



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 90 OF 2017 [SOA]

(CORAM: R.E. ABURILI – J)

JARED ASA OWITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment, conviction and sentence in Siaya P.M.

CRC No. 130 of 2017 dated 26.9.2017 before Hon. T.M. OLANDO – S.R.M.)

JUDGMENT

1. The appellant **Jared Asa Owiti** was charged with the offence of defilement Contrary to Section 8(1) as read with subsection (3) of the Sexual Offences Act No. 3 of 2006 vide a charge sheet amended on 20/3/2017. The Particulars were that on 13.3.2017 at Sirembe Sub-Location in Gem Sub-County, the Appellant intentionally caused his penis to penetrate the vagina of JAO [full name withheld], a girl aged 13 years.

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. Particulars were that on the 13th day of March, 2017 at Sirembe Location in Gem Sub county Siaya County intentionally touched the vagina of JAO with his penis.

3. The appellant pleaded not guilty to the charges and the trial commenced. The prosecution called 4 witnesses including the complainant to prove its case. The appellant was placed on his defence. He gave sworn testimony and called no witness.

4. At the end of the trial, the trial court found the appellant guilty of the main charge of defilement and sentenced him to serve a mandatory 20 years imprisonment on 26th September, 2017.

5. Aggrieved by the said judgment, conviction and sentence, the appellant filed this appeal on 29th September 2017 setting out the following grounds of appeal:

1. THAT: The learned trial magistrate erred in law and fact by failing to consider the defence and dismissing the same by terming it as an afterthought.

2. THAT: I cannot recall all that transverse during the trial hence pray for the trial records to adduce sufficient grounds at the hearing thereof.

3. THAT: I pray for orders of Habeas Corpus.

6. The appellant also filed supplementary grounds of appeal on 16th January 2019 contending that:

1. The trial magistrate failed to appreciate that the appellant's rights under Article 49(1) of the Constitution were violated.

2. That the trial court failed to appreciate that the charge sheet was defective in the light of section 214 (1) of the Criminal Procedure Code.

3. The trial court failed to comply with sections 20 and 22 of the Sexual Offences Act.

7. This being a first appeal, this court is expected to, as espoused in **Okeno v Republic, [1972] E.A. 32**, reassess the evidence adduced in the trial court and arrive at its own independent conclusion giving allowance to the fact that as an appellate court, it neither heard nor saw the witnesses as they testified.

8. Revisiting the evidence before the trial court, **PW1 JAO** [full name withheld] gave sworn testimony after a voire dire examination and stated that on 13.3.2017 she was at home then she went to take a bath and she heard someone entering the house. She stated that she went to check who was there and she found the appellant who is her aunt's husband. She stated that the appellant had a new panga and he pushed her down on the floor, held her neck and defiled her and blood came out of her vagina. She stated that she went back and washed herself. The following day, she went to school and on her return the appellant gave her food and instructed her to return home early from school. She went to school and fell sick and told her teacher of what had happened to her. She went to the hospital and divulged to the doctor what the appellant had done to her. She stated she was taken to the Chief and she later went to the police with the Chief as she was afraid of returning to her aunt's place. She was therefore taken to the home of the Assistant Chief and to the Chief called Christine who later escorted her to the police.

9. In cross-examination by the appellant, PW1 stated that the appellant put her on the floor and that when another child called Odis came, the appellant left her. She stated that the appellant had a new panga which he used to threaten her with telling her that she was to go to her home the next day.

10. **PW2 Christine Awino** testified that she is the Assistant Chief Malanga West Sub-Location. She stated that on 14.3.2017 at 6 p.m. she received a call from the Assistant Chief of Luande Sub-Location who told her that he had a girl in his house who had been defiled and she ran away. She stated that she told him to take the girl to PW2 and she talked to her. That the girl told her all that the appellant had done to her and the following day she took the girl to Siaya Police Station where a report was made and a P3 form issued to her. PW2 escorted the girl to Siaya Referral Hospital. She added that the girl was an orphan and that when her father went with two of her brothers, she refused to go home with them.

11. PW3 Evalyne Atieno Odhuno a clinical officer testified and stated that on 17.3.2017 the complainant JAO aged 13 years was seen by Silas who had worked with PW3 and whose hand writing P3 was familiar with. That the complainant alleged to have been defiled by a person well known to her. On examination, Silas found that the complainant had bruises on her private parts and her hymen was broken and fresh. She stated that the laboratory test revealed that she had epithelial cells which indicate that she had bruises in her vagina. Pregnancy test was negative. There was no discharge. There were pus cells. She had infection on high vaginal swab. She stated that based on the findings, there was evidence that a blunt object was used to penetrate the complainant's vagina.

12. PW3 further stated that the complainant was taken for age assessment and her age was found to be between 13 and 14 years as all last molars had not erupted. PW3 produced the P.3 form and the age assessment report as exhibits.

13. PW4 PC Jilo Maalim testified and stated that on 16.3.2017 he received a report from the Assistant Chief Christine who reported in the company of a girl and that it was alleged that the girl had been defiled by her uncle. He booked the report, issued her with a P3 form and sent the girl for age assessment. He later arrested the appellant whom he identified in court.

14. Put on this defence, the appellant gave sworn testimony and stated that he had lived with the complainant since her childhood and that he is the one who took her to school and that he did not defile her. He stated that the complainant had other boyfriends and that he had warned her against bad influence.

SUBMISSIONS

15. In support of his appeal the appellant filed written submissions accompanying the supplementary grounds of appeal. He submitted on each of the supplementary grounds as follows:

16. On non-compliance with Article 49(1) of the Constitution, the appellant submitted that he was arrested on 17/3/2017 and arraigned on 23/3/2017 which was beyond 24 hours without giving any explanation to the court hence violation of his right under the Constitution and evidence of framing the appellant with the offence.

17. On misapprehension of section 179 of the Criminal Procedure Code, it was submitted that the trial court erred in law and fact in convicting the appellant for a more serious offence under section 8(3) of the Sexual Offences Act yet he was charged with an offence under section 8(4) of the said Act which would have attracted a lesser sentence of 15 years' imprisonment upon conviction.

18. The appellant further submitted that the OB number on the charge sheet is OB No.5/17/3/2017 which is different from OB No.10/16/3/2017 indicated on the P3 form.

19. On the defense, it was submitted that the trial court failed to consider the appellant's defense which was never shaken by the prosecution evidence hence the appellant's rights were prejudiced.

20. In his oral highlights, the appellant urged the court to acquit him because he is 65 years old and disabled. He submitted that the victim was his wife's niece and that he could not have defiled her. Further, that he had only warned her against moving with boys as she used to wear uniform and ordinary clothes inside and so he told his wife to return her to her parents because she was spoilt. He submitted that he had lived with her from 2014.

21. The prosecution opposed the appeal and submitted in contention that the charge against the appellant was proved beyond reasonable doubt. It was submitted that the offence took place in broad daylight and that the appellant was armed with a panga. That the appellant took advantage of the victim in the absence of his wife and that medical evidence corroborated her testimony.

22. In a rejoinder, the appellant submitted that the panga was for use in the farm not for threatening the child. He submitted that he has a swelling in his private parts and so he could not have defiled the child.

DETERMINATION

23. I have considered the evidence before the trial court, the grounds of appeal as supplemented and the submissions for and against this appeal. The main issues for determination arise from the supplementary grounds of appeal which issues are:

- 1. Whether the appellant's rights under Article 49(1) of the Constitution were violated;**
- 2. Whether the trial court erred in convicting the appellant under section 8(3) of the Sexual Offences Act instead of section 8(4) of the Act and whether the charge sheet was defective;**
- 3. Whether the alleged differences in the OB Nos in the Charge Sheet and P3 form are fatal to the prosecution's case;**
- 4. Whether the trial court considered the appellant's defence and whether failure thereof vitiated the conviction and sentence;**
- 5. Whether the prosecution proved the offence of defilement against the appellant beyond reasonable doubt;**
- 6. Whether sentence meted out was lawful or appropriate.**

24. On the 1st issue on alleged violation of the appellant's right to be arraigned within 24 hours as stipulated in Article 49(1) of the Constitution, the charge sheet dated 20th March 2017 shows that the appellant was arrested on 17/3/2017 and arraigned on 20/3/2017. Article 49(1) of the Constitution guarantees an arrested person the right to be arraigned within 24 hours.

25. I have consulted the calendar for year 2017 and it shows that 17/3/2017 was a Friday. The next working day was on 20th March 2017 which was a Monday. In my humble view, therefore, as twenty-four hours fell on a non-working weekend, the appellant had to be arraigned on the next working day which was a working day for the courts. Accordingly, the appellant's right was not violated. The ground of appeal fails. It is dismissed.

26. On whether section 179(1) of the Criminal Procedure Code was misapprehended, the appellant claims that he was charged under section 8(4) but was convicted under section 8(3) which violates section 179 (1) of the Criminal Procedure Code.

27. I have perused the trial court record and it reveals that there are two charge sheets dated the same day of 20th March 2017 signed by the OCS Yala Police Station. The first one shows the charge under section 8(4) of the Sexual Offences Act. The second one is amended and shows that the charge is under section 8(3) of the Sexual Offences Act. The amendment was countersigned and dated. The evidence by way of age assessment of the complainant shows that she was aged 13 years which falls within section 8(3) of the Sexual Offences Act not section 8(4) of the Act. Accordingly, I find that the conviction of the appellant under section 8(3) was not in violation of section 179(1) of the Criminal Procedure Code as he was tried under section 8(3) and not 8(4) of the Sexual Offences Act. The ground of appeal fails and is dismissed.

28. On the alleged discrepancies and differences in OB numbers on the charge sheet and the P3 form, and whether such differences in OB numbers prejudice the appellant's rights, I have perused the trial court record and found that the OB Number on the charge sheet is 5/17/3/2017 which in my humble view is the date of arrest of the appellant as conceded by him. The OB Number on the P3 form produced as exhibit No. 1 is OB No. 10/16/3/2017 which, from the P3 form, is the date when the Police at Sirende Police Post issued the complainant with the P3 form which was on 16/3/2017 and the complainant took the P3 form to the MOH at Siaya County Referral Hospital on 17/3/2017 when the P3 form was filled and signed by Silah Oluoch. For those reasons, I find no discrepancy in the OB numbers that would vitiate the trial of the appellant.

29. The appellant also claimed that the charge sheet was defective in light of section 214 (1) of the Criminal Procedure Code but he never submitted on this ground of appeal. I have perused the charge sheet and albeit it says contrary to section 8(1)(3) of the Sexual Offences Act instead of contrary to section 8(1) as read with subsection (3) of the Sexual Offences Act, I find no defect that is prejudicial to the appellant as he understood the charge facing him. Accordingly, I find no discrepancy or inconsistency in the OB numbers cited and neither do I find any material defect in the charge sheet dated 20/3/2017 as amended, as to vitiate the trial and conviction of the appellant. The ground of appeal fails and the same is hereby dismissed.

30. On whether the defence for the appellant was not considered by the trial court and the effect thereof, I have perused the trial court record and I find at page 15 line 1 of the judgment of Hon T. Olando where he stated:

“Though the appellant in his defence stated that he did not defile the complainant, I cannot find any reason why the child could frame the appellant with such offence. The appellant stated that he had been sick and had to be circumcised but he did not produce any medical evidence or corroborating evidence to prove the same. I find the defence of the appellant to be a mere denial [see handwritten judgment], and an afterthought.”

31. Accordingly, I find no merit in the appellant's allegation that his defence was not considered at all. The ground of appeal is therefore found devoid of merit and the same is hereby dismissed.

32. On whether the prosecution proved the charge of defilement against the appellant beyond reasonable doubt, I have considered the evidence adduced before the trial court by the prosecution and defence, the question is whether the all the elements of defilement were established beyond reasonable doubt. These elements are: the age of the complainant; the fact of penetration of the complainant's genitalia [vagina] by the appellant's genital organ [penis] and positive identification of the perpetrator.

33. PW1 JAO testified on oath and was cross examined by the appellant. She stated that she was 13 years old and in Class Six. An age assessment report was produced to show that she was between age 12 and 14. Accordingly, her age was not in doubt. It was proved beyond reasonable doubt that she was in the age bracket stipulated in section 8(3) of the Sexual Offences Act.

34. On whether there was penetration of her vagina by the penis, PW1 testified that on 13/3/2017 she was in the house. This witness lived with the appellant and his wife as their niece. She is the child to the brother of the appellant's wife. She stated that she went to take a bath when she heard someone enter the house and when she went to check, she saw her uncle the appellant holding a new panga. She stated that the appellant then held her and pushed her to the floor and defiled her. She then went and washed herself and the following day she went to school and returned home and the appellant gave her food and instructed her to return home early. When she went to school she felt sick and went to the hospital and she told the doctor what had happened and she went told the head teacher and she was taken to the Assistant Chief who later took her to the Police Station

35. PW3 Evalyne Odhuno produced the P3 form which was filled by Silah Oluoch her co-worker at Siaya County Referral Hospital. She also produced the complainant's age assessment report showing that she was aged between 12 and 14 years. The P.3. Form indicated that the complainant's hymen was freshly absent and that she had epithelial cells which indicate that a blunt object was inserted into her vagina. She had also developed infections.

36. From the above evidence, not only was the age of the complainant proved beyond reasonable doubt by way of age assessment to be between 12 and 14 years which falls within section 8(3) of the Sexual Offences Act, but that in addition, there was overwhelming evidence that the complainant's vagina was penetrated by a blunt object and that the penetration was still fresh. The offence took place at 6pm. The appellant and complainant lived in the same house. She was his niece and he had lived with her for a long time hence she was like his own child. She knew him and he also conceded that she was like his child.

37. The trial magistrate who had the opportunity to see and hear her testify believed that PW1 was saying the truth as he did not find anything suggestive of her framing the appellant with such a heinous offence. I have reviewed that evidence by the complainant and what she told the Assistant Chief who took custody of her and iam persuaded that the evidence points at the appellant as the perpetrator of the offence of defilement. I concur with the findings of the trial court that there was no reason for the child to frame the appellant with such an offence.

38. I have also considered the defense by the appellant but iam not persuaded that his denial should be accepted by this court against such overwhelming evidence against him.

39. Accordingly, I find and hold that the conviction of the appellant for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act was sound and safe. I uphold it and find all the grounds of appeal raised devoid of merit. I dismiss this appeal against conviction.

40. On sentence meted out on the appellant, the appellant was sentenced to serve 20 years' imprisonment as stipulated in section 8(3) of the Act where the complainant child is aged between 12 and 15 years as was in this case. The sentence is mandatory minimum. The trial court gave the appellant an opportunity to mitigate and he said that he had nothing to say.

41. At the hearing of this appeal, he maintained his innocence and stated that he was aged 65 years old and wanted to be released from prison because he was also disabled. As the mandatory, minimum sentences provisions of the law have since been overturned by superior courts in the **Jared Koita Injiri v Republic [2019]e KLR in CA at Kisumu in CRA 93 of 2014** among other decisions of the Court of appeal, applying the principles espoused in the **Supreme Court Petition No. 15 &16 of 2015-Francis Karioko Muruatetu &Another v Republic**, and considering the age of the complainant, her relationship with the appellant and his age of 65 years old, and bearing in mind the fact that the offence is serious and traumatizing to the victim, **I exercise discretion and substitute the 20 years imprisonment with a prison term of Fifteen (15) years imprisonment to be calculated from the date of the appellant's arrest on 17/3/2017.**

Dated, signed and Delivered at Siaya this 9th Day of December, 2019

R.E. ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for State/ Respondent

CA: Brenda and Modestar