



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL APPEAL NO. 9 OF 2020

KELVIN MUTHONI MAKEMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **Section 8(1)(4) of the Sexual Offences Act No.3 of 2006** before the **Senior Principal Magistrate's Court at Marimanti.**

It was alleged that on diverse dates between 3/1/2019 and 4/1/2019 at [particulars withheld] Area within Tharaka Nithi South -Sub-County intentionally cause his penis to penetrate the vagina of C. K a child aged 16 years. The appellant pleaded not guilty to the charge and the trial magistrate proceeded to conduct a full trial. At the conclusion of the trial the appellant was adjudged guilty, convicted and sentenced to serve 15 years imprisonment. The appellant had been charged with an alternative charge of committing an indecent act with a child but was convicted on the main charge of defilement. The appellant was aggrieved by both the conviction and sentence and filed undated petition on 20/2/2020 in person. Mr. Mwenda Murango appeared for the appellant. The counsel filed an application dated 4/11/2020 seeking leave to amend the Petition of Appeal dated 8/1/2020. The appellant was allowed to amend the petition of appeal and proceeded to file an amended petition of appeal on 5/11/2020 raising the following grounds:-

- i. THAT the learned trial magistrate erred in law and fact by convicting the appellant on a defective charge sheet.***
- ii. THAT the learned trial magistrate erred in law and fact in failing to note that the particulars of the offence as stated in the charge sheet did not support the charge.***
- iii. THAT the learned trial magistrate erred in law and fact in failing to note that the prosecution evidence was at variance with the particulars of the offence and the charge.***
- iv. THAT the learned trial magistrate erred in law and in fact in failing to sufficiently analyse the evidence of the prosecution's case because had he done so, he would have found that the evidence was riddled with inconsistencies, discrepancies and contradictions depicting that the prosecution witnesses were not truthful therefore casting doubts on their credibility.***
- v. THAT the learned trial magistrate erred in law and in fact in failing to find that the medical evidence adduced by the prosecution was insufficient to sustain the charge and it was therefore not safe to convict the appellant.***
- vi. THAT the learned trial magistrate erred in law and in fact in dismissing the appellant's defence on grounds that the same was not proved.***
- vii. THAT the learned trial magistrate erred in not finding that the prosecution had not proved its case beyond reasonable doubt.***
- viii. THAT the learned trial magistrate erred in law and in fact by imposing the minimum mandatory sentence centrally to the tenets of the right to a fair trial guaranteed under the constitution 2010.***

The appellant prays that the appeal be allowed conviction be quashed and the sentence be set aside.

Although the appellant had filed submissions in person, on 22/10/2020 the appellant opted to proceed with the advocate which means that those submissions were abandoned. Mr. Murango filed submissions on 16/12/2020.

1. The respondent opposed the appeal and filed their submissions dated 23/2/2021. The respondent submits that the appeal lacks merits and prays that it be dismissed. The respondent conceded on the appeal on the sentence and submits that it was harsh and excessive.

The brief facts of the case are that it all started on 31/12/2018 when the complainant C.K accompanied her mother L.K and her sisters P.M. and a cousin MM and proceeded to her uncle's home at Kibeto for the eve of new year celebrations.

Later at 6.00pm the complainant left her uncle's place and proceeded to Mukothima town to have her hair shaved. Later the two sisters decided to go to a friend's place where they spent the night. The complainant and her sister ended up staying at the friend's place for three nights and returned home on 3/1/2019.

2. On 31/12/2018 the mother returned home only to discover that her children were not at home. The next morning she reported the matter to one Daniel Kibaara. Later on 3/12/2019 she met the complainant and her sister at a saloon at Mukothima town.

She called Administrative Policemen from a nearby Police Post. The officers went and arrested the complainant and her sister. They were questioned and said they were at a friend's place. The mother and her daughters went home. The mother (PW4) later at 9.00 pm noted that some money and her mobile phone were missing from her bag. She questioned the complainant and her sister and they returned the money. Later during the night the complainant and her sister sneaked from the house and ran away. PW4 called Kibaara a Volunteer Children Officer and she was advised to report to the police. After the complainant and her sister left their home, they met the appellant who convinced them to go and spend the night at Mutumas. The complainant and her sister agreed. While in Mutuma's house, the appellant defiled the complainant. The complainant's mother (PW4) happened to see the two girls sneaking out and so she sought assistance from Kibaara who is a Volunteer Children Officer who in turn advised her to report the matter to the police. PW4 proceeded to Mukothima Police Post where she reported the matter. Later at 5.00pm, PW4 received a call from Kibaara informing her that he had spotted her two daughters. PW4 met one Mugwimi who agreed to assist her to arrest the girls. The two girls were escorted to the police station and upon interrogation they mentioned the appellant, M and W. They admitted that they slept in the house of Mutuma and had sex during the night. The report was made to PW5 Mutua Davide Ngiti who was at the Children's and Gender Desk at Marimanti Police Station. He escorted the complainant to Hospital for a medical examination. A P3 form was filed by Andrew Kinyua and was produced in court by Lilian Wahu (PW3) a Clinical officer and it was confirmed that there was evidence of penetration. The appellant was arrested and charged.

Analysis and Determination:

I have considered the appeal, the submission and the proceedings before the lower court. This is a first appeal and this court has a duty and the appellant has a legitimate expectation that the evidence as a whole will be subjected to a fresh analysis and evaluation and the court to come up with its own independent finding. The leading authority on this subject has for years been case of **Okweno-v-Republic (1972) E.A** and has been reiterated in various authorities, see **Kiilu & Another -v- Republic (2005) 1 KLR**

I will proceed to evaluate the evidence based on the grounds of appeal.

The counsel for the appellant argued grounds 1, 2 and 3 together. The three grounds revolve around the charge and the particulars of the charge as laid out in the charge sheet. It is submitted that the charge sheet was defective. The appellant was charged under **section 8(1) (4) of the Sexual Offences Act No. 3 of 2006.**

The particulars are that – **Kelvin Muthomi Makembo** ;

“On diverse dates between 3/1/2019 and 4/1/2010 at [particulars withheld] Area in Tharaka South Sub-County intentionally cause Penis to penetrate the vagina of C.K. a child aged 16 years.”

Section 134 of the Criminal Procedure Code provides:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

The submissions by the counsel for the appellant is in my view, with utmost respect to the learned counsel on misapprehension of the particulars of the charge. His assertion that the particulars stated that ***“Intentionally attempted to cause his penis to penetrate”*** do not appear on the particulars of the charge which I have quoted above. The particulars quoted by counsel were on the first page of the Judgment which in my view is an error apparent on the face of the Judgment.

The charge of defilement has three ingredients which include, the age of the victim, penetration and the identification of the perpetrator. It follows that a charge of defilement will therefore be sufficient if it contains a statement of the offence, and such particulars as may be sufficient to disclose the nature of the

offence charged. It is my view that the charge as drafted meets the requirement under **Section 134 of the Criminal Procedure Code (Supra)**. The trial magistrate at page 31 of the record stated that the appellant was charged with defilement contrary to **Section 8(1)(4) of the Sexual Offences Act** and at page 43 he concluded that the appellant was convicted for the offence of defilement. The particulars stated by the trial magistrate were in error as rightly submitted by the State. Both the main and the alternative charge do not bear particulars that the appellant attempted to defile the complainant. The charge and the particulars were disclosed. There was no defect on the charge sheet. A defect on the charge will only be fatal if it prejudiced the appellant. **Section 382 of the Criminal Procedure Code** provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The grounds 1, 2 and 3 of appeal are therefore without merits.

3. There were no defects on the charge sheet. The evidence tendered by the complainant and other prosecution witnesses supported the charge of defilement. The complainant testified that the appellant had sex with her. The medical evidence adduced by PW3 confirmed that there was penetration. PW5 testified that he received a report of defilement. I find that the submissions by the appellant are not relevant as they are made *in- vacuo*.

Ground No. 4

The appellant submits that the trial magistrate failed to analyse the evidence to find that it was riddled with discrepancies contradictions and inconsistencies which cast doubts in the prosecution case. The Court of Appeal has dealt with the issue of inconsistencies and contradictions in the case of ***Erick Onyango Odeng-v- Republic(2014) eKLR***. The Court of Appeal in ***Kazungu Katana -v- Republic (2017) eKLR*** which is cited by the respondent stated as follows:-

“[15] This court had occasion to address this issue recently in Phillip Nzaka Watu -vs- R (2016), where it expressed; “However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.” (emphasis supplied)

Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case.

It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The court’s holding in ***Osetola vs State {2012} 17 NWLR (Pt1329) 251.***

The discrepancies pointed out by the appellant are minor. They do not show a design by witnesses to mislead the court. They do not in my view raise doubts in the prosecution case. To my mind the discrepancies are minor and must be ignored. The court of Appeal in ***Erick Odeng -v- Republic***, cited with approval the Ugandan Court of Appeal in ***Twehangane Alfred -v- Uganda Criminal Appeal No.139/2001 (2003) UGCA 6*** and stated that it is not every contradiction that warrants rejection of evidence.

As the court puts it-

“With regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained, will usually not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do affect the main substance of the prosecution’s case.”

The inconsistencies pointed out by the appellants counsel are minor and do not affect the substance of the prosecution case. This is a sexual offence and the court relies on the evidence of the complainant if it is satisfied that she was telling the truth. I have carefully read the Judgment by the trial magistrate and the contention that he did not analyze the evidence is far from the truth. At page 42 of the record the trial magistrate went at great length to state why he believed the complainant. I find that there were no material contradictions in the evidence which affect the credibility of witnesses. The ground is without merits.

Ground 5

The appellant submits that the trial magistrate erred in law and in fact in failing to find that medical evidence adduced by the prosecution was insufficient to sustain the charge and it was therefore not safe to convict.

I have considered the submissions. I agree with the appellant’s counsel that the broken hymen may not necessarily be proof of penetration. It also follows that broken hymen is not the only proof of penetration in defilement cases. Penetration is proved by the testimony of the complainant. In this case, the complainant testified that the appellant penetrated her. She was candid that they had sex. The Court of Appeal has held that what is most important to prove the allegation of rape or defilement is not scientific evidence but the oral evidence tendered by the victim. In ***AML -v- Republic (2012) eKLR*** the court stated-

“It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence

and not necessarily by medical evidence. This was the holding of the Court of Appeal in AML Cs Republic (2012) eKLR where it stated that:-

“The fact of rape or defilement is not proved by a DNA test but by way of evidence.

This position was re-stated by the same court in Kassim Ali Vs- Republic, Mombasa Criminal Appeal No.84 of 2005 where it stated that:

“ (The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence.”

The complainant testified on how she was defiled. A perusal of the record shows that her testimony on the subject was not challenged. Her testimony that she was defiled is intact. I cannot fault the trial magistrate for relying on her testimony to convict the appellant. The testimony of the complainant was sufficient and proved that there was penetrative sex with the appellant. Contrary to the submission by the appellant, medical evidence supported the fact of defilement. The appellant was a minor and could not give consent to have sexual intercourse. The ground must fail.

Ground 6:

The appellant faults the court for dismissing the defence of the appellant on the ground that it was not proved. I have considered this ground. The trial magistrate considered the defence of the appellant but never shifted the burden of proof on the appellant. The trial magistrate merely gave reasons for rejecting the defence. The ground is without merits.

Ground 7

Proof beyond any reasonable doubts.

The prosecution needed to prove the three ingredients which I have earlier stated. The age of the complainant was proved with the production of the Birth Certificate she was clearly 16 years old when the offence was committed.

The **Sexual Offences Act at Section 2** defines ‘penetration’ as:

“the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

In Mark Oiruri Mose vs R (2013) eKLR the Court of Appeal stated thus:

“Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ”

Further, the same court differently constituted, in the case of Erick Onyango Ondeng vs Republic (2014) eKLR in this respect noted: -

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured. “

In this instant case penetration is contested by the appellant, the contestation is on the identity of the person who committed the offence and the fact that the hymen was broken but not freshly. The appellant claims that he was framed.

The test to be applied *inter alia* to the principles in the cited cases elsewhere in this analysis is to be found in the case of Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995 where the Supreme Court held:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

In the same breadth, the Court of Appeal in Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga & A. K. Murgor JJA citing Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 (Mombasa) where the court stated that:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence”

Section 143 of the Evidence Act states that:

‘No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact.’

Section 124 of the Evidence Act makes this quite clear that:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

PW 4 did testify that on examination, the hymen of the complainant was broken but not freshly. There was also a foul smelling whitish discharge and further an infection in her urine; epithelial cells were seen and that there was evidence of penetration.

Line 7 – 3 on pages 8 – 9 of the court proceedings) PW 1 describes how each party paired up and the respective places upon which the three pairs had sex:

PW1 “...we spoke to them that we were going to aunt’s home. That is when they told us to go to Mutuma’s home instead and spend the night there. We then boarded their motor cycle. Accused was the rider. We went up to Mutuma’s house.....the house had a table room and one bedroom...the accused told me that he loved me. He convinced me to make love with him... we then had sexual intercourse with the accused. Accused though did not use a condom. We then spent the night there...”

The Learned Trial Magistrate further expressed himself as hereunder:

It is clear from the complainant’s evidence that the accused person actually tricked the complainant and PW2 to accompany him to a third party’s house at night. The complainant’s testimony describes actions that are clearly of a sexual in nature. She was therefore clear that the accused person had sexual intercourse with her that nightthe complainant was quite clear and consistent in her testimony. Though the accused person had a chance to cross examine her evidence in chief, he could not even shake or discredit the same as his questions were answered quite concisely.’

In regard to the foregoing, it is clear that the prosecution proved penetration to the required standard.

Proof of Identification

With respect to the evidence on recognition of the perpetrator, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape/defilement or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in **Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga & A. K. Murgor JJA** citing **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated that:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence”

The appellant argues that since the conviction was secured on the evidence of only one witness and further that there is variance in regards to the testimonies of PW1 and PW2, the same is not safe and urged this court to give him the benefit of doubt.

It is trite that the evidence of a single witness can be used to secure a conviction in sexual offences. In **Kassim Ali vs Republic [2006] eKLR** (supra).

Section 143 of the Evidence Act states that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact.

PW1 clearly told the court that when she left home together with her sister, while on their way to her aunt’s place, they met the appellant herein in company of W and M; they spoke and the appellant together with his company convinced the complainant to go to Mutuma’s house instead; this is the exact place where they spent the night and where also the appellant defiled the complainant.

The complainant goes ahead to describe how they even went to Mutuma’s house, the general arrangement of the house; (this is found from line 7 – 3 on pages 8 – 9 of the court proceedings) how each party paired up and the respective places upon which the three pairs had sex. This denotes a lot of time for which the complainant could easily utilize to identify the appellant herein.

To quote the same verbatim; Line 7 – 3 on pages 8 – 9 of the court proceedings:

“...we spoke to them that we were going to aunt’s home. That is when they told us to go to Mutuma’s home instead and spend the night there. We then boarded their motor cycle. Accused was the rider. We went up to Mutuma’s house.....the house had a table room and one bedroom...the accused told me that he loved me. He convinced me to make love with him... we then had sexual intercourse with the accused. Accused though did not use a condom. We then spent the night there...”

Therefore, taking above into account, it is clear the complainant's evidence and testimony on what transpired was consistent as captured by the lower court. She gave the whole genesis of what transpired from the moment they left home till when she bumped into the appellant herein; the way they went to the house whereupon the appellant convinced her to 'make love to him' hence the defilement.

Her evidence of recognition of the appellant stand unchallenged, and therefore in the circumstances the appellant was not only positively identified but also placed at the scene of crime by his victim.

However as was held in **John Mutua Munyoki vs. Republic** (supra)

“What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief.

In this instant case, the court had cogent reason to believe the complainant. This is what the court explained in line with the proviso to **Section 124 of the Evidence Act** at pages 8 lines 4 - 4 of the judgment (supra).

It is therefore clear that not only did the court find that the complainant was truthful but also recorded the reasons for the believing her. It was safe to rely on her testimony. The appellant was identified as the perpetrator.

SENTENCING

As regards the sentence, Section 8(3) of the Sexual Offences Act provides for a minimum sentence of fifteen (15) years imprisonment for any person convicted of defiling a child aged between sixteen (16) and eighteen (18) years.

Therefore, whereas proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction (see *Gilbert Miriti K Vs. R [2013] eKLR*).

The appellant has urged this court to exercise its discretion and review the appellant's sentence.

In **BW vs Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, the Court of Appeal considered the constitutionality of mandatory minimum sentences under the Act; and adopted what the Supreme Court decision held in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that the mandatory death sentence prescribed for the offence of murder by section 204 of the *Penal Code* was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25** of the Constitution.

In **Dismas Wafula Kilwake vs Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the **Sexual Offences Act** as follow:

“[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.”

In the case of **Wanjema vs Republic (1971) EA 493** the court laid down the general principles upon which the first appellate court may act on when dealing with an appeal on sentence. An appellate court will only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

However, the appellate court must not lose sight of the fact that in sentencing, the trial court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.

In this case the State has conceded that the sentence imposed on the appellant was harsh and excessive. The trial magistrate expressly stated that he was bound to impose the sentence provided under the Section. Based on the holding in **Dismas Wafula Kilwake -v- Republic**, Court of Appeal, which specifically interpreted the provisions of **Section 8 of the Sexual Offences Act**, there was room for the trial magistrate to exercise discretion on sentencing. I find that I should allow the appeal on the sentence. I set aside the sentence of **fifteen (15) years** and substitute it with a sentence of **seven (7) years** imprisonment which will run from the date the sentence was imposed.

As regards the appeal on the conviction, I find that it is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF JULY 2021.

L.W. GITARI

JUDGE

29/7/2021

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

29/7/2021