



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 120 OF 2019

SAMMY WAFULA NYONGESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. P.K. Mutai,

Resident Magistrate, delivered on 6th day of October 2017

in Kwale Chief Magistrate Court Criminal Case No. 420 of 2016).

J U D G M E N T

1. The appellant Sammy Wafula Nyongesa was an accused in Kwale SPMs Court Criminal Case No. 420 of 2016 where he faced a charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

2. Particulars of the offence were that Sammy Wafula Nyongesa on 2nd day of April 2016 at [Particulars withheld] Location in Kwale County within Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of MAA a child aged 7 years.

3. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006. Upon weighing the evidence of 5 prosecution witnesses against the evidence of the appellant the trial Magistrate found him guilty and he was convicted and sentenced to serve 30 years imprisonment.

4. The Appellant was aggrieved by the conviction and sentence and preferred the appeal herein on the following grounds:-

i. That the learned Magistrate erred in law & fact by not

considering the offence of defilement was not proved beyond every reasonable doubt.

ii. That the learned trial Magistrate erred in law & fact by

not considering that the evidence adduced in court by the prosecution does not link the appellant with this offence.

iii. That the learned trial Magistrate erred in law & fact by

not considering that the prosecution witnesses were incredible ones hence the conviction was unsafe.

iv. That the trial Magistrate erred in law and fact by not

considering appellants reasonable defence.

5. In brief the prosecution case was that the Appellant the neighbour to PW 1, PW 2 & PW 3 called PW 1 into his house and defiled her. PW 2 noticed her sister was not happy and when he inquired PW 1 told her the Appellant had defiled her. Since then mother was living away and only visited during the weekend they waited for their mother who on arrival noticed PW 1 was walking with difficulties and PW 2 told her that the Appellant had defiled PW 1. PW 1, PW 2 & PW 3 identified the Appellant as their neighbour who was known as Baba Bryan or

Sammy.

6. PW 1 was taken to hospital and when PW 4 examined her he found her hymen was broken and there were lacerations on her private parts with pus cells and foul smell. When matter was reported to police PW 5 conducted investigations and when PW 1 identified the Appellant he was arrested and charge.

7. The Appellant when placed on defence denied knowing the complainant and her mother. He claimed he had no wife or child by the name Bryan. He said that the real Baba Bryan was released at the police station when his relatives paid money. This appeal was canvassed by way of written submissions.

8. The Appellants submission argued all grounds together without distinguishing each one by one. He relied in the holding in **Maina vs Republic [1970] EA 370** where it was held that in every case of an alleged sexual offence the Magistrate should warn himself that he has to look at the particulars facts of the case having given full weight to the warnings, he comes to the conclusion that in the particular case the woman or girl without any really doubt is speaking the truth then the fact that there is no corroboration need not to stop his conviction.

9. He argued that the incident was alleged to have taken place at night and that PW 1 & PW 2 didn't tell the court what sort of light was available at the scene where defilement took place to identify him as the perpetrator with certainty. He also argued that the complainant didn't identify him by voice and that circumstances obtaining would not have enabled her to identify the assailant.

10. The Appellant also argued that considering that offence was reported after one week, malice & fabrication cannot be ruled out in light of the inconsistencies and contradictious in the prosecution case. The Appellant further submitted that the evidence of Dr. Mohamed Mazalla was not specific as he didn't reveal type of Sexual disease transmitted to complainant and there was no treatment given. He said he was also not examined to confirm if he was infected with any sexually transmitted disease. That the evidence of the doctor does not connect him to the offence in anyway.

11. The Appellant also submitted that discrepancies in the evidence of PW 1, PW 2 and the doctor were not considered by the trial Magistrate and that it was not safe to convict on uncorroborated testimony of the complainant. He said he told the court the truth which the court should evaluate independently and come up with an independent conclusion and allow the appeal.

12. In regard to sentence he relied in the case of **Benrodgers Muthui vs Republic HCRA No. 59 of 2018** at Mombasa where it was held that it was no longer necessary to be tied to the mandatory minimum sentences but in sexual offences act by dint of the holding in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**.

13. He argued that 30 years sentence imposed by the trial court was harsh, unjust & excessive in the circumstances of the case. He urged the court to substitute the sentence with a lenient sentence. He also urged the court to consider the period spent in remand custody prior to conviction under Section 333(2) Criminal Procedure Code.

14. The Respondents submissions on the other hand was that the evidence of PW 4 corroborated the complainant's evidence that the Appellant inserted his 'dud' into hers. It was also submitted that the age of the complainant was proved by production of the immunization card which showed the complainant was born on 19th May 2009.

15. On identity of the perpetrator the Respondent submitted that the complainant identified the Appellant as her neighbour and therefore well-known to her that PW 2 & PW 3 as well as PW 5 confirmed that the Appellant was known as Baba Bryan or Sammy in the area. It was also submitted that the incident happened at around 5.00pm and therefore there was light for positive identification.

16. The Respondent argued that all ingredients of the offence of defilement was proved by the prosecution's evidence which was cogent, consistent and uncontroverted. It was argued that there was nothing to question the character or credibility of the prosecution witnesses and that the trial court considered both the prosecution and the defence case and there was no other suspect to be investigated except the Appellant. It was argued that his defence of alibi was found to be an afterthought.

17. On issue of sentence it was submitted that the complainant was a 7 years old child and the incident traumatized and left a permanent psycho-traumatic experience on her hence the stiff penalty was intended to deal with the serious societal problem of sex predators of young children. It was the Respondents case that life imprisonment imposed by the law was deterrent and that in **Benjamin Lihevu vs Republic [2020] eKLR** the Court on Appeal upheld the life sentence for the same was befitting in the circumstances of the case.

18. Having re-evaluated the evidence in the trial Magistrates court as well as the judgment of the trial Magistrate as mandated of the 1st Appellate court as set out in the holding in **Okemo vs Republic**, the issues that arise for determination are:-

a) **The Age of the complainant was proved.**

b) **Whether it was proved that penetration occurred.**

c) **Whether perpetrator of the offence was identified.**

19. On 1st issue the Complainant and her mother PW 3 gave her age as 7 years old and immunization card showing date of birth was produced. The age of the Complainant was therefore proved. Whether perpetrator was identified and whether penetration was reproved, PW 1 reported to her sister PW 2 that Baba Bryan their neighbour had put his 'dudu' in hers. PW 1 identified Baba Bryan and he was arrested. PW 2 & PW 3 confirmed Baba Bryan was the Appellant herein.

20. The complainant was taken for medical examination and PW 4 found that her hymen was absent and she had lacerations on her private part. Laboratory tests conducted reveal multiple pus cells and foul smelling discharge. PW 4 attributed the multiple pus cells and foul smelling discharge to the untreated laceration and wet nature of the injured area.

21. The evidence of the prosecution that complainant was defiled is overwhelming. The identity of the perpetrator is also clear. When the Appellant cross examined PW 5 the investigating officer it didn't come out that another person also known as Baba Bryan had also been arrested but later released. It is Appellant who was identified and arrested. He was the Baba Bryan who defiled his neighbour 7 years old child. A child whom he ought to have protected being her mother was working away from home.

22. The offence occurred around 5.00pm and not at night and the issue of light to enable PW 1 identify the Appellant does not arise. There was also no reason why he would have been identified by voice recognition but at 5.00pm there is still light.

23. The Appellant claimed that the fact that report was made one week after offence had been committed there was likelihood of malice & fabrication but he didn't give particulars of malice or reason why he would be fabricated by a 7 years old child.

24. This court finds that the trial Magistrate properly weighed the evidence prosecution as against the appellants defence and arrived at the correct conclusion that the Appellant defiled the complainant.

25. On the issue of sentence, Section 8(1) as read with Section 8(2) of the Sexual Offence Act provides that a person who is found guilty shall be imprisoned for life. The Appellant was sentenced to serve 30 years imprisonment. The Appellant relied on the holding in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** to argue that the mandatory nature of the death sentence was declared unconstitutional.

26. However following the guidelines issued by the Supreme Court on 6/7/2021 that the holding related to offence of murder specifically this court finds that the Appellant cannot benefit from the holding therein unless and until a petition is presented in respect to other offences that carries the death penalty and/or mandatory minimum penalties for consideration by the High Court as to their constitutionality in relation to courts discretion in sentencing.

27. The court will however restrain from enhancing the sentence and leave it at 30 years imprisonment. The upshot is that the appeal has no merit and is dismissed.

28. Orders accordingly. The Appellant has 14 days right of appeal.

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