REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 31 OF 2018

ZOA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of Y. I. Khatambi delivered on 28th February in Criminal Case number 82 of 2017 at Chief Magistrate's Court Nakuru)

J U D G M E N T

1. On 28th February 2018 the appellant herein ZOA was found guilty and convicted of the offence of **defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.** He had also been charged with the alternative charge of **Indecent Act with a child contrary to Section 11(1) of the same Act.**

2. The particulars were that on diverse dates 22nd and 29th April 2017 in Nakuru North Sub-County within Nakuru County he committed an act which caused penetration by inserting his male genital organ namely penis into the female genital organ, namely vagina of MA a child aged 13 years. It is alleged that he had unlawfully and intentionally committed an Indecent Act with a child namely MA aged 13 years old by touching her private parts namely vagina.

3. On 9th March 2018, he was sentenced to serve thirty (30) years imprisonment.

4. He filed an appeal on 14th March, 2018 together with grounds, which he later amended and filed. They are undated and without a court stamp. These he filed together with his written submissions. The Amended Grounds of Appeal:

> *1. THAT the learned trial magistrate erred in law and fact by failing to find that the evidence adduced was inconsistent and thus could not support a safe conviction.*
>
> *2. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the medical evidence adduced could not corroborate the charge as drawn.*
>
> *3. THAT the learned trial magistrate erred in law and fact by failing to provide a reason as to why she found the appellant's defence incredible*.

5. The appellant challenged the consistency of the evidence by prosecution, the value of the medical evidence in corroborating the charge as drawn and the failure by the trial court to give reasons for rejecting the appellant's defence.

6. This being the first appeal the appellant is entitled to re-assessment of the evidence and the drawing of own conclusions by this court. My duty as the first appellate court is settled as was held in **Okeno vs Republic (1972) EA 32** is to re-evaluate the evidence and draw my own conclusions from the same. I must be conscious of the fact that I neither saw nor heard the witnesses see **Kimeu vs Republic (2003) KLR 756.**

7. The case for prosecution was set out by seven (7) witnesses.

8. The appellant and the victim's mother were married and had three other children. The victim was not the appellant's biological child.

9. On the night of 22nd April 2017 the victim's mother died. Apparently in the house. The neighbours assisted to take the body to the mortuary. The victim and her sisters who were much younger, her immediate follower was nine (9) years old while she was between thirteen (13) – fifteen (15) years old would share one bedroom while the parents slept in another room.

10. On the night of her mother's death, the victim and her siblings were sleeping. The appellant went into the room, called her. He was armed with a knife. He told her not to make a sound or he would kill her. He told her to remove her clothes, she removed her biker and pants, he removed his trousers and boxers and proceeded to defile her by inserting his penis into her vagina. In the process he heard people outside, he went out and came back and continued with the defilement. She could only cry and could not tell anyone.

11. On 29th April, 2017, the people were in the home planning the funeral. When everyone had left, late in the night and she had gone to sleep, the accused went back into the room, undressed her, undressed himself and defiled her in the same manner. When she tried to scream he held her mouth. It is only when he heard some noises outside and that left to his room.

12. Unknown to him PW4 Cynthia Wanjiku, PW5 Elizabeth Njeri, PW6 Ruth Wambui who were neighbours and friends of the victim's mother, and who had come for the funeral prayers were leaving the home after midnight when one of them told them she had seen accused enter the children's bedroom. They decided to go back. PW4 entered the home from the front. The other two from the back. They lay ambush. PW5 and PW6 heard the child panting and a man groaning. Then they went to the front of the house where they noticed the appellant leaving the children's room.

13. The chief was called and he came with an elder, the women went to speak to the victim. She told them how the appellant had defiled her on the night her mother died, on examination they noticed that she had some whitish substance on her thighs and her vagina. The victim and the accused were escorted to the AP camp, from where the victim was taken to Bahati Hospital where she was examined and treated.

14. PW7 No. 77620 PC Nixon Kimwele was attached to Bahati Police Station at the material time. The case was assigned to him on 29th April, 2017 at 6.00 a.m. Both the accused and the complainant were at the police station. He escorted them to hospital and both P3 and Post Rape Care were completed. He interrogated the child who described to him what had happened. He visited the scene. He established that accused was step father of the child and that her three siblings were asleep on the material night. He confirmed that the victim did not have a certificate of birth but that age had been assessed at fifteen (15) years old. He caused the accused to be charged with these offences.

15. PW2 Sophy Osita was the Clinical Officer at Bahati Hospital. She examined the complainant on 29th April, 2017 at 8.15 a.m. She found that the child's hymen was torn though the other systems were normal. She concluded that the child had been defiled.

16. PW3 Knisha Peter a dentist from Provincial General Hospital conducted a dental age assessment and assessed the complainant's age to be fifteen years of age. That led to the amendment of the charge sheet on 18th January 2018 for the age to read fifteen (15) instead of thirteen (13). When the prosecution closed its case the appellant gave his defence.

17. **The Defence**

In his defence the appellant gave an unsworn statement. His testimony was that he worked as a guard for the church and had refused to release church property to neighbours, leading to enemity with one Mama Mercy. That a grudge had also arisen because of the money that was collected after the death of his wife Kshs. 14,000/=. That the chief beat him up and asked for the MPESA pin which he gave. That the chief was not happy that he had obtained a burial permit from Teacher's area instead of KITI.

He denied defiling his daughter.

18. **Appellant's Submissions**

He argued the three grounds together. He submitted that the complainant never told anyone of the first defilement despite the fact that there were people there during the funeral arrangements. That the alleged discharge noted in the vaginal thighs of the complainant were never seen by PW2, and that there was nothing to support the conclusion that the complainant had been penetrated. That the evidence of a freshly broken hymen was not tenable as the complainant had allegedly been defiled on 22nd April, 2017, hence the hymen could not have been described as freshly broken on 29th April, 2017. He urged the court to find the evidence of PW4, 5 and 6 incredible, wondering how three mothers could stand outside the house, listen to a man defiling a child and only go in after he had finished instead of catching him red handed in the act. That the failure by the state to call the chief as a witness is fatal to the case from the prosecution because he was the one who is said to have arrested the accused and his evidence was crucial, especially the allegation that he interrogated the accused at the scene.

19. **Respondents Submissions**

The appeal was opposed. That the age was assessed at fifteen (15) years that the appellant was identified as the perpetrator. That the child narrated the same night how the accused defiled her and the medical examination was sufficient.

20. In response to the appellant submitted that the only issue here was payment of dowry, that his wife died and he had not paid dowry, and that there were neighbours who never wanted him to work there.

21. **Analysis and Determination**

I have considered the evidence and the submissions on record. The issues for determination are;

- Whether the evidence was inconsistent
- Whether the medical evidence did not corroborate the other evidence

- Whether the accused's defence was considered

22. The complainant herein gave a detailed description of what exactly the accused did. The circumstances surrounding the offence are disturbing. The victim was the accused's step daughter. The appellant's wife and the victim's mother had died that morning. The appellant attacked her while there were mourners in the home. It is bizarre but the testimony of the victim does not come through as motivated by any malice. In fact even the appellant himself does not accuse the victim of any wrong doing. He throws blame at the mourners, at the in laws and other people but not the victim. The victim's testimony was clear. It was not challenged by the appellant in any way. The fact of the chief coming to the scene was after the fact. As an 'arresting officer' the chief would not have had much to say, because even the evidence on record is that upon interrogation the appellant denied having committed offence. But what is more bizarre is that according to the victim when the chief came, the appellant was laughing. What was going on?

23. The evidence of the complainant was corroborated by the medical evidence and that of PW4, 5 and 6. It is true at first glance one would question the credibility of these three women. Why they would stand to listen to a man defiling a child. They did not know that a defilement was ongoing. They only heard sounds coming from the house. They did not burst into the house but called the chief to come because they were only suspicious. It is only upon interrogating the child and examining her that they learnt that the sounds they heard were actually a defilement going on and that is when accused was arrested. They had no prior information that accused used to defile the child. That is how the evidence appears to me. That had they known that a defilement was actually ongoing they would have broken into the house and dealt with the accused, however this was mere suspicion. Hence I would not do away with their evidence but find that they acted cautiously because they did not know what was going on. And perhaps they did not expect the appellant to be defiling his own daughter.

24. On examination by the clinical officer the Post Rape Care shows that, a whitish discharge was found together with yeast cells. The hymen was broken and although every other aspect of the genitals was normal, clinical officer formed the view that there was evidence suggestive of penetration, the whitish discharge, the broken hymen and the child's testimony. In my view, the evidence clearly came together, the age of the complainant was assessed at fifteen (15) years, there was penetration, the appellant was positively identified.

25. The record is self-evident as to why the appellant's defence was found to be an afterthought. It does not render itself capable of belief. It has been developing at the trial and even during the appeal. At the trial he said he had grudges with neighbours because he would not release church property to them, that they took the money that had been raised at the funeral, that the chief was annoyed because of the burial permit. At the appeal, he argued that there was an issue of unpaid dowry when his wife died, and neighbours who did not want him to work where he was working. Where is the *alibi* in all these?

26. The onus is on the prosecution to prove the case beyond reasonable doubt, but the moment the accused was placed on his defence and chose to speak, then he was expected to give testimony, that would dislodge the court's finding. Going by **Bhatt v Republic** the finding that there is a *prima facie* case is not a routine thing. It means that if the accused person does not say anything, the court could proceed to convict him on the evidence before it, that is how serious the finding of a prima facie case is. The accused spoke in his defence. He spoke of grudges but placed no evidence before the court to support his claims. During the appeal he said other things.

27. That trial court was not persuaded by his defence because it was an afterthought. None of those issues were put to the witnesses. But more importantly the accused did not at any one time allege that the child was lying on that she was being malicious or used by any one to settle a score.

28. I find that the evidence supports the conviction and there is no reason disturb the same.

29. Regarding the sentence, **Section 8 (3) of the Sexual Offences Act,** states that, a person who commits an offence of defilement with a child between the age of twelve (12) to fifteen (15) years is liable to upon conviction to imprisonment to a term of not less than twenty (20) years imprisonment. The appellant was sentenced to thirty (30) years imprisonment. The trial magistrate sentenced him to ten (10) years more than the minimum recommended sentence. The reason given was that the offence of defilement is rampant within the jurisdiction of that court and a deterrent sentence was required.

30. It is not disputed that the appellant was the step father of the complainant. The complainant had just lost her mother, who was the accused's wife at the time appellant chose to defile the complainant. Obviously no defilement can be said to have been done at the right time but that fact alone is an aggravating factor going by the *Sentencing Policy Guidelines*. Nevertheless he is a first offender, he did not cause the complainant any other physical harm except for the threats. Is it appropriate for him to suffer a longer sentence than the recommended minimum? The reasons given for the elongated sentence were not personal to the appellant. They were addressing the desire of the rest of the world to see such offenders punished in a manner to send what is often referred to as the strong message of deterrence. In **NYERI CRIMINAL CASE NO. 14 OF 2014 R vs JOSPHAT KIMAMO NGUNJIRI and RICHARD NGUNJIRI KIMAMO** this court stated in paying homage to the Guidelines stated;

> *"Sentencing is perhaps the most visible and hence reaction provoking stage of the trial. It is the culmination of the trial. In it the People represented by the Prosecutor and the people, the victims and the offenders, expect the true balance that will reflect their view of what is a just outcome."*

31. The former Chief Justice Dr. Willy Mutunga is quoted in the Guidelines stating:

> *"These guidelines recognize that sentencing is perhaps one of the most intricate aspects of the administration of trial justice. It acknowledges that sentencing impacts not just the individual offender but also the community, and indeed the entire justice system. They also seek to enhance the participation of the victim, and generally infuse restorative justice values in the sentencing process. Significantly, they champion the national value of inclusivity by promoting community involvement through use of non-custodial sentences in suitable cases."*

32. Clearly therefore it was necessary that for the trial magistrate to balance the expectations of the society and those of the appellant, and the impact of the offence on the appellant as well.

33. In Court of Appeal **Criminal Appeal No. 129 of 2014 DISMAS WAFULA KILWAKE vs REPUBLIC** the court stated;

> *"The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."*

34. The court also held that the principle holding in the **Muruatetu** case on the unconstitutionality of the mandatory nature of death sentence was applicable minimum sentences in the **Sexual Offences Act**. The Court stated:

> *"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*
>
> *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*."

35. Taking into consideration the circumstances of the offence in this case, the reasons for the thirty (30) years imprisonment sentence do not support it especially in the light of the Guidelines and the holding in ***Dismas Wafula Kilwake.*** In consideration the foregoing circumstances, I would substitute the thirty (30) years imprisonment with twenty (20) years.

36. The appeal is there for allowed in part. The Conviction. The sentence of 30 years is substituted with that of twenty (20) years with effect from the date the appellant was first held in remand custody.

Dated, delivered and signed at Nakuru this 27th day of February, 2020.

Mumbua Matheka

Judge

In the presence of

Edna Court Assistant

Appellant present in person

For Respondent Ms Odero