



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO. 16 OF 2015

(Being an appeal from the original conviction and sentence in Criminal Case No.946 of 2011

of the Principal Magistrate's Court at Kilgoris delivered on 24th November, 2013

by Hon. Hon B. O Ochieng SPM)

DANIEL NYAMUSWA OGWOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein Daniel Nyamuswa Ogwoka was the accused in the Principal Magistrate's court at Keroka in Criminal case No. 946 of 2011. He was charged with Defilement Contrary to **Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the 1st day of November 2011 at [Particulars withheld] Village in Transmara district within Narok County he intentionally and unlawfully caused his penis to penetrate the vagina of **JK** (name withheld) a girl child aged 6 years.

2. He also faced an alternative count of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act**. The particulars of the charge were that on the 1st day of November 2011 at [Particulars withheld] Village in Transmara district within Narok County he intentionally and unlawfully caused his penis to come into contact with the vagina of JK (particulars withheld).

3. He pleaded not guilty to the above charges against him and trial ensued.

4. PW1 the complainant herein testified that on 1st November 2011 she was at her aunt's (PW4) house when the appellant, who frequented the said house, which was also an alcoholic drinks den, to drink alcohol, came in and told her that he would give her a banana from his shamba. PW1 added that the appellant suddenly, slapped her whereupon she fell on the ground after which the appellant removed her clothes including her inner wear and proceeded to lie on top of her. She stated that the appellant then removed his trouser and did "bad manners" at her vagina as he held her neck tightly to prevent her from screaming. PW1 stated that the appellant gave her a banana after defiling her after which he left the house. PW1 then proceeded home where she informed PW4 of what had transpired. The complainant explained that she experienced difficulty in walking and felt pain at her buttocks.

5. PW4 was J N, the complainant's aunt. She testified that on the material day the complainant refused to

eat supper and could not sleep and upon asking the complainant what the problem was, she complained of pain on her back and legs and revealed what the appellant had done to her. This revelation prompted PW4 to wake up neighbours who answered her distress call and came to her house. PW4 stated that she examined the genitals of the complainant in the company of the neighbours and observed that she was bleeding and oozing of a liquid that she likened to semen. She also noticed that the complainant's inner clothes were torn. The village elder was then called to the scene and the appellant was arrested and escorted to the chief's camp and later to Kilgoris Police Station. PW4 further stated that she took the complainant to the hospital where the doctor treated her after confirming that she had been defiled. PW4 confirmed that the appellant frequented her house and that at the time of the incident, the appellant had accommodated her in another house in the compound.

6. PW3 was No. [particulars withheld] APC Gasper Mwihsaka who received the complainant, PW4, 3 elders and the appellant at the chief's camp where the defilement was first reported. He stated that the appellant was tied with ropes when he was brought to the chief's camp and that the complainant was walking with difficulty with her legs apart.

7. PW2 was Dr. Patricia Onguti a medical officer at Transmara District Hospital whose testimony was that the complainant was brought to her on 2nd November 2011 and upon examining her, she noticed that she had bruises below the labia minora in the right side, bruises on the vaginal opening posteriorly, and hymen was broken. She concluded that there was penetration of the complainant's vagina within 24 hours. She produced the P3 form and the age assessment report that placed the complainant's age at between 7-9 years as exhibit P1 and exhibit P2 respectively.

8. PW5 was No. [particulars withheld] P.C James Ngunjiri of the Kilgoris Police Station. He recalled that on 2nd November 2011 the appellant was brought to the station by administration police officers from Ngararu on allegations of defiling a child. His testimony was that he escorted the complainant and the appellant to Transmara District Hospital for treatment and examination. He also stated that he had submitted the underwear that the complainant had worn during the attack to the government analyst for examination.

9. The lower court record shows that the trial was adjourned on numerous occasions with a view to awaiting the government analysts report which report was never availed to court on time or at all thereby forcing the prosecution to close their case prematurely.

10. Upon considering the evidence tendered by the prosecution witnesses, the trial court ruled that a prima facie case had been established against the appellant to warrant his being placed on his defence.

11. The appellant gave an unsworn statement in his defence in which he admitted having given accommodation to PW3 and the complainant. His testimony was that on the material day, he left for hospital and told the children to take care of the cattle but upon his return, he found that the crops had been destroyed and this prompted him to beat the children. He added that he was arrested the following day while on his way to hospital and denied the charges while stating that he had been framed up.

12. DW2 Josephine Daniel was the appellant's wife. Her testimony was that the appellant did not defile the complainant and that the whole case was made up of speculation.

13. After evaluating the evidence of both the prosecution and the defence, the trial court found that the main charge of defilement had been proved beyond reasonable doubt and convicted the appellant who was then sentenced to life imprisonment.

14. Being dissatisfied with the above conviction and sentence, the appellant has appealed on the following grounds:

1. That the learned trial magistrate erred in law and fact in convicting and sentencing the appellant for a life sentence without giving adequate consideration to the accused's defence.

2. That the learned trial magistrate misdirected himself on the essential ingredients of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006.
3. That the learned trial magistrate erred in law and fact by failing to independently analyze/evaluate the defence before drawing a conclusion as by law required.
4. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without due regard to mitigating factors.
5. That the learned trial magistrate erred in law and fact by failing to evaluate that the prosecution failed to call essential witnesses to corroborate the evidence of the minor.
6. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without due regard and consideration of the appellant's evidence in his defence.
7. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellate without representation considering the weight of the offence.
8. That the learned trial magistrate erred in law and fact by sentencing the appellant without taking into consideration that the appellant was not medically examined to link him to the alleged offence as required by the law.
9. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without verifying as required in law whether the minor understood what she was saying as required by establishing whether she understood the importance of saying the truth and consequences thereof.
10. That the learned magistrate erred in law and fact by not considering the relationship between the family of the appellant and the complainant's family.
11. That in the whole, the conviction was against the weight of the evidence as the prosecution did not prove their case beyond reasonable doubt and the trial magistrate sentenced the appellant on flawed procedure.
12. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant by imposing very harsh improper/excessive sentence in the circumstances.

11. When the above appeal came before me on 24th March 2016, it was agreed that the same be argued by way of written submissions.

12. The appellant, through the firm of m/s Nyagaka, Mosota , Kerosi Ondieki & Associates Advocates, filed written submissions dated 25th May 2016 and contended that the trial court had erred in law and fact by:

1. **Wrongful admission of evidence of PW2,PW3,PW5 and PW4.**
2. **Wrongful exclusion of evidence by PW5, PW3 and DW2.**
3. **Misdirection as to the law applicable in the case.**
4. **Meting out the sentence which was by fact and law unlawful.**

13. The respondent filed written submissions opposing the above appeal on the following grounds:

1. **The prosecution established a prima facie case and proved its case beyond reasonable doubt and the trial court acted justly in convicting the appellant.**

2. **The admission of the evidence tendered by the complainant minor was lawful and just and was supported by provisions of section 124 of the Evidence Act.**

3. **The ingredients of defilement under section 8(1)(2) of the Sexual Offences Act were satisfied by the prosecution, and the court rightly convicted the appellant.**

4. **The prosecution proved its case beyond reasonable doubt and the trial court was justified to find the appellant guilty.**

5. **The appellant's rights to fair trial were not violated and there isn't reasonable cause to quash the trial court's finding.**

6. **The sentence meted out against the appellant is justified owing to the severity of the offence, the age of the complainant and the mandatory provisions of the law.**

14. The duty of this court as the first appeal court is to re-evaluate the evidence presented before the trial court and come up with its own independent decision on the same. See **Okeno vs Republic (1972) EA 32.**

15. I have considered the entire proceedings before the trial court, the judgement of the court, the petition of appeal and written submission filed by both the appellant and the respondents. The following issues present themselves for determination before this court:-

a. **Is corroboration of the evidence of a minor necessary in a charge of defilement?**

b. **What are the ingredients of the offence of defilement and is forensic evidence an essential ingredient?**

c. **Were the appellant's rights to fair trial violated in view of the fact that he was not being represented by counsel during the trial court?**

d. **Was the sentence meted against the appellant unlawful?**

16. With regard to the first issue of whether corroboration is essential in a charge of defilement, section 124 of the Evidence Act states that:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the 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."

17. In the instant case the trial court noted that even though the minor was not possessed with sufficient intelligence to understand the meaning of an oath, her evidence withstood the appellant's cross examination hence the trial court was convinced that the minor was telling the truth. The answers to the questions put to her demonstrated her confidence and credibility. I therefore find no merit in this ground of appeal.

18. With regard to the issue of whether the ingredients of defilement were proved, the critical ingredients that need to be proved for a successful conviction of defilement are age of the complainant, penetration and positive identification of the appellant. In Instant case the age of the complainant was proved by PW2 the medical officer who conducted a medical assessment examination and estimated the complainants age to be between 7-9 years. Even in the absence of any document, provided there is evidence of a parent, such evidence is sufficient to prove age. I rely on the Ugandan Court of Appeal case of **Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000** where it was held:

"In defilement cases, medical evidence is paramount in determining the age of the victim and

the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from the medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

19. On penetration PW2 the medical doctor who examined the complainant told the trial court that the complainant had bruises on the vaginal opening posteriorly, the region was hyperemic and her hymen was not intact. She therefore concluded that there was penetration. In my humble view and observation, penetration was also established through the complainant's own testimony which was corroborated by medical evidence. The complainant's testimony that she was defiled was supported by the medical evidence of PW2.

20. On identification of the appellant, it was the complainant's testimony that the appellant was like an uncle to her since he used to frequent her auntie's house for drinks. PW4 the auntie to the complainant corroborated the complainant's testimony when she stated that the appellant came to their house frequently and that at the time of the incident, he (appellant) had accommodated her at his house. It is therefore my finding that the appellant was not a stranger to the complainant who recognised him as the person who frequently went to her auntie's house. Besides, the alleged defilement took place in broad day light thus ruling out any chances of mistaken identity.

21. On the appellant's contention that he did not have counsel to represent him, Article 50 of the constitution provides for legal representation as follows:

1. Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.

2. Every accused person has a right to a fair trial which includes the right:

a.

b.

c.

d.

e.

f.

g.

h. To have an advocate assigned to the accused person by the state and at state expense , it substantial injustice would otherwise result, and to be informed of the right promptly.

22. The Court of Appeal sitting in Malindi had occasion to deal with the issue of legal representation in the case of **Karisa Chengo , Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** when it quoted the case of **David Macharia Njoroge v Republic [2011] eKLR** where it was held:

"State funded legal representations is a right in certain instances Article 50(1) provides that an accused shall have an advocate assigned to him by the state, at state expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the constitution, however, provisions of international conventions that Kenya is a signatory to are applicable by virtue of Article 2(6). Therefore, provisions of ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where 'substantial injustice would otherwise result' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new constitution would automatically be entitled to a retrial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new constitution will not apply retroactively, and secondly, every case must be decided on its own merit to determine if there was serious prejudice occasioned by reasons of such omission."

23. In the case of **Karisa Chengo, Jefferson Kalama Kengha (supra)** the Court of Appeal added as follows:

"substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

24. From the above quoted cases, it is apparent that for an accused person to qualify for legal representation under Article 50, it must be evident that such person charged with a capital offence cannot afford legal representation thereby compromising trial in one way or another. In the instant case, the appellant was charged with the offence of defilement that attracts a penalty of life imprisonment upon conviction and not death penalty. Under those circumstances, I find the appellant's argument that he was entitled to legal representation as envisaged under Article 50 of the constitution is not sustainable.

25. Lastly, on the sentence meted out against the appellant, the appellant was charged with defilement contrary to section 8(1)(2) of the Sexual Offences Act. The sentence provided by the Sexual Offences Act is a minimum mandatory sentence which is usually pegged on the age of the victim in which case the younger the victim the stiffer the sentence. Therefore once the trial court was satisfied that all the ingredients of defilement had been proved beyond reasonable doubt, there was no room for court to exercise discretion and the only minimum mandatory sentence provided for under the Sexual Offences Act was life imprisonment.

26. In the end, I find that the instant appeal lacks merit and it is hereby dismissed.

Dated, signed and delivered in open court this 15th day of September, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Appellant in person for the Appellant
- Omwoyo court clerk