



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 26 OF 2018

BETWEEN

JAMAL BARRACK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Order of the Senior Resident Magistrates Court at Winam (B. Kasavuli SRM) dated 14th March, 2018 in Criminal S.O Case Number 19 of 2017)

JUDGEMENT

Background

1. On 7th March, 2018; the Appellant was convicted for an alternative count of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 10 years imprisonment.

The Appeal

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the grounds of Appeal filed on 15th March, 2018, Appellant raised 8 grounds of Appeal which I have summarized into 1 (one) ground as follows **THAT:**

The findings, decision and judgment is against the weight of the evidence on record

3. When the Appeal came up for hearing on 10th July, 2018, I directed that the appeal be argued by way of written submissions which both parties dutifully filed.

4. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (This duty was aptly stated in the case of **Isaac Ng'ang'a Kahiga v Republic [2006] eKLR** where the Court of Appeal said:-

“A Court hearing a first Appeal (i.e. a first Appellant Court), also has to carefully examine and analyse a fresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor so the first Appellate Court would give allowance of the same.”

The prosecution's case

5. Complainant, a minor of tender age testified that the appellant whom he referred to as Baba Sammy put his “dudu” referring to penis, and fingers in her vagina and anus. **PW2 M A**, the complainant's mother stated that complainant was born on 6.2.12. She stated that she used to leave complainant on the bed of her neighbor Baba Sammy, accused herein, whenever she went to work at Kibuye Market. She stated that on 28.7.17, complainant informed her that Baba Sammy had inserted his fingers in her vagina and anus. She said she escorted the complainant to hospital and was issued with a P3 form and a PRC form. **PW3 Mwajuma Mohamed**, a community health worker upon receiving information that the appellant had sexually assaulted complainant reported the matter to the chief on 30.7.17 who arrested the appellant and handed him over to the police. **PW4 Nelson Maleck**, a clinical officer and **PW4 Dr. Ogola Don Sunday** stated that examination on complainant did not reveal any evidence of sexual assault because the anus and genitalia were normal and hymen was intact. They produced the complainant's PRC form as PEXH. 2 and P3 form and PRC form as PEXH. 3 respectively. **PW6 PC Rachael Mwash**, the investigating

officer stated that medical evidence available did not support the charges against the appellant but that there was public pressure that he be charged.

Defence case

6. In his sworn defence, appellant denied the offence. He stated that he was framed by his neighbor (complainant's mother) after they quarrelled. His wife Zuleha Said stated that she was the one that used to take care of complainant while her mother was away and that complainant was not sexually assaulted as alleged.

Analysis and determination

7. Section 5 of the Sexual Offences Act (*the Act*) states:-

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

8. A sexual assault charge under Section 5 (1) (a) (i) of *the Act* can be proved beyond reasonable doubt solely with credible evidence of penetration of the genital organs of another person with any part of the body of another or that person; or an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes.

9. Section 2 of *the Act* defines "penetration" to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

10. Complainant told court that the appellant inserted his *dudu* "referring to penis in her vagina and anus and also put his fingers in her anus. **PW4 Nelson Maleck**, a clinical officer and **PW4 Dr. Ogola Don Sunday** stated that examination on complainant did not reveal any evidence of sexual assault because the anus and genitalia were normal and hymen was intact. The medical evidence on record does not show that the appellant inserted his fingers into the complainant's vagina. The prosecution was required to prove penetration of the complainant's genitalia by the body part of the appellant. Without corroboration the trial court correctly found that the charge of sexual assault was not proved.

11. The issue in question is whether the appellant was properly convicted for the alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 whose particulars are that he did an indecent act to the complainant by touching her vagina with his penis.

12. I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides that:

notwithstanding the provision of section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such offence unless it is corroborated with other material therefore implicating him.

13. **Further; Section 124** of the Evidence Act Cap 80 Laws of Kenya provides that:

Provided that in criminal cases involving a sexual offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.

14. This being a case involving a sexual offence, a trial court can proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.

15. The trial court ruled that the complainant was truthful on the grounds that she had told court how she used to sleep with the appellant on the same bed where he'd put his penis and fingers in her vagina and anus.

16. From the evidence on record however, the complainant cannot be said to have been a truthful witness her evidence having been controverted by medical evidence.

17. **PC Rachael Mwash**i, the investigating officer confirmed that she was convinced that the charges against the appellant were not supported by medical evidence and stated that the appellant was charged due to public pressure that he be charged.

18. The charges preferred against the appellant were undoubtedly in violation of Article 157 (10) of the Constitution provides that

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”.

19. From the foregoing, I find that the trial court might have arrived at a different decision had it correctly reflected on the totality of the evidence on record.

20. As a result; I am satisfied that the prosecution case was not proved beyond reasonable doubt and appellant ought to have benefitted from that doubt.

Disposition

21. From the preceding analysis, I have come to the conclusion that the evidence presented by the state was not watertight. The conviction and sentence entered against the Appellant was not safe and should not be allowed to stand. I therefore allow the Appeal, quash the conviction and set aside the sentence. I order that the Appellant shall be set be at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 18th DAY OF October 2018

T. W. CHERERE

JUDGE

IN THE PRESENCE OF

Court Assistant - Mr Arua

Appellant - Present

For the appellant - Mr Ouma

For the state: - Mr Muia