REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL 15 OF 2012

[Arising from CM's Court Bungoma Criminal Case No. 769 of 2011]

A M O …..... APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

JUDGMENT

A M O was convicted and sentenced by the lower court on 7th April, 2014 for an offence of defilement of a child Contrary to Section 8(1) of the sexual offences Act No. 3 of 2006.

The particulars of this offence are that on the 21st day of April, 2011 at [particulars withheld] village, Teso North District, within western province, the appellant willfully and unlawfully did an act of penetration to (S N) a child aged 9 years by inserting his pennis to her genital organ namely vagina.

The evidence adduced by prosecution is that PW1 who's the complainant in this case was aged 9 years then. On 21/4/2011 at around 3.00 P.m, the complainant was playing with PW2 (F E) who was aged then 10 years, at the home of a neighbour called Z. The appellant who was in a house, called the complainant and led her into the house. He then called PW2 and gave her Kshs. 50 to go and buy him cigarettes. The appellant was left with the complainant in the house as PW2 and other children went for cigarettes. The appellant blocked the complainant's mouth. He removed her pants as well as his. It's then he inserted his pennis into her vagina. The complainant felt pain. The appellant threatened her that if she told anyone he'll kill her.

She cried aloud and he told her to keep quiet. The door to the house they were in was broken. When PW2 returned she found the appellant lying on the complainant. The appellant had removed his trousers and the complainant her pants. PW2 told the appellant that they wanted to go with the complainant home. The complainant started crying and the appellant allowed her to go.

On 22/4/2011, the complainant informed her mother, the PW3 in this case, that she was having painful abdomen and had pain on one leg. She did not disclose anything else. The mother noted that she was walking with difficulties. On 23/4/11 she was seriously in pain. At around noon PW2, who is described by PW3 as a friend of the complainant, disclosed that “S” (the nickname of the accused) had carnal knowledge of the Complainant. The mother urged the complainant and pressed her to talk and she confirmed that accused had carnal knowledge of her.

The complainant was taken by PW3 to Moding health center for treatment. She was treated and the matter was reported at Moding police. They were issued with a P3 form. The P3 form was filled by PW4 at

Kocholia District Hospital. The clinical officer revealed in his evidence that she was walking with a dent. She had bruises on genitalia which was discharging odour. Laboratory tests indicated that the urine had dent. The hymen was broken. He concluded that she had been sexually assaulted. He thus filled the P3 form on 2/5/2011. He also assessed the age of the complainant and indicated she was between 12 and 13 years old.

The appellant was taken to the police patrol base by the village elder. PW5 who is a police officer re-arrested him and had him charged.

On the foregoing evidence, the appellant was placed on his defence and gave unsworn testimony. He alleged PW3 went to him on 23/4/2011 demanding that he pays 500/= of which he owed her. He pleaded with her to allow him more time to look for the money and pay her. He was taken to the village elder before whom PW3 warned the appellant that if he does not pay the money he'll see her true colours. At around 3.00 pm, the village elder arrested him. He was taken to Moding police post and later transferred to Malaba police station. He was then charged with an offence of which he did not commit.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the following grounds:

- That the court failed to consider that he was not examined by a medical officer.
- That the case was not proved by the prosecution beyond reasonable doubt.
- That the sentence was harsh and excessive.
- That his mitigation was not considered.

In his written submissions, the appellant was not guided by his grounds of appeal. He raised new issues and given that this the first appellate court, I am as well expected to re – evaluate the entire evidence and make a deserved finding.

The first issue he raised is that his constitutional right was infringed as he was not taken to court within 24 hours upon arrest. The charge sheet shows that he was arrested on 23/4/2011 a date also supported by the evidence adduced. The same charge sheet and the proceedings shows he was taken to court on 3/5/2011. Definitely the period is out of the constitutionally allowed time which is 24 hours as per Article 49 (i)(f). The issue was not considered in the lower court and therefore no explanation for the delay was given.

While its clear that the appellant constitutional right was violated, it does not by itself entitle him to an acquittal. Such violation does not mean that he never committed the said offence, and or that he paid for the offence and need not suffer more for it. In the case of ***Julius Kamau Mbugua =vs= Republic, Criminal appeal No. 50 of 2008,*** the court of appeal on the issue concluded that violation of an accused's constitutional right does not render the trial a nullity. The accused's remedy in such circumstances lies in a claim for compensation by way of damages. On this issue, I take the said position.

The other relevant issue covered in the appellant's submissions is of contradictions in the prosecution case. The first one is of the name of the complainant where the 2nd name was indicated differently by witnesses as N, N, N, and N. The first name is given correctly by all and the 2nd name differences could have resulted out of pronounciation difference by the witnesses. This is a flimsy discrepancy which is easily understood. The right name of the complainant is not in doubt and that she was the person referred to in the different versions. This minor issue did not prejudice the appellant's position in the case or during the trial. I dismiss it as such.

The evidence given by different witnesses, even where they are eye witnesses cannot agree word for word. This is so as our interpretation of events may differ and memory also do fade. What the court need weigh is whether the truth or fact of a claimed position has been established beyond reasonable doubt: that is whether the correct position is settled. It is in this breadth that I find other trivial discrepancies aired by the appellant in his submissions do not deserve consideration as they can be reasonably explained out, and the correct position is easily settled.

The state opposed the appeal on the ground that all the ingredients for the offence of defilement were established to the required standard and he was given a fitting sentence in accordance to the law.

The evidence of PW1, PW2 and PW3 shows that the incident took place during the day. Through the two girls, (PW1) and (PW2) were not guided properly to state whether they knew the accused before then, their evidence when considered together with that of PW3 reveals they did. PW2 said he was their uncle and PW3 said he was her cousin. PW2 also told PW3 that its s. who defiled the complainant, a name of which PW3 confirmed to court is appellant's nick name. From the evidence, there's no doubt that the appellant is the real culprit.

The girl's age (complainant) was not well settled. She said she was 9 years old and her mother too stated she was 9 years old. However, PW4 who assessed her age placed her age at between 12 and 13 years. In regard to this, I can say in absence of a birth certificate, baptism card and any other document indicating the age of a girl, the most best person to know the correct age is the mother of the child. In this case, the mother and the girl had indicated an agreeing age of 9 years. Doctor's evidence is expert evidence of which is an opinion evidence. It can be unprecise and incorrect. Where there's better evidence to the contrary its safer for the court to go by that evidence. In this case the court took the age given by the doctor as of against the age given by the mother and the girl. I guess it's because the doctor's evidence favoured the appellant in sentencing, therefore avoiding prejudice on his part just in case the age was not correct. The appellant was therefore a beneficiary in that respect and I find no cause to interfere.

The evidence of PW1, PW2 and PW4 leaves no doubt that there was penetration. The offence of defilement was therefore proved beyond reasonable doubt. The appeal lacks merits and is dismissed.

Judgment Read and delivered in open Court in the presence of Mrs. Njeru and the Appellant.

Dated this 14th day of June 2017 at Bungoma.

S. GITHINJI

JUDGE