REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 6 OF 2019

CKR...……...……..……..……..……..……APPELLANT

VERSUS

REPUBLIC…….....……....…….RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. R. K. Ondieki, SPM delivered on 27.9.18 at Kilifi in Criminal Case No. 305 of 2016)

JUDGMENT

1. The Appellant, CKR, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence are that on 14.7.16, at [Particulars withheld] village, Kilifi County, the Appellant intentionally caused his penis to penetrate the vagina of LJN, (the Complainant), a child of 10 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this offence are that on the same day and in the same place, the Appellant intentionally and unlawfully touched the vagina of the Complainant. Following a full trial, the Appellant was convicted of the main charge and sentenced to serve life imprisonment.

2. Being aggrieved with both the conviction and sentence the Appellant preferred the Appeal herein. The summarized grounds as set out in his amended grounds of appeal are that the trial Magistrate erred in fact and in law in that he:

i) failed to consider that the Appellant was denied his rights of information disclosure prior to taking plea in breach of Articles 50(2) (a), (b), (c), (j) and (m) of the Constitution of Kenya, 2010, thereby rendering the trial a mistrial and a nullity.

ii) placed undue reliance and weight on weak and unreliable medical account as the only corroborative source of evidence.

iii) failed to consider that the sentence imposed was manifestly harsh and excessive in breach of Article 50(2)(p) of the Constitution.

3. The Appellant urged the Court to allow the Appeal and quash the conviction and sentence.

4. The prosecution called a total of 4 witnesses. The Complainant testified that she was 11 years old. She said that she used to see the Appellant. On the morning of 14.7.16, she had met the Appellant on her way to school who asked her to pass by his house in the evening to receive some money to take to her mother. On her way home from school she met the Appellant and they exchanged greetings. The Appellant then took her by the hand and dragged her into the bush. He removed her underwear, lay on her and inserted his penis into her vagina. She raised alarm and one Babu came to her rescue. Her father took the Appellant to the village elder. Thereafter the Complainant recorded a statement at Kilifi Police Station before proceeding to Kilifi Sub County Hospital for examination.

5. PW2, Dr. Laurine, a medical doctor based at Kilifi County Hospital, produced the P3 form which had been filled by a Dr. Suchira. She stated that the child's hymen was broken. PW3, Clara Bingo of Kilifi Police Station who investigated the case, referred the Complainant to the hospital for examination and had P3 and PRC forms filled. She produced the Complainant's birth certificate. She added that the Appellant was arrested and charged with the offence. PW4. SM, a cousin of the Complainant testified that he heard screams from the bush. Upon arrival, he found the Appellant who is his relative, defiling the Complainant. They were both naked. He took the Appellant to the village elder who in turn advised that they go to the police station. Thereafter the accused was charged.

6. After the close of the prosecution case, the Court ruled that the Appellant had a case to answer and was put on his defence. The Appellant gave a sworn statement in which he denied committing the offence. He stated that when he met the Complainant going home from school, he told her that he would give her the Kshs. 200/= he owed her mother later, as he did not have it then. Shortly after, PW4 appeared wielding a *panga* telling the Appellant that his days had come. PW4 took him to the village elder and then to the Kilifi Police Station. The Appellant was then convicted of the main charge and sentenced to serve life imprisonment.

7. Both parties filed their written submissions which I have considered. I have also subjected the evidence adduced before the trial magistrate

to a fresh analysis and evaluation while giving due allowance for the fact that I neither saw nor see the witnesses. In this regard I am guided by the holding in the case of Okeno v. Republic [1972] EA 32 where the Court of Appeal stated:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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, See Peters V. Sunday Post, (1958) E.A. 434)"***

8. On the ground of violation of Appellant's rights as guaranteed in Article 50 of the Constitution, the Appellant submitted that the prosecution failed to supply him with witness statements before taking plea. He was thus was not well informed of the detailed ingredients of the charges he faced. The Appellant contended that notwithstanding the fact that he fully participated in the trial, his constitutional rights to information disclosure and a fair trial were grossly violated. The Appellant further submitted that there was no interpreter when the charges were read to him contrary to Article 50(2)(m).

9. The Appellant's right to a fair trial cannot be gainsaid. Towards this end, the Appellant was entitled to the rights guaranteed under article 50(2) of the Constitution during the trial. The Appellant alleged violation of the following rights as guaranteed under Article 50(2) of the Constitution:

> ***(a) to be presumed innocent until the contrary is proved;***
>
> ***(b) to be informed of the charge, with sufficient detail ton answer it;***
>
> ***(c) to have adequate time and facilities to prepare a defence…***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence…***
>
> ***(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;***

10. I have looked at the entire record. I note that prior to taking plea, the charges were read and explained to the Appellant in Kiswahili, a language he understands. Following his plea of not guilty, the Court set down the matter for hearing. On 22.8.16, the Appellant informed the Court that he did not have the witness statements and charge sheet whereupon the Court directed that the Appellant be supplied with the statements. The witness statements were given to the Appellant on 24.9.16 while the hearing commenced on 21.3.17. The statements and charge sheet no doubt enabled the Appellant to prepare his defence. The matter proceeded to full trial with the prosecution calling 4 witnesses. The Appellant was accorded an opportunity to cross examine the witnesses thereby enabling him prepare his defence. Further upon being put on his defence, Section 211 of the Criminal Procedure Code was explained to him whereupon the Appellant opted to give a sworn statement. It is only upon analyzing all the evidence at trial that the Court came to the conclusion that the Appellant was in fact guilty. The foregoing secured to the Appellant the right to have adequate time and facilities to prepare his defence.

11. The Appellant takes issue with the fact that the witness statements were supplied to him after taking his plea. According to him, this violated his right to adequate information to take his plea. Section 207(1) of the Criminal Procedure Code provides:

> ***The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.***

12. At the stage of taking plea, the requirement is that the substance of the charge be stated to the accused person. The substance of the charge must also be explained to the accused person in a language that he understands. The record shows that the charges were both read and explained to the Appellant in Kiswahili, a language that he understands. The fact that witness statements were given to the Appellant after taking plea did not in any way violate his right to full information or at all. The statements were supplied to him before the commencement of the hearing, thus according him sufficient time to prepare his defence and safeguarding his right to a fair trial.

13. Did failure to have an interpreter amount to a violation of the Appellant's right under Article 50(2)(m)? The record shows that on the day of plea taking, the Court stated:

> ***"Charges read and explained to the accused in Kiswahili language in which he/she understands and pleads:"***

The record shows that the entire proceedings were conducted in the same Kiswahili language. Indeed the Appellant cross examined the witnesses and made his own sworn statement in the same language. Given that the Appellant understood the language used throughout the proceedings, there was no need for an interpreter. Article 50(2)(m) of the Constitution only applies where an accused person cannot understand the language used at the trial.

14. I am satisfied that the proceedings in the trial Court were was conducted in a manner that is consistent with a fair trial as envisaged in Article 50(2) of the Constitution. Accordingly I find that the first ground of the Appeal is without merit.

15. The Appellant's second ground is that the trial Magistrate placed undue reliance and weight on weak and unreliable medical account as the only corroborative source of evidence. The Appellant submitted that the evidence of the Complainant and PW2 were contradictory. He further argued that the Complainant ***"was able to go home without difficulties immediately she was sexually abused by the appellant, which is not logical for an adult person of about 65 years to defile a child of 10 years without that child having difficulties in walking."*** According to the Appellant therefore, penetration was not proved.

16. Besides proof of the age of the Complainant and proof that the Appellant was the perpetrator of the offence, there must be proof of penetration for the offence of defilement to be established. Section 2 of the Sexual Offences Act defines penetration thus:

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

In her testimony in the trial Court, the Complainant stated:

> ***The accused lay on my belly, inserted his penis into my vagina. I raised an alarm and Babu came and arrested the accused.***

PW2 produced the P3 form that was completed by Dr. Suchira. She stated:

> ***"The hymen was broken. There was no discharge from her private parts. Red blood cells was formed in her vagina which is consistent with penetration."***

The P3 form indicated that in Part II Section C paragraph 2(a) that the hymen was broken and in paragraph 6 that:

> ***"referring to PRC form vagina was wide open and red blood cells were found on the high vaginal swab which is consistent with penetration."***

17. The Complainant concisely stated that the Appellant put his penis in her vagina. This was corroborated by the testimony of PW2 and the evidence in the P3 and PRC forms. I find no contradiction in this evidence, as contended by the Appellant. Further, the suggestion by the Appellant that the Complainant walked without difficulty after the act, which is not proved, is outrageous and cannot lead one to draw the conclusion that there was no penetration. In any event, penetration need not be deep inside the vagina of a victim as to cause physical discomfort. In Mark Oiruri Mose v Republic [2013] eKLR, the Court of Appeal had this to say about penetration:

> ***Many times the attacker does not fully complete 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.***

18. In the present case, there is evidence that upon the Complainant raising the alarm, when the Appellant was defiling her, PW4 responded and caught the Appellant in the act on top of the Complainant, thus interrupting his act.

19. I now turn to the last ground. The Appellant finds fault with the trial Magistrate for imposing a life sentence which he says is manifestly harsh and excessive and in breach of Article 50(2)(p) of the Constitution.

20. Article 50(2)(p) of the Constitution provides that an accused person has the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing. In the present case, the Appellant was charged with defilement of a child of 10 years. Section 8(2) of the Sexual Offences Act provides that upon conviction the sentence shall be imprisonment for life. The prescribed punishment for the offence with which the Appellant was charged was not changed between the time of commission and sentencing. As such, this provision is not applicable in the circumstances herein.

21. The Appellant further placed reliance on the case of Francis Karioko Muruatetu & another v Republic [2017] eKLR and contended that the Supreme Court of Kenya recognized that a Court has discretionary power to consider mitigating circumstances before meting out a mandatory sentence.

22. The Supreme Court in the Muruatetu case (supra) stated:

> ***The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.***

23. It must be noted that the Supreme Court did not outlaw the death sentence. The Court found that the mandatory nature of the death sentence was unconstitutional as it deprived Courts of the discretion to impose sentences appropriate to the circumstances of each case. In Dismas Wafula Kilwake v R [2018] eKLR, the Court of Appeal was of the view that the reasoning in the Muruatetu case (ssupra) should also apply to the penal provisions of the Sexual Offences Act and stated:

> ***"Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing,***

should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

24. The circumstances of the instant case are that the Appellant a mature man with 3 wives preyed on a neighbor's 10 year old child and did the unthinkable. Rather than being a protector to the Complainant, a child of tender years, the Appellant turned predator and sexually assaulted her. All he could say in mitigation is that there was famine at home and that he had 3 wives. Nothing could justify his heinous act. My view is that this is an appropriate case in which circumstances demanded that the trial Court, freely exercising its discretion should be able to impose the prescribed sentence.

25. In the end, and for the stated reasons, the Court finds that the Appeal herein is devoid of merit. Accordingly, both the conviction and sentence are upheld and the Appeal is hereby dismissed.

26. It is so ordered.

DATED this 26th day of February 2020

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M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28th day of February 2020

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NJOKI MWANGI

JUDGE

In the presence of: -

…… for the Appellant

…… for the Respondent

…….…….. Court Assistant