



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 29 OF 2019

(Appeal arising out of conviction and sentence of Hon. M. Nyang'ara Osoro (Resident Magistrate))

in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 9 of 2018 delivered on 8th March 2019)

MOSES KARANJA MUREITHI ALIAS RASTA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, MOSES KARANJA MUREITHI alias RASTA, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 14th January 2018 at [particulars withheld] Estate within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate the vagina of RCA, a child aged eight (8) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 14th January 2018 at [particulars withheld] Estate within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of RCA, a child aged eight (8) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on the main charge and sentenced to **life imprisonment**.

The Appellant is aggrieved by his conviction and sentence. In his petition of appeal, the Appellant maintained that the trial court erroneously convicted him in the absence of the testimony of crucial witnesses. He cited that the Prosecution's evidence was fabricated. He contended that the medical evidence could not support a conviction. He lamented that his defence was ignored. In the premises therefore, the Appellant urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, both the Appellant and the Respondent (Prosecution) relied on their written submissions in support of their respective rival positions. The Appellant submitted there were glaring contradictions that went to the root of the case. He explained that PW2 and PW5 gave contradicting dates on when the alleged sexual assault is said to have occurred. He maintained that the identification of the perpetrator was not proved to the required standard of proof. He maintained that a forensic DNA analysis was critical to ascertain that the Appellant did indeed sexually assault the complainant. He maintained that **Article 49 (1) (a) (i)** of the **Constitution** was breached as he was not informed of the reasons for his arrest at the time of his arrest.

On the part of the State, Mr. Omooria submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. On the challenge that insufficient witnesses were called to testify, he dismissed the allegation as untrue. He submitted that all crucial witnesses testified. Additionally, he relied on **Section 124** of the **Evidence Act** asserting that corroboration is not necessitated to prove sexual offences. He asserted that the evidence of the Appellant was not weighty as it was unsworn. He urged this court to uphold the conviction, affirm the sentence and consequently dismiss the appeal.

The facts established by the Prosecution and giving rise to the charge are recorded as follows; PW2, RAC the Complainant testified that she was a class three (3) student at [Particulars withheld] Academy. She was born on 21st June 2009. On the night of 13th January 2018, the complainant retreated to the bedroom after having dinner with her parents. She was with her sister, MC (PW3) and two brothers; one was CK (PW4). The said children's shared a bedroom that was separate from the main house. In the wee hours of 14th January 2018 while asleep, the Appellant entered their bedroom. He awoke PW2 and PW3 whom he threatened with a knife. He shone a torch on the complainant's face. He climbed onto the bunk bed shared by PW2 and PW3. He then proceeded to the complainant's bed where he removed her skirt and panties and defiled her. The complainant was defiled in the presence of PW3. PW4, who was also in the bedroom, only realized later on that the Appellant was in their bedroom. He was uncertain as to his presence since the lights were off. He was asleep. After he was done, the Appellant switched the lights on.

PW3 and PW4 were able to see him. The evidence of PW3 was that the appellant had glaring spots on his face and a scar on his neck. PW4 described that the intruder was wearing a cap with lines, a blue T-shirt and a black jacket. He also observed the presence of the spots on his face.

Meanwhile, PW1, FA the Complainant's father testified that between the hours of 03:00 a.m. and 04:00 a.m., he heard his house gate opened. He however spotted no activity. He returned to bed. He was then prompted to walk into his children's bedroom whom he overheard people talking. The lights were unusually off. When he inquired from his elder son PW4, he was informed that someone had gained access to their bedroom.

The following morning, PW3 informed PW4 of the incident. PW4 informed his mother who in turn notified PW1. The Complainant was taken to Kitale District Hospital by his mother and PW1 for treatment. PW5, JOHN KOIMA, a clinical officer examined PW2 on 16th January 2018. He found pus cells in the urine. The Complainant's genitalia revealed that her hymen was broken. There were bruises on the labia. The vulva was swollen. PW5 administered treatment to her. He confirmed that the minor was eight (8) years old after seeing her birth certificate. His conclusion was that she was defiled. He produced the P3 form, the treatment notes and the Complainant's Birth Certificate as **Prosecution Exhibits 1, 2 3** respectively.

While at the Hospital, PW3 and PW4 conducted a search party to establish the whereabouts of the Appellant. It was in this instance that PW3 and PW4 saw him. In fact, PW4 recognized the apparel that the Appellant had worn the previous night save for the Marvin the Appellant had in lieu of the hat. They reported the matter to their mother who borrowed her friend's phone with which they took pictures of the Appellant. The pictures were later on processed and forwarded to the area chief for the Appellant's arrest.

The matter was then reported at Kitale Police Station where PC UMAZI NO. 92056 PW6 commenced investigations. She recorded witness statements and pieced the evidence together. She visited the scene. After interrogating the Appellant, she charged him with the present offence.

The Appellant was placed on his defence. His unsworn testimony was that in January 2018, he was selling charcoal. When he broke for lunch, he was informed that he was summoned by the chief. He went to the chief's office and was detained. He denied the offence.

This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**See Njoroge -Vs Republic [1986] KLR 19**). In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offence that he was charged with.

For the Prosecution to sustain the charge of defilement, it must establish that the following three ingredients to the required standard of proof:

1. Age of the Complainant
2. Penetration
3. Identification of the perpetrator

On the Complainant's age, PW2 testified that she was born on 21st June 2009. PW1, the Complainant's father, testified that she was eight (8) years old at the time of the offence. The complainant's Birth Certificate (**Prosecution Exhibit 3**) corroborated this evidence. This court thus finds that the age of the minor was established by the Prosecution to the required standard of proof.

The next ingredient is penetration. Section 2 (1) of the Sexual Offences Act defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

PW2's testimony was that an intruder broke into their home and inserted *kitu yake* into that "thing she uses to urinate." PW3 also testified that PW2 was defiled in her presence. PW5's found pus cells in the urine when he examined PW2. Her hymen was broken. There were bruises on the labia. The vulva was swollen. His conclusion was that she was defiled. This court finds that penetration was proved to the required standard of proof.

On the identification of the perpetrator, PW3's testimony was that the Appellant shone his torch towards the face of the complainant. The light emanating therefrom was sufficient for her to see the Appellant. After the ordeal, the Appellant switched on the lights. He turned back on his way out. PW3 and PW4 saw the Appellant's facial features as having black spots on his cheeks. He had a scar on his neck.

When PW3 and PW4 saw him the following day, they were able to recognize him from the previous night. This was confirmed from his facial features. PW4 further identified him from the blue t-shirt and black jacket he had worn the night before. He was thus positively identified as the perpetrator. This court sees no reasons to disagree with the finding in that regard made by the trial court.

The Appellant impugned the trial court's reliance on contradictory dates given by PW2 and PW5. This court finds that the evidence of PW2, PW3 and PW4 was that the offence occurred in the wee hours of the morning of 14th January 2018. This was also evident in the P3 form and the medical treatment notes. The same is thus dismissed as a minor contradiction. This court finds that the Prosecution established the ingredients of defilement to the required standard of proof beyond reasonable doubt. The Appellant's appeal against the conviction lacks merit. It thus fails and is hereby dismissed.

The Appellant was sentenced to **life imprisonment** by dint of the provisions of **Section 8 (2) of the Sexual Offences Act**. The court

considered his mitigation and the probation report. In his mitigation, the Appellant stated that he had siblings and children that depended on him. He was an orphan. This court finds that the sentence meted out was lawful. Furthermore, the Appellant did not show any remorse. Be that as it may, the wordings of **Section 8 (2)** of the **Sexual Offences Act** are couched in mandatory terms. Consequently, this court shall not interfere with the sentence imposed at trial. The Appeal against the sentence is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT KITALE THIS 24TH DAY OF FEBRUARY 2022.

L. KIMARU

JUDGE