



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, SICHALE & KANTAL, JJA)

CRIMINAL APPEAL. 118 OF 2015

BETWEEN

SILVERIOUS EPRONG OKIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma

(A. Mabeya, J.) delivered on 18th November, 2014 in HCCRA NO. 41 OF 2012

JUDGMENT OF THE COURT

[1] This is a second appeal in which **Silverious Eprong Okiru** (appellant) is aggrieved by the judgment of the High Court in which his first appeal from the judgment of the Senior Principal Magistrate court in Bungoma was dismissed.

[2] The appellant had been tried and convicted by the magistrate's court for the offence of defilement contrary to **section 8(1) of the Sexual Offences Act**. It was alleged that on diverse dates between 25th and 28th August, 2010 at [particulars withheld] Village in Bungoma North District, he caused his penis to penetrate the vagina of R.N.M. (named) withheld, a girl aged 13 years.

[3] During the trial, RNM who was a class six student at [particulars withheld] Primary School testified that the appellant who was a watchman at the school met with her as she was going to visit her uncle. He threatened her and forced her to board his bicycle, took her to his house where he locked her for two days, during which period he had sexual intercourse with her several times. On the third day, he released RNM and told her to go home.

[4] RNM then went to the home of her uncle INS. INS noted that RNM was walking with a gait and had blood on her legs. He asked his wife to examine RNM. As a result, he interviewed RNM and she revealed to him that the appellant had defiled her. He then informed RNM's parents **JMN** and **SM**, who took her to Naitiri hospital where she was examined and treated.

[5] **Eric Soita Juma**, a clinical officer who examined RNM testified that she looked psychologically disturbed and had visible dry blood stains on the vagina. There were also moderate pus cells on her vagina. He produced the treatment records for RNM which showed that at the time of examination, there was blood coming from the vagina, the labia minora was hyperemic and hymen rugged. He also produced a P3 form and an age assessment form which showed that RNM's age was assessed by a dentist as 14 years.

[6] The matter was reported to Kiminini police station by RNM's father. Subsequently, the appellant was arrested by administration police officers and handed over to **PC Gedion Ochieng'** of Kiminini police station who was investigating the case. **PC Ochieng'** caused him to be charged.

[7] Upon being put on his defence, the appellant gave a sworn statement in which he testified that at the material time he was employed as a watchman at [particulars withheld] primary school. He explained how he worked from the 25th of August 2010 to the 29th of August 2010 without any incident. On the 30th of August, 2010, RNM's father came to the school accompanied by RNM. He refused to record his details at the gate as he was required to do, ignored the appellant and went to the school office. RNM's father reported to the head teacher that he had information that the appellant had confined RNM in his house for two days, but when RNM was asked, she kept quiet and did not talk.

The head teacher sent the others out of the office and remained with the girl who when interviewed, denied having been defiled. RNM's parents demanded Kshs.5,000 from the appellant for the matter to be resolved, but the appellant refused because he had not committed any wrong. Subsequently, the appellant was charged.

[8] The trial magistrate noted that RNM was the only witness who implicated the appellant as the person who defiled her. He nevertheless found RNM's evidence reliable and sufficient to prove the charge against the appellant. He rejected the appellant's defence, found him guilty, convicted him of the charge and sentenced him to serve 20 years imprisonment.

[9] In his appeal to the High Court, the appellant challenged the judgment of the trial magistrate on the ground that the charge against him was defective; that his rights to a fair trial under the Constitution was violated; that the court failed to consider that there was no corroborative medical evidence; and finally that the court failed to consider his defence.

[10] In his judgment, the learned Judge of the High Court found that the charge against the appellant disclosed all the essential ingredients of the offence of defilement, as it was clear that the appellant was charged with defiling a child aged 13 years. The learned judge was of the view that failure to include **section 8(3)** of the **Sexual Offences Act** in the charge, did not prejudice the appellant in any way, and that the omission was curable under **section 382** of the **Criminal Procedure Code**. In regard to the alleged breach of fair trial, the learned judge found that it was not shown that the appellant applied for and was denied the statements of prosecution witnesses, or that he suffered any prejudice by the failure to supply the documents. He noted that the appellant was able to effectively cross-examine the prosecution witnesses.

[11] As regards the appellant's defence, the learned judge agreed with the trial magistrate that the defence was an afterthought as the appellant did not raise the issue of the alleged grudge with the prosecution witnesses. Finally, the learned judge concluded that the evidence of RNM was consistent with the evidence of the clinical officer who examined her.

[12] In this second appeal, the appellant has reiterated that the court erred in failing to find that his rights for fair trial under **Article 50(2) (c)** and **(j)** of the Constitution was violated; in failing to find that the prosecution evidence was false and contradictory; and in admitting the P3 form which was not duly filled.

[13] In his written submissions which he highlighted before us, the appellant pointed out that the record of the trial court showed that he demanded witness statements but the court directed that the statements were to be issued on payment of photocopying charges and this amounted to a denial as the appellant was not in employment, and he could not afford to pay for the photocopying.

[14] As regards the prosecution evidence, the appellant noted that RNM, though a minor, gave sworn evidence and confirmed that she understood the nature of an oath. He noted that her evidence that she was at Kibisi market alone with visible blood and faeces, without anyone questioning her, was unbelievable. The appellant also pointed out that RNM was asked to take a bath and therefore the medical evidence was washed away. He also pointed out that there was contradiction regarding the date of the alleged offence and the date of the arrest; that RNM having been examined five days after the alleged defilement, blood could not have been found on her private parts. He noted that evidence of DNA testing which was vital was not availed. Finally, he faulted the trial court for admitting the P3 form which was incomplete as vital parts had not been filled and was also lacking a medical practitioner's signature and stamp.

[15] **Mr. L.K. Sirtuy**, Principal Prosecution Counsel who appeared for the respondent opposed the appeal. In regard to the alleged defect in the charge sheet, he submitted that the omission to include the penal section did not cause any injustice as the evidence of RNM was clear on the defilement and her evidence was corroborated by medical evidence. In regard to the appellant's right to fair trial, **Mr. Sirtuy** maintained that there was no demonstration of any violation of the appellant's rights. In regard to the age of RNM, counsel referred the Court to the record which showed that her age was assessed at 14 years and that the witness also testified that she was 14 years. Counsel submitted that no DNA examination was necessary.

[16] This being a second appeal, our duty is limited to consideration of matters of law only and under **section 361** of the **Criminal Procedure Code**, severity of sentence is not a matter of law. As was stated in **M'Riungu vs Republic [1983] KLR 455**:

“Where right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”

[17] The appellant having been charged with the offence of defilement, it was imperative that the prosecution establishes all the ingredients of the offence of defilement. This includes the fact that there was penetration of RNM; that RNM was a minor; and that the appellant was positively identified as the person who caused the penetration.

[18] The appellant raised an issue concerning the propriety of the charge against him. It is clear from the charge sheet that the appellant was only charged under **section 8(1)** of the **Sexual Offences Act** that states as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

[19] This means that the charge sheet only referred to the general offence of defilement without relating it to any of the other sections (i.e. **section 8(2) (3)** or **(4)**) which relates the offence to a specific penal provision. The question is whether this makes the offence incurably defective. A defective charge is a charge that does not disclose any offence or one that is unclear to the extent of making it difficult for the offender to understand the nature of the charge against him, thereby prejudicing him in his defence.

[20] In this case, the charge and the particulars of which the appellant was charged were very clear that he was charged with defilement,

which means causing penetration with a person under the age of 18 years. As stated by the learned Judge of the first appellate court, the appellant clearly understood the charge that he was facing and was able to cross-examine the witnesses effectively. That is to say, that he was not in any way embarrassed or prejudiced by the charge as framed. The fact that the penal section was not adverted to was only relevant for the purposes of sentencing. This is because the sentence is graduated according to the age of the victim as stated in **sections 8(2)(3) and (4)** of the said Act.

[21] In regard to the age of RNM, it was not disputed that she was a child under the age of 18 years. The trial magistrate subjected her to a *voire dire* examination which is a clear indication that he appreciated that she was a child. In her evidence, RNM stated her age as 14 years and this was consistent with the age assessment that was done at Webuye District Hospital by **Dr. Obiero** and a report produced by **Eric Soita Juma**, a Clinical Officer. Even though the penal section was not indicated in the charge sheet, the trial magistrate appears to have sentenced the appellant under **section 8(3)** of the Sexual Offences Act as that is the section that covers the age bracket of RNM. We therefore, agree with the learned Judge of the first appellate court that the omission to include the penal section did not render the charge defective and that in any case, the same was not prejudicial to the appellant and can be cured under **section 382** of the Criminal Procedure Code.

[22] As regards the evidence adduced in proof of the charge, there was clear evidence that RNM was defiled. Her evidence in this regard was consistent with the evidence of her uncle and the clinical officer who examined her. We note that although the P3 form which was produced in evidence by the clinical officer was not very clear, there was an indication that there was hyperemic in the labia minora. This read together with the treatment notes which showed that on examination, the labia minora was hyperemic and there was also a rugged hymen, confirmed that the vagina of RNM had been penetrated. The allegation that the P3 form was not signed is not correct as there was a clear stamp together with the signature on the last page of the P3 form.

[23] We are mindful of the fact that it is only the evidence of RNM which implicated the appellant. Nevertheless, both the trial magistrate and the learned Judge of the first appellate court believed that RNM spoke the truth and made concurrent findings that RNM had properly identified the appellant whom she knew well as the person who had defiled her. This is consistent with **section 124** of the **Evidence Act**, which provides that a court may, in sexual offences rely on the evidence of the victim only, if it is satisfied that the victim is speaking the truth. We therefore find no reason to depart from the concurrent findings of the two lower courts. We find that the appellant's defence was properly rejected. In the circumstances, we find no substance in the appeal against conviction.

[24] As regards sentence, although RNM's age was assessed at 14 years, we find it appropriate that the assessment having been an estimate, the court should have exercised its discretion in sentencing rather than having its hands fettered by Section 8(2) of the Sexual Offences Act. In the circumstances, we find it appropriate to reduce the sentence of the appellant to 15 years imprisonment.

[25] Accordingly, we dismiss the appeal against conviction but allow the appeal against sentence to the extent of setting aside the sentence of 20 years imposed on the appellant and substituting thereto to a sentence of 15 years imprisonment with effect from 29th February, 2012.

Those shall be the orders of the Court.

Dated and delivered at Kisumu this 21st day of November, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR