



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 20 OF 2020

BENARD OWUOR ACHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon J Mitey (SRM) delivered at Winam

in Senior Resident Magistrate's Court in Criminal Case No 17 of 2016 on 28th August 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were on diverse dates between the month of May 2016 and September 2016 in Kisumu East District within Kisumu County, he intentionally caused his penis to penetrate the vagina of LA, a child aged fourteen (14) years.

2. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between May 2016 and September 2016 in Kisumu East District within Kisumu County, he intentionally touched the breasts and vagina of LA, a child aged fourteen (14) years.

3. He was tried and convicted by Hon J Mitey, Senior Resident Magistrate for the offence of defilement and sentenced to serve twenty (20) years imprisonment.

4. Being dissatisfied with the said Judgement, on 18th September, 2020 he lodged this appeal. His Petition of Appeal was undated. He set out five (5) grounds of appeal. He did not submit on these grounds of appeal. However, in his undated Written Submissions that were filed on 12th November 2020, he listed two (2) amended Grounds of Appeal that touched on his sentence. Notably, the State Written Submissions were dated 24th June 2021 and filed on 28th June 2021.

5. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that have been placed before it for determination are:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

b. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful and or warranted.

9. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

10. Grounds of Appeal Nos (1), (2), (3), (4) and (5) were dealt with together under this head as they were all related.

11. It was therefore not clear to this court if the Appellant had abandoned his initial grounds of appeal or not. The State, however, submitted on both proof of prosecution case and sentencing. This court found it prudent to determine both questions of proof of the Prosecution's case and the legality or otherwise of the sentence for the completeness of record.

12. The State was categorical that the offence of defilement was proven to the required standard. It relied on the case of **George Opondo Olunga vs Republic [2016] e KLR** where it was held that the ingredients of an offence of defilement are identification or recognition of the offender, penetration and the age of the victim. It pointed out that the Appellant's identity was one of recognition as he was a distant relative and a neighbour to LA (hereinafter referred to as "the Complainant") and he had visited her home several times.

13. It further argued that his identification was confirmed by the Complainant's mother, MAO (hereinafter referred to as "PW 2") who testified that on 30th August 2016, she met the Appellant who confirmed that the Complainant had spent the night at his place.

14. It averred that penetration was also proven. It submitted that the Complainant testified that the Appellant defiled her on diverse dates as a result of which she became pregnant but that the foetus died. It added that APC Evans Omwoyo (hereinafter referred to as "PW 5") adduced in evidence a birth notification of the said foetus dated 25th May 2017, and that a Post Rape Care (PRC) Form and P3 Form were also adduced in evidence. It was its further submission that both Dr Joyce Omondi and Dr Ombok Lucy (hereinafter referred to as "PW 6" and "PW 8") confirmed that there was penetration of the Complainant's vagina.

15. It further argued that a child's age could be proven by a birth certificate, an age assessment, the mother's evidence, the court's observation of the child at the time of trial, common sense together with a combination of all other evidence. It placed reliance on the cases of **Musyoki Mwakavi vs Republic [2014] eKLR** and **Francis Omuroni vs Uganda Court of Appeal Criminal Appeal No 2 of 2000** to buttress its argument.

16. In this regard, it submitted that the Complainant testified that she was fourteen (14) years having been born on 15th November 2002 and that by the time the P3 Form was completed, she was fifteen (15) years of age and consequently, her age had been equally proven. It was its contention that the Appellant's appeal lacked merit and urged this court to dismiss the same.

17. The Trial Court conducted a proper *voire dire* examination and satisfied itself that the Complainant was intelligent enough to adduce sworn evidence. She testified that she had sexual relations with the Appellant on diverse dates and in different places. It was her evidence that the Appellant threatened her whenever he met her and forcefully had sex with her. She told the Trial Court that after repeated sexual intercourse with him, she got pregnant but lost her baby after he kicked her in the abdomen. It was her evidence that she returned to PW 2's house after this incident.

18. PW 2 testified that the Complainant was born on 15th November 2002. It was her evidence that the Appellant had formed a habit of abducting and defiling the Complainant and he would stay with her for even up to three (3) days. When she was cross-examined, she denied that she ever allowed the Appellant to live with the Complainant.

19. Collins Omondi Odongo (hereinafter referred to as "PW 3") testified that on examining the Complainant, he found blood stains in her vagina and the hymen was absent. He produced the PRC form and concluded that there was evidence of defilement. On cross-examination, he testified that the PRC Form indicated the Complainant's date of birth as 15th June 2002.

20. No xxxxxxxx Sgt James Chepsui and No 2008054710 (hereinafter referred to as "PW 4" and "PW 5" respectively) were the arresting officers. Their evidence was that they arrested the Appellant and he led them to where he had hidden the Complainant.

21. PW 6 tendered in evidence a birth notification dated 25th May 2017 for baby LAO. The mother's name was given as LAO. There was inconsistency on the sex of the baby. PW 5 previously testified that the baby was female and later that baby was male. However, this was immaterial. The upshot of her evidence was the Complainant gave birth to a still born aged twenty four (24) weeks on 25th May 2017. PW 8 corroborated PW 6's evidence confirmed that the Complainant had a still birth.

22. No xxxxx Corporal Anne Chepchumba (hereinafter referred to as "PW 7") was the Investigating Officer. She confirmed having recorded all the Witnesses Statements.

23. In his sworn evidence, the Appellant denied having committed the offence. He contended that at the time the offence was committed, he was having visitors in his house. He said that he was charged. He stated that he was only helping PW 2, who was physically challenged, obtain a birth certificate for the Complainant herein. He attributed his arrest to a disagreement he had with PW 2 over money. He adduced in evidence a child health card with the name of Derty, who he contended was the Complainant herein, showing that she had changed her name to L and she was seventeen (17) years and not fourteen (14) years as the Complainant had contended.

24. Section 8(1) of the Sexual Offences Act provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

25. To prove an offence of defilement, the Prosecution must prove that there was an indecent act or an act which caused penetration, the victim must be a minor and that the offender must have been identified and/or recognised by the victim.

26. Having carefully scrutinised the evidence adduced on trial, it was evident that the Appellant and the Complainant were known to each other. In fact, it was clear from his evidence that he knew the Complainant and was helping her obtain a birth certificate. His identification was by way of recognition.

27. The PRC Form, P3 Form, Birth Notification and Postmortem Report of the deceased foetus which were tendered in evidence by the Prosecution was evidence that there was penetration of the Complainant's vagina. Indeed, her hymen was absent. This court could not attribute the blood stains at the Complainant's vagina due to penetration as PW 3 admitted in his Cross-examination that he conducted the medical examination when the Complainant was in her menses. The same documents showed that she was aged between fourteen (14) and fifteen (15) years of age at the material time.

28. The circumstances under which the Appellant was arrested were cogent and he was the one who in fact led PW 4 and PW 5 to where the Complainant was. The Prosecution's evidence was consistent, trustworthy and clear. There were no contradictions which if resolved in the Appellant's favour would create a doubt in the Prosecution case. On the contrary, the defence that was offered by the Appellant was a mere denial and could not displace the Prosecution's case. This court was therefore satisfied that the Prosecution proved that the Appellant was guilty of the offence of defilement beyond reasonable doubt.

29. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4) and (5) were not merited and the same be and are hereby dismissed.

II. SENTENCE

30. The Appellant's Amended Ground of Appeal Nos (1) and (2) were dealt with under this head.

31. The Appellant relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] e KLR** where the court held that mandatory sentences deprive courts their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person.

32. He also relied on the case of **Christopher Ochieng vs Republic [2008] e KLR** where the court held that minimum mandatory sentences are unconstitutional. He pleaded with court to consider the fact that he was a first offender and was arrested at the age of thirty five (35) years old hence was still a young family man with three (3) children to whom he was the sole breadwinner. He asserted that while in prison, he had undergone rehabilitation programs offered in Arc welding and fabrication tested by the Government Trade Testing Authority (NITA) where he qualified with Grade II.

33. He invoked Section 333(2) of the Criminal Procedure Code that obligates the court to take into account the period already served in custody if the convicted persons had been in custody during trial. In this regard, he relied on the Judiciary Sentencing Policy Guidelines and the case of **Ahmed Abolfathi Mohammed & Another vs Republic [2018] e KLR**.

34. On its part, the State did not oppose the Appellant's appeal on sentence mitigation in view of the decision in **Francis Karioko Muruatetu & Another** (supra) and Section 333(2) of the Criminal Procedure Code, but urged the court to impose a tough sentence bearing in mind that the Appellant was severally reported to Authorities by the Complainant's mother but still continued to defile the minor even when the case was ongoing. It submitted that twenty (20) years imprisonment was suitable in the circumstances.

35. As seen hereinabove, the Complainant testified that she was fourteen (14) years. Her mother also testified that she was fourteen (14) years at the time of defilement, having been born on 15th November 2002. This court was therefore satisfied that Complainant's age was proven and reiterated the decision in **Musyoki Mwakavi vs Republic** (Supra) where the Court held that apart from medical evidence, the age of the Complainant may also be proved by birth certificate, **the victim's parents** or guardian and by observation and common sense (**emphasis court**).

36. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in **Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010** as was cited in **NNC vs Republic [2018] eKLR** when it had this to say:-

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

37. Notably, Section 8(3) of the said Act provides that:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

38. It was therefore the finding of this court that the sentence imposed on the Appellant by the Learned Trial Magistrate was not harsh and/or excessive warranting any interference and/or disturbance by this court.

39. On 6th July 2021, the Supreme Court clarified that the import case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), only applies in respect of sentences of murder under Sections 203 and 204 of the Penal Code. In view of the fact that the Petitioner had been charged and convicted of the offence of defilement and not murder, the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was distinguishable and inapplicable in the circumstances of the case herein.

40. In his mitigation, the Appellant prayed that the trial court considers the time he had been in remand. He had stated that he had been in remand since 2016. This court noted that the Trial Court did not consider this period in line with the provisions of Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) and the case of **Ahmad Abofatti Mohammed & Another vs Republic [2016] eKLR**.

41. Indeed, Section 333 (2) of the Criminal Procedure Code stipulates that:-

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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.”

42. In the premises foregoing, this court that the Appellant’s Amended Ground of Appeal No (1) was not merited. However, Amended Ground of Appeal No (2) was merited and the same be and is hereby allowed.

DISPOSITION

43. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 14th July 2020 was partially merited. The conviction and sentence be and are hereby affirmed as it is safe to do so.

44. Although the court hereby upholds the conviction and sentence of the Appellant for the offence of defilement, it hereby orders that the period the Appellant spent in custody, if at all, shall be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code, Cap 75 (Laws of Kenya).

45. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE