



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEALS NOS. 102 AND 182 OF 2018

(From Original Conviction and Sentence in Hamisi Senior Resident Magistrate's Court

Sexual Case No. 32 of 2016 (Hon. Dennis Ogal, RM) of 9th July 2018)

MOSES MUSASA EDAVILE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. Dennis Ogal, Senior Resident Magistrate, of defilement contrary to section 8(1), as read with section 8(2), of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya, and was accordingly sentenced to life imprisonment. The particulars of the charge against the appellant were that between 3rd October 2016 and 6th October 2016, at [Particulars withheld] Village, Sabatia Sub-County, Vihiga County, he intentionally and unlawfully caused his penis to penetrate the vagina of SI, a child aged eleven (11) years. The appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called six (6) witnesses.

2. SI was the first to take the witness stand, as PW1. She was the complainant. She testified to be a Standard Three pupil at [Particulars withheld] Primary School. She gave a sworn statement and was cross-examined. She stated that on 3rd October 2016, as she was going to school, and after she got near the home of the appellant, the appellant called her and as they were talking, he pushed her into his house, took her to his children's bedroom and asked her to remove her clothes, which she did and lay on a bed. He removed his clothes, applied saliva to her vagina, and inserted his penis into it. After he was done, he gave her Kshs. 50. 00 and told her to go to school. She went to school and told no one there, but she mentioned it to her mother when she got home, who advised her to keep it to herself. She went through the same routine the next morning, 4th October 2016. As she was by passing the appellant's home, he waylaid her pushed her into his house and defiled her, and gave her Kshs. 20.00. She informed her mother, who advised her to not tell anyone. She also gave her mother the money to keep for her. The same thing happened on 6th October 2016. She was given Kshs. 60.00, which she gave to her mother. She later made a report to one of her teachers, to the effect that the appellant had defiled her. The teacher informed her mother and then the teacher and her mother took her to hospital. She was not examined. Her mother spoke to a nurse and they went home. Her mother insisted that the appellant had not done anything wrong to her. In the evening the complainant reported to her father, who informed her grandmother, who took her to hospital. At the hospital, the doctor confirmed that she had been defiled. She then reported at Mudete Police Station and statements were recorded. She identified the appellant as her relative, a grandfather in the family.

3. PW2, TEM, testified that the father of PW1 came and reported to her that PW1 had been defiled by the appellant. They took her to Mbale Referral Hospital and the child was examined by a doctor in her presence. She stated that the child told them how the appellant had defiled her on 3rd, 4th and 6th October 2016. The doctor examined her and confirmed that she had been defiled. After that they went to Mudete Police Station and reported. They were issued with a Police Form 3, which they took to the doctor for filling. She said that she knew the appellant as a neighbour and an in-law. She described herself as a grandmother to PW1. PW3, JAM, was the father of PW1. He testified that after he got a report that the appellant had defiled his daughter, he spoke to his wife, who had taken PW1 to a health facility, but she said PW1 was having her menstrual periods. He stated that his wife was trying to protect the appellant because she had caused a meeting of *nyumba kumi*, to be conveyed without consulting him, to discuss the issue. He stated that he only took action when the appellant's wife stormed into his home crying that his wife had given PW1 to her husband, the appellant, to become his wife. After that he spoke to PW1 who told him what the appellant had done to her, and further about how her mother had implored her not tell him about it. He contacted PW2 and they took PW1 to hospital, where it was confirmed that PW1 had been defiled. They went and reported the matter at the Mudete police station. PW4, APC Richard Biwott No. 227906, was the police officer to whom the initial report was made and who arrested the appellant. PW5, PC Jacktone Ouma No. 39938, was the investigating officer. The report of the incident was made to him by PW1, PW2 and PW3. He issued the minor with the P3 form and sent her to hospital for its filling. He gave details of the steps that he took, with respect to the investigation of the matter. PW6, Raphael Ochieng, was the medical doctor who attended to PW1, after she was brought to him by PW2 and PW3, and a police officer. She had a history of having been defiled on divers dates. He examined her vagina, and found a laceration at the vaginal opening and her hymen was missing. He concluded that the injuries had been caused by penetration. He filled the P3 form, which he

put in evidence, together with the treatment notes.

4. The appellant was put on his defence. He gave a sworn statement and called witnesses. He testified that he was at home on 6th October 2016, when his wife came home and informed him that she had heard that he had defiled a child. Later in the evening, he met the mother of the child, who informed him that she had been called to school over the incident, the child was called by the head teacher but she did not disclose anything. After three days he himself reported the matter to *nyumba kumi* and a *baraza* was held over the matter. After the *baraza*, he reported the matter to the Mudete Police Station on 10th October 2016, and was advised to pursue civil proceedings for defamation. A suit was initiated to that effect. He explained that on the three dates, when the defilement was alleged to have had happened, he had been at home with his children. He stated that the case was initiated by PW3 after he heard that he had attempted to seduce his wife. He asserted that he was not taken to hospital for examination. He stated that PW1 was a neighbour. He said that the child was coached to lie against him. He maintained that the case was an attempt by PW3 to discipline him because he thought he was seducing the child. He called his wife, Ezinapah Olega, as a witness, DW2. She stated that it could not be possible that PW1 was defiled by the appellant on the dates indicated as she was always at home and she knew what the appellant did on a daily basis. She confirmed that PW1 and her mother used to visit their home, and that the mother, at one time, worked for them. She confirmed that she heard rumours that the appellant had defiled PW1 and that he had a relationship with her mother. DW3 was Mary Ambogo. She worked for the appellant. She said that on the dates alleged she was at the homestead of the appellant, who had visitors. She said that she did not know PW1.

5. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgement.

6. Being dissatisfied with the sentence the appellant filed the two appeals, and raised several grounds of appeal. He largely averred that the trial court convicted him on insufficient evidence, the age of the victim was not sufficiently proved, that he was not subjected to medical examination to connect him to the crime, his sworn evidence was not given due regard, the conviction was based on inconsistent and contradictory evidence, the sentence imposed was harsh, and the trial court convicted on the basis of its personal views and opinions rather than on the evidence.

7. There are on record supplementary grounds placed on record by the appellant. They are undated and unsigned. Most of the grounds are a reproduction of the grounds already on record. They dwell on such matters as the trial court failing to undertake a diligent analysis of the evidence adduced, failure to consider the appellant's alibi defence, disregard of contradictions and inconsistencies in the prosecution's case, lack of corroboration of the minor's evidence, failure by the court to summon crucial witnesses, making an impression of demeanour without taking into account the totality of the evidence and not subjecting the appellant to forensic tests.

8. The appeal was canvassed on 11th December 2019. The appellant relied on written submissions that he had placed on record, while Mr. Mutua, Prosecution Counsel, appearing for the respondent, asked me to look at the record of the trial court. The appellant's written submissions dwelt on the age of the complainant, pointing out that the evidence thereon was contradictory.

9. I am sitting as a first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function 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 magistrates' findings can 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.”

10. I will first deal with the evidence on the age of PW1. According to the charge sheet her age is put at eleven years. When PW1 testified on 30th January 2017, she did not state her age, but the trial court stated it to be ten years and eleven months, even though no basis was laid for saying that that was her age. PW2 did not say a word about her age. PW3, her father, stated that she was born in 2006, which meant that she was age ten or thereabout as of 2016. PW5 placed on record a birth certificate dated 14th November 2016, which indicated that PW1 was born on 15th March 2006, which suggested that as of October 2016 she was ten years and seven months old.

11. The appellant complains that the age of PW1 was not sufficiently proved. He particularly raises issue with the fact that the birth certificate placed on record was obtained after the case had commenced. Ideally, the age of a person can be proved by production of birth records, and in their absence by the testimony of the parents of the person, who are expected to have firsthand knowledge of the child's date of birth. In this case PW3, the father of PW1, said she was born in 2006. That meant she was in the age bracket between ten and eleven. Age eleven is what was put on the P3 form. She was in Standard Three, and age eleven was the average age for a child in such class. I would go with the testimony of the PW3, being a parent of PW1, who would have been expected to know the date of her birth I am not persuaded that the age of the child was not sufficiently proved.

12. The appellant has argued that he was not subjected to forensics to connect him to the offence. He has not specifically cited section 36 of the Sexual Offences Act, which makes provision for the same. The said provision states as follows:

“36. Evidence of medical, forensic and scientific nature

(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence

under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.

(4) The dangerous sexual offenders' databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5)—

a. shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and

b. in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less than fifty thousand shillings or to both."

13. My reading of section 36 of the Sexual Offences Act is that the same is not in mandatory terms. In my view, it is worded in very permissive terms. It gives the court discretion to direct the taking of samples for forensics. There is, therefore, no obligation on the part of the trial court to direct that such samples be taken, since such directions could only be made at the discretion of the court in circumstances where it deemed it fit.

14. The court in *George Muchika Lumbasi vs. Republic* [2016] eKLR, stated that section 36 of the Sexual Offences Act does not make medical examination mandatory, except where the court thinks it is appropriate, in the circumstances of the case, to subject an accused person to such examination. Adding, that such examination is discretionary under section 36. *Evans Wamalwa Simiyu vs. Republic* [2016] eKLR and *Edwin Maiyo Kandie vs. Republic* [2019] eKLR were in similar vein.

15. I believe that the law has been settled, that, despite section 36 of the Sexual Offences Act, sexual assault is proved, not by medical examination, but by evidence adduced at the trial. The evidence of the victim, and that of corroborative witnesses or circumstantial evidence, is usually enough to establish sexual offences such as rape and defilement. That position was stated by the Court of Appeal in *Fappyton Mutuku Ngui vs. Republic* [2014] eKLR, where it was said that medical evidence was usually not necessary. A similar position was taken in *AML vs. Republic* [2012] eKLR, *Kassim Ali vs. Republic* [2006] eKLR, and *George Muchika Lumbasi vs. Republic* (supra), *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, among others.

16. It would appear that in this case, the trial court did not find it appropriate or necessary to subject the appellant to forensic tests to determine his culpability. It was within the court's discretion to decide whether or not to order such forensics. The court cannot, therefore, be faulted for not ordering the same. It could convict on other evidence, and failure to order such forensic examination did not affect the prosecution's case. Needless to say that the matter was reported to the police long after the alleged defilement and nothing would have come out of any forensic examination the appellant.

17. The appellant did not directly raise issue with evidence on penetration, but penetration is the crux of the matter, and he argued that the trial court convicted on insufficient evidence. It is critical in the circumstances to consider whether or not there was penetration of the genital organ of PW1 by that of the appellant. The record is quite clear that PW1 gave a very detailed account of what transpired. It is graphic that the appellant did penetrate her vagina with his penis. She gave a very clear account on what he did to her on the three occasions that she said he defiled her. She expressed the pain she felt on the three occasions. The medical evidence was very clear too, that PW1 had been defiled. PW6, the doctor who examined her, was emphatic that there had been penetration. Was it the appellant who penetrated her? PW1, a child of

ten or eleven years, in Standard Three, was very clear that it was the appellant who defiled her on all the three occasions. It happened during daytime, and the appellant was a person well-known to her, being her neighbour. The appellant and his wife confirmed that PW1 was a neighbour and had visited their homestead.

18. He also argued that his defence was not considered by the trial court. I note that he gave a sworn statement. Pages 6, 7 and 8 of the judgment were devoted to the defence. The trial court narrated the testimonies of the appellant and his witnesses, at both examination-in-chief and cross-examination. The trial court also narrated the submissions made by the advocate who appeared for the appellant at the trial, at page 8 of the judgment. The trial court analyzed the evidence presented by the appellant and his witnesses, at pages 9 and 10 of the judgment, before concluding that the said evidence was inconsistent and contradictory, and, therefore, fabricated. It cannot, therefore, be argued that the defence case, or evidence, was not considered or was not analyzed. The court did not disregard it. It looked at it, but, after applying its mind to it, dismissed it as unreliable and unbelievable.

19. He argued that his was an alibi defence. An alibi defence is one which places the accused person away from the scene of crime. The evidence that the appellant placed on record was not in the nature of an alibi. He said that on all the alleged dates of the commission of the offence he was at home, with his family. The two witnesses he called were intended to buttress that evidence, that he was at home and that there were people with him at the time. There is no basis at all upon which it can be concluded that there was alibi evidence that the appellant was not at the scene of the crime and, therefore, he could not have committed the offence.

20. He also argued that the trial court did not analyze the evidence in totality. I have gone through the entire length of the eleven page judgement, in small font. In it the trial court recited the testimonies of the witnesses, both in examination in chief and cross examination. Thereafter the trial court evaluated the said evidence to determine whether the trial court had established that PW1 was a minor, whether her vagina had been penetrated and whether the penetration was done by the appellant. The analysis was deep and exhaustive. It cannot therefore, be argued that the trial court dealt with the evidence in a shallow and perfunctory manner.

21. The other issue touched on inconsistencies in the evidence of the state witnesses. I have gone through the record and noted the inconsistencies alluded to by the appellant. These same inconsistencies and contradictions were addressed sufficiently by the trial court, and was concluded that PW1 sufficiently explained herself during re-examination to clear them. It was said in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, a case that the trial court also considered, that the court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. It was said in *Richard Munene vs. Republic* [2018] eKLR that not every inconsistency or contradiction is material. I am not satisfied that there were inconsistencies or contradictions in the evidence of the prosecution that were so substantial as to render the conviction herein unsafe.

22. He also raised issue with regard to the evidence of PW1 not being corroborated. I should start by pointing out that with regard to sexual offences the court can convict even without corroboration, so long as the testimony by the child victim is believable and credible. Of course, where the statements by the minor victims are unsworn corroboration would be critical as generally unsworn evidence is of little probative value. In this case though, the testimony of PW1 was sworn and her evidence was corroborated. She reported her ordeal to various persons, which led up to action being taken. There is also medical evidence which indicated that there was a sexual assault on her. It cannot, therefore, be argued that the evidence that the trial court relied on to convict was not corroborated.

23. The offence of defilement was established to the extent that the state proved the age of the complainant, the fact of penetration and the appellant was identified as the perpetrator of the crime. What needs to be proved for the purposes of defilement was stated in *Dominic Kibet Mwareng vs. Republic* [2013] eKLR in the following terms that -

‘The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.’

24. Overall, I am not persuaded that on conviction the trial court fell into any error. I shall, therefore, uphold the conviction.

25. On the sentence, he has argued that the same is harsh. The child victim was a minor of eleven. The provision under which the appellant was charged provides for a mandatory sentence of life imprisonment. It cannot be said that the trial court fell in error, in the circumstances, in awarding the sentence that it did.

26. Recent developments in jurisprudence on mandatory minimum and maximum sentences, however, would require me to give the same a second look. According to the Court of Appeal and the Supreme Court, the trial court should have some discretion to impose such sentences as it considered appropriate in the given circumstances without being constrained by the ceilings imposed by statute, and in particular the lower one. I am conscious of the fact that the Sexual Offences Act was passed to protect underage girls from predators who prey on them, whether the predator uses their physical strength to force sexual connection, or took advantage of their immaturity to lure them into consensual sex, bearing in mind that legally an underage person is deemed to be incapable to consenting to sexual activity, and any purported consent to such activity should be a matter of little consequence.

27. From the material before me, the age of the appellant was not disclosed, but he was said to be a grandfather, a married man with children. The complainant was a minor of a very young age, ten or eleven at the material time, barely out of tender age. She was literally a baby, and any sort of sexual connection between her and an adult could only be described as inhuman activity and a violation of her. Such encounter would leave her with lifelong psychological trauma. Any adult who preys on such young children should not be extended any form of mercy. A deterrent sentence is, no doubt, apt, to make the offender payback, and to give him sufficient time in jail to learn a lesson.

28. In view of everything that I have said above, these are the final orders:

a. That the aspect of the appeal on conviction is dismissed and the conviction is upheld;

b. That the sentence is hereby set aside and substituted with that of twenty-five (25) years imprisonment effective from the date of conviction on 9th July 2018; and

c. That the appellant has fourteen (14) days to appeal should he be aggrieved by the orders that I have made hereinabove.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF January, 2020

W MUSYOKA

JUDGE