



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 41 OF 2018**

**GOLOLA KISHANGA MUNGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of Hon. A. Ndung'u, Resident Magistrate, delivered on 15<sup>th</sup> September 2017 in Shanzu Senior Principal Magistrate's Court Sexual Offence Case No. 1201 of 2014).*

**J U D G M E N T**

1. The Appellant Golola Kishanga Munga was convicted and sentenced to life imprisonment in Shanzu Senior Principal Magistrates Court Sexual Offence Case No. 1201 of 2014. The Judgment was delivered on 15<sup>th</sup> day of September 2017 by Hon. A. Ndung'u RM.
2. The appellant was aggrieved by the conviction and sentence in his petition of Appeal filed on, he raised the following grounds:-
  - i. That the learned trial Magistrate erred in law and fact in convicting the appellant without proper finding that the charge sheet as preferred by the prosecution was defective.
  - ii. That the learned trial Magistrate erred in law and fact in convicting the appellant without proper finding that the prosecutions did not prove their case beyond any reasonable doubt.
  - iii. That the learned trial Magistrate erred in law and fact by convicting the appellant without proper finding that the evidence made by the prosecution does not support the offence of defilement.
  - iv. That the learned trial Magistrate erred in law and fact in convicting the appellant without considering his defence.
3. The appeal herein was canvassed by way of written submissions. The prosecution's case was that the appellant was employed by the complainant's father and that on 17<sup>th</sup> day of December 2014 when the complainant accompanied him to the grazing field in the afternoon the appellant sodomised him. The appellant was caught red handed in the act by PW 3 MKM a teacher at [Particulars withheld] Primary School in Chonyi and he escorted both the Complainant and the appellant to the home and the complainants parents and later to the District Officers Office and to Kijipwa Police Station where the appellant was arrested and placed in custody and later arraigned in court by PW 5 Sergeant Muheshiminwa Hamisi Kobe and charged.
4. The complainant was treated at Vipingo Hospital and later P3 form filled at Kilifi District Hospital from the P3 Dr. Kadivane Kigamwa who examined the complainant found that matter on external anal canal of the complainant as well as bruises on the interior anal canal and he concluded that the complainant had suffered harm and was put on antibiotics and analgesics. The said Medical Report-P3 form was produced by Dr. Abdullahi Hussein Abdullah – PW 6 on behalf of Dr. Kigamwa as EX.P3.
5. The appellant in his defence told the court that he had gone back home from his place of work on 17<sup>th</sup> December 2014 when police officer's went and arrested him and escorted him to Kijipiwa Police Station where he was charged with an offence he did not commit. He denied having worked to the Complainants parents as a herdsman and said he was a boda boda rider.

**Summary of Submissions**

6. The appellant in submissions argued that the P3 form did not indicate the hospital in which examination of the Complainant was done and that should raise and oust in the prosecution's case in his favour as the burden of proof in criminal cases is on the prosecutions to prove all

ingredients of the offence charged beyond all reasonable doubt. He relied in the holding supreme court of **Canada Case Republic vs Lifchus [1997] 3 SCR 320**.

7. The appellant also submitted that the trial court violated his constitutional rights by enhancing the sentence and failing to accord him the benefit of the least severe punishment prescribed by the law and thus he had suffered psychologically. He contested the constitutionality of the mandatory life sentence meted on him. He said being a 1<sup>st</sup> offender the maximum sentence should be left for serving criminals. He said life imprisonment cannot achieve the objective of sentencing to reform convicted offenders.

8. The appellant relied in the judgment of the **Supreme Court in petition Nos. 15 & 16 of 2015 Francis Muruatetu & Another vs Republic and Petition No. 24 of 2019 at Mombasa Yusuf Shiunzi Kunani vs Republic** to urge the court to set aside life imprisonment imposed on him and impose a less severe sentence most probably 10 years in the interest of justice.

9. The Respondents in submissions opposed the appeal and argued that penetration was proved. It was submitted that the evidence of the Complainant that the appellant sodomised /defiled him was not shaken by cross examination. The Respondent also submitted that the PRC form filled on the very day the child was defiled confirmed injuries on the interest anal wall. The P3 form also confirmed the injuries that were observed in the PRC form.

10. The Respondents in submissions in regard to sentence argued that it was not wrong for the learned trial Magistrate to state that the only sentence allowed under Section 8(2) of Sexual Offences Act 2006 was life Imprisonment as jurisprudence accommodating different sentences under this section is recent and has removed the need to stick to mandatory sentences.

11. The Respondent invited the court to consider the circumstances of this case and to uphold the sentence. It was argued that the complainant a 6 years old boy was forced to evidence an indignity and violation of his person and it is impossible to quantify the damage done by this act of defilement.

12. It was contended that the appellant had not expressed any remorse and the sentence should not be reduced and in the event the court is inclined to interfere with sentence the same should remain custodial of some commensurate period of time.

13. Having considered the prosecution's evidence on record in the trial court as well as the appellants defence and having considered the trial Magistrates judgment, the grounds of appeal and submissions in support of the appeal by the appellant and submissions in position to the appeal, the issues that arise for determination are:-

- i. Whether the charge sheet which resulted in appellant's conviction was defective.
- ii. Whether the prosecution case was not prove beyond all reasonable doubt.
- iii. Whether evidence adduced by the prosecution proved the offence of defilement.
- iv. Whether the appellants defence was considered by the trial Magistrate.

14. The appellants ground of appeal Nos. 1, 2 & 3 are related as they challenge the authenticity of charge against the appellant, the probative value of the evidence against the appellant and whether the offence of defilement was proved against the appellant beyond all reasonable doubt.

15. The offence of defilement under Section 8(1) and (2) of the Sexual Offences Act is proved when the prosecution establishes the age of the complainant, penetration of the complainant's genital by the genital organ of the accused and the identity of the perpetrator of the offence.

16. In his submissions the appellant did not point out the defect in the charge sheet as per his 1<sup>st</sup> ground. From the record is the trial court the Complainants age was proved to be 6 years. It was also proved from the evidence of the Complainant that he was defiled by a person know to him as their herdsman.

17. PW 3 found the said herdsman in the act and using a big stick hit him on the back because he caught him unawares and thereafter escorted to the home of the complainant and to the D.Os office and later to the police station. When complainant was taken to hospital at Vipingo and examined it was established that he had bruises on the internal wall of his anal canal. He was again examined for purposes of filing P3 and the same injuries were confirmed and the doctor assessed injuries arising from the penetration as harm.

18. The 2<sup>nd</sup> ingredient of the offence of defilement was therefore proved by the prosecution. Whether it was established that it is the appellant who committed the offence. PW 1 said he went to the filed with appellant to herd and while there an appellant defiled him.

19. PW 3 said he had gone to harvest mangoes and while on top of the tree he saw the appellant lead the complainant nearer the tree where he was and that appellant made the child bend on a tree known as Mkone and undressed him and then inserted his penis in the childs anus. That he was interrupted when a cow strayed into a cassava plantation but after removing the cow and tethering it he again took the child next to a banana plantation and removed the trouser the child had worn, he also removed his trouser and started penetrating the child. That the child cried and appellant took saliva and applied to the childs anus.

20. PW 3 said when he heard child say he was in pain he went down the tree picked a thick rod and confronted the appellant. That the appellant was shocked and PW 3 told him that if he brought problems he would raise alarm and he would be in problems if members of

public responded. Pw 3 didn't know the appellant and didn't know the complainant. It is Appellant who led him to the home where he was employed as herdsman and they found PW 2 the mother of the complainant. It cannot therefore be true that the appellant did not know the Complainant and his parents and the trial Magistrate in analyzing the appellants defence said there was corroborated evidence by PW1, PW 2 and PW 4 that the appellant worked for the family looking after livestock and was not working as a bodaboda rider.

21. The trial Magistrate said the appellant was caught by PW 3 in the act and PW 3 in company of PW 1 went with appellant upto the home and then to D.O.'s Office and to Kijipwa Police Station. It was found and rightly so that appellant's evidence did not displace or controvert the prosecution's evidence.

22. This court finds that the prosecution proved all the ingredients of the offence of defilement and the conviction was therefore properly failed.

23. The appellant in his submissions has submitted that the sentence was harsh and excessive on ground that is not in his petition of appeal. However this being a 1<sup>st</sup> appellate court the jurisdiction given to the court is vide to sense the justice of the day. The appellant was sentenced to life imprisonment under Section 8(2) of the Sexual Offence Act after the trial Magistrate said that the sentence is couched in mandatory terms.

24. The appellant said and the Respondent has conceded that the mandatory nature of penalties has been outlawed to enable courts exercise discretion depending on the circumstances of the case. The appellant in his mitigation sought to leniency on the ground he had old parents. The Complainant herein was a vulnerable 6 years old boy of tender years who accompanied the appellant to the grazing field. The appellant had worked for the parents of the complainant and they had trusted him with their son but he breached that trust. If it was not that God planted PW 3 at the scene at that point in time. It is not known what else the appellant could have done to the child. In the circumstances as much as mandatory sentences were outlawed in the Francis Muruatetu petition by the Supreme Court of Kenya, the appellant committed a heinous act against a child of tender years who looked upto to him for protection and as such the deserves severe punishment.

25. This court will and hereby quantifies the life sentence to 2 years imprisonment to take effect from 22<sup>nd</sup> day December 2014 when he was arraigned in court and subsequently remanded in custody.

26. The appeal therefore fails the conviction is upheld. The sentence varied to 20 years imprisonment from 22/12/2014.

**Dated, signed and delivered at Mombasa this 18<sup>th</sup> day of March, 2021 by Microsoft Teams/Open Court**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**