



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 4 OF 2014.

AMOS IPULO:.....APPELLANT.

VERSUS

REPUBLIC:.....RESPONDENT.

(Being an appeal from the original conviction and sentence of C. Kendagor – AG. SRM in Criminal Case No. 91 of 2013 delivered on 31st December, 2013 at Kakamega.)

JUDGEMENT

INTRODUCTION.

1. The appellant herein A I was charged with the offence of Defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the night of 6th and 7th day of March, 2013 at [Particulars Withheld] in Kakamega County within Western Province he intentionally and unlawfully caused his penis to penetrate the anus of I K, a child aged ten (10) years.
2. The alternative charge was that of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars on the alternative charge were that on diverse dates between the night of 6th and 7th day of March, 2013 at [Particulars Withheld] in Kakamega County within Western Province intentionally and unlawfully touched the anus of I K a child aged ten (10) years with his penis.
3. The trial court found him guilty on the main charge convicted and sentenced him to life imprisonment.

The appeal.

4. Being aggrieved and dissatisfied by both his conviction and sentence, he filed his appeal on the following homemade grounds:-

(1)That the trial magistrate erred in law and fact in convicting the appellant on the basis of a defective charge sheet hence the charge sheet was defective under section 214 (1) of the CPC as enshrined in article 50 (2) (b) and article 25 (c) of our constitution 2010;

(2)That the trial court erred in law and fact in convicting the appellant and sentencing the appellant on the basis of the birth certificate marked as exhibit “MFI 4” hence the age of the complainant indicated on the charge sheet is different with one indicated on the birth certificate

hence the sentence and conviction was null and void (see the case of **ABDI SARAN ABDI VS. R. CR.A. No. 82 of 2008** and the case of **DOMINIC KIBET [2013] e KLR**;

(3) That the trial court magistrate erred in law and in fact in convicting and sentencing the appellant by failing to note and consider that appellant's right was violated by the police as he was not informed the reason of arrest hence bad in law contravening article 49 (1) (a), (i), (ii) (iii) and (f) (i) (ii) of the Constitution of Kenya 2010.

(4) That, the trial court proceeding did not comply with section 197 and 198 of the CPC as the appellant takes plea after the hearing of the case as indicated on the trial court proceedings hence bad in law leading to misdirection and unrepresented by the trial court magistrate;

(5) That the recognition and identification of the appellant was not positive because the complainant failed to describe the assailant's features, name and clothing to enable him to recognize the appellant in the first place. I rely on the case of **Republic vs. Turnbull [1976] 3 ALL E.R. 549** at page 552 and the case of **Roria vs. Republic [1967] E.A. 583**;

(6) That the trial court erred in law and fact by convicting the appellant based on hearsay testimonies, contradictory, uncorroborated evidence and inadmissible evidence hence bad in law;

(7) That the trial magistrate erred in law and fact by failing to note and consider that before and the trial there was a material irregularity in the failure of the prosecution to disclose to the defence relevant evidence which was under the duty to disclose at the first report and the witnesses statements was not given to the appellant for his defence;

(8) That the appellant Alibi Defence was not given a proper considerations by the trial court magistrate as the sentence meted out by the trial court was manifestly harsh and excessive in the circumstances hence bad in law;

(9) That the medical evidence was not authentic to warrant the conviction of the appellant as the birth certificate evidence and the evidence on the record cannot be admissible in matters of law as the essential witnesses was not summoned to testify;

(10) That the trial court magistrate erred in law and in fact in convicting the appellant on the uncorroborated evidence of a child contrary to section 2 of the Children's Act;

(11) That the trial court magistrate erred in law and fact in convicting and sentencing the appellant under section 8 (1) of the Sexual Offences Act without the relevant sub section hence no sentence under section 8 (1) can be passed without the relevant sub-section leading to violation of the law and ignorance of the law;

(12) That the trial magistrate erred in law and fact in failing to evaluate, re-analyze the evidence as required standard and formed an unbalanced view which was not supported by the law;

(13) That the trial magistrate erred in law and fact by failing to note and consider that police failed to comply with section 46 paragraph 6 (iv) of the force standing orders (F.S.O) to conduct identification parade as the prosecution failed to elicit during evidence as to whether the witness (PW1) had observed the features of the culprit. See the case of **FRANCIS KARIUKI NJIRU AND 7 OTHERS VS. REPUBLIC Criminal Appeal No. 6 of 2007 U.R.** and the case of **MOHAMMED ELIBITE HIBUYA AND ANOTHER VS. REPUBLIC Appeal No. 22 of 1996 U.R.**;

(14) That, I beg the honourable court of the law to re-evaluate, re-analyze and re-visit the evidence afresh and come out with an independent conclusion and judgment as it was required by law see **Okeno vs. Republic [1972] E.A. 32** among others.

5. He wants this appeal allowed, conviction quashed, sentence set aside and he be set at liberty.

Submissions.

6. This appeal was canvassed orally and the appellant also filed his written submissions which are on record.

7. The appellant relied on his written submissions and added that he was beaten when he was arrested and denied the right to cross-examine during trial.

8. In opposing the appeal Mr. Oroni, state counsel from the O.D.P.P. submitted that the evidence of PW1 was corroborated and that the Investigating Officer found enough evidence to charge the appellant. He maintains that the case was proved as required by law and that conviction and sentence were lawful. He asked the court to dismiss the appeal accordingly.

9. This being a first appeal, this courts duty is to re-evaluate the evidence on record afresh, analyze it and come up with its own conclusion bearing in mind that it never saw the witnesses testify to see and evaluate their demeanour. See the case of **Okeno vs. Republic [1972] E.A 32.**

The Prosecution case.

10. During the trial the prosecution called a total of four (4) witnesses to prove their case. PW1 told the trial court that the victim PW2 was her sister in law's son who she lived with. She testified that PW2 was ten (10) years old and in class 4 at [particulars withheld]. She recalled on the 6th March, 2013 when PW2 went missing and her efforts to trace him on that night were futile. The next morning at 5.00 a.m. she continued with her search and was told by the children PW2 was playing.

11. With that he had decided to go to his grandmother's home at Roster man because it was late and he had been cautioned not to go back home late. PW1 further testified that as she was heading to Roaster man she called the grandmother and she was told that he had not gone there. She decided to go to the AP's camp at Lurambi where she met them (AP's) along the way together with PW2.

12. When PW2 saw her he started crying and the A.P's told her that there was a problem. They told her to rush to Kakamega Police station. She then asked PW2 what was the problem and he told her that he had been injured on his buttocks by a man. She then checked him and saw tears on his anus and some fluid on the area and some oil around the buttocks. She took PW2 to hospital immediately where he was checked and treated as shown on PExh. 1. She went to the police to report the incident the next day and was given a P3 form. PEx. 2 and the Post Rape Care Form P. Exh. 3. She asked PW2 if he could identify the man who defiled him and he led her together with the police to the house where the appellant was arrested.

13. PW2 satisfied the trial court that he understood the nature of giving a testimony on oath. He testified that he was ten (10) years old and in class 4 at [particulars withheld]. . He told the trial court that after playing with other children he decided to go to his grandmother's house because it was late. As he was going he met a man near the approved school who told him he knew where Roaster man was as he was coming from there and that there was a fire in town. He told him that he would take him there the next day. They went to a home in Lubao where the man lit a tin lamp and gave him some ugali and sukuma wiki. He also told him that he had a sword. At night the man asked him to remove his clothes and threatened to kill him.

14. The man then poured oil on his (PW2) buttocks, removed his clothes took his penis and inserted it into his buttocks. He did this three (3) times. Early before sunrise the man escorted him and told him to go away and that he should not tell anyone. He went to the Lurambi Police Post where he slept on the bench. He was woken up by the officers at the police station and he told them what happened to him that night. The police officers then escorted him home and as they were going they met PW1 and he told her what had happened to him. She immediately took him to Kakamega Hospital where he was treated.

15. Thereafter, he recorded his statement. He was able to recognize the face of his assailant and his home. He took his relatives to the accused's home and the police also. He maintained that it was the accused who injured him on his anus.

16. PW3 Duncan Minigwa, a clinical officer at Kakamega Provincial Hospital testified that he examined PW3 on 8th March, 2013. He was given the history of PW2 that he was sodomized by people known to him on 6th March, 2013 at night in Lubao area. He told the trial court that the age of PW3 was ten (10) years. On examining him, he observed a tear on both the upper and lower sides. He also observed there was pus like discharge on the anus.

17. He also examined the appellant on the 13th March, 2013. There was no discharge from the penis and he was normal. The anal swab on PW3 showed that he had no spermatozoa, H.I.V. was negative so was the accused's test. He filled the P3 form on the 8th March, 2013 which he produced as PExh. 2 Post Rape Care Form PExh. 3 and photocopies of the treatment notes for PW2 PExh. 1.

18. P.C. Odoyo No. 81294 was the last to testify for the prosecution. He told the trial court that on 7th March, 2013 PW2 accompanied by his mother reported that PW2 had been defiled. PW2 was aged ten (10) years. He recorded their statements and issued them with a P3 form which was signed by a doctor. He interrogated PW2 who told him of what happened on the 6th March, 2013 the way the appellant had cheated him and lured him in believing that he would take him to his grandmother's home but in the end defiled him at night. PW2 also told him how the appellant had threatened him with a knife before he sodomised him.

19. He went to the scene as directed by the victim PW2 who also identified the appellant. He told the trial court that the victim was ten (10) years old and also produced a copy of his birth certificate "PExh. 4". The accused was arrested after being identified by the victim.

On cross-examination, he told the court that his investigations took 3 days.

Defence case.

20. The appellant had a case to answer and was placed on his defence. After explaining to him the provisions of section 211 of the CPC the appellant opted to give an unsworn statement of defence. He told the trial court that on 10th March, 2013 between 4 a.m. and 5 a.m. he was arrested. On asking why he was arrested he was not told. On Monday, he was brought to court. He claimed that the victim (PW2) was coached.

Issues for determination.

21. After hearing both the prosecution and the defence case the trial court found the accused guilty on Count 1 and sentenced him. In this appeal the following are the pertinent issues to be determined:-

(a) Whether the charge was defective and whether the trial court erred in convicting the appellant on the said charge;

(b) Whether the age of the victim was proved as required and the authenticity of the medical report;

(c) Whether the appellant's rights were violated by the police;

(d) Whether the appellant took plea after the hearing of the case;

(e) Whether identification was proper and whether there was need for an identification parade in the circumstances;

(f) Whether the evidence by the prosecution was contradictory and needed corroboration;

(g) Whether the appellant's alibi defence was given proper consideration.

22. We will first deal with the first issue which is whether the charge sheet was defective. What constitutes a defective charge sheet was spelt out in the case of **JOSEFU AND ANOTHER VS. UGANDA [1960] E.A. 236**. The East African Court of Appeal held that:-

“The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc in contravention of the Act.”

23. And in **SIGIZANI VS. REPUBLIC [2004] 2 KLR 480** it was held that:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

24. On the other hand Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows:-

“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, together with such particular as may be necessary for giving reasonable information as the nature of the offence charged.”

25. From the onset of the case the appellant knew that the charge facing him was one of defilement. Its particulars were clearly set out which included the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. The only problem with the charge sheet was that it didn't separate the section that defines the offence and that one that gives the punishment to be meted upon the person found guilty. The particulars clearly showed that the appellant defiled a minor which is good enough to show what the appellant was charged with. It remains therefore that the defect in the charge sheet was not fatal to the charge as the same was explained in the particulars thereof.

26. Secondly, on the issue of proof of age it has been showed that the child was ten (10) years by PW1. There was the child's birth certificate. PEx. 4 which showed that the child was born on 23rd March, 2003. The same was produced by PW4 and the victim also said in his testimony that he was aged ten (10) years. In the case of **RUA NGAO MWATUMA VS. REPUBLIC [2014] eKLR H.C. @ MALINDI CRIMINAL APPEAL NO. 21 OF 2012**, the learned honourable Justice Angote while relying on the decision in the case of **KAINGU ELIAS KASOMO VS. R. MALINDI CR. APP. NO. 504 of 2010** observed as follows:-

“The date of birth was not given and it would seem that the only medical evidence tendered was the P3 form which gives the estimated age of 15 years. In the case of KAINGU ELIAS KASOMO VS. REPUBLIC MALINDI CR. APP. NO. 504 OF 2010 the court of appeal stated that the age of a minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth.”

27. I find that the age of the victim in this particular case was properly proved. Thus the submission by the appellant that the age of the victim had not been proved cannot stand.

28. Issue No. 3 is whether the appellant rights were violated by the police. Article 49 (1) (a) (i), (ii), (iii)

and (f) (i) (ii) of the Constitution of Kenya, 2010 provides for the rights of an accused person to be informed promptly, in a language that he understands the reason for the arrest, right to remain silent and consequences of not remaining silent; and to be brought before a court as soon as reasonably possible.

29. From the charge sheet the accused was arrested on 10th March, 2013 and brought to court on the 11th March, 2013 that is within 24 hours as required. Nowhere in the proceedings did he raise issue that he was not informed about the charge or his right to remain silent and the consequences thereof. He also did not request to be issued with statements of the prosecution witnesses all throughout the proceedings. The court would have recorded the same and ordered that the said statements be issued to him. This allegation that his rights were violated cannot stand.

30. On the 11th March, 2013 the accused was arraigned in court and the substance of the charge and every element thereof read to him in Kiswahili, a language that he understood and the accused pleaded not guilty. Plea was therefore taken on the first day when appellant appeared in court and not after the hearing of the case.

31. On the issue of identification and whether there was need to conduct an identification parade, I find that the appellant herein was positively identified. The appellant and the victim spent the whole night together. They were not in darkness because as testified by the victim PW2, when they went to the appellant's home he lit the kerosene lamp which had light. They also ate ugali and sukuma wiki together. He (PW2) had all the time to see the appellant. The appellant was also arrested within a day or two after the incident. He (PW2) did not describe the appellant to the police but was able to take them to his house. He still remembered the place of the appellant. I find that the appellant was properly identified.

32. On corroboration of evidence section 124 Evidence Act has properly been captured by the court of appeal in **Mohamed vs. Republic [2006] 2 KLR 138** when it stated that:-

“It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

33. The evidence of PW2 need not be corroborated for the trial court to reach a conclusion. The trial court will reach its conclusion if it is satisfied that the child is telling the truth in sexual offences cases. The appellant's submission can therefore not stand as section 124 of the Sexual Offences Act is clear.

34. Lastly, the trial court did consider the defence evidence. His evidence though, centered on his arrest and no alibi was raised by him. The upshot of all the above is that the appeal herein fails. This court is satisfied that the appellant was properly convicted of the offence of defilement contrary to section 8 (2) of the Sexual Offences Act 2006.

35. The appeal has no merit and the same is accordingly dismissed.

SIGNED, DATED AND DELIVERED at KAKAMEGA this 1ST day of DECEMBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**In Person** **for the Appellant.**

.....**Juma SC.** **for the Respondent.**

.....**Lilian** **Court Assistant.**

