



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, WARSAME, AND GATEMBU, JJA]

CRIMINAL APPEAL NO. 174 OF 2016

BETWEEN

AMOS OMONDI OJWANG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Kisumu (E.N. Maina, J.) dated 16th April, 2015

in

H.C.C.R.A. No. 69 of 2014)

JUDGMENT OF THE COURT

1. The appellant, Amos Omondi Ojwang was charged with defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the offence were that:

“On the 15th day of June 2013 at about 3.00 p.m. at Karateng sub/location in Kisumu West District within Kisumu County Intentionally caused his penis to Penetrate the vagina of EAO [name withheld], a child aged 14 years old.”

2. The appellant also faced an alternative charge 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 same day, he intentionally touched the vagina of **EAO**, a child aged 14 years with his Penis.

3. The brief background of the appeal is that on the material day, PW1 was at home with her younger siblings; when the appellant held her by the neck and pulled her towards a banana bush, removed her clothes and defiled her. PW1's sister, **LA, PW2** who was on her way home from fetching water was met with the young children who told her what had transpired. She walked in the direction pointed to her by the children and found the appellant having sex with the minor and screamed. The appellant ran away and she took PW1 who was bleeding to the police station. The Complainant was taken to Chulaimbo District Hospital where she was examined by PW3 who filled the P3 form. PW3 noted that her pants were blood stained, there was tenderness on the vaginal walls, her hymen was absent, there was blood in her urine, there were excessive red blood cells, pus cells and spermatozoa. He concluded that there was forced penetrative sex. PW4, Caroline Chelangat, received the complaint, issued a P3 form and re-arrested the appellant and charged him accordingly.

4. Upon being placed on his defence, the appellant gave unsworn evidence and explained how he was called by his neighbor **GO**, who instructed him to find him in Maseno Police Station. Assuming he was going to be given a painting job, he proceeded to the station and was arrested without cause. He maintained that the real reason for his arrest was not for defilement as alleged but revenge on the part of **PW2** who had threatened him because he was the boyfriend to her sister, one **MA**.

5. The learned trial magistrate evaluated the evidence tendered before him, found the appellant guilty of the offence in the main count, convicted him and sentenced him to twenty-one years imprisonment. Aggrieved by this decision, the appellant preferred a first appeal against the conviction and sentence to the High Court. The High Court (Maina, J.) in a judgment dated 16th April, 2016 dismissed the appeal.

6. Unrelenting, the appellant is before us on second appeal. His appeal is mainly predicated on three grounds; that his conviction was based on a defective charge sheet, that the age of the complainant was not ascertained and that the court erred in meting out a mandatory sentence.

7. At the hearing of the appeal, the appellant appeared in person while **Mr. Akoi**, learned Principal State Counsel represented the state. Relying on his written submissions, the appellant maintained that defilement contrary to **section 8(1)(3)** as stated on the charge sheet did not exist in law rendering the same improper and fatally defective. Lastly, he challenged the sentence meted out to him as being illegal. Citing the decision in ***Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 consolidated with Petition No. 16 of 2015*** the appellant submitted that the trial Court failed to consider the mitigating circumstances presented and that the mandatory nature of his sentence was unconstitutional. He therefore urged us to allow the appeal against conviction and sentence.

8. Opposing the appeal, **Mr. Akoi** relied on his written submissions and contended that the charge sheet was not fatally defective and that the appellant clearly understood the substance of the charge against him.

Regarding sentence, he submitted that appellant's appeal was distinguishable from the Supreme Court advisory opinion in ***Francis Muruatetu & Another (Supra)*** in that the Supreme Court was deciding on the issue of mandatory sentence imposed by statute and that the said decision had no relevance in the instant matter. Learned Counsel urged us to dismiss the appeal on the grounds that there was sufficient evidence to warrant the appellant's conviction and that the sentence imposed was lawful.

9. We have considered the grounds of appeal, the record, submissions by the appellant and counsel as well as the law. This is a second appeal and by dint of **Section 361** of the **Criminal Procedure Code**, we are mandated to consider matters of law only. This was stated in ***Karungo vs. R (1982) KLR 213***;

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”

10. It is important to appreciate that as was held in various decisions of this Court, to wit ***Njoroge vs. Republic (1982) KLR 388***, that on second appeal, this court is bound by the concurrent findings of fact by the two courts below and we can only depart from such findings if it was not based on evidence on record, that both courts or one court misapplied or misapprehended the law or evidence or that it has been demonstrated that the courts acted on wrong principles in arriving at the said findings. It is incumbent upon a party intending to upset the concurrent findings of the courts below to satisfy the principles hereinabove.

11. The first issue raised by the appellant is the defectiveness of the charge sheet. The appellant attacks the manner, nature and mode of drafting the charge sheet, in that he was charged, convicted and sentenced on a non-existent charge. The contention of the appellant is that the charge sheet was not correctly and rightly framed.

12. The record shows that the charge as drafted read “Defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006”. In our view the charge as phrased clearly referred to the offence of defilement as created under Section 8(1), while section 8(3) provided for the penalty of the offence of defilement where the victim is a child between the age of twelve and fifteen years. Even though the reference to the section of Act creating the offence could have been more elegantly drafted, its form did not negate the substance of the offence. Looking at the evidence on record, it is evident that the appellant appreciated the nature of the charges against him and the particulars disclosed gave him a clear picture of the charges he was facing; being defilement of a minor. Consequently, he was able to fully participate in the trial and cross-examine the prosecution witness on the particulars of the charge. We therefore do not think that the anomaly in phrasing the charge prejudiced the appellant in any way or that it occasioned a miscarriage of justice resulting in prejudice to the appellant. As was stated by this court in ***John Irungu vs Republic, Criminal Appeal No. 20 of 2016***:

“The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice.”

13. In our view, the crafting and drafting of the charge sheet is a matter of style and the elegance or otherwise of same can only affect the proceedings before court, when it does not disclose an offence or no clear information is conveyed or disclosed. Again, the manner and mode of crafting a charge sheet should not affect or prejudice the accused person in any manner. In essence the prejudicial effect must lead or result in an injustice or failure of the accused to make his defence or prepare for case before court. More importantly, the charge sheet must convey clear and unequivocal information as to the intention of case against the accused person. It must not leave doubts in the minds of reasonable persons looking at the charge sheet.

14. We therefore think that the charge as drafted created no doubt in the mind of the appellant and we agree with the sentiments of the first appellate court that although ‘the drafter of the charge could have done a better job’, the same was curable by **Section 382** of the **Criminal Procedure Code**. Nothing turns on that ground of appeal.

15. On the issue of whether or not the victim's age was ascertained, it is trite that ideally the age of a victim should be proved through a birth certificate, birth notification card or other formal documents. Where actual age of the victim is not known the apparent age is sufficient (see ***Evans Wamalwa Simiyu v Republic [2016] eKLR***). Our perusal of the record indicates that the clinical officer estimated the complainant's age as 14 years and PW4,

Corporal Caroline Chelangat, produced a letter from the school to ascertain the complainant's age and a formal document which indicated that she was born on 28th December 1999. This formed the basis of the trial court's conclusion that PW1 was capable of giving a sworn statement and that she “*appeared mature enough and can give sworn evidence*”. The appellant did not attack the veracity and authenticity of the said documents and in the absence of such a position, we think the evidence and documents proved the age of the complainant.

16. In our view, the prosecution's case was unshakable. PW1 gave a detailed description of how the appellant held her by the throat, dragged her to nearby bush and defiled her. Her testimony was corroborated by PW2 who caught the appellant red handed in the act of

defiling the complainant in broad daylight. The appellant was well known to the complainant and PW2, so no doubts as to the identity of the appellant was raised. In addition, the medical evidence established that the complainant's pants were blood stained, her hymen was absent evidencing penetration as defined under Section 2 of the Sexual Offences Act and spermatozoa was seen. Consequently, all the ingredients of the charge were proved and we find no reason to interfere with the concurrent findings of the courts below that the prosecution had proved its case beyond reasonable doubt.

17. As regards sentence, there is no justification to interfere with the sentence. Although the trial court did not so state, it had at the back of its mind the fact that the appellant was a 1st offender as the Prosecutor stated this. The appellant did not express any remorse at the time of sentencing. The trial magistrate exercised his discretion and gave one year above the minimum sentence of 20 years. The High Court considered the sentence and found no reason to interfere. As a second appellate Court we can only interfere if the issue of sentence becomes a matter of law and in the circumstances herein, there is no legal issue.

18. Consequently, the appeal against conviction and sentence fails in its entirety.

It is so ordered.

Dated and delivered at Nairobi this 7th day of August, 2020.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR