



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, MUSINGA & GATEMBU, J.J.A)

CRIMINAL APPEAL NO. 191 OF 2016

BETWEEN

RPO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay (Majanja, J.) delivered on 26th August 2015

in

H.C.Cr.App. No. 15 of 2015)

JUDGMENT OF THE COURT

1. The appellant, RPO, has in this second appeal, challenged his conviction and sentence to 15 years’ imprisonment by the Chief Magistrate’s court at Homa Bay for the offence of gang defilement contrary to Section 10 of Sexual Offences Act. His first appeal was dismissed by the High Court (*Majanja, J.*) in a judgment delivered on 26th August 2015.

2. This being a second appeal, our mandate is confined to matters of law by reason of Section 361(1) of the Criminal Procedure Code. As stated by the Court in *Chamagong vs. Republic (1984) KLR 611:*

“A court on appeal will not normally interfere with a finding of fact by the trial Court whether in a Civil or Criminal case unless it is based on no evidence or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted in wrong principles in reaching the findings he did.”

3. The facts, based on the concurrent findings of the two courts below, are that on the 2nd October 2010 at about 2.00 p.m., HAO, the complainant (PW1), a girl aged 15 years at the time, left her house to fetch water from the river. The appellant’s house was on the way to the river. As the complainant passed the appellant’s house, he called her, ostensibly to give her books. The appellant was not a stranger to the complainant as he was a cousin to the complainant’s father (PW4). On getting into the appellant’s house, the appellant locked the door from inside. Another person, Ouma, who was already in the house placed a handkerchief with some liquid on the complainant’s nose thereby suffocating her. She lost consciousness. She later found herself in Homa Bay Hospital with pain in her genitalia. She had apparently been defiled.

4. Meanwhile, the complainant’s brother (PW3) who was at home got concerned that her sister (the complainant) had taken rather long to return home from the river. He went in search of her. As he passed the appellant’s house, he heard someone scream. He recognised the voice as that of his sister the complainant. He approached the house and knocked on the door. After a while the appellant opened the door and fled.

5. Inside the house, PW3 found the complainant sprawled on the bed, naked and foaming in her mouth. He went to call his father, PW4. On getting to the appellant’s house, PW4 found the complainant on the floor near the bed. She had injuries on her elbow and knees. Together with his son, PW3, they took the complainant to a health clinic and thereafter to Homa Bay Hospital.

6. At the hospital, the complainant was examined by Dr. Watongo whose medical report was produced before the trial court by Dr. Ojwang

(PW2). The examination revealed that the complainant had bruises on the left knee and lacerations in the vagina and whitish discharge. The P3 form duly completed by the examining doctor was tendered in evidence by Dr Ojwang.

7. The complainant's father, PW4, reported the incident at the police station. In his testimony, he confirmed that the complainant was born in 1996; that she was aged 15 years at the time the offence was committed; that she was in class 7 at the time; and that her baptismal card got burnt in the house.

8. Police constable Marion Serem (PW5), the investigating officer, testified that she interviewed and recorded statements from the witnesses; that the complainant's parents confirmed to her that the complainant was 15 years old; and that based on her investigations the appellant was arrested and charged with the offence of gang defilement.

9. In his defence, the appellant, who acknowledged the complainant as his relative said he is a business man at Ogingo Market; that on the material date he was at [Particulars withheld] Secondary School sitting a chemistry examination and got back home at 6.00 p.m.; that he had earlier differed with the complainant's father and the charges against him were framed.

10. Both the trial court and the first appellate court found that the ingredients of the offence were proved to the required standard. The appellant has faulted both courts and submitted that he was wrongly convicted. In his submissions before us, he urged that the charge sheet was defective because the time the offence was committed was not indicated; that as neither the birth certificate nor baptismal card in respect of the complainant were produced, the age of the complainant was not proved; that the P3 form did not indicate the weapon used to assault the complainant nor did it confirm the form of drug or alcohol allegedly used to suffocate the complainant; that there was unreasonable delay in concluding the trial in breach of Article 50(i)(e) of the Constitution. As regards sentence, the appellant urged us to reduce the same to the period already served as he had completely been reformed.

11. Opposing the appeal, the learned prosecution counsel, **Mr. Kakoi**, submitted that all the necessary ingredients of the offence, namely age of the complainant; penetration; identity of the perpetrator; and the fact that the offence was committed by more than one person were proved to the required standard; and that the appellant was rightly convicted and sentenced.

12. We have considered the appeal and the submissions. As already noted, our mandate on a second appeal is confined to matters of law. The issues for consideration are whether the charge sheet is defective on account of the omission to include the time the offence occurred; and whether the ingredients of the offence were established to the required standard.

13. As regards the contention that the charge sheet was defective, Section 134 of the Criminal Procedure Code provides that every charge shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Section 137 of that Act sets out rules for framing charges.

14. In ***Isaac Nyoro Kimita & another vs. R [2014] eKLR*** this Court expressed:

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge.”

15. And in ***Benard Ombuna vs. Republic [2019] eKLR*** the Court stated that:

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”

16. Flowing from those decisions, the critical consideration is whether the appellant is prejudiced by the perceived defect in the charge sheet. There is no doubt that in the present case, the charge contained the statement of the offence, which described the offence, as well as the particulars of the offence. There is no suggestion that the omission to include the time when the offence occurred in the charge sheet occasioned the appellant any prejudice whatsoever in the conduct of his case. No complaint was raised by the appellant before the trial court that the omission to include in the charge sheet the time the offence was committed in any way hindered him or affected the conduct of his case. In our view, notwithstanding that the time the offence was committed was not indicated in the charge sheet, the same contained sufficient details to enabling him to appreciate the charges he was facing. See also ***Yosefa vs. Uganda [1969] EA 236***. There is no merit in this complaint.

17. In relation to the ingredients of the offence, the appellant singled out the element of the complainant's age as not having been established to the required standard. There is no doubt that under the Sexual Offences Act, the age of the victim is an important element as it not only determines the particular offence of which an offender is charged, but also determines the sentence. In ***Kaingu Elias Kasomo V. Republic, Malindi Criminal Appeal No. 504 of 2010***, for instance, this Court stated:

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

18. Learned counsel for the respondent referred us to the Ugandan case of ***Francis Omuroni V. Uganda, Criminal Appeal No. 2 of 2000***,

where the Uganda Court of Appeal stated that, in defilement cases, apart from medical evidence, age may also be proved by birth certificate, the testimony of the victim, parent or guardian and by observation and common sense. That decision was reaffirmed in the case of **Mwalango Chichoro Mwanjembe V. Republic, Mombasa Criminal Appeal No. 24 of 2015** where this Court stated:

“The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R,Cr.Appel No.19 of 2014 and Omar Uche v R,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim.Appel.No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable.”

19. More recently in **MW vs. Republic [2020] eKLR**, the Court reiterated that ***“the age of the victim can be established by medical evidence, birth certificate, the victim himself or herself, parents or guardian through their testimony before the trial court.”***

20. Having regard to those principles, the record in this case shows that in her testimony, the complainant stated that ***“I am 15 years old. I was born in 1995.”*** Her father also stated that her daughter, the complainant was 15 years old although he said the year of birth was 1996. In his words, ***“she is 15 years old. She was born 1996. She goes to [Particulars withheld] in class 7”***. The evidence of the medical doctor who examined the complainant was that her age was 15 years as indicated in the P3 form. In our view, that evidence was sufficient to prove her age and both courts below were in concurrence in that regard.

21. There is no complaint regarding the other ingredients of the offence. As regards identity of the perpetrator of the offence, the complainant and her father stated that the appellant is a relative. The father of the complainant referred to the appellant as a cousin. The appellant himself confirmed that the complainant is related to him. There is therefore no question of mistaken identity. Penetration was established through the evidence of the complainant and the medical evidence tendered by PW 2. And the fact that the offence was committed by the appellant and another person named Ouma, rendering the offence gang defilement, which was established. Accordingly, the complaint that the ingredients of the offence were not proved also fails.

22. What remains is the complaint that the trial took unreasonably long to conclude thereby compromising the appellant’s right to a fair trial under Article 50(2)(e) of the Constitution. The record of the trial court is replete with adjournment requests made at the instance of the appellant. Indeed, a considerable period of time was lost because the appellant breached his bail terms and absconded leading to the cancellation of his bond and a warrant of arrest had to be issued to secure his attendance in court. He cannot be heard to complain of delay that he himself caused. There is no merit in this complaint.

23. As regards sentence, Section 10 of the Sexual Offences Act under which the appellant was convicted provides for imprisonment for a term of not less than 15 years which may be enhanced to imprisonment for life. The trial court considered the circumstances in which the offence was committed and noted that ***“the offence was committed in very cruel manner to the girl.”*** The sentence meted out by the trial for imprisonment to 15 years was not only legal but justified. There is no basis for interfering with the same.

24. The upshot of the foregoing is that the appeal is devoid of merit. It is accordingly dismissed in its entirety.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR