



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 103 OF 2019**

**ERICK ONG'ERA OCHOTI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgment of Hon. C.A. Ogweno, Resident Magistrate,*

*delivered on 11<sup>th</sup> July 2019 at Mombasa Chief Magistrate's Court*

*Sexual Offences Case No. 26 of 2018).*

**J U D G M E N T**

1. Erick Ong'era Ochoti the Appellant herein filed this appeal on 23<sup>rd</sup> September, 2019 based on the following grounds:-

- i. That the learned trial Magistrate erred in law & fact by finding Appellants conviction and sentence without considering that the offence of defilement was not proved beyond any reasonable doubt.
- ii. That the learned trial Magistrate erred in law & fact by finding appellants conviction & sentence without considering that the case was due to fabrication.
- iii. That the learned trial Magistrate erred in law and fact by convicting the Appellant & sentencing him without considering that the sentence of 15 years was unlawful.
- iv. That the trial Magistrate erred in law & fact by convicting & sentencing him without considering that the sentence was harsh & excessive.
- v. That the trial Magistrate erred in law & fact by convicting & sentencing the Appellant without considering his reasonable defence.

2. The Appellant was charged in the trial court 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. The particulars were that Erick Ong'era Ochoti on the diverse dates between 16<sup>th</sup> & 17<sup>th</sup> September 2017 in Jomvu sues County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of DA a girl aged 15 years old.

3. In the alternative Appellant was charged with offence of committing an indescient act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

4. The prosecution's case was that the Appellant defiled the Complainant who was his neighbours daughter on 2 occasions and she conceived. The complainant's mother PW 2 realized that complainant tummy was protruding, she interrogated her with help of a neighbour and she reverted that Complainant had been defiled.

5. Report was made to police and PW 5 conducted investigations and through DNA test. PW 4 found that the child who had been delivered by the complainant was 99.00% the biological child of the Appellant. The Appellant denied having defiled the complainant. He alleged there was difference between him and the complainant's mother long before the husband died that led to him being fabricated. He said that he disciplined the complainant for writing a love letter to his son and the complainant's mother claimed that it was appellants memo advised her daughter.

6. He also said that the Complainants mother claimed that Appellant bewitched her husband who died. He said that he used to find his chicken strangled and having on his doors. He also said that his wife infected him with an STI which he had been unable to treat for 10 years. He said he suffers from syphilis and he didn't defile the Complainant. He asked to be acquitted to take care of his children.

7. When filing his submissions on 7<sup>th</sup> July, 2021, the Appellant amended his grounds of appeal as follows:

a. That the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that the sentence was harsh.

b. That the learned Magistrate erred in law and fact in convicting the Appellant without considering that the child born out of the consensual sexual intercourse is his biological and needs father's care pursuant to Article 53 of the Constitution of Kenya, 2010.

c. That the trial Magistrate erred in law and fact in convicting the Appellant without considering that the sentence meted on him was harsh, excessive, unjust, unfair and unconstitutional basing on the circumstances of the case.

8. This appeal was canvassed by way of written submissions. The Appellant's submissions were that sentence passed against him was excessive. He said he was charged under Section 8(1) & 8(4) which provides for term not less than 15 years. He relied on the holding of **Opoya v. Uganda [1967] EA. 752** at page 754 where it was held that the words 'shall be liable to' do not in the ordinary meaning require the imposition of the stated penalty, but merely express a stated penalty which may be imposed at the discretion of the court.

9. The Appellant argued that the words 'liable upon conviction' to imprisonment' gives room for judicial discretion and that under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of the Constitution of Kenya, 2010. He relied on the holding in **Francis Karioko Muruatetu and Another v. Republic (2017) eKLR** to argue that mandatory minimum sentences are unconstitutional and his sentence to be reduced as in the case of **Ben Rodgers Muthui v. Republic. HCCR. App. No. 59 of 2018** at Mombasa and **Eliud Muchonde v. Republic HCCR. App. No. 93 of 2017** at Kiambu.

10. The Respondents-in their brief submissions, argued that the Supreme Court had recently clarified its stance on the Muruatetu decision with regard to mandatory sentences and further, the Appellant was out on bond for the duration of trial and his prayer for reduction of sentence is opposed and the appeal be dismissed.

11. On 29<sup>th</sup> of July, 2021, the Appellant filed a Reply to the Respondent's Submissions.

12. From the amended grounds of appeal, it is clear that the Appellant is appealing against the sentence only.

13. Section 8 (1) and (3) of the Sexual Offences Act provides as follows:

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.**

14. The sentence prescribed is determined by the age of the victim of the sexual offence. In this case, the complainant was born on 24<sup>th</sup> of May, 2001 as per Exhibit No. 4 and the trial Magistrate established that the age of the complainant at the time of the offence was 16 years and the Appellant was therefore guilty for the offence of defilement under Section 8(1) and Section 8(4) of the Sexual Offences Act.

15. Under section 8 (4) of the Sexual Offences Act, the penalty provided for is

(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.**

16. The sentence of 15 years imprisonment meted against the appellant was therefore lawful as the section provides for a term not less than 15 years. The Appellant's argument that mandatory minimum and maximum sentences are unconstitutional-pursuant to the Supreme Court holding in **Muruatetu Case (supra)**, cannot stand for the reasons that on 6<sup>th</sup> of July, 2021, the court clarified that the decision was applicable only to murder cases.

17. The Appellant also submitted that, being that he was the father of the complainant's child and the court should have considered that the child needed a father's care pursuant to Article 53 (e) of the Constitution of Kenya, 2010 before convicting him. He relied in the holding in **Hamisi Musudi Ngabere v. Republic HCCR. App No. 121 of 2016** at Mombasa, where the court is alleged to have held that the Appellant is the father of the complainant's child who needs father's care and the sentence of 15 years was reduced to 11 years.

18. The view of this court is that the mother of the child was a child herself when the Appellant sexually abused her and made her pregnant at an early age and thus causing her lifelong psychological trauma. The Appellant cannot claim a benefit of fatherhood out of his criminal acts. The Appellant took advantage of the complainant who had just come back from burying her father and was in a vulnerable emotional state.

19. The Appellant's appeal on sentence cannot stand as the same is lawful. The appeal is therefore dismissed for lack of merit.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF OCTOBER 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

***In the presence of:-***

*Ogwel – Court Assistant*

*Mr. Mulamula for Respondent*

*Appellant – present in person*

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**