



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 2 OF 2010

MUSA KIPSIELE CHEPKONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from conviction and sentence of Hon. H. O. Barasa (Resident Magistrate) delivered on the 29th of December 2009 in Nakuru Chief Magistrate Criminal Case No. 97 of 2008)

JUDGMENT

1. The Appellant herein is Musa Kipsiele Chepkonga. He was arraigned before the Nakuru Chief Magistrate's Court charged with a single count of defilement. The charge sheet stated that his offence was "contrary to section 8(1) as read together with Section 8(2) of the Sexual Offences Act, No. 3 of 2006."

2. The particulars included in the charge sheet were that on the 6th day of June, 2008 at [particulars withheld] Centre, Solai, in Nakuru District within Rift Valley Province, unlawfully and intentionally caused his penetration of his genital organ into the genital organ (vagina) of EC, a child aged 10 years.

3. The Appellant denied the charges and a trial followed. During the trial, the Prosecution called four witnesses and closed its case.

The Learned Trial Magistrate ruled that the Appellant had a case to answer. The Appellant elected to give an unsworn statement and did not call any witness. The Learned Trial Magistrate returned a verdict of guilty and sentenced the Appellant to life imprisonment as per the statutory minimum in section 8(2) of the Sexual Offences Act.

4. The Appellant is dissatisfied with both the conviction and sentence and has appealed to this Court as a matter of right. The Appellant's original Petition of Appeal raised four grounds of appeal which, reproduced verbatim, are as follows:

a. THAT your lords, I did not plead guilty to the charge and still maintain the same

b. Your lords, that the sitting Trial Magistrate erred in law and in fact since there was no evidence from the prosecution apart from the said complainant, who saw exactness of the alleged crim in action. What the prosecution did was to place before the sitting Court witnesses who tailored evidence that was hearsay. The evidence presented by the witnesses needed corroboration. The Prosecution has not corroborated the evidence to consolidate to that of seeing the crime on section

c. THAT your lords, the evidence adduced by the medical officer in his findings there was no any specimen found from the said victim, matched to me., but the sitting magistrate erred in law and in fact, in this instant case the Prosecution failed to establish that I caused the injury on a private part on the Complainant. Such severe injury require a doctor who examined the Complainant.in view of the grounds stated, there is not nexus between the injury and the evidence of the prosecution must form a transaction such that no doubt is raised at any point.

d. THAT your lords, the sentence imposed upon me is too harsh and cruel. I therefore beg the entire high Court to quash the conviction and set aside the sentence sinc the sex crime alleged is of cooked

5. The Appellant filed an amended memorandum Grounds of Appeal and witness statements. The grounds, again reproduced verbatim, are that:

a. The Learned Trial Magistrate erred in law and in fact by relying on the evidence of a single witness namely the Complainant without exerting caution on the dangers of relying the evidence of a single witness

b. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the evidence adduced by the prosecution was not corroborated

c. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the evidence adduced by the prosecution was marred with discrepancies

d. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced by the prosecution did not corroborate the charges preferred against me

e. THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate that the evidence by the prosecution did not create any nexus between me and the alleged offence

f. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate that in totality that the prosecution did not prove its case beyond reasonable doubt as required by law.

6. Subsequently, the Appellant filed another “amended memorandum of Grounds of Appeal and witness statements”. The grounds are that:

a. The Learned Trial Magistrate erred in law and facts in accepting the PW 1 and PW 2 Complainant’s evidence as safe whereas the same were insufficient and incredible.

b. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the Prosecution had failed to prove its case to the standard required in law that is, proof beyond reasonable doubt.

c. The Learned Trial Magistrate erred in law and fact in admitting Medical officer evidence PW 4, Dr. Samwel Onchere when the Doctor who is alleged to have treated and, or examined the Complainant was never heard thus doubtful.

d. The Learned Trial Magistrate erred in law and fact in admitting documentary evidence P 3 form and whereas No. PRC from produced in Court whereas the same were inadmissible in law.

e. The Learned Trial Magistrate erred in law and fact in failing to take into account and or failed to consider and or failed to give reason why she disregarded the Appellant’s alibi defence

f. The Learned Trial Magistrate erred in law and facts in failing to give the decision thereon and the reason for the decision made contrary to the clear provision of section 169 of the Criminal Procedure Code.

7. This is a first appeal. As a first appellate Court, the Court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See *Okeno v R [1972] EA 32* and *Kariuki Karanja v R [1986] KLR 190*.

8. The evidence that emerged from the trial was as follows.

9. The Complainant testified as PW1. She testified after the Learned Trial Magistrate conducted *voir dire* and concluded that the minor was intelligent enough to understand the meaning of and the need to speak the truth. She was affirmed. She told the Court that she was 10 years old and a Standard four student at [particulars withheld] Primary School. She told the Court that while in their house on 06/06/2008, the Appellant went there and asked her mother to allow him to go with her (the Complainant) to his house to help him cook. The Complainant’s mother, LAM (who testified as PW2) allowed her to go.

10. The Complainant told the Court that she accompanied the Appellant to his house – which was only about fifty metres away from theirs. While at the Appellant’s house, the Complainant testified, she started to light a fire so that she could cook. However, the Appellant pounced on her, held her by the neck, covered her mouth and took her to his bed where he removed all her clothes and lay on her. He also removed his pair of trousers and underwear and inserted “the thing he uses to urinate” into her “private parts”. The Complainant also described what the

Appellant did as “bad manners to her.”

11. The Complainant testified that she could not scream because the Appellant had covered her mouth. However, the Complainant’s mother caught him red-handed and pulled him from her. As she did so, the Complainant’s mother was screaming to attract attention of neighbours even as she fought the Appellant. Evans and Wanjiku, their neighbour also came to the scene. The Appellant escaped from the scene naked.

12. The following morning the Complainant went with her mother to report the matter to the Police. They were referred to a hospital in Nakuru where she was examined and a P3 Form later filled.

13. PW 2 was LAM, the mother of the Complainant. She stated that on 6th day of June 2008 at about 8.00 p.m. while in the house with her husband, JM, her sister and W, the Appellant went and politely asked her to allow the Complainant to go cook for him since he was tired. He was her brother in law. She allowed the Complainant to go with him to his house because his wife had run away.

14. LAM testified that waited for Emily for about 2 hours but she did not return. At that point, her husband told her to go for the Complainant. She proceeded to the Appellant’s house which was 50 meters away. The door was closed but it had not been fastened. The

lights were off so she pushed the door open and found the Appellant on top of her daughter. He was strangling her. She said that the Appellant “was doing what men do to women.” She held his leg and pulled him and screamed in pain. She took her daughter and started fighting the Appellant “for what he had done.” They struggled for some time before people came to her rescue. E, W and her husband came, but by then the Appellant had run away to Kapsoniary. He ran away without his clothes.

15. LAM testified that she took the Complainant home. She was in pain. The following day she and the Complainant reported the matter to the Chief who referred her to Banita police station. At Banita they were taken to Nakuru Provincial General Hospital for treatment. The Complainant was treated, and issued with a P3 form and a treatment card. She identified the documents.

16. PW 3 was PC Peter Muthenja, a Police Constable attached to Solai police station, Mbaruku patrol base on general duties. He testified that on the 6th of June 2008 at about 10.30 am while at the said patrol base, the Appellant went to the base and reported that he had been assaulted by a certain woman by the name of LAM. About 30 minutes later, the said woman arrived accompanied by her daughter namely EC, the Complainant, who was aged 10 years. LAM said that she attacked the Appellant when she found him defiling her daughter; that she had found him in the act. PC Muthenja arrested the Appellant and later charged him with defilement. He took the minor to Nakuru Provincial General Hospital where she was treated. The Appellant was also treated at Nakuru Provincial General Hospital. A P3 form was duly filled. PC Muthenja identified the Appellant on the dock as the person he arrested is present in court.

17. PW 4 was Dr. Samuel Onchere, a Doctor attached to Nakuru Provincial General Hospital. He had worked with one Dr. Wainaina for over one year and was familiar with his handwriting and signature. Because Dr. Wainaina had been transferred to Eldoret, Dr. Onchere went to Court to produce the P3 form on his behalf. He produced the P3 form which was filled on 17th November 2008 by Dr. Wainaina. The P3 Form indicates that Dr. Wainaina examined the Complainant who had been sent to him by police officers from Benita patrol base with the history of having been defiled by someone known to her. She was in school uniform and was aged 10 years. She was in good general condition. She had no injuries on the other parts of the body. The defilement had occurred 5 month 10 days prior to the filling of the P3 Form. The Complainant had been given drugs to prevent from AIDS and taken for a lab test. She was HIV negative. However, on the part that he was to describe in detail the physical state of and any injuries to genitalia, the doctor simply wrote: “no hymen (see treatment records for initial examination findings.” Unfortunately, those treatment records were not produced in Court.

18. When the Appellant was put on his defence, he gave an unsworn statement. He stated that he used to transport milk and was aware of the charges he was facing. He stated that he reported to work to 8:00 am and ferried milk to Nakuru KCC. He worked until about 2:00 pm then went back home. He had lunch and decided to take a stroll. At about 4:00 pm, he entered the house and found two men and one woman. He ordered for chang'aa in that house for Ksh.30/=. He finished the first glass and ordered for a 2nd one. The seller then asked him to pay and he paid Ksh.100/=. At about 5:00 pm, he bought Busaa at Ksh.40/=. He asked for his change and she gave him Ksh.30/= He stated that he asked for the rest of the money and the lady stated that his wife owed her some money. He said that the lady, then, hit him on the head and he fell down and other patrons protested. She cut him on the ear and hit him with a panga on the shoulder. He said he did not fight her. He said that the woman had quarrelled with his wife and that she had threatened to burn his house during the Post-Election Violence. He said that he slept outside in the field that night because he was afraid and that he reported to the Police in the morning only for him to be arrested.

19. The Appellant's key submissions related to the issue of penetration. He submits that the Learned Trial Magistrate erred in accepting PW 1 and PW 2's evidence. He further submitted that there was no evidence from the doctor who treated and examined the Complainant neither did the said doctor testify in Court while his evidence was vital. There was no PRC form produced that guides the doctor in filling the P3. He also noted that the Complainant was treated after one day which he concludes to be 7th of June 2008 yet the P3 form was filled on the 17th of November 2008 which was five months later.

20. On the issue of his defence of alibi, he stated that his defence was ignored for no reason. He placed reliance on the case of **Kimotho Kiare v Rep (1984) eKLR**. The gist of the case being

that ‘an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to charges preferred against him does not in law thereby assume any burden of proving that answer and it is an alibi introduces the mind of the Court a doubt that is not unreasonable’. He further submits that the onus of proof always lies on the Prosecution and the Accused person has no obligation of proving his innocence. He further states that the Trial Magistrate erred by convicting him on the basis of very inconsistent and contradictory evidence.

21. The Appellant further submitted that his constitutional right to a fair hearing enshrined in Article 50(2)(j) of the Constitution were flouted and violated because his prayer for disclosure of Prosecution statements, OB extracts and identification forms prior to commencements of the trial had been denied. He sought to rely on **Thomas Gilbert Patrick Cholmondely v R [2008] eKLR** in this regard.

22. I should begin by observing that there is nowhere in the Trial Court record where there is an indication that the Appellant requested for the documents that he says he did not receive and that he was denied access to them. The presumption is that these documents were supplied to him before his trial. While the Prosecution has a duty to disclose its evidence before trial, an Accused Person has a minimal duty to inform the Court where the Prosecution has not disclosed so that the Trial Court can ensure compliance. The Supreme Court of Kenya has said as much in **Hussein Khalid And 16 others v Attorney General & 2 others [2019] eKLR**:

*[90] Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial. We are persuaded by the holding of Ngugi J, in **Republic v Francis Muniu Kariuki [2017] eKLR**, where he aptly captured these duties and obligations. The Judge, inter alia stated:*

“18. Our case law has now established without a doubt that it is the Prosecution's duty to provide the witness statements to an Accused Person and the Trial Court's duty to ensure compliance with the constitutional requirement. Article 50(2)(c) and (j) are

quite clear and the Courts have said as much: the right to adequate time and facilities for the preparation of one's defence includes the right to receive beforehand the evidence that the Prosecution intends to adduce against the Accused. At a minimum, this right includes the right to receive a copy of the charge sheet, witness' statements and copies of any documents which will be relied on at the trial.

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23. However, an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Court's duty to ensure the documents are supplied before commencement of the trial."

23. The Prosecution through Mr. Jamsumba announced that it would concede the appeal. Mr. Jamsumba argued that this is because the medical evidence on record does not support the ingredient of the offence. He argued that the only medical evidence on record is the P3 Form and the content of the P3 Form does not prove to the required standard that there was penetration. He argued that it was unfortunate that the treatment notes referred to in the P3 Form were not available since the conclusion "no hymen" is not sufficient to support the element of penetration.

24. Mr. Jamsumba also argued that age was not proved in this case because no documents such as birth certificate, immunization card or the like was produced to prove the age of the Complainant.

25. This Court has a duty to evaluate all the evidence notwithstanding concession by the Prosecutor. As the Court of Appeal stated in **Genya Mwasaha v Republic [2018] eKLR**:

[8] The aforesaid concession notwithstanding, it is still our duty as an appellate Court to subject the entire evidence to a fresh examination. (See Norman Ambich Miero & Another Vs Republic, Cr. App. No. 279 Of 2005 (Nyeri)).

"We restate that this Court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was"

26. In this case, Prosecutor is, unfortunately, wrong to concede on both scores. While it is true that the evidence presented in the P3 Form is largely useless for proving penetration, that fact does not necessarily mean that there was no evidence of penetration. Our case law has long established that penetration is not necessarily proved by medical evidence only. Like all other aspects of a criminal trial, this element is proved by all admissible evidence. The Court of Appeal had the following to say on this question in **AML vs Republic (2012) eKLR (Mombasa)**:

"The fact of rape or defilement is not proved by the way of DNA test but by way of evidence. This was further affirmed in the case of Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 Mombasa where the court stated;

"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by way of oral evidence of a victim of rape or by circumstantial evidence and so is the offence of defilement.

27. In the present case, as Mr. Jamsumba acknowledged there was what he called "graphic" evidence of how the defilement occurred.

The evidence was put on record through the testimonies of the Complainant and her mother. The mother found the Appellant *in flagrante delicto* and had to pull him off the Complainant and then fight him off as she screamed to attract the attention of the neighbours. The Trial Court found both witnesses to be candid and truthful and their testimonies were completely consistent in every material way. The Complainant was categorical that the Appellant removed all her clothes and then inserted his "thing for urinating" into her private parts and then "did bad manners to her." She said that she felt pain in her private part. The mother said she found the Appellant on top of her daughter doing "what men do women." The testimonies of these two witnesses remained completely unshaken through cross-examination. This was sufficient evidence to establish the element of penetration.

28. What about age? It is true that no documents were presented to the Court to substantiate the age of the Complainant. However, the Complainant testified credibly that she was 10 years old and that she was in Standard 4 at [particulars withheld] Primary School. Her mother also testified that the Complainant is her 5th child and that she was ten years old at the time of the incident. The P3 Form also states that the Complainant was ten years old. All these credible evidence is enough to establish that the Complainant was, at least below 12 years old at the time of the offence. As this Court stated in **Fappyton Ngui Mutuku v R [2012] eKLR**:

*I am aware that our case law requires that the age of a child to be conclusively proved before any conviction can arise from an offence under the Sexual Offences Act. The Courts are strict about this requirement because the penalty once found guilty is dependent on the age of the victim. For this strict approach, see, for example, **Hillary Nyongesa v Republic (Eldoret HC Crim. App. No. 129 of 2009 (Mwilu J. as she then was))**. I would be prepared to clarify that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth 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. In this particular case, I am prepared to hold that available evidence shows that the victim was less than eleven years old, which is the threshold for triggering a charge under section 8(2) of the Sexual Offences Act.*

29. The situation is the same here: there was sufficient information on record to reach a conclusion that the Complainant was less than 12 years old – the cut off age for charges under section 8(2) of the Sexual Offences Act.

30. The final ingredient to establish defilement is the identity of the perpetrator. In this case, the Complainant knew the Appellant well – indeed, he was a relative. The Appellant went to their house to ask for the Complainant’s help to cook. All the other members of the Complainant’s household – including her mother – saw him as he walked away with the Complainant. Then the Complainant’s mother found him on top of the Complainant and had to pull him off and fight him off before he took off sans his clothes. There is possibility of misidentification.

31. There is one last point I wish to address before considering the appeal against sentence. This is the complaint that it was improper for the Court to allow Dr. Onchere to produce the P3 Form yet it was Dr. Wainaina who had examined the Complainant. Dr. Onchere explained that Dr. Wainaina had been transferred away from Nakuru and was, therefore, unavailable to testify but that he was familiar with his handwriting having worked with him for more than one year. This is expressly permitted by section 77 of the Evidence Act as read together with section 33 of the Evidence Act. Our case law has consistently held as much. See, for example, the Court of Appeal decisions in **Joseph Bakei Kaswili -vs- Republic [2017] eKLR** and **Chaol Rotil Angela -vs- Republic [2001] eKLR**.

32. Consequently, it is my finding that all the elements for the offence of defilement were proved beyond reasonable doubt. The conviction is hereby affirmed.

33. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve life imprisonment in line with Section 8(2) of the Sexual Offences Act. That section provides that:

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.

34. This is what the law provides and it is what the Learned Magistrate used to impose the sentence she did. However, in a recent decision, in **Dismas Wafula Kilwake v R [2018] eKLR**, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

*In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015**], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

35. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

36. In the present case, the Appellant mitigated that he had young children at home and that their mother had died leaving him as a sole parent. He also said that his siblings relied on him for their upkeep. He asked the Court for leniency.

37. The Appellant was a first offender. It is also a factor that while, the victim was a child of tender years and she will likely be scarred for life by this traumatic sexual assault, the defilement did not involve use of sadistic or gratuitous violence on the victim. Therefore in the circumstances of this case, life imprisonment would be disproportionate. Considering the mitigating and aggravating factors, I am of the view that a sentence of twenty (20) years imprisonment would properly serve the sentencing objectives in this case.

38. The upshot of all this is that the Appellant’s appeal against conviction fails. However, the appeal against the sentence is hereby allowed. Accordingly I set aside the sentence of life imprisonment and substitute therefor a sentence of twenty (20) years imprisonment with effect from 09/06/2008 when the Appellant was first arraigned in Court.

39. Orders accordingly.

Dated in Nairobi this 21st day of January, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.