



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM; CHERERE-J)

CRIMINAL APPEAL NO. 43 OF 2014

BETWEEN

LEVI CHELOGOI EMMANUEL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case NO. 622 of 2011

in the Senior Resident Magistrate's court at Kimilili

by Hon. M.A.Nanzushi (Ag. SRM) on 15.4.14)

JUDGMENT

The trial

1. The Appellant **LEVI CHELOGOI EMMANUEL** has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of *the Act*. The particulars of the main count are that

On diverse dates between 7th June, 2011 and 17th June, 2011 at [particulars withheld] sub location in Mt. Elgon District within Western Province unlawfully committed an act that caused penetration with a child namely V.C a girl aged 15 years

The prosecution's case

2. The prosecution called 5 witnesses in support of the charges. PW1 V.C, the complainant herein recalled that on 7.6.11 on his way to school at about 6.30 am, he met the appellant whom he referred to as Levi, who was a neighbor, and he asked her to accompany him to the home of his aunt where they would live as husband and wife and she accepted. It was her evidence that she lived with the appellant in [Particulars withheld] area until 17.6.11 when they were both arrested and handed over to the police. She told court that for the time she lived with the appellant, they engaged in sexual intercourse on two nights. PW2 M C, the complainant's mother recalled that complainant who was 15 years went to school on 7.6.11 and was not seen again until 17.6.11 when she was found living with the appellant. PW3 Duncan Kuria, a clinical officer examined complainant on 18.6.11 and found her with a normal genitalia but hymen was missing. He conducted an age assessment of the complainant and found that she was approximately 16 years. He produced complainant's P3 form and age assessment report dated 6.8.12 as PEXH. 1 and 2 respectively. PW4 Willy Kibet Cheptek arrested the appellant and the complainant on 17.6.11 and handed them over to the police.

The Defence Case

3. When the appellant was put on his defence, he denied the offence. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 20 years imprisonment.

The Appeal

4. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 29th April, 2014. From the grounds of appeal and written and oral submissions by the appellant, I have deduced the following issues:-

1. *Defective charge sheet*
2. *Complainant's age was not proved*
3. *Failure to consider section 36(1) of the Sexual Offences Act*
4. *Failure to call crucial witnesses*
5. *Contradiction in the prosecution case*
6. *Sentence is excessive*

5. Mr. Oimbo learned Counsel for the state opposed the appeal and submitted that failure to include the word intentionally in the charge sheet was not fatal. He submitted that complainant's age was proved by way of an age assessment report, whereas penetration was proved by way of the P3 form. Counsel further submitted that the prosecution called all its crucial witnesses and that it was not mandatory under the sexual offences act to have the appellant examined by a doctor.

Analysis and Determination

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor”.

8. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

1. Is the charge sheet defective?

9. The charge sheet clearly shows that the word “unlawful” was not included in qualifying the offence of defilement. A charge can be deemed as defective if it is not stated and explained to an accused person in clear and unambiguous manner that would enable him to know the charge he is facing and as to enable him to prepare for his defence.

10. In the present case, the facts of the charge as spelt out were very clear that the Appellant caused penetration with the complainant, a girl aged 15 years. The facts as read disclosed the offence of defilement. It is to those facts that the Appellant pleaded not guilty to. Furthermore, the omission to include the word “**unlawful**” is curable under **Section 382 of the Criminal Procedure Code** which provides that:

“Subject to the provisions hereinbefore 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 complaint, 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 or justice.”

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

11. On the whole therefore, I conclude that the charge was not in any way defective.

2. Was complainant's age proved?

12. The Court of Appeal in **J.W.A. v. Republic (2014) eKLR** held that age of the victim is a matter of fact which could be proved by evidence other than birth certificate and age assessment report. The exact age of the complainant is critical for purposes of computing the applicable penal provision under the Sexual Offences Act. Evidence by the complainant's mother, PW2 was that the complainant was 15 years in 2011 when the offence was committed. The age assessment conducted on 6.8.12 approximated the complainant's age to be 16. It is worthy to note that the age assessment was conducted over one year from the time of the alleged offence. I am therefore convinced that the complainant was 15 years when the offence was committed and 16 years a year later when her age was assessed.

3. Was examination of the appellant necessary?

13. The appellant urged the court to find that there was no medical evidence to link him to the offence. **Section 36** of the Sexual Offences Act provides as follows:

“Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence”.

14. My reading of this provision is that there is no requirement that a person who is charged with committing a sexual offence be subjected to medical examination for the purpose of obtaining evidence that he committed the offence. The Sexual Offences Act, in the section set out above, leaves the discretion to the trial court, which I believe would be exercised on the basis of the circumstances before the court. In the present case, the trial court believed that the evidence of PW1 was corroborated by the medical report. In my view, there was no requirement that the appellant should have been subjected to medical examination to prove whether or not he had committed the offence.

4. Failure to call crucial witnesses

15. Appellant faulted the prosecution for not calling the OCS who gave authority for his arrest and the other person who was in company of PW4 at the time of his arrest.

16. **Section 143** of the Evidence Act, Chapter 80, Laws of Kenya provides,

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”

17. Further, in ***Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005***, the Court of Appeal held,

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

18. No oblique motive has been shown to have influenced the prosecution on the number of witnesses to call. The fact that the appellant was indeed arrested and arraigned before the court was sufficient and there was no need for the prosecution to call any more witnesses on the said issue.

5. Contradiction in the prosecution case

19. The appellant pointed out that the charge sheet showed that he stayed with complainant for 10 days whereas the P3 form showed he stayed with her for 14 days. In my humble view, this is a non-issue and what matters really is whether the appellant defiled the complainant for the time he lived with her, the period notwithstanding.

6. Sentence is excessive

17. Section 8 of the Sexual Offences Act provides for appropriate punishment for the offence of defilement in respect of victims of various statutory categories of age.

18. Evidence by the complainant's mother, PW2 that the complainant was 15 years in 2011 is corroborated by the age assessment report dated 6.8.12 which shows that complainant was 16 years one year after the offence was committed.

19. The appellant was charged under section 8(1) as read with 8 (3) of the Sexual Offences Act which provides as follows:-

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

20. The 20 years sentenced handed down on the appellant is the minimum sentence under 8 (3) of the Sexual Offences Act. The sentence is lawful, appropriate and not excessive.

Disposition

21. *Having considered the evidence in its totality, I find that the appeal is without merit, and it is hereby dismissed. Both the conviction and sentence are upheld.*

DELIVERED AND SIGNED AT BUNGOMA THIS...9thDAY OF...November....2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Ribba & Diannah

Appellant -

