



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.1 OF 2020

BENARD KIPTOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment, conviction and sentence by Hon B.R. KIPYEGON (SRM) in Kericho Criminal Case No. 15 of 2016 delivered on 31/10/2018)

JUDGMENT

1. The Appellant was charged and convicted with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act (SOA) No.3 of 2006 and he was sentenced to 20 years imprisonment.
2. The particulars of the charge were that on the 5th day of February, 2016 in Kericho West District within Kericho County, the Appellant willfully and intentionally caused in his penis to penetrate the anus of MC a girl aged 13 years.
3. The prosecution called a total of six (6) witnesses whose evidence was that PW1 (MC) the complainant, a girl aged 14 years was sent by her mother on 5/2/2016 at 4 p.m. to get pineapples from her grandfather's home.
4. PW1 said she did not find her grandfather and she went to her friend's home. She did not find her friend also and when she was going away, she met BERNARD (the Appellant) who offered to take her home on his motorbike.
5. When they reached Kapsoit, the Appellant refused to take her home. He took her to a certain house near Kapsoit in a residential plot and he left the motorbike beside the road. The house was one room with a bed.
6. The complainant further said she struggled with the Appellant and her skirt and her panty got torn. He put her on the bed and put his penis in her anus and defiled her. The complainant said when the Appellant was done, she dressed up and left. It was still day time. She went to Kapsoit where she later met her father at nightfall and he slapped her. He got her a motorbike and they went home where she was again beaten by her father for being at Kapsoit at night. The complainant said she told her big sister what happened and her big sister told her mother what had happened and the following day she was taken to hospital.
7. **PW 3 ROBERT KIPYEGON LANGAT**, a Clinical Officer at Kericho District Hospital said he examined the complainant on 8/2/2016 said she had bruises on the left shoulder and a 0.3 cm cut on the anal canal but the anal sphincter was intact. He said the injury suggested anal penetration.
8. The Appellant said in his statement of defence that the victim was forced to testify against him by her father and further that he was assaulted by the investigating officer (PW 6).
9. The trial court found the Appellant guilty as charged and sentenced him to 20 years imprisonment. The Appellant has now appealed to this court against both conviction and sentence on the following grounds;

(i) THAT the Appellant was convicted without sufficient evidence to support the charge of defilement and without evidence of the scene.

(ii) THAT the Appellant was not medically examined as stipulated in section 2 (i) of the SOA.

(iii) THAT the trial court did not consider the defence case.

10. The parties filed written submissions in the appeal. The Appellant submitted that he was convicted and sentenced to 20 years in prison without considering the mitigating circumstances in that the Appellant is a first offender and a sole bread winner of his family.

11. The learned counsel for the Appellant further submitted that the Supreme Court held in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER VS REPUBLIC SC PET NO. 16 of 2015 [2017] eKLR** that mandatory sentences are unconstitutional as they deprive courts of their legitimate jurisdiction to exercise their discretion in sentencing.

12. The Appellant further submitted through his Advocate that the court did not determine whether penetration occurred and therefore the evidence on record did not meet the standard required that is beyond reasonable doubt.

13. The Respondent opposed the appeal and submitted that the evidence of the complaint was corroborated by that of her father who found her at Kapsoit at night and took her home. The complainant narrated to her big sister what had transpired and her sister told her mother and the complainant was taken to hospital the following day.

14. The Respondent further submitted that PW3, the Clinical Officer who examined the complainant confirmed she had a tear on her anal opening measuring 0.3 cm which suggested forceful and strong penetration.

15. The Respondent also submitted that subjecting the Appellant to medical examination to prove that he committed the Sexual Offence is not a mandatory requirement.

16. The Respondent also submitted that the defence evidence was considered in paragraph seven of the judgment and further that a visit to the scene was not necessary as the complainant gave evidence that the Appellant took her to a residential unit at Kapsoit Center where the incident took place.

17. The Respondent said in their submissions that the prosecution evidence was corroborative, consistent and based on direct evidence and further that the prosecution proved its case to the required standard and therefore the conviction was safe and the court should therefore uphold the sentence.

18. This being first appeal, it is the duty of this court to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the conviction while bearing in mind that the trial court had the advantage of seeing the witnesses (see **OKENO VS. REPUBLIC [1972] EA 32**).

19. The issues for determination in this appeal are as follows;

(i) Whether the prosecution proved their case to the required standards.

(ii) Whether the sentence meted on the Appellant is lawful.

20. On the issue as to whether the prosecution proved their case to the required standard, there are three elements that the prosecution must establish to prove a charge of defilement.

(i) Penetration.

(ii) Identity of the Appellant.

(iii) The age of the complainant.

21. On the issue of penetration, the complainant gave clear evidence how the Appellant took her to a residential unit at Kapsoit Centre and after undressing her and tearing her skirt and panty he inserted his penis into her anus. I find that the medical evidence corroborated the complainant's testimony.

22. The complainant also testified that she knew the Appellant well as he used to operate a motorcycle. The Appellant was properly identified as he was a person well known to the complainant and the incident occurred in broad daylight.

23. I also find that the age of the complainant was proved by production of the clinic card which confirmed that the complainant was born on 26/2/2003 and therefore she was 13 years and 11 months (almost 14 years). The definition of a child is that given in the Children Act as follows:- "**child**" means any human being under the age of eighteen years.

24. In the case of **FAPPYTON MUTUKU NGUI VS. REPUBLIC [2012] eKLR** Ngugi J. stated as follows: "**conclusive**" proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

25. This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of **GEORGE OPONDO OLUNGA VS. REPUBLIC [2016] eKLR**, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

26. I therefore find that the prosecution proved its case to the required standard in criminal cases.

27. On the issue as to whether the mandatory sentence of twenty (20) years is lawful, I find that in the Sexual Offences Act, the severity of the sentence is determined by the age of the victim.

28. In the Court of Appeal case of ***KAINGU KASOMO VS. REPUBLIC CRIMINAL APPEAL NO. 504 OF 2010*** the Court stated that: ***“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.”***

29. Similarly, in ***HADSON ALI MWACHONGO VS. REPUBLIC [2016] eKLR***, the Court of Appeal stated that: ***“The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim”***

30. In the case of ***ALFAYO GOMBE OKELLO VS. REPUBLIC CRIMINAL APPEAL NO. 203 OF 2009 (KISUMU)*** the Court of Appeal stated as follows; ***“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).”***

31. Counsel for the Appellant submitted that the mandatory nature of the penalty takes away the power of the court to exercise its judicial discretion in sentencing. However, I find that this does not hold in a defilement case. The Supreme Court issued directions on 6th July, 2021 highlighting that the decision and guidelines in the Francis Karioko Muruatetu (*supra*) only apply to murder cases and further that the decision did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.

32. I therefore find that the sentence meted is lawful and the conviction is safe. I accordingly dismiss the appeal and uphold both the conviction and sentence.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 20TH DAY OF DECEMBER 2021.

A. N. ONGERI

JUDGE