



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO 23 OF 2020

KEN SITATI SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. H. M. Nyaberi (SPM) delivered at Winam

in the Senior Principal Magistrate's Court in Criminal Case No 45 of 2018

on 1st September 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (2) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 20th day of August 2018 at [Particulars withheld] village in Kisumu East Sub county within Kisumu County, he intentionally caused his penis to penetrate the vagina of PMJ (hereinafter referred to as "the Complainant"), a child aged eight (8) 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 20th day of August 2018 at [Particulars withheld] village in Kisumu East Sub county within Kisumu County, he intentionally touched the Complainant's vagina, a child aged eight (8) years.
3. He was tried and convicted by Hon. H. M. Nyaberi, Senior Principal Magistrate for the offence of defilement and sentenced to serve life imprisonment.
4. Being dissatisfied with the said Judgement, on 16th September, 2020 he lodged this appeal. His Petition of Appeal was dated 14th September 2020. He set out nine (9) grounds of appeal challenging both conviction and sentence. He filed two (2) sets of Submissions.
5. His Written Submissions were dated 11th May 2021 and filed on 13th May 2021. His undated Supplementary Written Submission were filed on 23rd June 2021. Notably, the State's Written Submissions were dated 24th June 2021 and filed on 28th June 2021. The Appellant filed further Written Submissions in reply to the Respondent's Written Submissions dated 24th June 2021.
6. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. 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.
8. 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...”

9. 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.

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

I. PROOF OF PROSECUTION’S CASE

11. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7) and (8) were dealt with together under this head as they were all related.

12. The Appellant submitted that the Complainant’s evidence was marred with contradictions that cast doubt to the Prosecution’s case. He argued that while the Complainant stated that he defiled her, it emerged from the evidence on record that she gave PW2 two (2) different versions in that she initially said that she had been defiled in a bathroom and thereafter said he had defiled her in his house.

13. He contended that that was clear indication that she was not truthful and her evidence could not be relied on. He added that her evidence contradicted the evidence of No 90975 PC George Oduor (hereinafter referred to as “PW 5”). He further pointed out that whereas the Complainant testified that she took a bath together with her younger sister at 4.00pm, her aunt, Elizabeth Emelda Ashivaka (hereinafter referred to as “PW 2”) testified that she saw the Complainant and her sister take a bath at 1.00pm.

14. It was his submission that the investigations that were conducted by PW 5 were not conclusive or comprehensive. He added that although the doctors stated that there was penetration on the Complainant, no DNA was conducted to connect him to the Complainant. He questioned how a child aged eight (8) years could comfortably proceed to play after being penetrated as alleged.

15. He relied on the cases of **Karanja vs Republic [2005] eKLR**, **JOO vs Republic [2015] eKLR** and the case of **Elizabeth Waithiengi Gatimu vs Republic [2015] eKLR** cited by Odunga J in **Michael Mumo Nzioka vs Republic** (eKLR citation not given) where the court held:-

“I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused person is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.”

16. In his undated Supplementary Written Submissions, he argued that the age of the victim was not verified through age assessment and that the authenticity of the birth certificate was in doubt. He contended that the identity of the perpetrator ought to have been done by an identification parade since the Complainant indicated that she had been defiled in the bathroom then later mentioned the Appellant. He added that three (3) days after the alleged incident meant that the Complainant could have been defiled by another perpetrator other than him.

17. He further argued that penetration was not proven since the Complainant testified that the Appellant tied his hands and legs, he asserted that one could not be penetrated with legs tied up. In this regard, he relied on the case of **Daniel Onyango Ochar vs Republic** (eKLR Citation not given). He argued further that the information on the PRC (Post Rape Care) form was given by the Complainant’s mother and not the Complainant herself and thus unreliable.

18. He argued that even though the hymen was found missing, the doctor could not tell if that was fresh or old and asserted a missing hymen was not necessarily a result of sexual intercourse. In this respect, he relied on the case of **Queen vs Manuel Vincent Quintanilla (1999) AB OB 769** where the Canadian Court found that a missing hymen could be caused by using tam bones (**sic**), masturbation, injury and medical examination.

19. He argued that Section 26 and 36 of the Sexual Offences Act were infringed in that no DNA test was done and there was nothing linking him to the whitish and yellowish discharge. In that respect, he relied on the case of **Anthony Kiprof vs Republic** (eKLR citation not given).

20. He further asserted that the charge sheet was defective in that it did not indicate the OB number. He added that ‘Mike’ was a vital witness who ought to have been called to testify by Prosecution as it was alleged that he was the person who told the Complainant to go and call him. He placed reliance on the case of **Bukenya and Others vs Uganda (1972) EA 549** among other cases, where the court held that it was a duty upon the director to make or call upon witnesses necessary to establish the truth.

21. He pointed out that the onus was on the Prosecution to displace his defence of alibi. In that respect he relied among other cases the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR**.

22. The State was categorical that the ingredients necessary to prove the offence of defilement were proved beyond reasonable doubt by the prosecution as required of it as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.

23. It pointed out that THE COMPLAINANT was examined by court and found to have understood the proceedings before court being allowed to give sworn evidence. It added that she identified the Appellant as the perpetrator and argued that the identification was one of recognition as he was well known to her. It added that he tied and threatened her into silence. It was its submission that the incident occurred in broad daylight and hence the Complainant had enough time to know that it was him who had defiled her.

24. It further submitted that she testified that on 20th August 2018, he defiled her using his penis and upon PW 2 enquiring from her the following day why she was walking with her legs apart, she disclosed that she had been defiled by the Appellant. It added that Dr Brenda Luvembe, a Clinical Officer at JOORTH (hereinafter referred to as "PW 4") produced in evidence, a PRC form which showed that there was penetration which fact was corroborated by the P3 form.

25. It was its contention that her age was proved as PW 3 testified that she was born on 9th March 2010 and a birth certificate produced by PW 5 giving her age as eight (8) years five (5) months at the material time. It placed reliance on the case of Musyoki Mwakavi v Republic [2014] eKLR where the court held, **"...apart from medical evidence, the age of the Complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense."**

26. It was categorical that Section 200(3) of the Criminal Procedure Code was complied with on 6th November 2019, when a new magistrate took over. It added that the Appellant's defence was unsupported and thus had no basis.

27. The Complainant testified that about noon she was playing with her friends in the field when the Appellant's friend sent her to call the Appellant. She told the court that she proceeded to the Appellant's house and that is when he closed the door and defiled her after telling her to undress and tying her. He then threatened that he would slaughter her if she disclosed the same to anyone. After that, she went back and continued playing with her friends.

28. PW 2 testified that on 21st August 2018 at around noon she noticed the Complainant was walking with her legs apart. When she interrogated the Complainant, she was hesitant to mention the suspect. Upon being pestered she mentioned one Ken, the Appellant herein. She immediately reported the matter to her mother.

29. Justin Leah Ashivaga (hereinafter referred to as "PW 3") is the one who took the Complainant to hospital and reported the matter to Kondele Police Station.

30. PW 4's testimony was that on examining the Complainant, the labia majora was swollen and labia minora was bruised. High vaginal swab showed pus cells and red blood cells and produced the PRC form.

31. PW 5 charged the Appellant on the statement evidence of PW1, PW2, PW3 and PW4 and produced the birth certificate of the Complainant which showed that she was born on 9th March 2010.

32. The Appellant raised a defence of alibi and called two witnesses in support of his testimony. He testified that on the material date, at around 9.30am he had gone to Kibos market to watch a movie and thereafter he visited his friend Gaudencia at her Mpesa Shop between noon and 3pm. He later met his other friends at 5.00pm and walked home. On 22nd August 2018 he was confronted by the Complainant's mother on an allegation of defiling her daughter.

33. 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."

34. 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.

35. The Appellant's assertions that the Complainant ought to have been subjected to age assessment was immaterial as a birth certificate is an absolute proof of age by law unless proven otherwise. The age of the Complainant was settled by the birth certificate produced which showed that she was born on 9th March 2010. In any event, in the case of Musyoki Mwakavi vs Republic (Supra), it was held that a guardian and common sense could assist in determining the age of a victim. The Learned Trial Magistrate conducted a *voire dire* examination before he took the Complainant's evidence on oath. This court was thus satisfied that the Complainant was a child of tender years within the meaning of the law.

36. On the issue of penetration, Section 2 of the Sexual Offences Act defines penetration as:

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

37. This position was fortified in the case of Mark Oiruri Mose vs R [2013] eKLR when the Court of Appeal stated that:-

'...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....'

38. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic [2014] eKLR** held as follows on the aspect of penetration:

"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."

39. Based on the above, the Appellant's argument that there was absence of spermatozoa found on examination of the Complainant's genitalia could not outweigh the Prosecution's case. It was not necessary that there be spermatozoa for defilement to have occurred and/or proven.

40. The record showed that the Complainant testified that the Appellant herein who was known to her removed her clothes and inserted his penis into her organ that she used to urinate. The medical evidence indeed showed that the labia majora was swollen and labia minora was bruised. High vaginal swab showed pus cells and red blood cells. This court was therefore satisfied that penetration was proved.

41. The record further indicated that the Complainant mentioned the Appellant's name as "Ken". In his evidence, he admitted that he was known to the Complainant and he knew her as they were neighbours. The incident occurred during the day when the circumstances were conducive for a positive identification. His identification was by recognition. An identification parade was unnecessary in the circumstance. In the case of **R-vs- Turnbull & Others [1976] 3 All ER 549** the court stated:-

"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

42. The testimony of a minor of tender age must be approached with care. In this regard, this court fully associated itself with the holding in the case of **Musikiri vs Republic (1987) KLR 69** where it was held as follows:-

"The necessity of material corroboration of the evidence of a child of tender years is, under Section 124 of the Evidence Act (Cap 80), an indispensable condition to a conviction of a person charged with an offence."

43. Be that as it may, Section 124 of the Evidence Act Cap 80 (Laws of Kenya) stipulates as follows:-

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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."

44. The Appellant questioned how a child could play after being defiled. This was a reasonable observation. However, it was not entirely improbable behavior as victims of sexual offences can behave in the strangest of ways in what is referred to as trauma bonding. Notably, the Complainant testified that she used to go to the Appellant's house daily. He did not deny the same.

45. Further, although the Appellant argued that when asked why she was walking with her legs apart the Complainant first replied that she had been defiled at the bathroom and then later gave a different version that he was the one who defiled her did not draw any contradictions. She testified that the Appellant had threatened her into silence. It was reasonable to expect that a child at that age would be afraid of disclosing to a third party what had actually transpired.

46. Though young, the court found that the Complainant was intelligent enough and appreciated the need to speak the truth. She recognised the Appellant as Ken and was emphatic that he was the one who defiled her. This court also noted that her evidence was corroborated by the medical evidence that was adduced by PW 4. Of critical importance was that the Complainant was walking with her legs apart the following day after the incident and medical examination showed that her genitalia had injuries.

47. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant. The three (3) ingredients required to sustain a conviction in a charge of defilement were conclusively proved by the prosecution before the trial court.

48. On the other hand, the Appellant's defence of alibi was not sufficient to outweigh the evidence tendered by Prosecution. It was his responsibility to call his friend Michael, if he had such a friend or relative, to support his case and not for the Prosecution to have called him. The Prosecution was under no obligation to assist him in proving his case.

49. Going further, his argument that the charge sheet was defective for omitting the OB number was not fatal to the case. It did not go to the root of his case and/or cause him any prejudice. If he suffered any prejudice, then he did not demonstrate the same to this court. Indeed, under Article 159(2)(d) of the Constitution of Kenya, 2010, states courts are mandated to administer justice without undue regard to procedural technicalities.

50. Consequently, this court found that the Learned Trial Magistrate directed his mind to the applicable law against the facts that were placed before him and reached the correct conclusion.

51. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7) and (8) were not merited and the same be and are hereby dismissed.

II. SENTENCE

52. The Appellant's Ground of Appeal No (9) was dealt with under this head.

53. The Appellant submitted that pursuant to the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, he was not bound by the mandatory minimum sentence. In this respect he also relied on the case of **Christopher Ochieng vs Republic [2005] eKLR** where it was held that mandatory minimum sentences disregard all individual characteristics and such a system can result in gross disregard of the right to dignity.

54. On its part, the State opposed the Appellant's appeal on sentence. It argued that the Trial Court considered the case of **Francis Karioko Muruatetu & Another vs Republic(supra)** before imposing the sentence and therefore the sentence meted upon the Appellant was lawful.

55. As seen hereinabove, the birth certificate was proof that the Complainant was born on 9th March 2010 which therefore meant that she was eight (8) years at the material time. This court was therefore satisfied that Complainant's age was proven and relied on the decision in **Musyoki Mwakavi vs Republic [2014] eKLR** 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**).

56. 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.”

57. Notably, Section 8(2) of the said Act provides that:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

58. A reading of the Judgment of the Trial Court showed that the Learned Trial Magistrate considered the mitigation by the Appellant. It was therefore the finding of this court that the sentence imposed on the Appellant by the Learned Trial Magistrate was not unlawful, harsh and/ or excessive warranting any interference and/or disturbance by this court.

59. In the premises foregoing, this court found that the Appellant's Ground of Appeal No (9) was not merited.

DISPOSITION

60. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 16th September 2020 was not merited. The conviction and sentence be and are hereby affirmed as it is safe to do so.

61. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 2021

J. KAMAU

JUDGE