



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 42 OF 2019**

**PETER KAMAIS HAPEM.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the decision of Hon. S Wahome (CM)**

**in Molo Criminal Case No. 20 of 2017 Dated 29<sup>th</sup> May 2019).**

**JUDGEMENT**

1. The Appellant, was charged with the offence of **Defilement contrary to Section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that on the 25th day of February 2017 at [Particulars Withheld] in Rongai Sub-County within Nakuru County intentionally caused his penis to penetrate the vagina of MN a child aged twelve years.**

2. He also faced an alternative charge of **Committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that on the 25th day of February 2017 at 2017 at [Particulars Withheld] in Rongai Sub-County within Nakuru County intentionally touched the vagina of MN a girl aged 12 years.**

3. The appellant together with his co accused pleaded not guilty to the two charges and the trial commenced. The prosecution called 6 witnesses. At the close of the prosecution case the accused person gave unsworn evidence without calling witnesses. The trial magistrate after hearing the prosecution and defence case found the appellant guilty of the offence of defilement of a child aged 12 years and sentenced the accused to serve 20 years' imprisonment.

4. Dissatisfied by the said conviction and sentence the appellant filed his petition of appeal on 10/6 /2019 and set out the grounds of appeal as follows:

**a. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution case was marred with contradictions and inconsistencies.**

**b. THAT, the learned trial magistrate erred in law and fact by failing to appreciate that a critical witness was not called upon to testify.**

**c. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the conditions necessary for a positive identification were not favourable.**

**d. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that there was no nexus created between the accused and the alleged offence.**

**e. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the complainant's age was not proved as required by law.**

**f. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced did not corroborate penetration.**

**g. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution had not proved its**

case beyond reasonable doubt as required by law.

**h. THAT, the learned trial magistrate erred in law and fact by failing to find that the appellant's fundamental right to a fair trial as provided by Article 50(2)(g)(h) of the Constitution of Kenya, 2010 was violated.**

**i. THAT, the learned trial magistrate erred in law and fact by sentencing the appellant to a mandatory minimum sentence as provided by the statute which was not informed by the facts and circumstances unique to the offence, yet recent law developments in law have declared the mandatory nature of sentences as unconstitutional.**

5. The appellant as well later filed amended grounds of appeal which mirrored the above grounds.

6. When the matter came up for hearing the court directed the same to be disposed by way of written submissions.

#### **APPELLANT'S SUBMISSIONS**

7. The appellant submitted that he was not informed of his right to legal representation as provided by **Article 50 (2) (g) and (h) of the Constitution. The trial court ought to have interrogated the provisions of Article 5 (2) (g) (h) of the Constitution** and make a finding and/or order to the effect that a state counsel be provided to the accused person for not only justice to be done but to be seen to be done. This right needs to be communicated promptly and the trial court's record must indicate that the accused was made aware and more so where the court finds that substantial injustice would be occasioned. The appellant placed reliance in the case of **Pett V Greyhound Racing Association, (1968 2 All E.R 545, AT 549 and the case of Karisa Chengo & 2 others v R, CR No's 44, 45 & 76 of 2014** and submitted that the accused faced an offence that carries a severe sentence of life imprisonment but he was not accorded his right to legal representation as required by law. In that regard, there is substantial injustice occasioned unless he is represented.

8. The mandatory duties imposed on trial courts by **Section 43 (1) of the said Legal Act and Article 50 of the constitution** were violated. The proceedings were prejudicial to the appellant hence they ought not to stand.

9. The appellant submitted that the trial court's judgement wrongly drew an inference that the freshly torn hymen was indicative of defilement. The hymen can be torn through a myriad of ways. In the instant case, the freshly torn hymen cannot be attributed to the fact that PW1 engaged in sex with the appellant. PW1 never stated that she saw blood after the incident. There is a possibility that the freshly torn hymen was occasioned by pw6 during his examination of PW1.

10. The appellant placed reliance in the case of **Mwani v Republic [1984] KLR 595** and the case of **P.K.W v Republic [2012] eKLR** and submitted that penetration was not proved and therefore the trial court's inference was wrong.

11. The appellant submitted that the mandatory minimum sentence denies the trial court the opportunity to consider the appellant's mitigation and employ its discretion in sentencing. The appellant quoted a myriad of cases not forgetting the Muruatetu case and submitted that the mandatory minimum sentence should be found unconstitutional as well as it denies the court discretion.

#### **RESPONDENT'S SUBMISSIONS**

12. The respondent submitted that right to have legal representation is not absolute, the court must be satisfied that there is a likely hood of substantial injustice. The gravity of the allegations faced must be considered by the kind of penalty they attract. In the instant case the appellant has not demonstrated what substantial injustice occurred to him as a result of not being represented. He portrayed himself as one who understood both charges against him as well as the trial process. He exercised his right to cross-examine the prosecution witnesses and subsequently adduced his defence when given the opportunity to do so. The appellant also offered his mitigation and therefore there is no proof whatsoever of miscarriage of justice and/or prejudice suffered by the appellant in this case. The respondent placed reliance in **Karisa Chengo & 2 others v R (supra)**.

13. The respondent submitted that this matter should be treated as an afterthought and in the contrary finding, should not be used to vitiate the trial court proceedings as a whole. The respondent concedes to not promptly informing the accused of his right to choose an advocate of his choice, however, the court should weigh the effects of a retrial order in the circumstances and consider factors such as age of the complainant, availability of witnesses among other factors.

14. The respondent placed reliance in the case of **Julius Kioko Kivuva v Republic [2015] eKLR** and submitted that the complainant was clear and consistent in her testimony on the events of the material day. She contended that she was bleeding from her private parts after the ordeal. Her evidence was well corroborated by the evidence of pw6. Hence, the offence of penetration was proved beyond reasonable doubt.

15. The appellant when placed on his defence, stated nothing on the charges preferred against him and/or on what the prosecution witnesses had testified on hence failing to create any doubt in the mind of the court on the prosecution case as a whole. The respondent urged the court to affirm that the defence was not plausible and reject that ground of appeal.

16. The respondent submitted on the issue of sentence that the appellant's actions were more than brutal, the appellant and his accomplice mishandled an innocent minor by threatening her and using actual force thereby injuring her in addition to defiling her. Pw6 confirmed that the complainant had injuries and bruises on the body. The appellant caused the complainant trauma by threatening her with a slasher. They tied her mouth so that she was unable to scream for assistance and proceeded with the beastly act of defiling her. These being the circumstances, the respondent implores the court to mete out a sentence that is commensurate, the 20 years' imprisonment being the mandatory minimum sentence at the time of sentencing was lenient and not harsh and/or excessive. The respondent urged this court to uphold and not to interfere with the same unless for purposes of enhancement.

## ANALYSIS AND DETERMINATION

17. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424.”**

18. The prosecution evidence commenced with PW1 the complainant who after *voire dire* gave sworn evidence and stated that she is in class 5 at St [Particulars Withheld] primary school. She recalled that on 25/2/2017 she was in a store where firewood is kept at about 4.00pm. She later left after spreading the firewood and went to do her homework. As she was doing her homework alone, someone appeared and held her mouth, he had a shirt in his hand, warned her not to scream. She testified that she knew the 2nd accused person who came with a slasher and warned her not to scream or else he will hit her.

19. She also knew the appellant person as Peter Kamais. They tied her mouth with the shirt. The 2nd accused person tied her mouth as the appellant was holding her legs. The appellant after sending the 2nd accused person to check the surrounding, lifted the complainant to the 2nd accused’s house just near the complainant’s room. He removed her jeans, pant and blouse. He also tore her sweater. He then put on a condom and defiled her by having sex with her. She felt lots of pain and cried.

20. Then the 2nd accused informed the appellant of a woman who had come to the neighbourhood. The appellant opened the door and pretended that they were listening to music from the phone. The complainant jumped out of the window naked with her mouth tied. The lady saw her and untied her. The accused went inside the house and told the lady to put down the shirt or they cut her. The complainant and the lady went to Mama Mwaura who called the chief. The complainant stated that she was bleeding at the vagina. When her mother came she explained everything to her. She was taken to Salgaa Police post where they reported the incident. She was also taken to Rongai Hospital where she was examined and given HIV drugs. A p3 was filled at the hospital.

21. The mothers of the appellant went to her and asked for pardon by proposing to pay hospital bill but her grandmother refused. They were later found in a crusade and arrested.

22. **PW2 DWM**, the complainant’s mother testified that pw1 was born on 4/7/2005 and marked the birth certificate as pmfi 1. She stated that on 25/2/2017, she had attended a clinic in S.T Mary hospital near Naivasha when she was called by mama Mwaura and informed that the complainant had been defiled by the 2nd accused person. The appellant used to be her immediate neighbours in their plot. She then reported to the chief who referred her to Salgaa Police station later took pw1 to the hospital. The p3 and PRC forms were filled and it was confirmed that pw1 had been defiled.

23. She stated that they had lived with the appellant as neighbours for about one month. They were arrested after 6 days and some condoms were recovered from the house of the 2nd accused 4 days after the arrest. Two used condoms were found in the house of appellant. PW1’s sweater was recovered.

24. **PW4 Jacinta Wachuka** testified that on 25/2/2017, she was going to buy vegetables when she saw the 2nd accused person with a phone. She passed him, bought vegetables, and she still saw him enter house no 2. Then a girl jumped out of the window and her pant fell off. She started crying. The complainant informed her that she had been defiled by 2 young men. PW4 took the child to mama Mwaura and left her there. She said that she only saw the 2nd accused person outside the house. On cross-examination she stated that she doesn’t know who defiled the complainant.

25. **PW5 No. 69627 PC Adan Galgalo** testified that he was in the station when the complainant and her mother came to make a report of defilement by persons known to her. PW5 booked her in OB and referred her to hospital for treatment. He also gave them a P3 form. On 3/3/2017 the accused were spotted in a hotel at Salgaa where they were arrested and later charged.

26. **PW6 Bildad Ngoge** a senior clinician produced a P3 form of the complainant who had a history of defilement. She had an injury at the back of the head and bruise at the left ankle joint. The genitalia had a broken hymen which was freshly torn, she had whitish vaginal discharge, and had bacterial infection. He formed the opinion that she had been defiled. He then filled the P3 and PRC form. He produced them as exhibits 2 and 3 respectively. On cross-examination he confirmed that the complainant had clothes on but had lost her pant and school sweater.

27. After finding that the accused persons had a case to answer, they were put on their defence. The appellant gave unsworn statement and stated that on 3/3.2017 he went to work, later he went to Salgaa at 6.00 p.m. for overnight prayers. On the following day he quarrelled with the complainant’s mother who framed him. He was then arrested in a hotel by the police and taken to Salgaa police station.

28. DW2 Patrick Mamiso the appellants co accused gave unsworn statement and testified that on 3/3/2017 he had gone to Salgaa. He was taking tea at 8.00 pm when he was arrested by the police who alleged that he had defiled the complainant. He stated that he told them that it was the 1st accused who had brought the complainant to his house.

## ISSUES FOR DETERMINATION

29. After a perusal of the petition of appeal, Evidence brought forth and the submissions from both parties, the following issues fall for determination;

**(a)Whether the Appellant’s rights as provided for under Article 50 (2) (g) & (h) were violated.**

**(b)Whether the prosecution proved its case beyond reasonable doubt.**

**(c)Whether the sentence was excessive in the circumstances**

**(a)Whether the Appellant’s rights as provided for under Article 50 (2) (g) & (h) were violated.**

30. *Article 50 (2) (g) & (h) of the Constitution of Kenya 2010 provides as follows;*

**(2) Every accused person has the right to a fair trial, which includes the right-**

**(g) To choose, and be represented by, an advocate, and to be informed of this right promptly;**

**(h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;**

31. The aforementioned provision of the Constitution makes it mandatory for an accused to be promptly informed of this right before the trial commences and/or on his/her first arraignment before the Court. A perusal through the record of appeal shows that the Appellant was arraigned in Court on 6th March 2017, he took plea and was given a mention date on 8/3/2017. The matter was mentioned on 16/03/2017 and a hearing date of 19th/4/2017 was set. From the proceedings, it is clear that the accused was not informed of his right as enshrined under **Article 50 (2) (g) and (h) of the Constitution.**

32. Though that ought to be the case there is no indication that the appellant failed to appreciate the proceedings or at all. All through the trial which lasted for about two years the appellant fully participated including cross examining the witnesses and offering his unsworn defence. His rights must also be weighed against those of the minor.

33. Although the trial court ought to have explained the same to the appellant, at no point did he complain that he was unable to follow the proceedings or had any difficulty in conducting the matter.

**(b)Whether the prosecution proved its case beyond reasonable doubt.**

34. **Subsections (1) and (3) of section 8** under which the appellant was charged reads as follows: 8. ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

***(3) 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.***

35. Thus, three critical elements that must be proved to sustain a conviction for the offence of defilement under these provisions of the law are the act of penetration, the age of the victim and that the appellant was the perpetrator of the offence.

36. **“Penetration”** is a term of art and is defined Section 2 of the Act to mean ***“the partial or complete insertion of the genital organs of a person into the genital organs of another person”.***

37. The complainant gave a clear and elaborate explanation on how the act of defilement was done, with the 2nd accused person keeping watch of the surrounding. PW6 too gave an elaborate report in form of a P3 form and PRC form showing that indeed the complainant had been defiled. He stated that the hymen was freshly torn and the complainant had a whitish vaginal discharge. The complainant also had an injury at the back of the head and bruise at the left ankle joint. The appellant on the hand contended that the torn hymen could have been caused by anything else apart from penis penetration. When testifying, the complainant stated that the appellant tied her mouth with a cloth and after taking her to the 2nd accused’s house put on condom and defiled her by having sex with her where she felt a lot of pain and she bled from her private parts.

38. PW4 also testified that she saw the complainant jump from the 2nd accused’s house and her pant fell off. The complainant informed her that she had been defiled. I don’t have any reason to doubt the prosecution witnesses. There was indeed evidence of defilement, hence the hymen was not torn by anything else apart from penetration by the accused person.

39. The evidence and the testimony of PW 1 was clear, precise and consistent as to what had happened. Her testimony was not shaken on cross-examination. Therefore, this ingredient was proved beyond any reasonable doubt.

40. As regards her age the complainant’s mother testified that she was born on 4/7/2005 according to her birth certificate meaning the complainant was about 13 years by the time she was testifying. At the time the offence was committed on the complainant, she was 12 years old. This was enough evidence to confirm that the child was a minor for purposes of the sexual offences Act.

41. In the case of **Edwin Nyambaso Onsongo Vs Republic (2016) eKLR**, the court cited the case of **Mwolongu Chichoro Mwanjembe**

Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR) where the Court of Appeal held that: -

**“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.” “... we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.**

42. It is also worth noting that Rule 4 of the Sexual Offences Rules of Court Rules recognizes that:

**"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

43. It is therefore sufficient to say that the age of the minor was proved beyond any reasonable doubt.

44. The issue of whether the appellant was the perpetrator is not in dispute since the complaint knew the accused person as they were neighbours. It was therefore a case of recognition and not a case of identification. In view of the foregoing, I will be inclined to conclude that the prosecution proved their case to the required standard of beyond reasonable doubt.

**(c)Whether the sentence was excessive in the circumstances**

45. Section 8(3) of the Sexual Offences Act provides *“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”*. This therefore means that the minimum sentence is 20 years but the maximum sentence is discretionary.

46. The court in *Sylvester Wanjau Kariuki v Republic [2016] eKLR* held:

**“Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.”**

47. Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered. In the case of *Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated thus: -

**“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered”**

48. I have considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the aggravating and mitigating factors, the age of the victim at the time of the offence, and further the fact that the accused person was a first offender and I do not find any reason that would justify reducing and/or setting aside the sentence as awarded by the trial court. In any event, the supreme court’s directions that were issued on 6th July 2021 in the *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR* clarified the issue of mandatory minimum sentences by stating that;

**“We therefore reiterate that, this Court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.”** The Supreme court proceeded to state that **“It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.”**

49. In the upshot, the sentence does not violate any of the appellant’s rights and is not unconstitutional in the circumstances as contended by the appellant. The offence of defilement was properly proved beyond any reasonable doubt.

50. For the foregoing reasons this court does not find any merit in the appeal and the same is hereby dismissed. The appellant of course has the right of appeal to the Court of Appeal.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021**

**H K CHEMITEI**

**JUDGE**