REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA 90 OF 2016

COLLINS SHIKANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(***appeal arising from the original conviction and sentence by Hon.Malesi in Kakamega CM's S.O. case No. 46 of 2016 delivered on 5/9/2016)***

J U D G M E N T

1. The appellant herein was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve life imprisonment. He was aggrieved by the judgment of the lower court and has filed this appeal on the grounds that :-

1. That the learned trial magistrate grossly erred in law and facts in putting him on trial without considering that his continued detention by the police for more than 24 hours gravely infringed on his fundamental rights as enshrined under article 49(1) (f) of the constitution.

2. That the learned trial magistrate grossly erred and /or misdirected himself in law and facts in failing to inform him of his rights to legal representation and further, in not assigning him an advocate for such a serious matter as outlined under article 50(2) (h) of the constitution thereby occasioning undue prejudice.

3. That the learned trial magistrate grossly erred in law and facts by convicting and sentencing him on evidence based purely on suspicion and in the absence of water tight medical evidence.

4. That the learned trial magistrate misdirected himself in law and facts in shifting the burden of proof to the appellant.

5. That the learned trial magistrate grossly misdirected himself in law and facts in sentencing him to such severe sentence without considering his mitigation.

2. Some other grounds of appeal were filed by an advocate then appearing for the appellant, J.J. Mukavale in HCCRA No. 93 of 2016. The grounds therein were basically that the trial court convicted the appellant against the weight of the evidence adduced in court. Though there was no application to consolidate the two files I will consider the grounds in both appeals.

3. The appeal was opposed by the state. The prosecution counsel Mr. Ng'etich submitted that the ingredients of defilement were proved in the case. That the age of the victim was proved by production of a birth certificate and also by the evidence of the clinical officer. That the appellant used to work for the complainant's parents and was identified as the perpetrator of the offence by the complainant PW2 and her brother PW3.

4. The prosecution counsel further submitted the appellant was not barred from getting legal representation as alleged in his submissions.

The case for the prosecution.

5. The particulars of the charge against the appellant were that on the 5th April ,2016 at Milimani estate in Kakamega town of Bukhungu sub-location in Municipality Division of Kakamega Central District in Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of KBM(herein referred to as the complainant/victim) a child aged 5 years .

6. The prosecution evidence was that the complainant (PW2 in the case) and her brother, NIM (PW3 in the case) were children who at the material time were aged 5 and 7 years respectively. They live in Nairobi with their mother PW4. During the August 2016 school holiday they were staying with their father in Kakamega town where their father works. The appellant was working for their father as a domestic worker. That on the 8/8/2016, the complainant and his brother were in their house in Kakamega with the appellant. The complainant's brother was watching cartoons on the television. The complainant was in her bedroom. The appellant entered into the complainant's bedroom. He unzipped his trousers. He removed the complainant's clothes. He applied lotion onto her vagina and penetrated into her with his penis. The complainant's brother was attracted by screams from the complainant. He peeped into the room and saw the appellant defiling the complainant. He entered into the room. The appellant threatened him that he would take him to the cow shed as the appellant knew that the boy had a fear for cattle. The appellant threatened to beat the complainant if she told anybody about what he had done.

7. The children then returned to Nairobi on the same day, i.e, on 8/4/16. The complainant's mother PW4 then noted odd behavior in the girl because she had refused to be undressed. On 20/4/16 the mother forcibly undressed the girl and examined her on her private parts. She noticed some whitish/ yellowish discharge on her private parts. She questioned her. The girl informed her that the appellant had defiled her. Her story was confirmed by her brother PW3. The mother took the girl to Nairobi Women's Hospital. She was examined. Her labia minora and the hymen were found to be torn at the 6.00 o'clock with rugged edges. She also had a whitish discharge. A HVS and urinalysis examination were done that revealed presence of puss cells. Later a clinical officer at Kakamega General Hospital PW1 completed a P3 form on reliance of the medical documents from Nairobi women's Hospital -the discharge summary , the Post Rape Care Form and Gender Violence Recovery Centre Form .

8. A report was made at Kakamega Police Station. A police officer, Phoebe Oluoch PW5 investigated the case. She recorded statements of witnesses. She visited the scene. She arrested the appellant and charged him with the offence. He denied the charge. During the hearing the clinical officer PW1 produced the PW3 form and the above stated documents from Nairobi Women's Hospital as exhibits – PEX-1-4 respectively. The mother to the complainant PW4 produced the child's birth certificate as exhibit, PEX6.

Defence Case.

9. When placed to his defence , the appellant gave a sworn statement and stated that he had worked for the complainant's father as a shamba boy for a period of one year. That during the 2016 August holiday the complainant and her brother were in Kakamega town. The complainant's father had instructed him not to be bathing the complainant who was being bathed by the house girl. That on the 8/4/16 the children were returning to Nairobi. He prepared the complainant's brother,PW3. When their father came back he found the children ready. He, the father, travelled with the children to Nairobi. He denied that he defiled the complainant.

10. The appellant further stated that it is the complainant's mother who had taken him to work for her husband. That she had given him extra duties of telling on her husband if he brought other women into the house. She had bought him a mobile phone for that purpose. Later her husband discovered that he was telling on him. He warned him against it. He stopped doing so. Her relationship with the complainant's mother soured. She ordered him to leave work but her husband retained him.

Findings by the trial court:-

11. The two children PW2 and 3 gave unsworn evidence in court. In his judgment the trial magistrate stated that though it was not necessary for corroboration of the complainant's evidence corroboration was availed in the evidence of her brother PW3 and the medical evidence. That the medical evidence proved penetration on the girl. That the birth certificate indicated that the girl was born on 18/10/2010 which meant that she was aged 5 years at the time the offence was committed. That the two children knew the appellant very well. The magistrate was satisfied that the appellant defiled the girl.

SUBMISSIONS.

12. The appellant tendered in written submissions. He submitted that during plea taking, the learned trial magistrate did not , as of duty , inform him of his right to be represented by an advocate of his choice neither did he inform him of the right to legal representation by an advocate assigned to him by the state . He contends that substantial injustice did occur in this case for lack of legal representation which was a violation of his rights as enshrined, under article 50 (g) and (h) of the Constitution of Kenya, 2010.

13. The appellant submitted that at the close of the prosecution case, the trial court did not make a ruling on whether a prima facie had been established against him sufficient enough to require him to make a defence but instead the magistrate expressly put him on his defence. His contends that this was irregular.

14. It was further submitted that the offence was alleged to have taken place in Kakamega on 8/4/16 . That the report was made to the police on 24/4/16. That the victim was examined in hospital after 16 days. That the victim did not inform her father of the incident but instead informed her mother after more than 10 days. Further that her father did not testify in court. The appellant contends that the evidence relied upon by the court to return a conviction was not credible.

ANALYSIS AND DETERMINATION

15. This is a first appeal. It is the duty of a first appellate court to look at the evidence presented before the trial court afresh , re- evaluate and re- examine the same and reach its own conclusion . The court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant-see **Kinyanjui Vs Republic (2004) 2 KLR 364.**

16. The appellant contends that he was denied a fair hearing as enshrined in Article 50(2) of the constitution of Kenya, 2010. The article provides that:-

" Every accused person has the right to a fair trial which includes the right

(a) – (f) …

(g) to choose and be represented by ,an advocate , and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result , and to be informed of the right promptly;

(i) – (q) …..

17. In **Republic Vs Karisa Chengo & 2 others (2017) eKLR** , the supreme court held that the right of legal representation at state expense under article 50 (2) (h) is to enjoyed whether or not parliament has enacted the necessary legislation to actualize provisions of article 50 . It however emphasized that the right is not open ended but is only available " if substantial injustice would otherwise result. It further held that the right is not limited to those charged with capital offences.

18. There is now in operation the Legal Aid Act, 2016 that came into force on 10/5/2016. The appellant was charged in 2014. The Act does not operate respectively. It is my view that it is the appellant who was supposed to apply to the court for legal representation. The court would not have known of his limitations in conducting his defence. More so, the appellant has not shown that there were complex issues of law in the case such that if state representation was not accorded it would result to substantial injustice to him. I therefore decline to accede to that ground of appeal.

19. The court record indicates that at the close of the prosecution case, the court made the following remarks:

"The provisions of section 211 CPC are explained to the accused. His rights obtained under the said section explained to the accused in Swahili."

The court record indicates that upon compliance with the said section, the accused stated that:

" I shall give a sworn statement . I shall call one witness".

Section 211(1) of the Criminal Procedure Code states that:

"At the close of the evidence in support of the charge ,and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that , if he does so, he will be liable to cross – examination , or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)"

Section 211(2) requires the court to adjourn the case to another date to enable an accused person to call witnesses where the witnesses are not in court. The fact that the appellant selected to give a sworn statement and said that he will call one witness is a clear indication that the court did orally explain to him that he had a case to answer. That there was no formal order that the accused had a case to answer is a defect that did not occasion a failure of justice. The defect is curable by section 382 of the CPC that states that:-

"subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice."

It is evident that section 211 of the CPC was complied with. That ground of appeal is thereby dismissed.

20. The grounds of appeal raised in High Court Criminal Appeal No. 93 of 2016 were that the trial magistrate erred in convicting the appellant against the weight of the evidence, that the magistrate relied on the prosecution evidence which was characterized with material contradictions and that the magistrate erred by rejecting the defence of the appellant.

21. The appellant was charged with defilement contrary to section 8(1) of the Sexual Offences Act 2006 which states that:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Section 2 of the Act states that the term "child" has the meaning assigned thereto in the Children Act.

Section 2 of the Children Act states that "Child" means any human being under the age of eighteen years.

22. In a case of defilement, the prosecution has in the first instance to prove that the victim is a child as defined in the Children Act. A birth certificate was produced in this case that showed that the victim was born on the 18/10/2011. This means that at the time that the alleged offence was committed on 8/4/2016, the victim was aged 5 years. The victim was therefore a child as defined under the Children Act.

23. The appellant contended that there was no water right medical evidence to sustain the charge. However it is not a necessity that defilement has to be proved by medical evidence. Under the provisions of section 124 of the Evidence Act a court may convict on reliance of the evidence of a child if the court is satisfied that the evidence of a child is credible. This was exemplified by the court of Appeal in **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010** (as cited in **Dennis Osoro Obiri (2014) eKLR** where the court held that :

> "***Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under provision to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone , if the court believes the victim and records the reasons for the belief ."***

In the same case of **Dennis Osoro Obiri**, the Court of Appeal cited the case of **Kassim Ali Vs Republic** where it had stated that:

> " ….(T) he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

In this case there was no medical evidence linking the appellant to the commission of the offence. The question was whether the court could rely on the evidence of Pw2 and PW3 to convict the appellant.

24. The medical documents from Nairobi Women's Hospital and the evidence of the clinical officer PW1 proved that the complainant had been defiled. There was torn hymen around 6 o'clock with ragged edges. The medical evidence thereby corroborated the evidence of the complainant that she had been defiled.

25. The complainant's mother is not the one who mentioned the appellant as the person who had defiled the complainant. It is the complainant herself who did so. She was supported in that by her brother PW3. The two children were in Nairobi when they made the accusations that it is the appellant who had defiled the complainant. The appellant was in Kakamega when the children made the accusations. Why would children who were about 400 km away from where the appellant was make such an allegation against him?

26. The appellant cross – examined the complainant's mother PW4. He did not ask her any question as to whether she had employed on him to spy on her husband. The allegation to that effect in the appellant's defence can only have been an afterthought. The insinuation that the complainant's mother had fabricated the case against him because of sour relations between them can only be a fabrication.

27. The complainant and her brother PW3 gave unsworn evidence. In **D.W.M Vs Republic (2016) eKLR**, the Court of Appeal stated that a child who gives evidence not on oath is liable to cross – examination to test the veracity of the evidence of the child. The appellant in this case cross examined the children and they did not waver in their evidence. They came out as truthful and straight forward witnesses. There was thereby no reason to doubt their evidence.

28. The appellant alleged that the trial court shifted the burden of proof to him during the trial. He did not pin point any instance where the court did so. The appellant also alleged that the prosecution evidence was characterized with material contradictions. None of these contradictions were brought forth. He further alleged that the trial court did not consider his defence. I find that the trial magistrate considered the appellant's defence in the judgment and found that it could not hold water.

29. Upon carefully going through the evidence adduced at the lower court I find that the appellant was convicted on the basis of cogent and credible evidence of the complainant (PW2) and PW3. The appeal on conviction has no merits.

30. The appellant alleged in the petition of appeal that the trial court sentenced him to a severe sentence without considering his mitigation. Sentencing in a criminal trial is a discretion of the trial court. This was emphasized by the court of Appeal in **Shadrack Kipchonge Kogo Vs Republic, Eldoret Criminal Appeal No.253 of 2003** (cited **in Arthur Muya Muiuki Vs Republic (2015 eKLR**), where the stated the following on principles of sentencing:

> "Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred."

31. The trial court called for a pre – sentencing report before sentencing the appellant. The report indicated that the appellant was above the age of 18 years and possesses a national identity card and a driving licence. Photo copies of the same were attached to the report. The date of birth that was indicated in the appellant's identity card was 6/5/1997. That means that at the time that the offence was committed he was aged 18 years and 11 months.

32. The appellant was charged under the Sexual Offences Act,2006. Section 8 of the Act only provides for minimum sentences. The court has no discretion of giving a lesser sentence where a minimum sentence is provided by an Act of parliament as was stated by the Court of Appeal in **David Kundu Simiyu Vs Republic,** Criminal Appeal No. 8 of 2008, Eldoret- as cited in **Fredrick Nzioki Wambua Vs Republic (2015) eKLR** that:-

> "***Those (sentences under the Sexual Offences Act) are minimum sentences and parliament appears to give no discretion to courts to impose sentences below those specified as the minimum. The provisions accord to the prime objectives of the Act which is prevention and protection from harm and from unlawful sexual act"***

33. The punishment provided in section 8(2) of the Sexual Offence Act for a person found guilty of committing an offence of defilement against a child aged less than 11 years is life imprisonment. The complainant herein was aged 5 years. The appellant was given the minimum sentence. There was no discretion to give him anything less than the minimum sentence. The sentence was lawful.

In the foregoing, the appeal is bereft of merit and is accordingly dismissed.

Delivered, Dated and signed at Kakamega this 19th day of July, 2018.

J.NJAGI

JUDGE

In the presence of :

Appellant .....Appearing in person

Mr. Juma .....for respondent/state

George .....court assistant

14 days Right of appeal.