



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 63 OF 2019

BONIFACE KARORI ALIAS RASTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. I. Ruguru, Senior Principle Magistrate, delivered on 31st day of May 2016 in Mombasa Chief Magistrate Court Criminal Case No. 478 of 2015)

J U D G M E N T

1. The appellant Bonface Karori alias Rasta preferred this appeal from the Judgment of Hon. I. Ruguru SPM delivered on 31st day of May 2016 in which he was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that the Appellant on the 14th day of March 2015 at [Particulars withheld] area of old lower port location within Mombasa County intentionally and unlawfully caused his penis to penetrate the anus of the Complainant F.A. a boy aged 5 years old. On conviction the Appellant was sentenced to serve life imprisonment.

3. The grounds of appeal filed in the petition of Appeal are as follows:-

i. That the learned trial Magistrate erred in law & fact by convicting the Appellant without considering the offence of defilement was not proved beyond any reasonable doubt.

ii. That the learned trial Magistrate erred in law & fact by convicting the Appellant without considering that Section 36(1) of the Sexual Offences Act was not put into consideration.

iii. That the learned trial Magistrate erred in law and fact by convicting the appellant without considering that the life imprisonment imposed upon him was excessive.

iv. That the trial Magistrate erred in law & fact by convicting him without considering his reasonable defence.

4. The prosecutions case was that PW 4 Imran Mohamed Ali on 14th March 2015 at 2.00pm saw the Complainant emerge from the Municipal dumpsite – a lorry stationed at the old town and he was carrying a box containing toys. When he asked PW 1 where he was from he said he had come from picking toys from Rasta but he started crying and told him Rasta had inserted his penis into his anus. PW 4 took complainant to his father PW 2 and told him what had happened PW 4 said F – PW 1 was known to him as their neighbour.

5. PW 4 called PW 1's mother, PW 3 and Chief and Rasta the Appellant herein was escorted to the police station with Assistance Chief after he was taken to PW 2's shop. PW 4 said the Appellant had lived in the dumpsite for a long time and he started seeing him there when he was 10 years. He said there was no other Rasta at the dumpsite.

6. PW 1 testified that Rasta the Appellant grabbed him and dragged him behind the ladder for the lorry removed his short and did 'tabia mbaya'. That Appellant made him lie on his abdomen when he did 'tabia mbaya' on him. He said Appellants dudu was inserted behind where he excretes with. That he screams but no one came and Rasta gave him his short to wear.

7. That after he wore his short he saw PW 4 – Abed who asked what he was doing there and he explained that Rasta had put his dudu in his behind. That Abed arrested Rasta who was still at the lorry. That Chief came and tied Rasta and he was taken to police station and the

Complainant was taken to hospital. PW 1 said it was not the 1st time Appellant defiled him. He said he had done it during school holidays but he didn't report.

8. PW 2 reiterated what PW 4 told the court. PW 3 the mother of the Complainant testified that Kirikuu went to her on 14/03/2015 at 1.00pm and told her his father was calling her at the fish market. That she went and found a crowd of people. That the father of Kirikuu told her son had been seen coming from under the lorry for rubbish and that Rasta the Appellant had defiled him. That on interrogating F he said Rasta had defiled him severally. That PW 1 identified Rasta and Chief came to the scene and escorted him to Central Police Station.

9. That police advised her to take the Complainant to Coast General Hospital. She was escorted by P.C. Eunice. That PW 1 was examined and treated and P3 & PRC form filled and handed to P.C. Eunice. PW 3 said that the Complainant could not hold his bowels and could boil his clothes regularly and she had suspected something was wrong as he passed stool uncontrollably. She said she knew the Appellant who was based at the dumpsite. She said PW 1 used to go home with gifts such as crayons and pencils from the Appellant. She suspected Appellant used the gifts to defile the Complainant.

10. Dr. Ibrahim examined the Complainant and filled P3 form which was produced by Dr. Mathla Mohammed. On examination the Complainant's anal region had lacerations and it was assessed that weapon used was blunt.

11. PW 6 Chief Ahmed Abdulzak received a phone call on 14/03/2015 at 2.00pm that a mob was buying for a suspect's blood at Kibokoni. He rushed to the scene and found a crowd of people and appellant had been tied with ropes and was about to be lynched. That he intervened. He was told the Appellant had defiled a child. That PW 6 escorted Appellant to police station with help of members of public and appellant was placed in custody.

12. PW 7 Sergeant Khaman Abdullahi testified that on 14/03/2015 he was at the Central Police Station when a crowd of people went with a small boy and a suspect the Appellant herein on allegation of defilement and Sergeant Eunice who was at the gender desk booked report and investigated matter as initial investigating officer. That when Sergeant Eunice went to Kiganjo Training School PW 7 took over as they had investigated together.

13. PW 1 was escorted to Coast General Hospital where he was examined and his age assessed and P3 & PRC forms filled after the doctor confirmed that he had been defiled. PW 7 said he visited scene in-company of the Complainant and his mother.

14. When prosecution case was closed and Appellant placed on his defence, he gave sworn statement and said that Abed & Imran went to his place of work with Chief and arrested him. He said he owed them money but he was unable to pay as he didn't have money. He said they had warned to teach him a lesson if he failed to pay that money. He said no one saw him defile the complainant. He confirmed his street name is Rasta. He confirmed he was stationed at the dumpsite where he was on 14/03/2015. He said he knew the Complainant physically and used to see him.

15. Upon weighing the evidence tendered by prosecution witnesses and the Appellants defence the trial Magistrate found Appellant guilty and convicted him and he was sentenced to serve life imprisonment. The appeal herein was canvassed by way of written submissions. The Appellants submissions were that he was denied a right to fair trial contrary to Article 25(1) of the Constitution of Kenya 2010 as charge sheet was amended. Amendment was in respect to age of PW 1 Complainant from 6 years to 5 years after his age had been assessed. Amendment on 23/2/2016.

16. The Appellant argued that the 5 prosecution witnesses who had testified before amendment had exonerated him. He said although the court indicated that Appellant was at liberty to recall any witnesses he was not allowed to recall any of the prosecution witnesses. He said he was not allowed to cross examine prosecution witnesses on the new evidence on the amended charge sheet and that he was prejudiced as the evidence that formed that basis of his conviction was not challenged.

17. The Appellant relied in the holding in **Ann Njogu & 5 Others vs Republic** H. C. Misc. Application No. 55 of 2007 where it was held:-

“...there is yet no known cure for the nullity that result from attempted prosecution of any person in this country, once its shown that his/her constitutional and fundamental rights were violated”.

18. The Appellant also submitted that he told the court that he was illiterate and was not aware of what was taking place in court and needed representation but no action was taken by the court. He said the witness statements supplied to him were in English language which he didn't understand. He said he did not participate in trial. He argued that he was not informed of the right under Article 50(2) (h) of the constitution that he was entitled to legal representation assigned by state and at state expense, if substantial justice would otherwise result. He argued that the appeal should be allowed as fair trial can only be attained if the rights under Article 50 are not violated.

19. The Appellant submitted further that the proceedings against him were a nullity as coram was not indicated that PW 2 and PW 3 presented their evidence without anyone in court and it is not clear who took and recorded the evidence.

20. The appellant also argued that PW 1 whose evidence was relied onto find him guilty was not a truthful witness. He said evidence of PW 1 needed corroborated to be relied upon. That the trial Magistrate didn't give reasons for believing PW 1. The Appellants contention is that Abed who fined Complainant wearing short ought to have reported the alleged repeated defilement but he didn't. The Appellant claimed that Abed PW 4 had a grudge against him which the prosecution ought to have investigated. Appellant wanted doubt created by evidence of PW 1 & PW 2 to be resolved in his favour.

21. The Appellant argued that his reasonable shown defence was not considered by the trial Magistrate and therefore this carriage of justice was occasioned. He prayed that appeal be allowed.

22. The Respondent on the other hand filed submissions in support of the conviction and sentence for reasons ingredients of the offence of defilement namely penetration, age of complainant and identity of the perpetrator were proved by the prosecution beyond all reasonable doubt.

23. The Respondent counsel argued that the trial Magistrate found rightly that Appellants defence was a mere denial. It was submitted there was no need to conduct DNA as it was held in **AML vs Republic (2012) eKLR** that “fact of rape or defilement is not proved by DNA test but by way of evidence”.

24. It was also submitted that the mandatory sentence under section 8(2) of the Sexual Offences Act is life imprisonment and the sentence meted by the trial Magistrate was lawful.

25. The Respondent submitted that issues raised in appellants submissions were not raised on the grounds of appeal. The prosecution argued that when Appellant complained he was illiterate prosecution witnesses testified in Kiswahili language which he understood and inference that he didn't understand the proceedings is therefore rebutted.

26. On whether the proceedings were a nullity, it was submitted that the trial Magistrate signed off the proceedings with his name and rank and failure to indicate coram was merely an oversight which did not prejudice the appellant since he was able to cross examine the witnesses on that day.

27. On whether the Complainant was untruthful witness, the Respondent submitted that proviso under Section 124 of Evidence Act permits the court to convict in Sexual Offences on evidence of the victim if the court deems the witness to be truthful. It was submitted that P3 proved injuries suffered in complainants anal region on being defiled and the other witnesses corroborated what PW 1 said and same was not controverted during cross examination.

28. The Respondent argued that defence did not put any holes in prosecution case. That PW 1 was not related to the people alleged to have grudge with the appellant and the appellant didn't raise issue of indebtedness with them during cross examination and therefore his defence was an afterthought.

29. On sentence, it was argued that Complainant was 5 years old and the sentence was meant to keep of sex predators from young children. That in this case the Appellant had severely defiled the child and he didn't raise any issues for consideration in his mitigation. The Respondent urged the court to uphold the conviction and sentence.

30. Having re-evaluated and re-examined the record of the lower court as against the grounds of appeal and submissions as is mandated of the 1st Appellate court as is set out with holding in **Okemo vs Republic**, the issues that fall for determination are:-

i. Whether the prosecution proved beyond all reasonable doubt that appellant committed the offence herein by proving all ingredients of the offence namely:-

- **Age**
- **Penetration**
- **Identification of perpetrator**

ii. Whether the appellant understood the proceedings.

iii. Whether the proceedings in which appellant was convicted was a nullity.

iv. Whether the appellants defence was not considered.

v. Whether sentence against the appellant was harsh and excessive.

31. The ingredients of the offence of defilement were proved by the prosecution beyond all reasonable doubt. The complainant's age was assessed to be 5 years old and that led to amendment of the charge sheet to indicate the right age. This amendment didn't occasion any prejudice to the appellant because the age fell below the 11 years under Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

32. The complainant was examined by Dr. Ibrahim who found his anal area was lacerated. It was confirmed that the complainant's anus was penetrated by a blunt object. The complainant said that his anus was penetrated by appellant's dudu. He said the appellant had severely sodomized him. The complainants mother said she had suspected the complainant had a problem as he soiled his clothes regularly and his bowel was loose. Penetration was therefore proved beyond all reasonable doubt.

33. On identity of the assailant, PW 4 testified that he saw the 5 years old complainant come from the dumpsite and was carrying a box containing toys. When he asked the complainant where he was from he said he had gone to pick toys from Rasta from the dumpsite. That complainant then started crying and told PW 4 that Rasta had inserted his anus. PW 4 reported to his father PW 2 and PW 3 the mother of PW 1 and the Chief – PW 7 were called and Rasta the appellant herein was arrested and escorted to Central Police Station as the Complainant was taken to hospital.

34. PW 4 saw Complainant come from dumpsite & PW 1 said Appellant had sodomized him and that it was not the 1st time. The Appellant

had been giving him toys, crayons and pencils and in turn sodomized him leading to him having lose sphincter muscles that made him soil his clothes regularly. He had no control of long call of nature.

35. Prosecution witnesses confirmed it was only the Appellant who lived at the dumpsite and that there was no other Rasta who lived there. Appellant alleged that Imran – PW 4 and Abeid of PW 2 demanded for their 2000/= which he didn't have and decided to teach him a lesson but PW 2 said that Appellant didn't owe him anything and that he didn't sell any gumboot to the Appellant. PW 2 said he didn't take appellants phone and that he had no grudge against him. The Appellant didn't tell PW 4 that he was charged because he owed him money.

36. I do find as the trial Magistrate did that this defence is unbelievable and that PW 2 and PW 4 – father and son respectively were not related to the Complainant so as to use him to fabricate the Appellant. The complainant was confirmed to have been sodomized as shown in P3 & PRC forms.

37. On whether the Appellant understood the language of the court and that he was illiterate the record shows that proceedings were conducted in Kiswahili language which he understood and he cross examined all the prosecution witnesses very effectively.

38. On sentence the Appellant was sentenced to serve life imprisonment in consideration of the gravity of the offence. The Appellant did not submit on the issue of sentence which in ground 3 has claimed was excessive. Life imprisonment is the sentence provided for under Section 8(2) of the Sexual Offence Act. It is couched in mandatory terms and the trial Magistrate made a lawful finding in passing the same against the Appellant. However there is an emerging trend that life sentence should be quantified in terms of years and I do therefore substitute the sentence of life imprisonment to 30 years to run from 16th March 2015 when appellant was arraigned in court.

39. The Appeal lacks merit and the same is dismissed save that life imprisonment is quantified in terms of years. Right of Appeal – 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST 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