



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 126 OF 2017

BETWEEN

RONALD SIKUKU WAKOYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 903 OF 2015 in the Senior Principal Magistrate's Court at Webuye by Hon. N.N.Barasa (SRM) on 24.11.17)

JUDGMENT

The Trial

1. The Appellant herein **RONALD SIKUKU WAKOYA** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**). 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 30th August, 2015 at [particulars withheld] area in Miendo location in Bungoma East District within Bungoma County unlawfully and intentionally used his fingers to penetrate the genital organ namely vagina of A.B a girl aged 11 years

Prosecution case

2. The prosecution called a total of five (5) witnesses in support of its case. PW1, the complainant, aged 9 years recalled that on the material date, she was with her brother Collins when the appellant whom he referred to as **Baba Sikuku** called her to the house of Mama R, pulled down her pants and inserted his fingers in her vagina. She stated that she cried and her brother Collins went into the house and found her pants pulled down to her knees. She stated that she informed her brother what the appellant had done to her and he informed J who in turn reported the matter to her mother who escorted her to the police station and later to hospital. PW2 C B, aged 9 years told court that the complainant was his sister. She recalled that she was playing with complainant when the appellant called her to the house of Mama R. That immediately thereafter, she heard the complainant crying and when he went to check her pants pulled down to her knees. He stated that he informed Mama J who in turn reported the matter to her mother who returned home and escorted complainant to the police station and later to hospital. PW3 J N B, the complainant's mother upon receiving a report that the complainant had been defiled returned home and escorted her to the police station and later to hospital. She told court that complainant was 11 years old and produced her certificate of birth as **PEXH. 3**. PW4 Letizia Mbalwe, a clinical officer examined complainant on 30.8.15 and found no evidence of penetration. She produced complainant's P3 form **PEXH.1**. PW5 PC Linet Ogero, the investigating officer upon receiving complainant's report arrested the appellant and had him charged.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant denied the charges.

4. *In a judgment dated on 24.11.17, appellant was convicted and sentenced to life imprisonment.*

The appeal

5. Aggrieved by this decision, the appellant lodged the instant appeal on 8th December, 2017. From the 4 grounds of appeal and written submissions filed on 7th November, 2018, the appellant's main issue is that penetration was not proved.

6. When the appeal came up for hearing on 8.11.18, appellant chose to wholly rely on the grounds of appeal and also on his written submission in which he reiterated the grounds of appeal.

7. Mr. Oimbo, Learned Counsel conceded the appeal on the ground that penetration was not proved and urged the court to invoke section 178 of the Criminal Procedure Code and substitute the sentence with a lesser offence of sexual assault under section 5 of the Sexual Offences Act.

Analysis and Determination

8. In a more recent case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**, the Court of Appeal stated as follows on the duty of the first appellate court:

“It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision.”

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and on behalf of the state.

10. In dealing with this appeal, I will deal with the issue raised in the appeal and another deduced from the proceedings of the trial court. The issues are:

1. **Whether penetration was proved**
2. **Cross-examination of the minor witnesses**

1. Whether penetration was proved

11. It is important to note that key ingredients necessary to establish a sexual offence under the Sexual Offences Act are as the age of the victim, penetration and identity of the offender. As conceded by the state, PW4, a clinical officer, upon examining complainant did not find evidence of penetration. The conviction on a charge of defilement and sentence imposed on the appellant in respect thereof is therefore unlawful.

12. I have considered the trial courts record and I have observed one other important issue. Although the issue was not raised by the appellant, it in my considered view is relevant if the appellant is to be said to have been accorded a fair trial envisaged under the provisions of Article 50 of The Constitution and I would fail in my duty as a court if I disregard it.

2. Cross-examination of the complainant

13. It is on record that when the complainant and PW2 who are minors testified, they were not cross-examined. No doubt the trial court adopted a wrong procedure. Every witness whether minor or adult is supposed to be cross-examined by the accused person. It is a right accorded to the accused and it is upon the accused to decide either to cross-examine or not. There is a difference between an unsworn witness and the unsworn evidence of an accused person. (See **Lawrence Iria v Republic [2017] eKLR**)

14. In the case of **Sula V. Uganda (2001) 2: E.A.**, the **Supreme Court Of Uganda** held as follows:-

“Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.

15. Similarly, In the case of **Nicholas Mutula Wambua V. Republic, Mombasa Criminal Appeal No. 373 of 2006 (C.A.)**, It was held:-

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.....It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is obvious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.” That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate’s courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.”

16. The issue which arises is whether the appeal should be allowed on account of failure by the trial Court to allow minor witnesses to be cross examined. It is true there is violation of the appellant’s constitutional right under Article 50 (k) of the Constitution to challenge the evidence of the minor witnesses. The evidence of the 2 minors implicates the appellant. My view is that the court has to evaluate the other evidence independently without that of the minors who were not cross examined and make its own finding. Failure to subject a minor witness to cross examination should not be an automatic licence to acquittal of the accused.

17. The foregoing notwithstanding, it is the duty of the court to ensure that fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and under no circumstances should these interests be jeopardized.

18. Appellant was charged on 31.8.15. He was released on bond a month later and remained as such until the date of his conviction on 24.11.17. To date, appellant has served one year imprisonment. This period does not surpass the interests of justice in trying a serious offence as defilement. Furthermore, it only serves justice to order a retrial so that even the complainant can see to it that justice has been served. It is also a serious offence that in the public interest ought to be disposed of in a trial conducted in an objective and fair manner.

20. Having found that it would be in the interest of justice to order a retrial, I shall not consider if the evidence on record disclosed a lesser offence of sexual assault under section 5 of the Sexual Offences Act because that consideration might prejudice the retrial.

Disposition

20. In the end, this appeal partially succeeds. Accordingly, it is hereby ordered that:

1. The Appellant shall be released from Prison custody forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial.

2. The Appellant shall be presented before the Senior Principal Magistrate, Webuye Law Courts NOT LATER THAN 19th November, 2018 for taking plea afresh before any other magistrate other than Learned Honourable *N.N.Barasa (SRM)* who initially heard the case.

21. It is so ordered.

DELIVERED AND SIGNED AT BUNGOMA THIS...9th.....DAY OF...November.....2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Ribba & Diannah

Appellant -

For the State - Mr Oimbo