REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 8 of 2018

JOSHUA OGONDI SELELYA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the judgment of Hon. E. Kanyiri, SRM delivered on 29th September, 2017 in Criminal Case 70 of 2016 at the Chief Magistrate's court at Makadara).

JUDGMENT.

Background.

1. Joshua Ogond Selelya, hereafter the Appellant was charged with two counts of sexual assault contrary to Section 5(1)(a) as read with Section 5(2) of the Sexual Offences Act. He was also charged in the alternative, in each count, with the offence of an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the 1st count were that on 6th June, 2016 in Kariobangi North Estate within Nairobi County, the Appellant, unlawfully manipulated his finger to penetrate the genital organ (vagina) of M A, a child aged 10 years. The particulars of the alternative charge were that on 6th June, 2016 in Kariobangi North Estate within Nairobi County, the Appellant, intentionally touched the vagina of M A, a child aged 10 years.

2. The particulars of the 2nd count were that on 6th June, 2016 in Kariobangi North Estate within Nairobi County, the Appellant, unlawfully manipulated his finger to penetrate the genital organ (vagina) of D A, a child aged 7 years. The particulars of the alternative count were that on 6th June, 2016 in Kariobangi North Estate within Nairobi County, intentionally touched the vagina of D A, a child aged 7 years.

3. The Appellant was found guilty of the two main counts. He was consequently sentenced to life imprisonment. Being dissatisfied with the conviction and sentence he filed the present appeal. He relied on the grounds of appeal filed together with written submissions filed on 24 th May, 2018. He was dissatisfied that he was convicted on the basis of insufficient and contradictory evidence, (ii) that the sentence passed was harsh and excessive, that his defence was not considered and that the police investigations were shoddy.

Evidence

4. Both complainants M A and D A. testified as PW2 and 1 respectively. They were at the time of the incident aged 7 and 10 years respectively. On the material dates 6th June, 2016, they were accompanied by two other children, namely S and E O after leaving school to look for their younger brother whom they called D. PW1 referred to her elder sister PW2 as M. They walked into a farm-like field where they stumbled on the Appellant who was seated on a stone. He enquired from them what they were doing. They told him that they were looking for their brother D. He then informed them that he knew where he had gone to and would assist them to find him. That is when he led them to a bushy area near a river. He confronted them and told them that he would beat them because they were lying that they were looking for their brother. He commanded them to remove all their clothes because he does not beat children with their clothes. The two children who were accompanying PW1 and 2 were much younger than them and to them, he said he could beat them in their clothes but for the two they had to entirely undress. When they hesitated to remove their clothes, he forcefully undressed them. He thereafter picked up dry tree leave, tied them on his fingers and inserted them into their private parts. He then asked them to suck his penis after which he wiped their private parts with dry leaves and asked them to leave for home. When they left for home, they informed a neighbor one Mama D and mother to PW1 what had happened. **PW3, G O**, the father to PW1 and E O who was accompanying the victims found her daughters with Mama D. PW2 in turn informed PW3 what had happened. Mama D one **Julian Odhiambo** testified as **PW5.** She requested the children to take her back to the scene of the incident which they identified to her. On their way, they came across the Appellant whom PW1 and 2 identified as the assailant. When Mama D called him, he ran away. PW1 and 2 together with Mama D informed PW3 of the incident and that they had seen and identified the Appellant who had fled. The Appellant was physically known to the children as he hailed from Baba Dogo where they also lived. PW5 together with PW3 took the victims to MSF Clinic where they were examined and treated. Medical certificates and Post Rape Care Forms were issued on the same date. The matter was thereafter reported to the police and P3 forms issued accordingly.

5. **PW4, Purity Kajuju** was a Clinical Officer working at MSF Clinic in Mathare. She confirmed she examined the victims on 6th June, 2016 at around 10.45 p.m. According to her evidence, PW1 told her that the Appellant lay on her and touched her genitalia with his penis and thereafter wiped it with dry leaves. On examination, her outer genitalia was normal and no discharge was noted. The vagina was reddened and had bruises on the inner labia walls. The hymen had a tear at 6.00 O'clock. The anal region was normal. A swab examination showed no presence of sperm. There was also no sperm in the urine. The child was given drugs to prevent HIV/AIDS and sexually transmitted infections. She was also booked for counseling. The witness filed a medical report as well as a Post Rape Care (PCR) form which she produced as exhibit.

6. **PW6 Dr. Maundu** of police surgery examined both PW1 and 2 and filled their medical examination (P3) forms. With respect to PW1, she had no physical injuries, her genitalia was reddened with visible bruises in the inner labia. The hymen was torn at 6.00 o'clock position. She had no discharge. He confirmed she had been treated at MSF Clinic and a medical certificate as well as a post rape care form issued. With respect to PW2, he noted that she had mild reddening of the genitalia and some inflammation on anterior part of the genitalia. The hymen was intact. She also had been treated as SMF Clinic where a PRC form was filed. He identified the medical certificates and PRC forms issued to PW1 and 2. In addition, produced their respective P3 forms which he filled as exhibits.

7. The case was investigated by **PW7, Corporal Julie Ambungu** of Kariobangi Police Station. While summing up the evidence of prosecution witnesses, she testified that the Appellant was escorted to the Police Station by members of the public on allegations of having defiled some children. He re-arrested the Appellant and after investigations, preferred the charges against him. Her summary of the case was that the Appellant offered to help the victims to look for their brother after which he led them to a bush near Nairobi Area River. He then forced them to lie on the ground and remove their clothes. He tied two of his fingers with leaves and told them to close their eyes after which he rubbed them in their private parts. He then asked PW2 to touch his private parts and to leave for home. PW2 informed her mother and after spotting the Appellant in the area, raised alarm after which members of the public arrested him. She produced a birth certificate in respect of PW2 which indicated that she was born on 8th August, 2008.

8. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement of defence and did not call any witness. He stated that on the 5th June, 2016, he left Kitengela for Kariobangi in Nairobi to visit his cousin. Because he did not find his cousin, he entered a bar where he drank alcohol. It is in the bar where he met PW5 who kept insisting that he buys beer for her. Since he was not interested in her, she declined to buy her alcohol and after he was drunk he left. He stated that he was followed from the bar by three boys who confronted him, beat him and stole his mobile phone, cash Kshs. 7,000/= and shoes. When he went to the police station to report the robbery, he met PW5 who pointed and shouted that he was the man. Incidentally, PW5 was accompanied by the three boys who had robbed him. They arrested him and had him booked at the Police Station. On the following day, 6th June, 2016, PW5 went to the station accompanied by a child. On 9th June, 2016, he was taken to Makadara where again PW2 was present with her mother. He stated that PW2 was couched by her mother to implicate him. He denied any involvement in the offence.

Submissions and Determination

9. It is now the duty of this court to reevaluate the evidence on record and come up with its own independent findings. **See Okeno v Republic [1972] E.A, 32 and E.A** and **Pandya v Republic [1957] E.A, 336.** The Appellant who was in person entirely relied filed written submissions. Learned State Counsel, Miss Sigei for the Respondent made oral submissions. She opposed the appeal submitting that prosecution proved its case beyond a reasonable doubt and that the conviction was safe and sentence proper. She urged the court to dismiss the appeal. In the interest of not duplicating the Appellant's submissions, I shall refer to them in the body of the determination.

10. After considering the evidence on record and the respective rival submissions, I have deduced that the issues arising for determination are; whether the conviction was founded on contradictory evidence, whether the Appellant's defence was considered, whether the case was proved beyond a reasonable doubt and whether the sentence passed was harsh and excessive.

11. On the Appellant's submission that he was convicted on the basis of inconsistent and contradictory evidence, he pointed to PW1's evidence that her genitalia was rubbed with dry leaves. He submitted that if that were the case there would have been visible scratches (tears) of the vulva. Further, that the evidence of PW1 did not disclose that the Appellant's finger penetrated her vagina at any time. He submitted that the children referred to "*matawi" (*as what they were rubbed with*)* which in English means branch and that if a branch was used there would be evidence of the same. He was of the view that *matawi* could not refer to leaves. He also pointed to the evidence of PW2 that PW1 knew the Appellant who was known to mistreat children, in fact defile them and questioned why he had never been reported before the instant incident. He thus submitted that he was framed. On the latter submission, I underscore the fact that the court shall determine the case based on the evidence of a positive identification of the Appellant and his culpability. As such, whether or not PW1 was seized of the knowledge of the Appellant's previous character should not be construed to consist of an inconsistency or contradiction in her evidence.

12. The same case applies to the Appellant's submission that he was not culpable because as regards PW2, she was not given drugs to prevent a sexually transmitted disease because she told PW4, the Clinical Officer that only a finger was inserted in her genitalia. Be that as it may, it is important to note that the Appellant was charged for the offence of sexual assault because there was no sufficient evidence to sustain an offence of defilement. And so his submission vindicates the prosecution case that the evidence available could only sustain a charge of sexual assault. To this end whether it was a finger solely or a finger wrapped with leaves that was used to penetrate the genitals is not in issue.

13. On proof of the case, the offence charged involves the unlawful penetration of the genital organ of another person with any part of his body or of another person or through the manipulation of an object where the same is not carried out for hygienic or medical reasons. It was therefore incumbent upon the prosecution to prove that the penetration into the genital organ was unlawful and that it is the Appellant who did it. In the instant case, the victims were both minors aged 7 and 10 respectively. By virtue that under the Sexual Offences Act, minors are not capable of consenting to penetration and having regard to the fact that the case did not involve a medical procedure, the question of the unlawfulness of the act of penetration is dispensed with. All that was then required of the prosecution is the proof that both victims were minors.

14. With respect to PW1, her age was established by way of a birth certificate which showed her date of birth as 8th August, 2008. As regards PW2 no documentary evidence was adduced in this respect. But the law is now settled that the age of a minor can be established not only by documentary evidence but also through observation and common sense. PW2 was subjected to *voire dire* examination prior to her testimony, an indication that she was not only a minor but a child of tender years. In no uncertain terms therefore, both victims were minors and the acts causing penetration into their genital organs were inherently unlawful.

15. I now determine whether penetration was proved. In the case of PW2, medical evidence showed bruises on the inner labia and a hymen tear at 6.00 o'clock position. As for PW1, her genitalia was mildly reddened and some inflammation on the anterior part of the genitalia was visible. Her hymen was however intact. No doubt the medical evidence was corroborative of the evidence of the victims that their genitalia were interfered with. Although PW1's hymen was intact, under Section 2 of the Sexual Offences Act, penetration may be partial or complete. The presence of mild reddening and inflammation demonstrated partial penetration, thus a proof of penetration beyond a reasonable doubt.

16. On the identification of the Appellant, PW1 testified that she had seen him prior to the date of the incident, thus the identification was by recognition. As for PW2, she only stated that she had seen him at the police station and "at another place he was standing". It is not clear which this place he was standing at was, and it could be in the dock, anyway. I am unable to deduce that she (PW2) identified the Appellant by recognition. All the same, it is noteworthy that both PW1 and PW2 were assaulted together one after the other and the same scene. There is no evidence that the Appellant was accompanied by any other person at the time so as to mistake his identity. As such, the positive identification of the Appellant by PW1 properly implicates him to having committed the offence also against PW2.

17. It was also the Appellant's submission that his defence was not considered, and in not doing so, the trial court shifted the burden of proof unto to him against the standard legal principle that the burden of proof always lies with prosecution to prove the case beyond a reasonable doubt.

18. I have read the trial court's judgment. The trial court noted that it contradicted the testimonies of PW5 and 7 who testified that the Appellant was arrested on 7th and not 5th June, 2016. The court's finding was vindicated by the charge sheet which clearly showed the date of arrest as 7th pursuant to an Occurrence Book*(OB) entry No. [Particulars withheld] of the same date. This goes against the Appellant's assertion that he was in custody as at the date of the incident and was therefore framed.

19. With regards to the sentence the Appellant contends that the sentence imposed was harsh and excessive. Section 5(2) of the Sexual Offences Act provides for a mandatory minimum sentence of 10 years. The learned trial magistrate in exercising her discretion under Section 5(2) enhanced the sentence to life imprisonment. As an appellate court I would be hesitant to disturb the sentence unless it is demonstrated that the same was inordinately too high or inordinately too low or that the trial court did not take into account material factors of the case or applied the wrong principles of law in sentencing. The rationale is that sentencing is entirely the discretion of the trial court but which discretion must be exercise judiciously. See Baroness Hale in **Re J(A child)(Child returned abroad: Convention Rights)[2005] UKHL 40,** thus:

> ***"If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is … a matter for the trial [****Court****]. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere:… Too ready an interference by the appellate court, …., risks robbing the trial [****Court****] of the discretion entrusted to [****It****] by law."***

20. In enhancing the sentence, the learned trial magistrate only took into account the age of the complainant whom she noted were very young. In his mitigation, the Appellant pleaded for leniency stating that he had four children although one had since died. He told the court that one has finished school and one was very young. He told the court that his mother could not afford to take care of his children. The court ordered for a pre-sentencing report which upon its perusal indicates that the victims were greatly traumatized by the incident and even if the Appellant was remorseful, their parents pleaded that a sentence commensurate with the offence be imposed.

21. In the view of this court, although the close relatives of the Appellant spoke well of him, the offence committed was heinous and will have an adverse psychological and physical trauma against the victims for the rest of their lives. The Appellant took advantage of their tender age to damage their womanhood. Being 46 years old as at the time of the offence, he ought to set a good example not only to his family but the society at large. These observations in my view are aggravating factors that would call for an enhanced sentence. At the same time, the court must take into account that sentence is not intended to harden an offender but to correct them. For this reason, it is my opinion that the life imprisonment was too punitive.

22. In sum, I uphold the conviction in respect of both counts. I however set aside the life imprisonment and substitute it with an order that the Appellant shall serve fifteen years imprisonment in respect of the two main counts. Both sentences shall run concurrently. The sentences shall be reduced by one year six months, being the period he was in custody prior sentencing. It is so ordered.

DATED and DELIVERED this 17th day of July, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*

2. *Mr. Momanyi .for the Respondent.*