



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 76 OF 2017

SHADRACK KAMAU GATHIU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment in S. O. No. 18 of 2015 at Kandara by M. Kurumbu, Resident Magistrate, dated 8th September 2017]

JUDGMENT

1. The appellant was adjudged guilty on two counts of *defilement* contrary to section 8 (1) of the **Sexual Offences Act**. He was sentenced to *life imprisonment*.
2. The first count stated that on the 9th day of December 2015 at around 18:00 hours in Kandara Sub-County of Murang'a County, he intentionally caused his penis to penetrate the vagina of TW [*particulars withheld*] a child aged 2½ years.
3. The particulars of the second count were that on the same date and place, he intentionally caused his penis to penetrate the vagina of MW [*particulars withheld*] a child aged 6 years.
4. The appellant lodged a *petition of appeal* in person on 1st November 2017. However, another appeal was irregularly filed on 14th May 2018 through his counsel, J.K. Ngaruiya, in Murang'a High Court Criminal Appeal Number 31 of 2018.
5. On the date of hearing of the appeal, the appellant purported to lodge *amended grounds* of appeal. No leave had been obtained as decreed by section 350 of the **Criminal Procedure Code**. Nevertheless, his counsel, Mr. Muiruri, clarified that he was not relying on the grounds or submissions filed by the appellant in person. He instead relied on the submissions filed by his firm on 15th August 2019.
6. The grounds of appeal can be condensed into four. Firstly, that there was insufficient evidence to prove the offence. Secondly, that the trial court failed to take into account the mental capacity of the appellant. Thirdly, that the appellant's constitutional rights to a fair trial under **Articles 25, 49 and 50** of the **Constitution** were violated by failure to provide witness statements or evidence in advance; and, by denying him the right to recall witnesses.
7. Like I stated, learned counsel for the appellant largely relied on the written submissions filed on 15th August 2019. He argued that the appellant was not properly identified; and, that the evidence of key witnesses such as PW1, PW2 and PW4 was riddled with inconsistencies. He submitted that the appellant was undergoing treatment at Mathari Mental Hospital which perhaps explains why he initially pleaded guilty. He argued further that the learned trial magistrate was unduly influenced by that original plea.
8. The appeal is contested by the State. Learned State Counsel, Ms. Gichuru, submitted that all the ingredients of the offence were proved beyond reasonable doubt. She argued that penetration was not in doubt; that the age of the victim was established; that the appellant was positively identified and caught red handed.
9. She submitted further that that the appellant was found fit to stand trial; and, that there was no violation of the right to a fair trial. She implored the Court to dismiss the appeal.
10. This is a *first appeal* to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
11. I will first deal with a number of preliminary matters. From the birth notification card produced at the trial (exhibit 1), the 1st complainant was born on 30th August 2013. I am thus satisfied that at the time of the offence, she was about 2½ years.

12. It is thus understandable that the complainant relied on her *grandmother* (PW5) as an intermediary. PW5 confirmed that the minor could not talk.

Under the **Children Act**, it was open to the trial court to find the child was *vulnerable*; and, to accept the evidence of the *intermediary*.

13. The other complainant (PW4) was a minor aged 6 years. This is clear from her clinic card (exhibit 5). The trial court carried out an elaborate *voire dire* examination. The record contains the *questions* by the court and her answers. The learned trial magistrate formed the opinion that the minor did not understand the nature of an oath. She thus gave unsworn evidence. I am satisfied that the trial court complied with the procedure of taking the evidence of the minor. **Johnson Muiruri v Republic** [1983] KLR 445.

14. That notwithstanding, the appellant cross-examined both PW4 and PW5.

It is not true that the appellant was denied an opportunity to recall witnesses. For instance, on 27th September 2016, he applied to recall PW1 who had first testified on 24th August 2016. PW1 was recalled to the stand on 27th September 2016 and was cross-examined further by the appellant.

15. It is true that the accused was unwell in the course of the trial. On 13th December 2016, for example, he complained that he had not been taken to the clinic since August. The trial court directed that he be taken to the hospital. But I have seen an order by the trial court of 22nd January 2016 calling for a full psychiatric examination. The document is in *Kandara S.O. 19 of 2015* which was consolidated with *Kandara S.O. 18 of 2015*. I have also seen a medical report dated 26th January 2016 by Dr. Muigai, Consultant psychiatrist at Thika Level 5 Hospital. It concludes that the appellant was *unfit* to take plea due to a *'long standing psychiatric disorder compounded by polysubstance abuse'*. Plea was deferred.

16. On 26th May 2016, a further medical report was presented by Dr. Ngugi Gatere. He opined that the appellant was suffering from *"schizophrenia triggered by cannabis/muguka abuse"*. However the consultant psychiatrist concluded that the appellant was now *mentally fit* to stand trial but would require some medication. The record shows that the appellant participated fully at his trial and cross-examined all witnesses.

17. On 30th May 2016 and 20th June 2016, the record shows that the appellant asked to be supplied with witness statements. The trial court on both occasions ordered that he be supplied with the statements. On 18th July 2016, the appellant confirmed he was ready to proceed with the trial. I thus find that the appellant was accorded a fair trial and comprehended the proceedings. I find no breach of the **Constitution** as alleged.

18. I will now turn to the evidence. On 9th December 2015, PW1 was returning from her farm carrying some animal feed. She became suspicious when she met with the appellant holding the hands of two minors, *TW* and *MW*. When she sought answers, the appellant said that the children were his friends and they were playing together. Her fears were confirmed when she turned back and heard from PW2 that the appellant wanted to defile the minors. PW1 started screaming.

19. When PW1 was recalled to the stand she stated on cross-examination:

You took W [PW4, particulars withheld] as you wanted to sleep on her [sic]. I turned carrying cattle leaves [sic]. W went home. Your face had changed. Then you picked TW [1st complainant] and entered the maize farm with her. I saw you Kamau. I cannot lie. I never saw blood. Your body had changed. I took TW then Gitau came for you and started beating you. You had opened the zip of your trouser. I cannot agree you were helping the children.

20. PW1 knew the appellant by name. She also knew the two minors. True, it was about 6:30 in the evening and getting dark but I entertain no doubt that she clearly saw the appellant leading the two minors into the thicket. Furthermore, it was *corroborated* by PW2 and PW3. The appellant in his defence also conceded that he saw all the three witnesses at the scene.

21. PW2 had leased the maize farm. She found the appellant in the plantation with the complainant immediately after the defilement. She testified:

I met face to face with Kamau. He had opened his trousers and was holding it at the waist.

22. There is then the evidence of PW3. He is a *brother* of the appellant. He was alerted by the screams from PW1. He went to the scene and found the appellant and *TW*. He was incensed by the conduct of the appellant and beat him up seriously. Knowing his previous conduct, PW3 asked that the minors be examined to confirm if they had been defiled.

23. As stated PW5 was the grandmother to *TW*. She examined the minor at the scene and noted wetness on the abdomen and private parts. The 2nd complainant (PW4) on her part was quite clear about what the appellant did to her. She said:

He held me by the hand. He then did to me bad things. He removed my trousers and did to me tabia mbaya. He slept on me. He put me on the ground. He did bad habit (holds her private part - vagina)

While he did tabia mbaya TW was there at the road. Then he threw TW into the maize. He did that to me first I did not see him doing anything to TW. I went home. When he did tabia mbaya I felt pain here (touches the private part). I told mum. She is called N. I told her that night.

24. I am alive that a child of PW4's age may not describe sexual acts in a *graphic* manner. But in this case, she sufficiently described the act in terms that leave no doubt that the appellant penetrated her.

25. The evidence of penetration of the two victims was corroborated by Dr. Gichane (PW7). She testified that the 1st complainant's (TW's) hymen was broken due to penile penetration. Regarding PW4, she found minor lacerations on her vagina and a broken hymen. A high vaginal swab showed presence of sperms, purple cells and blood. Syphilis was negative. He produced the medical notes, P3 Forms, PRC Forms and lab results.

26. Penetration is defined in section 2 of the **Sexual Offences Act** as "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*". From the totality of the evidence, I am left in no doubt that the appellant was positively identified as the person who led the two victims into the maize plantation and defiled them.

27. I have then juxtaposed that evidence against his defence. He confirmed that he was with the two girls. He also confirmed that they met with PW1 and upon enquiries, he said he was playing with the minors. But he denied committing the offence. In the material parts of his testimony, he stated:

After 20 minutes I heard noise people coming [sic]. PW2 came and asked me what I did to the children. I was very surprised.....

The witnesses lied. Some say they went to hospital with police. Others say otherwise some say the case was reported on 9/12 at 4.00 p.m. But at that time I was in the shamba. All of the witnesses say they rely on the doctor yet the doctor said he was not at the scene. The doctor said he can't say I did it. I was not examined by a doctor. I had a wife and family even before this case. When in court, I was referred to Mathari. My wife left when I am [sic] in custody. I leave my case for the court to decide.

28. I agree that no DNA examination was carried out on the spermatozoa found in MW's vagina. But the evidence against the appellant was overwhelming and pointed exclusively to him. I concur with the learned trial magistrate that the defence was a complete sham. The appellant was found at the scene by no less than three witnesses. The appellant was caught in the act with the hapless 2 ½ year old child. His trousers were unzipped and below the waist. The child had been defiled and it was confirmed by medical evidence. The other victim (PW4) was 6 years old and was categorical that the appellant penetrated her.

29. I agree there are some discrepancies in the evidence of PW1 and PW2. However, the divergences are minor and immaterial. In any trial, there are bound to be such inconsistencies. **Joseph Maina Mwangi v Republic**, Court of Appeal, Criminal Appeal No. 73 of 1993.

30. I found earlier that the appellant was declared to be mentally fit to stand trial. For the reasons outlined earlier, I also found that the trial was fair in the circumstances; and, that there was no violation of his constitutional rights.

31. In the end I find that the prosecution proved all the elements of the charge beyond reasonable doubt. The appeal on conviction is *dismissed*.

32. I will now turn to the sentence. There was clear documentary evidence establishing that the ages of the victims were 2½ years and 6 years respectively. Section 8 (1) and (2) of the **Sexual Offences Act** provides for a *minimum* sentence of *life imprisonment*.

33. Following landmark decision of the supreme Court in **Francis Karioko Muruatetu & another v Republic**, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR, the courts now frown upon *minimum* or *mandatory* sentences.

34. Specifically, the Court of Appeal has given fresh guidance on *minimum sentences* under the **Sexual Offences Act**. In **Jared Koita Injiri v Republic** [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

*In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by **section 8 (1)** of the **Sexual Offences Act**, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.*

The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

*Needless to say, pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic** (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court. [Emphasis added]*

35. I accordingly *set aside* the life sentence. The appellant shall now serve a term of *30 years imprisonment*. For the avoidance of doubt, the new sentence shall run from 8th September 2017, the date of the original conviction.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 26th day of March 2020.

KANYI KIMONDO

JUDGE

Judgment read in chambers in the presence of-

Appellant absent in line with NCAJ's Covid-19 pandemic guidelines of 15/3/2020.

No appearance by counsel for the accused.

No appearance by counsel for the Republic.

Ms. Dorcas, Court Assistant.