



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Criminal Appeal 207 of 2010

JOSHUA ALUBE GILBERT APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Karanja & Aroni, JJ) dated 3rd June, 2010

in
H. C. CR. A. NO. 69 OF 2009).

RULING OF THE COURT

1. **JOSHUA ALUBE GILBERT**, the appellant, was charged before the Senior Resident Magistrate’s Court at Winam with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No.3 of 2006**. He also faced an alternative count of committing an indecent act to a child contrary to **Section 11(1)** of the same Act.
2. He pleaded not guilty to both charges but after trial, he was convicted on the main count and sentenced to ten years imprisonment. His appeal to the High Court was dismissed by Aroni, J. thus provoking this appeal.
3. This being a second appeal, **Section 361** of the **Criminal Procedure Code** (the CPC) requires us to deal with only issues of law. What then are the issues of law raised in this appeal?
4. In his four grounds of appeal set out in the memorandum of appeal and seven in the supplementary memorandum, the appellant complained that the learned Judge of the High Court erred in failing to realize that:
 - (i) the medical evidence was “inconsistent with the offence of defilement;”
 - (ii) the age of the complainant was not determined;
 - (iii) the appellant’s conviction was based on contradictory evidence;
 - (iv) the appellant’s defence was ignored; and
 - (v) the appellant’s conviction was based on the evidence of a single witness.

He also complained that the learned Judge erred in enhancing his sentence from ten to twenty years imprisonment.

5. At the hearing of the appeal before us, the appellant relied on his written submissions which he had filed and made oral submissions in addition. In both of those submissions, he added one more ground that the charge of defilement was defective for failure to make mention of penetration of the complainant's vagina by the appellant's penis.

6. The other additional ground raised in submissions is one of a grudge. The appellant argued that he had made a wooden chair for the complainant's father which he had refused to pay for. The complainant's father therefore fabricated the charge of defilement of his daughter against the appellant to camouflage his demand for the payment for the chair. He urged us to find that it is that fabrication of the charge that caused the three days delay in reporting the matter and not the complainant's fear that the appellant would kill her as the State Counsel would like us to believe.

7. The second ground was that the appellant was convicted on contradictory evidence. The contradictions were in the evidence of Dr. Kepha Otieno (PW6) who examined the complainant and claimed that she was HIV positive while in the P3 form he stated that she was negative. The other contradiction was PW6's finding that there was no tear to the complainant's genitals while the complainant testified that she had profusely bled after the defilement. On those submissions he urged us to allow this appeal.

8. Opposing the appeal, Mr. Meroka, learned State Counsel, dismissed the appellant's submissions as untenable. He submitted that the complainant was categorical that the appellant defiled her three times. The medical evidence of hymen perforation corroborated that claim. Being the complainant's neighbour, he said, the question of mistaken identification of the appellant as the person who defiled the complainant does not arise. On sentence Mr. Meroka submitted that all that the High Court did was to impose the correct sentence authorized by law. He termed that a "correction" and not "enhancement" of sentence. He concluded that the appellant's conviction was founded on overwhelming evidence and urged us to dismiss this appeal in its entirety.

9. We have considered these rival submissions and carefully read the record of appeal. To start with, we would like to dispose of the appellant's claim that the charge of defilement was defective. Although we should have rejected that ground as it was raised in submissions, we shall deal with it because the appellant is unrepresented. **Subsection 8(1)** reads:

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

The particulars of the charge stated that on "the 18th day of May, 2008 at Kisumu District within Nyanza Province [the appellant] unlawfully caused penetration with...[his] genital organ to a child namely C.S age 12 years." We find that those particulars satisfied the above provision. The charge was therefore not defective and that ground must therefore fail.

10. On contradictions in the medical evidence, it is correct as the appellant asserted that in his evidence in chief, Dr. Otieno is recorded as having said that the complainant was tested for HIV and found to be positive. In the P3 form, which that witness completed, he stated that she was found to be negative. We suppose that there was an error on that, and it was most likely in the recording of that witness's oral evidence. Even if there was no error, that contradiction does not help the appellant as the appellant was not tested for HIV so that the results of his test would be compared with that of the complainant.

11. The other contradiction is that PW6 said he found no tear in complainant's genitals while the complainant claimed she had bled after defilement. That submission has no basis. That witness examined the complainant five days after defilement when she must have healed. In the circumstances we dismiss that ground of appeal.

12. The other ground of appeal was that the appellant was convicted on the evidence of a single witness.

Section 124 of the **Evidence Act** provides that in sexual offences, the evidence of the victim, even if she is a minor, if believed suffices to found a conviction. As both courts below found, the complainant's testimony was consistent throughout. She was categorical that it is the appellant, whom she knew well having been her neighbour who defiled her, not once, not twice but thrice. We therefore find that the two courts below did not err in relying on her evidence. That evidence was at any rate corroborated by that of Dr. Otieno who found that she had indeed been defiled. That ground also therefore fails.

13. The appellant also claimed that his defence was ignored. In his defence the appellant claimed that the complainant's father trumped up the charges against him to cover the debt he owed him. That claim was clearly displaced by the overwhelming evidence against the appellant including his confession to the Assistant Chief PW3 that satan had caused him to defile his neighbour's child.

14. The remaining ground of appeal was on sentence. The appellant faulted the learned Judge of the High Court for enhancing the sentence from 10 to 20 years. We agree with the learned state counsel that there was no enhancement as such. Enhancement arises when the court, considering the circumstances of a case finds that the sentence imposed is lenient and increases it. In this case the sentence of 10 years imprisonment that the trial court had imposed was illegal. **Section 8(3)** provides for a minimum sentence of 20 years for defiling a child between 12 and 15 years. It reads:

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
[Emphasis supplied]

Dr. Otieno, PW6, assessed the age of the complainant in this case at 12 years. That assessment also answered the appellant's contention that the complainant's age was not assessed. We agree therefore with the learned state counsel that by imposing the sentence of 20 years, the High Court Judge did not enhance the appellant's sentence but merely substituted the illegal sentence of 10 years with the correct one of 20 years.

For these reasons, we find no merit in this appeal and we accordingly dismiss it in its entirety.

Dated and delivered at Kisumu this 21st day of February, 2012.

E. M. GITHINJI
.....
JUDGE OF APPEAL

W. KARANJA
.....
JUDGE OF APPEAL

D. K. MARAGA
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR