



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 38 OF 2018

ALI OMAR BABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the sentence of 10th November 2017 charged with offence of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 by Hon. A. Ndung'u RM at Shanzu Principal Magistrate Court.

J U D G M E N T

1. The Appellant Ali Omari Babu was charged with offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, in Shanzu PM's Court Sexual Offence Case No. 72 of 2016 where he was found guilty, convicted and sentenced to serve life imprisonment. The sentence was passed on 10th November 2017.

2. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal therein based on the following amended grounds of appeal:-

- i) That the learned trial Magistrate erred in law & fact in convicting him an unsubstantiated evidence of the minor
- ii) That the learned trial Magistrate erred in law & fact in convicting the appellant without considering the period/duration which the act was committed and the time at which the appellant was arrested and charged do not rhyme.
- iii) That the learned trial Magistrate erred in law and fact in convicting the appellant without considering the evidence adduced was marred in several inconsistencies and contradiction.
- iv) That the learned trial Magistrate erred in law and fact in convicting the appellant without considering that there was no corroboration in the prosecution case.
- v) That the learned trial Magistrate erred in law & fact in convicting the appellant without considering that the evidence of the alleged victim was not voluntarily obtained.
- vi) That the learned trial Magistrate erred in law & fact in convicting the appellant without considering appellants reasonable defence and mitigation.
- vii) That the learned trial Magistrate erred in law & fact in convicting the appellant without considering that the sentence meted out was harsh, excessive, unjust, unfair and unconstitutional basing on the circumstances of the case.
- viii) That the learned trial Magistrate erred in law & fact in convicting the appellant without considering the pretrial custody pursuant to Section 333(2) of the Criminal Procedure Code.

3. The prosecution's case was that the Appellant defiled the complainant 9 years old child in the toilet and while PW 3 was waiting to enter the toilet the complainant emerged while running and PW 3 stopped her to interrogate her why she was in the toilet bare foot and in darkness the accused also emerged from the said toilet and exclaimed "Mayo". PW 3 took PW 1 the Complainant to her mother and that is where on interrogation she said the appellant had done 'tabia mbaya' to her.

4. PW 2 the mother of the Complainant examined her private parts and found she was bleeding from the vagina and she had bruised vagina.

Matter was reported to village elder immediately and when the appellant was interrogated by the village elder he confirmed had actually been to the toilet because he had running stomach. PW 1 was taken to hospital and was examined and treated and PRC form and P3 forms filled. P3 was filed by Dr. Abdul Aziz and produced by Dr. Julian Njambi Muiruri PW 4. It was found the complainant hymen was broken with abrasions on the fourchette.

5. The doctor also said that there was purple & yeast cells detected on laboratory examination. Investigations were conducted by PW 5 Corporal Elizabeth Kombe and she arraigned the appellant in court being charged with offence of defilement.

6. In his defence the appellant told the court that on the day in question when he was on his way home from work PW 2 Complainant's mother called and told him she wanted water but when he arrived she told him she had enough water and he left. Later at 8.00pm PW 2 again called him and told him she needed to see him. That when he arrived at PW 2's place he found PW 3 who claimed that she found him with PW 1 in the toilet and he denied. That after a week the village elder called him and told him to accompany PW 2 to the station where he was arrested and charged.

7. This appeal was canvassed by way of written submissions. The Appellants submissions were to the effect that it was dangerous for the trial Magistrate to convict him based on uncorroborated evidence of the complainant. He supported this position with the authority in **Fuad Dumila Mohamed vs Republic Appeal No. 210 of 2003**.

8. The Appellant submitted that the Complainant was taken to hospital long before the offence was committed. He said the complainant didn't scream or even bled if she was indeed defiled. He questioned whether a minor aged 9 years could run according to the testimony of PW 2 if she had indeed been defiled. He relied in the hearing of **Warsame J in John Candrew Wagner vs Republic and 2 Others [2011] eKLR**. The appellant further submitted that the complainant's evidence was procured by threats and only given as instructed by PW 2 & PW 3.

9. The appellant implied malice & for being fabricated with the offence of defilement. He said the evidence was inconsistent and full of contradiction and that there was no justice in the way in which the trial was conducted as his defence was disregarded.

10. Regarding of sentence the appellant argued that same should be substituted based on the Supreme Court Authority in **Francis Karioko Muruatetu & Another vs Republic** as well as holding in **Baraka Safari vs Republic. HCCR Appeal No. 75 of [2016] eKLR** at Mombasa where life imprisonment was substituted with 15 years' imprisonment.

11. The Appellant also relied in the holding in **Ben Rodgers Muthu vs Republic CR. A. No. 59 of 2018** at Mombasa where it was held that it is no longer necessary to be tied to the minimum mandatory sentences set out as Sexual Offence Act by dint of the holding in **Francis Muruatetu & Another vs Republic [2017] eKLR**.

12. The Respondents in their submissions dated 3rd March 2011 argued that all the ingredients of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 had been proved by the prosecution beyond all reasonable doubt and the conviction and sentence should be upheld and appeal dismissed.

13. Being the 1st appeal this court is mandated to relook and re-evaluate the evidence on record as well as the judgment of the trial court and come up with my own conclusion.

14. Having perused the evidence on record in the trial court and the trial Magistrates judgment together with the grounds of appeal and submissions thereto the issues for determination are:-

- i) Whether evidence upon which the appellant was convicted were contradictory, inconsistent and unsubstantiated.
- ii) Whether the evidence by the prosecution was corroborated.
- iii) Whether complainant testified due to threats.
- iv) Whether the appellants defence was considered.
- v) Whether the sentence meted out was harsh, excessive, unjust, unfair and unconstitutional.
- vi) Whether the appellant ought to have had his remand period during trial factored on when he was sentenced.

15. In a Sexual Offence and more so under Section 8(1) as read with Section 8(2) of the Sexual Offences Act the ingredients that ought to be proved are:-

- i) Age of Complainant
- ii) Whether there was partial and full penetration of the complainant's genital organ by the perpetrators genital organ.
- iii) The identity of the perpetrator.

16. From the P3 form which was produced as EXPH and certificate of both – EXP1 the minor was said to be 9 years old and therefore a child

within the meaning of section 8(1) of the Sexual Offences Act. That ingredient of the charge was therefore proved by the prosecution. Whether the 2nd ingredient of penetration was proved, the Complainant's mother testified that PW 3 came and told her that the Complainant came from the same toilet that the appellant also emerged from and she called the elders in the presence of appellant. PW 3 explained what she saw.

17. PW 2 said she examined the child's private part and found she had bruises and was also bleeding. PW 1 was taken to hospital and on examination found to have abrasions at the fourchette and her hymen was also broken, pus cells and yeast cells were also observed on examination.

18. PW 1 told the mother PW 2 that appellant pushed her into the toilet where he did 'tabia mbaya' to her while they were standing after removing her panty. When they emerged from the toilet one after another. PW 3 was outside there and when complainant was examined she was found to have been defiled. I do find that the prosecution proved that the complainant was indeed defiled and the perpetrator was the appellant.

19. The Appellant claimed there were contradictions on the prosecution case and that the evidence of PW 1 was procured by threats. The authority relied on by appellant in this regard John **Cardon Wagna vs Republic & 2 Others [2011] eKLR** is distinguishable in material aspects from the case herein for reasons that in this case PW 3 found the appellant and the Complainant in the toilet and it turned out the Complainant had been told by the appellant to leave the toilet and run away and should not stop even if someone talked to her. The Complainant feared she would be disciplined and told PW 3 not to tell her mother.

20. She was therefore threatened to speak up and what she said turned out to be true that the appellant defiled her. This was confirmed at the hospital. It was suspicious that the appellant emerged from the same toilet as the Complainant and any prudent adult would have a reason to interrogate such conduct. Appellant left the toilet running and did not take long in his house.

21. When PW 1 led the mother to Appellant's house they found he hurriedly left. PW 2 pushed the matter the same night with the village elder and the appellant was also called and interrogated. I find the evidence of defilement is corroborated by the medical evidence and the evidence of PW 2 & PW 3. The Complainant was taken to hospital immediately after it was discovered she had been defiled and it was established she was defiled and it is not true that she was taken to hospital before the offence was committed.

22. As far as the sentence is concerned the same is pegged on the age of the complainant which in this case is life imprisonment and therefore the same was within the law. While passing the sentence the trial Magistrate considered appellants mitigation and said that inconsideration of the age of the child which was 9 years the appellant could not be forgiven. That was an exercise of the trial Magistrates discretion which is inherent and should not ordinarily be interfered with.

23. However the practice now is to quantify life imprisonment into specific time. In the circumstance do convert the life imprisonment to 25 years imprisonment to take effect from 22/8/2016 as it appears the appellant was never released on bond during his trial. The appeal is therefore dismissed save for the sentence.

Dated, signed and delivered at Mombasa this 18th day of March, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE