



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JJA)

CRIMINAL APPEAL NO. 201 OF 2010

BETWEEN

S.S APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega, (Lenaola, J.) dated 18th July, 2010

in

H.C.CR.A. NO. 60 OF 2008)

JUDGMENT OF THE COURT

1. S.S (the Appellant), was charged with defilement of a child contrary to **Section 8(1) and (2)** and transmission of threatening sexually transmitted disease contrary to **Section 26(1) (c)** of the Sexual Offences Act. He pleaded not guilty to both counts but after trial before the Acting Senior Resident Magistrate at Butere, he was convicted and sentenced to twenty-five years imprisonment on each count. The sentences were ordered to run concurrently.

2. The facts of the case were briefly that on 6th May 2008 as F O, a child aged 11 years old (the complainant), was walking home through a thicket from Butere Township where she had gone for shopping, the appellant bounced on her and defiled her. She knew him as he was a common tout at Butere. The appellant was later arrested and charged with defiling an eleven year old child contrary to **Section 8(1) and (2)** of the Sexual Offences Act and of transmitting a sexually transmitted disease contrary to **Section 26(1) (c)** of the said Act. After hearing before the Acting Senior Resident Magistrate at Butere, the appellant was convicted on both charges and sentenced to 25 years imprisonment on each count and, as stated, the sentences were ordered to run concurrently.

3. The Appellant's appeal to the High Court was dismissed and his sentence on Count 1 was enhanced to life imprisonment. He has now preferred a second appeal to this Court.

4. In his memorandum of appeal, the appellant complains that his identification was flawed; that he was

not accorded a fair trial; that it was wrong to base his conviction on the evidence of a single visual identifying witness; that the learned judge of the High Court erred in failing to properly re-evaluate the evidence on record; and that his defence was ignored.

5. On his trial, the Appellant submitted that the proceedings were, not translated into his mother tongue. He also argued that the prosecution failed to supply him with witness statements as required by Article 50(2) (5) of the Constitution. In the circumstances the appellant urged us to hold that his trial was a nullity.

6. On the second ground, the appellant submitted that the High Court erred in upholding his conviction which was based on the evidence of a single visual identification witness. Citing several authorities, the appellant argued that the offence was allegedly committed at about 8.00 pm when the conditions were not favourable for a positive identification. Although the complainant claimed there was moonlight, its brightness was not stated. The appellant faulted the two courts below for assuming that by calling his name the complainant had recognized him. Moreover, the name “*Shikuku*” is common in the area and there is no telling if the complainant was referring to him or to another person by the same name. He cited several authorities on the proposition that a witness can be honest but mistaken and that at times witnesses make mistakes even in the identification of their close relative.

7. On count 2, while conceding that he is HIV positive, the appellant submitted that there was no conclusive evidence that he transmitted any sexually transmitted disease to the complainant. This is because the doctor testified that the appellant had STD which he did not specify and added that the complainant was “possibly” infected with the HIV virus. He asserted that in the absence of any DNA forensic evidence, the medical evidence on record was deficient and could not therefore sustain conviction on either count.

8. The appellant also faulted the High Court for failing to properly re-evaluate the evidence on record. Had it done so, it would have realized that the appellant was tried on trumped up charges because of the grudge between him and the complainant’s mother. The High Court would also have realized that the prosecution had failed to dislodge the appellant’s alibi defence.

9. On sentence the appellant submitted that with no age assessment or production of a birth certificate, the two courts below erred in assuming that the complainant was 11 years old and that led to the enhancement of his sentence to life imprisonment.

10. On those submissions, the appellant urged us to allow his appeal.

11. Opposing the appeal, Mr. Sirtuy, learned Principal Prosecution Counsel, submitted that the complainant was found with an infection having the same STD strains as those of the appellant. That sealed the case against him. He said the High Court properly re-evaluated the evidence against the appellant. On fair trial, counsel submitted that the record bears him out that there was interpretation into Kiswahili which language the appellant understands. He therefore urged us to dismiss this appeal as unmeritorious.

12. We have carefully read the record of appeal and considered the elaborate submissions made by the appellant as well as those made by the learned Principal Prosecution Counsel. Having done so, we find that the major issues raised in this appeal are whether or not the appellant was accorded a fair trial; whether or not the High Court properly re-evaluated the evidence on record and whether or not the appellant was properly identified.

13. The appellant based his complaint that he was not accorded a fair trial on contentions that the proceedings were not translated into his mother tongue and that he was not supplied with witness statements. On the first contention, upon examination of the record, it is clear that the proceedings before the subordinate court, right from 14th May 2008 when the plea was taken, were conducted in Kiswahili language which the appellant confirmed he understood. Further more, he cross-examined all the prosecution witnesses. He could not have done that if he did not follow the proceedings as he now claims.

As regards the witness statements, there is nothing on the record to show that he applied for them. In the circumstances, we find no merit in the first ground of appeal.

14. On the second ground, having carefully read the record, we find that the High court re-evaluated the entire evidence on the record. That ground must also fail.

15. The last ground is on identification. As stated, the appellant contended that his conviction was based on the evidence of a single visual identification witness and that at the material time and place, the conditions were not favourable for a positive identification.

16. It is not in dispute that the complainant was defiled and infected with a sexually transmitted disease. The medical evidence on record verifies that. The main issue before the two courts below and even before us in this appeal was the identity of the defiler.

17. Although the offence was admittedly committed at about 8.00 pm in a thicket, the complainant said there was moonlight which enabled her to see the appellant. Bearing in mind the fact that to defile the complainant the appellant got very close to her, we are satisfied that the complainant was able to identify the appellant. Moreover, having known him previously, this was a case of recognition which is more reassuring than mere identification of a stranger. See **Anjononi v. Republic [1976-80]1 KLR 1566**.

18. Besides the visual identification, upon medical examination by the clinical officer, PW4, the appellant and the complainant were found to have an STD of the same strain. In the circumstances, we agree with Mr. Sirtuy, the Principal Prosecution Counsel, that that evidence sealed the appellant's fate as the defiler of the complainant.

19. On sentence, the prosecution produced a Baby Dedication Certificate issued by Apostolic Fellowship Association showing that the complainant was born on 26th October, 1996. It follows that as at 6th May, 2008 when the offence was committed, the complainant was slightly more than eleven and half years.

20. **Section 8(1) and (2)** of the Sexual Offences Act under which the appellant was charged states that:

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment.”

21. In **Robert Ole Gweni v. Republic, Criminal Appeal No. 329 of 2011** in which the defiled child was 11 years and slightly more than one month old, we held that;

“That put...[the matter] beyond the ambit of Section 8(2) of the Sexual Offences Act because...[the complainant] was above 11 years old. It follows that the life imprisonment imposed upon the appellant is illegal. Section 8(3) of the Act, however, provides for the sentence for convicts who defile children between the age of 12 and 15 years. There is, however, no provision for sentence in cases of defiled minors who are between the age of 11 and 12. Despite the mathematical precision that went into the drafting of the Sexual Offences Act especially with regard to sentence, there is obviously a lacuna in the two sub-sections. That however does not follow that the appellant in this case should not be given any sentence at all. In the circumstances we have to give the appellant the “benefit of doubt” and move to the next age bracket of between 12 and 15 years in respect of which Section 8(3) of the Act provides for a minimum sentence of 20 years.”

22. We adopt that statement in this appeal with the consequence that, we dismiss the appeal on conviction but allow the one on sentence. We therefore set aside the sentence of life imprisonment imposed upon the appellant by the High Court and restore the sentence of 25 years imprisonment that the trial court had imposed.

23. This is the second time in as many months that the issue of sentence where the defiled child was over 11 years but below the age of 12 has come before us. We therefore direct that a copy of this judgment be served upon the Hon. the Attorney General to do the needful.

DATED and delivered at Kisumu this 18th day of June, 2015

D.K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy
of the original.

DEPUTY REGISTRAR