompanied her mother and W3 to take complainant to hospital.
6. **PW5 ELKANA MODI ODHIAMBO** a clinical officer stated that on 26.11.16, he examined complainant and found her with lacerations on labia minor and majora. Hymen was torn and she had minimal vaginal bleeding. He stated that there was evidence that complainant had been defiled and produced her P3 form as **PEXH. 1**.
7. **PW5 PC STELLA JEPLETING**, the investigating officer stated that produced a government analyst's report **PEXH. 4** which showed that analysis of high buccal swabs taken from the complainant and the Appellant were analyzed against a white sheet stained with body fluid **PEXH. 5** allegedly recovered from Appellant's shop by CPL NELSON KIPLAGAT had complainant's DNA but had no relationship with Appellant's DNA.
8. In his sworn defence, the Appellant stated that the complainant went to his shop on 27.11.16 with 5/- to buy Roiko and she claimed that she had given him 50/-. It was his evidence that they disagreed concerning the amount of money she had given him and she went away crying. It was his evidence that he was arrested a day later on 28.11.16 and was charged with an offence that he did not commit.

9. In a judgment dated 28th May, 2019, the Appellant was convicted and sentenced to 20 years' imprisonment.

Appeal

10. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 05.12.18. From the amended grounds of Appeal and submissions filed on 12.11.19, I have deduced the following issues for determination: -

- 1) **Whether the charge sheet was defective**
- 2) **Whether Appellant's rights under Article 49 (1) were violated**
- 3) **Whether prosecution case was contradictory**
- 4) **Whether the judgment of the trial court complied with Section 169 of the Criminal Procedure Code**

11. When the appeal came up for hearing on 12.11.19, Appellant stated that he was wholly relying on the amended grounds of appeal and written submissions filed on 12.11.19. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and relied on written submissions also filed on 12.11.19.

Analysis and Determination

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. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under *the Act*. These are the age of the victim, penetration and identity of the offender.

14. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

15. It is therefore important for the prosecution to prove the age of a victim since age determines the sentence to be meted out on the offender. Complainant's certificate of birth **PEXH. 3** shows she was born on 28.03.03 and the trial court's finding that she was proved to be 13 years when the offence was committed was well founded.

Penetration

16. Section 2 of *the Act* defines penetration to entail: -

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

17. The P3 form **PEXH. 1** produced by **PW5**, a doctor shows that complainant had lacerations on labia minor and majora, hymen was torn and she had minimal vaginal bleeding. The trial court's finding that there was penetration was supported by medical evidence.

Whether the charge sheet was defective

18. The Appellant did not clearly explain what he meant when he asserted the charge sheet was defective and that ground must hence fail.

Was Article 49 (1) were violated

19. Article 49 (1) provides that:

An arrested person has the right (f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day

20. There is evidence that appellant was arrested on Sunday 27.11.18 and was arraigned in court on Tuesday 29.11.16. There was indeed a one day before Appellant was charged. Appellant had an opportunity to question the investigating officer regarding the delay but he did not. I therefore find that this ground has no merit.

Was Section 169 of the Criminal Procedure Code complied with

21. I have considered the judgment of the trial court and I am convinced that the trial magistrate complied with the provisions of Section 169 of the Criminal Procedure Code in that the judgment contains the points for determination, the decision thereon and the reasons for the decision, specifies the offence and the section of the Sexual Offences Act and the Criminal Procedure Code under which the Appellant was convicted, and the punishment to which he was sentenced and is dated and signed by the trial magistrate.

Identity of the offender

22. I have deliberately determined to deal with the issue of identity of the offender last. The Appellant conceded that he was not a stranger to the complainant since she used to frequent his shop but denied defiling her.

23. It is on record that the complainant was the only witness to the incident. High buccal swabs taken from the complainant and the Appellant were analyzed against a white sheet stained with body fluid marked as **PEXH. 5** allegedly recovered from Appellant's shop by CPL NELSON KIPLAGAT. The government analyst's report produced as **PEXH. 4** demonstrates that the sheet had complainant's DNA but had no relationship with Appellant's DNA.

24. The foregoing notwithstanding, the trial court heavily relied upon the government analyst's report and loudly wondered how a bedsheet with complainant's DNA was recovered from the Appellant's shop.

25. With due respect, there was no evidence that the white sheet stained with body fluid which was marked as **PEXH. 5** was recovered from Appellant's shop. The fact that a statement by CPL NELSON KIPLAGAT who allegedly recovered the said sheet was produced as an exhibit did not permit the trial court to rely on such untested evidence and hold it as gospel truth. PW5's evidence concerning the recovery of the sheet amounted to hearsay evidence, is inadmissible and ought to have been rejected.

Disposition

26. In view of the foregoing analysis, it is clear to this court that whereas the prosecution proved beyond a doubt that the complainant was defiled, its own evidence contained in the government analyst's report exonerated the Appellant. I thus find and hold that the conviction and sentence were unsafe. Accordingly, I quash the conviction and set aside the sentence. Unless otherwise lawfully held, I order that appellant shall be set at liberty forthwith.

DATED AND SIGNED THIS 05th DAY OF December 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Amondi/Okodoi

Appellant - Present in person

For the State - Ms. Gathu