



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 101 OF 2015

SAID SALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentence of the Honourable Kituku SRM,

in the Mombasa Chief Magistrate's Criminal Case No 1108 of 2014

delivered on 19th May 2015)

CORAM: Hon. Justice Reuben Nyakundi

Said Salim in person

Theresa Mwangeka for the DPP

JUDGEMENT

The appellant, **Said Salim**, was arrested on the 12th June 2014 and charged with the offence of defilement of a girl contrary to section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. By a decision of **Hon. J Kituku**, Principal Magistrate, delivered on 19th May, 2015 in Mombasa Chief Magistrate's Court Criminal Case No. 1108 of 2014, he was convicted and sentenced to 15 years imprisonment. He has filed this appeal herein on various grounds that upon consideration can be summed up as: the trial court convicted and sentenced the Appellant without a proper finding that the offence of defilement contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006 had been proven to the required standard by the law.

The particulars of the offence facing the Appellant at trial were that on the 9th June 2014 in Likoni District within Mombasa County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of one JS a child aged 16 years.

At trial, the prosecution presented 5 witnesses in aid of its case. After a full trial, the Appellant was found to have a case to answer and put on his defense. The Appellant gave sworn testimony and called upon 2 witnesses to buttress his testimony.

When the Defence closed its case, on consideration of the witness testimony and the evidence on the record, the learned trial magistrate found that the offence of defilement contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act had been proven beyond reasonable doubt and convicted the Appellant accordingly. Thereafter, the Appellant plead for leniency in mitigation and the trial court entered a sentence of 15 years imprisonment hence occasioning the instant appeal on both the conviction and sentence.

Submissions on Appeal.

The Appellant filed his submissions on 4th February 2020. The Respondent filed submissions dated 12th March 2020 on 24th March 2020 to which the Appellant filed further submissions on 27th July 2020.

The Appellant argued that the prosecution did not prove its case beyond reasonable doubt. For starters, he questioned the whether he was the one responsible for the Complainant's pregnancy. He argued that per the evidence of the Complainant, she had multiple sexual partners including one *Rasta* and it was plausible that she could have engaged in sex with someone other than himself hence occasioning her

pregnancy. His argument was that the Complainant's pregnancy alone could not implicate him as no DNA test had been conducted to establish paternity. That the evidence of the Complainant required corroboration. The argument put forth was that the evidence adduced by the Complainant pointed to the offence of indecent act with a child as she had testified that he did not cause any penetration. That the evidence of the complainant and doctor did not support the charge of defilement and it was not corroborated by the medical evidence. That the witness testimony was contradictory and, on this limb, placed reliance on **Kimani Ndung'u vs Republic 1979 KLR. 282.**

The argument further espoused by the Appellant was that the sentence meted out on him was excessive and he had the right to benefit from the least severe punishment prescribed by law. He cited **Mwandaza Jonda v R Mombasa HCCR App. No. 142 of 2018** and **Hamisi masudi Gambere v R Mombasa HCCR App. No. 121 of 2016.**

Finally, citing Section 333(2) of the Criminal Procedure Code, he implored the court to consider time served.

The State, represented by **Ms. Mwangeka**, submitted that the critical ingredients forming the offence of defilement were; age of the complainant, proof of penetration and positive identification of the assailant.

On age, it was submitted that **PW1** produced an age assessment form that was done at Coast General Hospital on 23rd June 2014 showing her age was assessed to be 16 years old. It was thus submitted that the age of a victim can be determined by medical evidence and other cogent evidence. In the instant appeal, the age assessment form was conclusive proof of the complainant's age.

Turning to the issue of penetration, it was submitted that **PW1** testified that the on 9th June 2014, the appellant pushed her to the bed, undressed her and himself and had sex with her. That according to **PW1** they usually had sex during lunch time break and the appellant, whom she knew through **H** used to give her money mostly when she was on her way to lunch. **PW1** stated that they had sex on six different occasions.

It was submitted that the PRC Form in this matter was filled on 13th June 2014. And on genital examination lacerations were noted on the labia minora and her hymen was broken. The P3 form was filled on 23rd June 2014 at Coast General Hospital, and its findings concurred with that of the PRC Form. **PW1** had a history of defilement and her hymen was broken, though not freshly broken and she had lacerations on her labia minora

Lastly, on identification, it was submitted that in the PRC Form in the circumstances as told by **PW1** were that the perpetrator was a business man of approximately 40 years old who had had sex with her severally.

It was further submitted that on cross examination **PW1** stated that when she was asked in school who defiled her, she gave the name of the accused person and one called Rasta. It further submitted that the evidence of **PW4** confirms that on the day of the arrest, the police together with **PW1** went to the house of the appellant and arrested him. Additionally, the police had also gone to the house of another suspect who was not home at the time. This was as a result of her being called to **PW1's** school and the senior teacher informing her that **PW1** had developed a habit of skipping classes so as to meet her boyfriend.

According to the prosecution, the appellant in his defence did not deny knowing the complainant or the fact that they were neighbors. That he even stated that **PW1** was friends with his daughters and admitted to giving her money. That **DW2** and **DW3** also confirmed that the complainant used to go to the appellant's house.

On the Appellant's attempt to introduce another suspect by the name Rasta as the one responsible for the act stating that the complainant has a previous sexual history and had other boyfriends, Counsel cited **Criminal Appeal No. 44 of 2016; Sahali Omar v Republic [2017] eKLR** on the issue of previous sexual experience. It was hence submitted that the complainant stated that the appellant defiled her on 9th June 2014. Additionally, that they had had sex on six different occasions. **DW2** also confirmed that the complainant on the day of the arrest, lead the police to the house of the appellant. That the appellant's wife went to the complainant's school and reported the complainant due to her bad manners and mentioned her husband's name. As such it was submitted that there was no doubt that the appellant used to defile the complainant and whether she had other sexual partners is immaterial as the incident in issue is that which occurred on 9th June 2014 with the appellant.

Regarding the assertion that the lack of a DNA test to prove paternity of the Complainant's child was fatal to the prosecution's case. It State Counsel submitted that evidence of paternity is not one of the ingredients to be proved in an offence of defilement. No prejudice was occasioned to the appellant by absence of the DNA test because penetration was proved by the testimony of **PW1**. Neither the appellant nor defence witnesses controverted the evidence on penetration.

On the issue of contradictions, it was submitted that the appellant had not pointed out any material contradictions in the prosecution case. The evidence on record shows that there was positive and proper identification of the appellant as the person who defiled the complainant; there was also proof of penetration which is a key ingredient of the offence of defilement; lastly there was proof of the age of the victim.

Lastly, on the Appellant's contention that his defence was not considered, it was submitted that this was untrue as the trial court in its judgment at page 33 to 35 of the record laid out and analyzed the appellant's defence and ultimately found it unbelievable.

Analysis and Determination

This is a first appeal. It is my duty to cast a fresh eye on the evidence and witness testimony adduced at trial. All the while, I must remember that I do not have the luxury of the trial court to observe the demeanor of the witnesses. This duty further enjoins me to come up with my own independent conclusions. **See Okeno v R (1972) EA 32.**

As I had alluded to, the main issue in this appeal is whether the prosecution proved its case beyond reasonable doubt. Corollary to this issue is whether, in the circumstances, the sentence imposed by the trial court was sound.

The burden placed on the prosecution is founded on Section 107 (1) of the Evidence Act which provides:

“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

This duty is addressed in the English authority of **Miller v Minister of Pensions 1947 2 ALL ER 372-274** as follows: -

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be described with the sentence of course it is no doubt nothing short of that will suffice.”

Guided by this premise, I will now proceed to consider what elements the prosecution ought to have established for the appellant who was charged with the defilement of a girl contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006 to be convicted. The aforesaid sections provide:

“8. (1) A person who commits an act which causes penetration

with a child is guilty of an offence termed defilement.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

From the foregoing Section and in accordance with established legal precedence such as in **Baraka Kahindi v Republic Criminal Appeal No. 70 of 2018 [2019] eKLR** and **Festus Kandu Ngome v Republic Criminal Appeal No. 18 of 2019 [2019] eKLR**, the crucial elements for a charge of defilement remain to be proof that the complainant was below 18 years, proof of penetration and the positive identification of the accused person as the person that caused the penetration.

My point of departure is the positive identification of the deceased. The principles to be followed were stated in **Cleophas Otieno Wamunga vs Republic (1989) KLR 424**, as follows: -

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification”.

The Court of Appeal in **Francis Muchiri Joseph – V- Republic [2014] eKLR** stated that:

“In LESARAU – v- R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name....”

In **Anjononi & Others vs Republic, (1976-1980) KLR 1566**, it was held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other. The instant case is one of recognition as the Complainant knew the Appellant well, as her testimony demonstrates. The complainant **JS** testified as **PW1**. Her testimony as is relevant to the identification of the Appellant was that the first time she met the Appellant, she was in the company of her friend **H**. On that occasion, the Appellant gave them Ksh. 40/= for lunch. She further testified that the accused person would routinely give her money mostly when she was on her way to lunch from school and on one occasion gave her Ksh. 1,600/=. She deposed that she had sex with the accused on six different occasions, including on the 9th of June 2014 and on the 11th of June 2014 where she went to school at around 8.00am and when she went on break, proceeded to the appellant’s house where they engage in sex. She testified that upon the accused’s arrest, she identified him.

PW3 MC testified that she was the complainant’s teacher. That on 11th June 2014, when she called out the complainant’s name in the register after the morning break of between 9.00-9.20 am, she was absent. That this was perplexing as she had seen the complainant in the morning. She sent two students to find out if **PW1** was home but they returned with a negative report. That the following day the complainant came back to school.

The accused in his sworn testimony stated that he knew the Complainant as her neighbour and a student in the same school as his daughter. He however denied ever having sex with her. On cross-examination he admitted that the complainant had come to his house with his daughter on several occasions but on re-examination clarified that she had only found him in the house on two occasions. He further admitted to giving the complainant money but denied that it was a reward for her engaging in sexual acts with him.

DW1 Abdalla Mwinyi Chenyemi and **DW2 Suleiman Hamisi** both corroborated the fact that the complainant and the accused person were

neighbors and that the complainant attended the same school as the accused's daughter.

Based on the above, I am satisfied that the appellant was properly identified as the perpetrator by the complainant.

On the question of penetration, Section 2 of the Sexual Offences Act defines penetration to mean the **'partial or complete insertion of the genital organ of a person into a genital organ of another person.'** PW1 testified that she had engaged in sex with the complainant on six different occasions. That she would ordinarily go to his house when on her way home for lunch. That on the material day, she had gone to his house in school uniform, they both sat on the bed, he undressed her and himself and pushed her on the bed and they had sex. The testimony of the doctor PW2 Dr. Ngowa was that there was penetration. He relied on the PRC form which was filled by Mrs. Maundu, his colleague.

The Appellant in his defense stated that while he knew the Complainant, he did not at any time engage in any sexual relations with her. He insisted that the complainant had a boyfriend by the name *rasta* whom he knew as Hamisi Rashid. That he was married with children and that his wife had gone to the complainant's school to make a complaint against her conduct with their daughter due to what he termed as the complainant's bad manners. That his wife had jokingly mentioned his name.

In his appeal, the appellant contends that no DNA test was conducted to establish the paternity of the child borne by the complainant. In this regard, my response is to align with the holding of the court in in **AML v R {2012} eKLR** where it was stated:

"The fact of rape and defilement is not proved by a DNA test but by way of evidence that sexual intercourse with the complainant did take place on the material time arising back to the facts of the case."

As such, I am convinced that the prosecution availed cogent evidence that penetration did occur, and that it was the Appellant that caused such penetration.

Regarding the age of the complainant at the time when the penetration occurred, in *Uganda v Godfrey HC CR Case No 141 of 2002, Francis Omuroni v Uganda CR Appeal No. 2 of 2008* the court held that:

"In defilement cases, medical examination, is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim parents and by observation and common sense."

In the case of in **Thomas Mwambu Wenyi v Republic Criminal Appeal No. 21 of 2015 [2017] eKLR** the Court of Appeal cited with approval **Francis Omuroni Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that: -

"...Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...." (Emphasis mine)

The testimony of PW1 was that she did not know her age though per the age assessment form which she produced, she was 16 years of age. The testimony of PW4 MA was that she was the complainant's cousin. That at the time of trial, she was 17 years of age. On cross-examination, she admitted that she did not know what year PW1 was born but she had accompanied her to hospital and given consent for the age assessment to be done by the doctors. The testimony of PW3 who was the complainant's teacher was that the complainant could not have been above the age of 18 at the time the offence was committed.

In light of the evidence of the age assessment form, which was corroborated by the Complainant's cousin with whom she lived, I find that the prosecution proved that at the time of the offence, the complaint was 16 years old.

Flowing from the foregoing, it is clear that all the preconditions for a charge of defilement were met by the prosecution. The age of the complainant was established as 16 years. Additionally, the complainant positively identified the accused as having engaged in sexual acts with her on several occasions, including on the ones for which the accused was arrested; that is to say, on 9th and 11th June 2014. As regards the appellant's defence that the complainant had relations with other men who were not brought before the court, I advert to Section 34 (1) of the Sexual Offences Act which provides:

"34. (1) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions."

Further to the above, I am guided by the authority to which Ms. Mwangeka for the State directed the Court on the issue where in **Criminal Appeal No. 44 of 2016; Sahali Omar v Republic [2017] eKLR** it was held:

"The other issue of law raised by the appellant was with regard to the evidence of the appellant's previous sexual experiences. According to Mr. Nabwana, the witness' testimony pertained to acts perpetrated in 2009 while the medical reports adduced in evidence bore dates in March, 2010. In view of that, he said, the court ought not have relied on the oral testimony of the witnesses, for it pertained to evidence on the appellant's sexual history, which evidence was adduced without leave of court as required under section 34 of the Sexual offences Act. The said provision, provides that;

"No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions." (Emphasis added)

Our understanding of this provision is that where a party wishes to advert to a complainant's sexual history, leave of court must first be sought and granted. Nevertheless, such leave is only required in cases where the previous sexual experience under reference does not relate to the present offence for which a person is being tried. In other words, leave is not necessary if the evidence in question relates to the same transaction and offence being tried. As stated by this Court in S.J v. Republic [2016] eKLR; the 'section deals with the evidence of character and previous sexual exploits of the complainant.' In this case the previous conduct or character of the complainants was not an issue whatsoever."

My conclusion therefore is that the conviction by the trial magistrate was safe. This leaves the issue of sentencing. The trial court sentenced the accused to 15 years imprisonment being a minimum mandatory sentence for the offence for which he was convicted. Regarding sentencing, the jurisprudence in the matter has since developed in light of the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** where the Supreme Court held that:

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."

Judicial consensus is now that the mandatory sentences of the Sexual Offences Act takes away judicial discretion in sentencing. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where it is stated thus: -

"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, 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."

However, it must be stated that the holding of the Supreme Court in **Francis Karioko Muruatetu & another v Republic (Supra)** did not abolish mandatory sentences. The Court of Appeal in **Samson Mumbaa Murigi v Republic [2020] eKLR** held that: -

"In this instance, it is significant to note that at the time of committing the crime, the appellant was given the minimum penalty of 20 years imprisonment which was the prescribed sentence for the offence of defilement under Section 8(3) of the Sexual Offences Act. The record indicates that the trial court took into consideration the mitigation of the appellant and the victim impact status report. The sentence imposed by the trial court and affirmed by the High Court cannot therefore be said to be unlawful or manifestly unjust. The trial Court took into a consideration both aggravating and mitigating factors and arrived at the correct conclusion. Consequently, the appeal against sentence fails."

In light of the foregoing, the Appellant beseeches the court to review his sentence downwards. When sentencing the Appellant, I note that the trial Magistrate was bound by the mandatory minimum sentence as provided in Section 8(4) of Sexual Offences Act. While the sentence was lawful, I find that the trial Magistrate failed to consider the fact that the Appellant was a first offender. I reduce his sentence to 7 years.

Finally, the Appellant seeks this Court intervention to have the time he has spent in detention considered as part of his sentence. The law in this instance is Section 333 of the Criminal Procedure Code which provides:

"333 (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

The Appellant was initially sentenced to 15 years imprisonment which sentence I have reduced to 7 years. His sentence at the trial court was passed on the 14th may 2015. In the upshot, the appeal on conviction fails. The sentence is however reviewed to that period of 7 (seven) years with effect from the date of arrest.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH 2021.

.....

R. NYAKUNDI

JUDGE.

In the presence of

1. Mr. Alenga for the state
2. The appellant