



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 36 OF 2020

SNA.....APPELLANT

VERSUS

STATE.....RESPONDENT

(An appeal from the original conviction and sentence of the Chief Magistrate's Court at Kisii Criminal Case No. 3357 of 2016 delivered on the 2nd December 2019 by Hon. N.S Lutta, CM)

JUDGMENT

1. 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, No. 3 of 2006, Laws of Kenya**. The particulars of the charge against the appellant were that on diverse dates between the months of November 2014 and October 2015 within Marani District of Kisii County, he intentionally caused his penis to penetrate the vagina of JKM, a child aged 10 years.
2. He also faced the alternative Count of committing an indecent Act with a Child contrary to **section 11(1) of the Sexual Offences Act**.
3. He further faced a second count of deliberate transmission of HIV contrary to **section 26 (1) of the Sexual Offences Act No 3 of 2006**.
4. The appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted and in a judgment dated 2nd December 2019 the trial court found him guilty of the offence of defilement. He was sentenced to 10 years on Count 1.
5. JKM (Pw1) testified that during the December holiday she met the appellant by the roadside and he asked Pw1 to accompany him to her grandmother's home. Upon arrival the appellant gave the complainant 2 doughnuts. She testified that the appellant then asked her to get in bed and he removed his sexual organ and defiled her. The appellant covered her mouth with his hands to stop her from screaming and warned her not to tell her mother. She testified that when she started experiencing stomach pains and her sister in law took her to Isecha dispensary where she was found to be HIV positive. She told court that the appellant is the only one she had sex with.
6. EMM (Pw2) recalled that on 15th October 2015, Pw1 was taken to Isecha Dispensary. The doctors then called her with information that Pw1 was HIV positive and she proceeded to report the matter at Rioma police station.
7. AO (Pw4), a clinician at Kegogi health Centre, testified that he filled a P3 form in respect to the complaint. She alleged that she had been defiled severally by a person known to her. Pw4 testified that they were evidence that Pw4 had been defiled. He explained that the hymen was torn and that Pw1 had a whitish vaginal discharge. Pw1 tested positive for HIV.
8. PC GK (Pw3) testified that he received a report that the complainant had been defiled and recorded the victim's statement. The appellant was arrested and taken for examination.
9. The trial magistrate found that the appellant had a case to answer and put him on his defence. The appellant testified that the complainant would borrow things from the homestead where he worked and when he declined to give her the items the complainant swore to teach him a lesson. The appellant denied committing the offence.
10. The appellant now appeals against the sentence meted by the trial court and asks this court to consider that he is remorseful and that his wife has since passed on. At the hearing of the appeal the appellant urged the court to reduce his sentence to a non-custodial one and also submitted that the court should consider that he is 61 years old.
11. Mr. Otieno, counsel for the state, submitted that the appellant was convicted of the crime of defilement. He observed that the appellant was sentenced to 10 years which is not the mandatory minimum sentence prescribed by law.

12. This being an appeal on sentence only the appellant is required to establish that the trial court in arriving at its decision did not take into account a relevant factor or considered an irrelevant factor or the manner in which it exercised its discretion was plainly wrong. This was stated in **Kyalo -vs- Republic [2009] KLR 325 and Omuse -vs- Republic [2009] KLR 214**, where the court held that;

“an appellate court would only be entitled to interfere with the exercise of discretion of sentencing where it was shown that the court whose exercise of the discretion was impugned had either not taken into account a relevant factor or had taken into account an irrelevant factor or that short of those two, the exercise of the discretion was plainly wrong.”

13. In this case, the appellant defiled a child aged 10 years but was sentenced only to 10 years imprisonment. **Section 8 (2) of the Sexual Offences Act** provide that;

“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.”

14. The minimum sentence of life imprisonment under **section 8 (2) of the Sexual Offences Act** has been held to be unconstitutional following the Supreme Court decision in **Francis Karioko Muruatetu and Others v Republic SC Pet. No. 16 of 2015** and subsequently the Court of Appeal decision in **Jared Koita Injiri v Republic, Criminal Appeal No. 93 of 2014**.

15. I have carefully considered the proceeding before the trial court and find that the trial court took into consideration the mitigation of the appellant before pronouncing itself on the issue of sentence.

16. Although the appellant is an old man this court has considered the age of the child and the gravity of the offence and finds that the sentence pronounced by the trial court was very lenient in the circumstance.

17. The appeal is lacking in merit and consequently dismissed.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF MARCH, 2021.

R. E. OUGO

JUDGE

In the presence of:

Appellant In person - Present

Mr. Otieno Senior State Counsel Office of the DPP

Ms. Rael Court Assistant