



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 40 OF 2014

BETWEEN

JUMA OKWARO.....APPELLANT

AND

REPUBLICRESPONDENT

**(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE IN SPM'S CRIMINAL
CASE NO. 30 OF 2012 DELIVERED ON 24.03.2014 BY HON. H. WANDERE PRINCIPAL
MAGISTRATE MUMIAS)**

J U D G M E N T

Introduction

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Mumias on a charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006, the particulars being that on the 12th day of January, 2012 in Mumias District within Kakamega County intentionally caused his penis to penetrate the vagina of I.A, a child aged 12 years. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, the particulars being that on the same day and time he intentionally touched the vagina of I.A, a child aged 12 years with his penis

2. The appellant denied both the main and the alternative counts when he appeared for plea. The prosecution called 7 witnesses in its effort to prove the allegations against the appellant. The witnesses called by the prosecution were I.A, the complainant who testified as PW1, number 81636 Corporal (w) Faith Kaindi, PW2 Isaac Mukhwana, Clinical Officer, who was PW3 while No. 2008131619 APC Philip Ole Kumoywa testified as PW4. No. 236081 APC Stephen Otewo Were was PW5 while D O M was PW6. The last witness for the prosecution PW7 was Peter Maloba Musala.

3. The appellant who was the only witness for the defence denied committing the offence and stated that the allegations made against him were false and malicious because of a dispute he had with PW6 who wanted him to vacate some rental house he (appellant) was occupying so as to make room for PW6 to take over the said premises.

Judgment of the trial Court

4. After carefully considering all the evidence on record, the learned trial Magistrate was satisfied that the

prosecution had proved its case against the appellant on the main count of defilement and accordingly found him guilty as charged, convicted him and sentenced him to twenty (20) years in prison as by law provided.

The appeal

5. Being dissatisfied with both conviction and sentence, the appellant filed this appeal on 07.04.2014 on grounds that: the charge was defective, the evidence on record was uncorroborated fabricated and lacked probative value. The appellant also complained that the trial court failed to consider that there was no eye witness and that there was no medical evidence to support the charge against him. It was also the appellant's contention that the learned trial Magistrate failed to consider his alibi defence and finally that the prosecution failed in its duty of proving its case against him beyond any reasonable doubt. The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set aside.

Duty of this court.

6. As this is a first appeal the appellant is entitled to a rehearing of his case by this court with the only caution being that it has no opportunity of seeing and hearing the witnesses who testified during the trial. It is only after rehearing the appellant's case that this court can decide whether to uphold the judgment of the learned trial court to vary it. The courts have held that it is a very heavy matter for an appellate court to set aside the judgment of the trial court and that it can only do so if the appellate court is satisfied that the trial court erred on points of law or that the facts prosecuted during the trial do not support the charge against the appellant. Generally see **Okeno – vs – Republic [1972]EA 32 and peters – vs – Sunday post [1957] EA**

Submissions

7. The appellant filed and relied on his written submissions in arguing this court to allow the appeal. Mr Samson Ngetich prosecution Counsel for the respondent opposed the appeal ground by ground and urged this court to find and to hold that the case against the appellant was proved beyond any reasonable doubt.

Analysis and Determination

8. In the instant case, the prosecution is under a duty to prove the age of the complaint, and also that there was penetration and that it was the appellant who caused the penetration. Since the appellant has also raised the issue of a defective charge sheet I shall proceed to make a finding on the same.

Whether the charge sheet defective.

9. The appellant does not specifically address this issue in his written submission; though he raised the complaint in ground 2 of the petition of appeal. In response to this ground, prosecution counsel submitted that the charge sheet was properly before court and that even if there were any defects, the same were curable under the provisions of Section 382 of the Criminal Procedure Code. Section 382 of the CPC provides:-

“ 382 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 of 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.”

10. In cases such as **Joseph and another – vs – Uganda [1960]EA 236 and Sigilai – Vs – Republic [2004] 2KLR 480**, Coupled with the provisions of Section 134 of the Criminal Procedure Code, every charge or information shall contain; and shall be sufficient if it contains:-

- a statement of the specific offence or offences with which the accused person is charged,
- Such particulars as may be necessary for giving reasonable information to the nature of the offence charged.

11. In other words, the charge sheet should disclose the offence known in law and the same should be stated in a clear and unambiguous manner such that the accused person pleads to a specific charge which is easily understandable so that he is also enabled to prepare his defence.

12. In the instant case, and as correctly submitted by counsel for the respondent, the charge sheet meets all the requirements of Section 134 of the Criminal Procedure Code. The only anomaly that this court has noted is that the charge sheet should have read “.....contrary to Section 8(1) as read with Section 8(3). “This anomaly however did not cause any prejudice to the appellant and the same is curable under section 382 of the Criminal Procedure Code. The appellant’s second ground of appeal is therefore dismissed.

Whether the age of the complainant was proved

13. The age of the complainant in a defilement case is critical because it is the age that determines the extent of the sentence to be meted out to an accused person on conviction. In her testimony the complainant told the court that she was 12 years old. PW2 Number 81636 CPL (w) Faith Kamali told the court that the complainant was 13 years old. PW3, the clinical Officer told the court that the complainant was 12 years old. PW3 produced the P3 form – PExhibit 3 on which the police had given the age of the complainant as 12 years. PW3 also told the court that the complainant was not a virgin and that on the day she was examined, she had no pains at all. Noting from the complainant’s own testimony, that she was an orphan, it became critical in this case for the investigating officer to provide better proof of the age of the complainant by having her properly examined to determine her age. The investigating officer, PW2 never carried out or facilitated such investigations. PW3 never went beyond adopting the age, given in the P3 form by the police. In effect therefore this court finds and holds that the prosecution failed to prove the age of the complainant to the required standard. The appellant gets the benefit of that failure.

Whether there was penetration and whether it was proved that appellant caused the penetration.

14. The complainant testified that for about 5-6 days, the appellant defiled her every night and that during the day he locked her into the house and went away and only returned in the evening to take her to the toilet and back. According to PW3 the complainant ‘Had no pains at all’ on examination, her hymen was missing. PW3 also noted on the P3 form as follows: “ No sign of injuries noted,.” She also had no discharge although during his testimony in court, he stated that discharge was found. PW3 justified absence of discharge by the fact that the complainant was taken to hospital some 4 days after the alleged defilement.

15. From all the above, there appears to have been some penetration, but it is not clear when that may have happened. The answer to this issue is whether the evidence on record ties the appellant to the offence.

16. In his petition of appeal and in his written submissions, the appellant alleged contradictory and malicious evidence. From the testimony of the complainant, on 12.01.2012 she walked out in the night and met other children and followed them to their house where she (complainant) found their mother and told her what had befallen her (complainant). On the following day, she was taken to Mumias Police Station where she gave her testimony to the police. She was also taken to the children’s officer and explained her plight there.

17. According to PW4 both the complainant and the appellant were found together in the appellant’s house at about 8.00pm on 12.01.2012. This was after the police broke down the door to the appellant’s

house. PW5 corroborated the testimony given by PW4. According to PW5 both the complainant and the appellant were found half naked on the bed under a net. PW6, D O M testified that on 11.01.2012 at about 5.30pm, he saw the complainant trying to come out of the appellant's house with the appellant trying to prevent her from doing so. PW6 called the village elder PW7 and together they informed the police who came to appellant's house broke down the door and rescued the complainant.

18. PW7 stated that he himself was able to peep inside the room where he saw a small girl on the bed sitting with the appellant. From all the evidence above of the "eye witnesses" "this court is not satisfied that their stories add up. It may be true that the appellant defiled the complainant in his house, but when was it and how was the complainant rescued? Did she walk out on the evening of 12.01.2012 or was she rescued by PW4, PW5, PW6 and PW7 on the evening of 11.01.2012?

19. It appears clear to the court that either all or some of the witnesses were not truthful witnesses. This court would therefore be slow in accepting their evidence to the effect that the appellant was found together with the complainant in the house on the evening of 11.01.2012. For this reason. I am not satisfied that it was the appellant who was responsible for the missing hymen and this coupled with the fact the prosecution did not prove the age of the complainant to the required standard means, that the prosecution did not prove its case against the appellant beyond reasonable doubt.

Whether the trial court failed to consider the appellant's alibi defence

20. From the judgment of the learned trial Magistrate no mention is made of the appellant's alibi defence. I have however, myself carefully read through the appellant's defence, and note that if the prosecution had tied the loose ends of its evidence together, this alibi defence would not have shaken that evidence at all. In any event and as rightly submitted by counsel for the respondent the alibi defence did not shake the evidence adduced by the prosecution. In my considered view therefore, the appellant's alibi defence had no weight at all considering the totality of the prosecution's case against him.

Conclusion

21. In summary, and for the reasons given above, I find that the findings of the learned trial Magistrate cannot stand. Accordingly, I allow the appeal, quash the conviction and set aside the sentence of twenty (20) years imprisonment, meted out against the appellant.

22. Unless he is otherwise lawfully held, the appellant shall be released from prison custody forthwith.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 11th day of May 2017

RUTH N. SITATI

JUDGE

In the presence of:-

present in person.....for Appellant

Mr. Juma (present).....for Respondent

Polycap.....Court Assistant