



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 12 OF 2020

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. G.N. Wakahiu (C.M) in Narok

CMCR No. 65 of 2018 on 17th February 2020 and 4th May 2020)

STEPHEN KIMARI GATHANO..... APPELLANT

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

[1]. This appeal is against the conviction and sentence to 15 years' imprisonment for defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act NO. 3 of 2006. It was alleged that on 12th July 2018 at [particular withheld] Estate Narok North Sub County within Narok County intentionally and unlawfully caused his penis to penetrate the vagina of B.M a child aged 9 years old.

[2]. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on 12th July 2018 at [particulars withheld] Estate Narok North Sub County within Narok County intentionally and unlawfully touched the buttocks and thighs of B.M. a child aged 9 years with his penis.

[3]. The prosecution called 5 witnesses. The defence called one witness; the appellant.

[4]. On 17th February 2020, the trial court convicted the appellant.

[5]. On 4th May 2020, the trial court sentenced the appellant to serve 15 years imprisonment.

[6]. The appeal sets out the following grounds of appeal:

i. That the sentence awarded is highly excessive and punitive.

ii. That he is remorseful of the offence committed and have since been rehabilitated by the harsh conditions in prison environment.

iii. That he suffers from erotic duodenum peptic ulcers a condition that is seriously complicated and aggravated by the harsh conditions within the prison environment. She used traditional medicinal herbs a facility that is not available in prison.

iv. That he is a first born in a family of nine and his mother is epileptic and is not able to play an active role in upbringing and fending off the siblings a task that was squarely on his shoulders with his confinement in prison, the family is likely to suffer.

v. That he earnestly prays that the sentence awarded therein be reviewed and a lesser sentence be considered.

vi. That in consideration of his ailment, he be awarded a suspended sentence so that he may amend his broken life.

[7]. He prayed that this appeal be allowed; conviction and sentence be set aside and quashed, or the court evaluates the evidence and make its own finding in conviction and sentence or the total success of the appeal on its entirety as the sentence set is excessive in all

circumstances.

SUBMISSIONS

[8]. The matter was canvassed by way of written submissions.

Appellant's submissions

[9]. The appellant submitted that the trial court failed to consider and establish age and his mitigation. He cited the cases of ***Joseph Kaberia Kahinga & 11 Others V Attorney General [2016] eKLR***.

[10]. The appellant made two major submissions: -

i) That the trial court failed to consider and establish age and his mitigation. He cited the cases of *Joseph Kaberia Kahinga & 11 Others V Attorney General [2016] eKLR*.

ii) That the sentence was harsh, severe and undesirable, for; a) it did not take account of the period spent in custody as provided in Section 333(2) CPC. He relied on the case of *Ahamad Abolfathi Mohammed & Another V Republic [2018] eKLR*; and; b) offends Article 55 (2) (p) of the Constitution and *Francis Opondo V Rep. [2017] eKLR*

The respondent's submissions.

[11]. Mr. Karanja, the prosecution counsel, submitted that the complainants testified that she was 9 years old. This was corroborated by PW2 –the mother to PW1. Further the same was proved through age assessment which confirmed to be aged 9 years.

[12]. The respondent submitted that the fact of penetration was proved beyond reasonable doubt. The evidence of PW1 and PW2 on the fact of penetration was corroborated by the medical evidence produced in court by PW3.

[13]. The prosecution submitted that the identity of the perpetrator as the appellant was proved beyond reasonable doubt. When the victim was questioned by her mother and neighbours, she started that it was '**Mzee Wa Purity**', '**Baba Elli**'. During trial the child identified the accused person being husband to purity. The accused and their family lived within a neighbourhood. Her testimony was corroborated by PW2.

[14]. The respondent submitted that the sentence passed by the trial court was manifestly too lenient and further it was a sentence not known in law and thus not legal. The sentence is not commensurate to the crime committed by the appellant. They sought the court to relook the sentence and impose appropriate sentence. The respondent relied on the cases of ***Republic V Elijah Mune Ndundu and Another [1978] eKLR, Sammy Abiyo Jiilo V Republic [2021] eKLR and R V Jeremiah Koilel [2021] eKLR***

[15]. In conclusion, the respondent submitted that the conviction was safe as against the appellant. They urged the court to uphold the conviction and review the illegal sentence and pass the proper sentence provided by law.

ANALYSIS AND DETERMINATION.

Court's duty

[16]. As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See ***Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.***

[17]. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following broad issues for determination.

i. Whether the prosecution proved their case beyond reasonable doubt; and

ii. Whether the sentence was manifestly harsh and excessive

Elements of offence of defilement

[18]. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act which provides:

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

[19]. The specific elements of the offence defilement arising from Section 8 (1) of the Sexual Offences Act which the prosecution must prove

beyond reasonable doubt are:

- i. **Age of the complainant;**
- ii. **Proof of penetration in accordance with section 2(1) of the Sexual Offences Act; and**
- iii. **Positive identification of the assailant.**

[20]. On these elements; “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”(**Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013**).

[21]. What does the evidence portend?

Age of the complainant

[22]. In a charge of defilement, the age of the victim is important for two reasons:

- i. defilement is a sexual offence against a child; and
- ii. age of the child has been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

[23]. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

[24]. PW1 testified that she was in class 3 at [particulars withheld]Primary School. PW2- the mother of the victim testified that PW1 was born on 11/10/2009. She stated that the birth certificate was burnt in a fire. The child was subjected to an age assessment. PW3 a clinical officer stated that, upon age assessment, it was found that PW1 was 9 years old at the time. PW3 produced the age assessment report as **P Exh 3**.

[25]. On this question of age, I am content to cite the case of ***Fappyton Mutuku Ngui vs. Republic [2012] eKLR*** where it was held:

... That “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

[26]. On the basis of the evidence adduced, I find that the age of the victim was proved to be 9 years.

Penetration

[27]. Section 2(1) of the Sexual Offences Act defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

[28]. On this see the case of **Mark Oiruri Mose v R [2013] eKLR**

[29]. Jacob Leshan Kisorio testified as PW3. He produced the P3 Form and treatment notes as **P Exh 1** and **2**. According to the P3 Form, PW1 had injuries which were fresh. The victim was bleeding. The blood was on her mother’s back where she had been carried. She was also injured on the neck on both sides. She was bleeding at the vagina and there were bruises on one side. The hymen was freshly broken and bleeding.

[30]. PW1 testified that on 12th July 2018 at around 6.00a.m when she was on her way to school alone, she met the appellant. The appellant was smoking a cigarette. He questioned her about school. He then grabbed her by the neck and strangled her. He threw her to the bushes and proceeded to removed her clothes and do her ‘**bad manners**’. PW2 corroborated the evidence of PW1. She stated that after PW1 had left for school that morning she heard her screams. She rushed calling out her name. along the way she saw the child’s shoe and bag. Another lady also arrived before her. She noted the girl was bleeding from her mouth and her panty had been removed. The trial court visited the scene. The examination was done a few hours after the defilement.

[31]. The above medical as witness testimonies prove the fact that there was penetration of the child. But by whom? This is the mega question.

Was the appellant the perpetrator?

[32]. The appellant was known to PW1. When the victim was questioned by her mother and some neighbours she stated that it was Mzee Wa Purity, Baba Elli. During trial the child identified the accused person being husband to purity. The accused and their family lived within a neighbourhood. Her testimony was corroborated by PW2.

[33]. PW2 stated that the victim had told her that she meets the appellant on her way to school. When the appellant was confronted by 6 ladies in his house he shouted 'don't say it was me' Even though no one had spoken.

[34]. It bears repeating that the Appellant was a person known to the complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia. She was categorical it was Mzee wa Purity- she knew the accused as such.

[35]. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant.

[36]. In sum. I find that the prosecution proved beyond reasonable doubt that the appellant penetrated PW1, a child aged 9 years. Therefore, the conviction was proper.

[37]. Appeal on conviction therefore lacks merit and is hereby dismissed.

Of sentence

[38]. Under Sexual Offences Act, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age of the victim of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing.

[39]. In this case, the complainant was of the age of 9 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:

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

[40]. I am however, accordingly instructed to use the judicial tool of construction of existing statutes provided in section 7 of the Transitional Provisions in the Sixth Schedule of the Constitution, and provide for appropriate adaptation, alteration and modification; I take life sentence to be the maximum sentence under the section.

[41]. Sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See **Shadrack Kipkoech Kogo - Vs - R., and Wilson Waitegei V Republic [2021] eKLR**)

[42]. Was there anything vitiating exercise of discretion by the trial court in imposing a sentence of 15 years' imprisonment?

[43]. Of important consideration: first, the victim of the offence is a child of 9 years. Second; the said child suffered physical injuries. Third, the manner of commission of the offence was cruel and violent- strangled her, violently penetrated her as evidenced by the injuries. The appellant brutally defiled the victim. Fourth, the traumatic experience will linger in her life forever- and as she grows older to know exactly the violation she went through, she will live with the shame and great mental trauma caused to her by this savage act of sexual debauchery. Fifth, this is a serious offence of which extreme societal desire to get rid of society of such wickedness and sexual perversion has been expressed publicly and formally through Sexual Offences Act. See James. **Okumu Wasike (2020) eKLR.**

[44]. It should also be noted that the appellant took an unfair advantage to secure and satisfy his sexual desires on a child of only 9 years. The Court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.

[45]. Seriousness of the offence is a relevant factor in sentencing and in sexual offences. Generally, it is worth of note that, the assault leaves the innocent victim with eternal and time-explosive dent on the integrity of the person as a human being. For a girl, the assault destroys the beauty of a woman which is encapsulated in the pride, self-esteem, confidence, integrity and honour of the person. To say the least, their self-worth and innocence is irreparably damaged by the beastly act. They are left with deep and chronic trauma which will affect them psychologically, emotionally and physically for the rest of their lives. These things must be said to dramatize what it real means to rape or defile a person. I have stated before, and I will state it again without fear of contradiction, that whomever admires and defiles the prohibited; a child; will tremble in the right place; the prison. No wonder the legislative intent which is a reflection of the societal detestation of defilement exclude sexual offences from settlement through alternative dispute resolutions, traditional methods of dispute resolutions, plea bargaining, probation, community service order et al.

[46]. The aggravating factors weigh heavy; against the mitigating factors of the appellant.

[47]. Exercise of discretion by the trial court ought to have been exercised judicially. The trial court did not consider the tender age of the minor, the seriousness of the offence, the violent and brutal manner the offence was committed, the severe injuries the minor sustained and the traumatic effects on the girl which deserved a stiffer and deterrent sentence. Thus, the trial court committed an error in principle thereby imposing a patently lenient sentence.

[48]. In an appeal on sentence, the court may sustain or reduce or enhance or alter the nature of sentence. The prosecution has sought for enhancement of sentence to life imprisonment. The request is reasonable and aimed at achieving justice for the victim, and punishing the offender for the offence. The circumstances herein warrant enhancement of sentence.

[49]. The circumstances of this case could even justify enhancement to life sentence. However, in exercise of my discretion, I set aside the 15 years' imprisonment and enhance the sentence to 30 years' imprisonment.

[50]. For purposes of Section 333(2) of the Criminal Procedure Code, the sentence shall commence from 16/7/2018 when he was first arraigned in court. I note he was never released on bond, hence the date of commencement of sentence.

[51]. I therefore find no merit on the appeal herein both on conviction and sentence which I hereby dismiss. Orders accordingly.

[52]. It is so ordered

[53]. Right of appeal explained.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 28TH DAY OF APRIL, 2022.

F.M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for DPP
2. The appellant
3. Mr. Kasaso -Court Assistant