



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 72 OF 2019

FESTUS KITSAO CHARO APPELLANT

VERSUS

REPUBLICRESPONDENT

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

J U D G M E N T

The appellant was arraigned before the Chief Magistrates Court at Malindi facing defilement as defined in terms of Section 8(1) as read with 8(2) of the Sexual Offences Act No.3 of 2006 (hereinafter the Act). The particulars of the offence were that in the wee hours of the 23rd of February 2016 at [Particulars Withheld] estate in Malindi Sub-County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **WSB** a girl aged 14 years.

Alternatively, he was charged with the offence of Committing an Indecent Act with a Child Contrary to Section 11(1) of the Act. The particulars alleged that on the same date, place and time, the appellant intentionally and unlawfully touched the vagina of the complainant a child aged 14 years with his penis. The appellant denied the offence, the matter went through a full trial after which he was found guilty and sentenced to 20 years' imprisonment. Having been dissatisfied with both conviction and sentence, the appellant filed timeously filed the instant appellant on the basis of the following grounds:

- (a) That the learned magistrate erred in both law and facts by failing to consider that the prosecution did not prove its case beyond reasonable doubt.***
- (b) That the learned Magistrate erred both in law and facts by relying on evidence of a single witness which was insufficient to warrant a safe and justified conviction.***
- (c) That there were sharp contradictions by the prosecution in contravention.***
- (d) That the learned magistrate erred both in law and facts by failing to adequately consider his defence.***
- (e) That the learned trial magistrate erred in both law and facts by failing to consider the appellant's grounds of mitigation.***

Facts:

The prosecution case was anchored on evidence adduced by four witnesses. The complainant testified as **(PW1)**. She told the court that she was 15 years of age at the time she was violated. That, in the wee hours of the material date, she woke up and went to the toilet and while on her way back, she saw the appellant's door open, the appellant called her in, she entered and he instructed her to remove her clothes. She complied and laid on his bed as per his further instructions. The appellant also removed his clothes. He proceeded to have intercourse with her.

Around the same time, her mother also went to the toilet and went back to the house, she checked on the complainant and found her missing from the house. She informed the complainant's father. She left the appellant's house and went to **Sharon's** place, a neighbor. She was later found, interrogated on her whereabouts and revealed that she was at the appellant's place. The matter was reported to the police that morning. She was taken to the hospital in pursuant to the offence, treatment notes were therefore produced as MFI-1. She was not examined, she was told she was told 15 years of age. Her age was assessed and found to be 14 years. Age assessment report was produced as MFI-2.

She was also issued with a P3 Form at the police station produced in court as MFI-3. She also adduced evidence to the fact that it was not their first time to have sexual relations. She told the court that she knew him for a year and his voice. Upon Cross-Examination she testified that she had not arranged with appellant, that she did not know who locked the door from the outside, that she was Moses's house who had called her, and that he is also a neighbor.

(PW2); the complainant's mother testified that the complainant left the house in the wee hours of the material date purporting to go to the toilet. She followed her after approximately ten minutes and did not find her at the toilet. She went back to the house and inform the complainant's father. **M**, the complainant's uncle was also informed. They woke up neighbors to help look for her. She heard her speak at a neighbor's place. When she was finally found, she attempted to lie that she was hiding on the wall. She was taken by one **Moses**, for questioning after which she revealed that she was with the appellant in his house. They decided to go to Malindi police station to report the incident. She was examined at the hospital. Further that, she was fifteen years of age, in class 6 and that the appellant is a neighbor. Upon cross-examination, Pw2 stated that she is not the complainant's biological mother, she reiterated that the complainant is 15 years of age but she does not know her year of birth, that the complainant was beaten by her father.

(PW3); **Abdalla** who treated the complainant pursuant to an allegation of defilement testified that he found no injuries on her genitalia, her hymen was broken and the lab tests were negative on venereal disease and pregnancy. There were spermatozoa seen, there was penetration done. He therefore produced a P3 form, post rape care and age assessment. She was found to be 14 years.

(PW4); **Cpl: Mariam Hussein** investigated the matter. She testified that she received a call from one Michael who informed her that he had locked up someone on the plot who had defiled a 14 years old girl, a class 5 pupil. The appellant was arrested and **(PW4)** interrogated him. The rest of her testimony is similar to that of **(PW2)**. That marks the end of the prosecution case.

The defence case is premised on a single witness, the appellant. He basically denied the offence. He stated that at the time when the offence was alleged to have been committed, he was sick, suffering from epilepsy and my neighbors are all aware. He took drugs at 9pm the previous day and sleep. He attempted to go for a call of nature but to his surprise he found his door locked from outside. At 9 am the next day, two officers came and arrest him on allegations of having defiled the complainant. They asked for money, but he did not have any, they checked the entirety of his place for the same after which they arrested him. He alleged that he has grudge with the complainant's mother; **(PW2)**. He used to warn her on how she treats her children, the father always chew miraa and he is not responsible. He warned the mother severally and at one time they fell out. She told him to mind the business of his family and he suspect the instant matter was instigated by the falling out.

Submissions on Appeal

The appellant filed submissions in support of his appeal. He submitted that the learned trial magistrate erred in convicting and sentencing him to 20 years' imprisonment as the same was not done within the parameters of the law. He disputed the evidence on voice identification. He argued that the evidence against the appellant depicts mere suspicion. He did not, however, elaborate on this point.

Further that the prosecution did not prove its case beyond reasonable doubt. He referred to the medical testimony tendered by **(PW3)** which alleged existence of spermatozoa inside the complainant's vagina. He therefore refers the court Section 36 of the Sexual Offences Act in which the court, in appropriate cases, may direct samples to be taken on the accused person or such place, for purposes of forensic and other scientific testing including DNA test in order to gather evidence and to ascertain whether the accused person committed the alleged offence.

The appellant basically challenged the aforesaid evidence on the basis that DNA testing, which was not done, could have been conclusive evidence to determine the real perpetrator of the offence. He submitted that his arrest had not correlation with the allegations of defilement. He therefore cited the case of **Michael Mugo Msyoka v Republic (2015) eKLR** in which the Court of Appeal dismiss a defilement matter on the basis of the lack of evidence to prove that there was any contact between the genital organs of the appellant with that of the minor. He also alleged that his matter was poorly investigated. He, therefore, prayed for an acquittal and that marks the end of the appellant's submissions. The State did not file submissions in opposition of the appeal and therefore I shall proceed to analyze the evidence on record, the appeal and the appellant's submission and come up with an independent finding.

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.”

Findings and Determination

The issues for determination in this matter are as regards whether the prosecution proved the charge of defilement to the required standard of proof beyond reasonable doubt and whether there are material inconsistencies and/or discrepancies in the prosecution case. The onus to prove the instant case beyond reasonable doubt resides with the prosecution/respondent.

For the Court to be satisfied that the offence of defilement has been proved, the following three ingredients have to be proved:-

1. the minority age of the complainant;

2. *penetration of the complainant's genitalia;*

3. *positive identification of the perpetrator.*

On the question of penetration, it is defined in terms of Section 2 (1) of the Sexual Offences Act No. 3 of 2006 as follows: -

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

The record show that (PW1) testified on in the wee hours of the material date, she left her house to go for a call of nature after which met the appellant's door open. He called her inside and she complied. He then removed her clothes, instructed her to lie on the bed, removed his clothes and proceeded to have sexual intercourse with her. She did not scream or raise alarm. The complainant told the court that it was not their first time to have sexual intercourse. The P3 form produced before the trial court confirmed that the complainant had a broken hymen. A broken hymen is indicative of sexual penetration. The doctor concluded that the complainant had been defilement. In the absence of evidence to the contrary of the foregoing, I find penetration to have been proved beyond reasonable doubt.

Section 124 of the Evidence Act is however very clear that no corroboration is necessary in criminal cases involving a sexual offence, in fact a Court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth.

On the question of identification of the perpetrator, the complainant testified that the appellant is the perpetrator of the offence. She narrated in detail how he called her to his house and have sexual intercourse with her. The complainant further testified that she had known the appellant very well prior to the incident as they have been staying in the same compound for many years. The matter is one of identification by recognition which lessens the possibility of mistake as far as identification of the appellant as the perpetrator of the offence is concerned. From the foregoing, there is no doubt that the appellant was positively identified as the perpetrator of the offence.

As regards whether the age of the complainant's was proved beyond reasonable doubt, the charge was brought Section 8(1) as read with 8(2) of the Sexual Offences Act. Section 8(1) requires the victim to be child and the definition of a child has been held to be a person under the age of 18 years. In terms of sub-section 2 the age bracket is between eleven years or less and the sentence prescribed is imprisonment for life. However, a quick perusal of the record of proceedings reveals that the appellant having been charged under Section 8(2) as read with 8(2), the learned magistrate proceeded to convict the appellant under Section 8(1) as read with 8(3) whose age bracket and prescribed sentence is between twelve and fifteen and not less than twenty years' imprisonment, respectively. Thus, the section that the appellant was charged with does not tally with the section he was convicted and sentenced with.

The evidence available shows that the complainant was 14 years old at the time the offence was committed. The complainant's mother testified that she was 14 years when the offence happened. The assessment report also gave similar findings. The court after having seen and observed the complainant in court, it was satisfied that the complainant's age was approximately 14 years. This can also be supported by the fact that the minor is known to a class six people. Despite the evidence on the age of the minor not being very conclusive due to the fact that to documentary evidence tendered in support of the oral averments such as child vaccination card or a birth certificate, the complainant was held to be under the age of eighteen.

In view of the decision in **Okeno (supra)**, a further perusal of the evidence on record shows that the complainant was a child under the age of eighteen years when the offence was committed. The evidence shows that the complainant, despite having told the court that she left the house in wee hours of the material date for purposes of taking a call of nature only, one can easily deduce that she had arranged for a meet up with the appellant which did not go as per their plan. When she knew that she was being looked for, she did everything she could to protect the appellant but after some interrogation she gave up the appellant. The complainant also told the court that it was not the first time having sex with the appellant.

It is clear to me that despite being a young lady of age 14, the complainant was behaving like a full grown woman who was already engaging and enjoying sexual intercourse with men. She did not complain about the incidents she had with the appellant in her evidence. The law is that under the Sexual Offences Act, a child below the age of 18 years old cannot give consent to sexual intercourse. However, in the event that the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, she knows what she is doing and such evidence if brought before the court, should benefit the appellant in his grounds for mitigation upon his sentencing.

After having peruse the record of appeal, I have not seen any material discrepancies and or inconsistencies in the prosecution case as alleged by the appellant. Further he neglected to bring to the attention of the court the detail around the foregoing allegation. Thus, there is nothing before me for consideration of that ground of appeal. His defence was adequately put into consideration by the learned trial magistrate. He simply denied the allegations of defilement and lamented on having a grudge with the complainant's mother. The same sounded like nothing but an afterthought and cannot come to his aid at any point in the consideration of this matter. Therefore the appellant was properly convicted of the offence of defilement.

On sentencing, the appellant was tried, convicted and sentenced for defilement as defined in terms Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 which provides as follows:-

Section 8. (1) of the Sexual Offences Act No. 3 of 2006 provide as follows: -

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

And Section 8. (3) of the Sexual Offences Act No. 3 of 2006 provide as follows: -

“(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.”

The appellant herein was sentenced to 20 years’ imprisonment being the minimum sentence for the offence he was convicted. I take note of the decision in the case of **Muruatetu** where the Supreme Court declared unconstitutional mandatory nature of sentence as it takes away discretion of the judicial officer.

It is evident from the perspective of the appellant he is amenable to a lesser sentence if the Court was to apply the intelligible guide in the **Muruatetu** dicta. However, he forgets that **Muruatetu (II)** decision by the Supreme Court shut the doors for any inferior Court attempting to take steps or measures to extend the principles to any other provisions with mandatory sentences.

Recalling its mandate under Section 203 as read with Section 204 of the Penal Code, it became necessary to formulate and lay down the limitation of the principles to any other Penal or Statutory provisions. It was emphasized that the language used in **Muruatetu one**; is to entitle assistance in the sentencing process for those charged with murder contrary to Section 203 of the Penal Code.

Therefore, the sentencing matrix in relation to most offences with mandatory sentences remain to follow legislative prescriptions. Speaking of the offence the appellant was charged with, mandatory sentence is provided for that does not allow discretion below or above the specific sentence. Although, the trends in our jurisdiction in mandatory sentences is a transitory one, towards elimination of the mandatory minimum sentences to permit Courts to consider mitigating factors, such a move in all sentencing scheme was brought to a halt by the Supreme Court in **Muruatetu (II)**. It would be overstating the case to say that the pendulum has swung away from mandatory sentences. The future remains in the realm of unknown. Therefore, in considering the appeal, appellant calling for the application of **Muruatetu** to reduce the sentence would be going against the principle of *stare decisis*.

The effect of it is to dismiss the appeal on sentence as prayed for by the appellant. It follows that the appeal against conviction and sentence must be disallowed in their entirety.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

IN THE PRESENCE OF:

1. THE APPELLANT

2. MR. MWANGI FOR THE STATE