



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 165 OF 2017

ARAFA ALI MWADENI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence of Hon. Kagoni E.M, Senior Resident Magistrate, delivered on 13th September, 2017 in Mombasa Chief Magistrate's Court Criminal Case No. 859 of 2015)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a girl contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 10th May, 2015 at [Particulars Withheld] area in Changamwe sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the anus of SM [name withheld] a girl aged 10 years. He was sentenced to life imprisonment.

2. The appellant was aggrieved by the decision of the Trial Court and on 21st September, 2017 he filed a petition of appeal through the law firm of Okanga & Co. Advocates. He raised the following grounds of appeal:-

- (i) That the Learned Magistrate erred in law and fact by making a finding that the prosecution had proved its case beyond reasonable doubt;
- (ii) That the Learned Magistrate erred in law and fact by placing heavy reliance on the evidence of prosecution witnesses which was contradictory with inconsistencies and therefore not safe to rely on; and
- (iii) That the Learned Magistrate erred in law and fact by sentencing the appellant to life imprisonment which was excessive in the circumstances.

3. The appellant had on 26th September, 2017 filed a petition of appeal in person. It was assigned High Court Criminal Appeal No. 170 of 2017. The appellant's Counsel however proceeded with the appeal he had filed which was assigned High Court Criminal Appeal No. 165 of 2017. High Court Criminal Appeal No. 170 of 2017 is therefore regarded as abandoned.

4. The appeal herein proceeded by way of written submissions. The appellant's Counsel filed his on 18th October, 2019. Ms Mwangeka, Prosecution Counsel, filed hers on 29th October, 2019 on behalf of the Director of Public Prosecutions. Mr. Okanga, Learned Counsel for the appellant highlighted his written submissions by stating that the complainant claimed to have been dragged to the bush and defiled in [Particulars Withheld] area. It was stated that she further claimed that the appellant who was walking behind her grabbed her covered her mouth and dragged her into the bush where he lay her on the ground and defiled her.

5. He further submitted that the Investigating Officer testified that the appellant was arrested on 12th May, 2015 for an offence that occurred on 10th May, 2015 in the appellant's house in Migadini, thus the said witness and PW1 did not speak in unison on where the offence occurred. It was stated that the Investigating Officer contradicted the evidence of PW1.

6. On the charge brought against the appellant, his Counsel submitted that it did not support the evidence. It was indicated that PW1 gave evidence that the appellant removed his shorts and his *mdudu* and put it in her private part. After he finished doing, she felt pain in her private parts, yet the charge sheet states that she was defiled in her anus.

7. Counsel for the appellant relied on the case of **Julius Kioko Kivuva v Republic** [2015] eKLR where the Judge found that there was no evidence of penetration as the complainant therein failed to explain what she meant by the words "having sex."

8. It was pointed out that in this case, the Post Rape Care (PRC) form was filled on 11th May, 2015 and the P3 form was filled 6 months later on 23rd November, 2015. It was argued that in the said circumstances, the P3 form could not be of much evidential value. He referred to the PRC form which indicated that PW1 had a broken hymen and an old scar. It was contended that if PW1 was defiled on 10th May, 2015 and examined on 11th May, 2015, she would have been found with a fresh wound, not an old scar.

9. Counsel for the appellant submitted that failure by the Investigating Officer to visit the scene of crime was a big omission as it was not established if the scene was in the bush or in the appellant's house. It was pointed out that in his Judgment, the Hon. Magistrate found that the evidence by the prosecution did not remove the appellant from the scene of crime. In Mr. Okanga's view, the scene of crime that the said Magistrate was referring to was not clear.

10. In making reference to the decision filed by the Prosecution Counsel, in **JEO v Republic** [2019] eKLR, Mr. Okanga stated that in the said case, the Judge was of the view that it is always desirable and important for an Investigator to visit the crime scene and in appropriate cases such failure may lead to an adverse inference on the prosecution.

11. Mr. Muthomi, Prosecution Counsel, highlighted the submissions that had been filed by Ms. Mwangeka. He submitted that the issue of penetration was proved by the PRC and P3 forms. He stated that the Doctor indicated on the PRC form that there was oedema of the labia majora and an old scar. He explained that oedema means swelling which was evidence of penetration. In referring to Section 2 of the Sexual Offences Act, he submitted that penetration could be either partial or complete. On the issue raised by Mr. Okanga about the organ of PW1's private parts which was penetrated, Mr. Muthomi stated that private parts refer to both the vagina and anus. It was stated that Section 2 includes penetration of a genital organ of one person into the genital organ of another person and an anus is defined as a genital organ under the said section. He submitted that in this case, penetration was proved.

12. The Prosecution Counsel submitted that the primary document in a defilement case is the PRC form. In his view, the fact that the P3 form was filled 6 months after the offence was committed did not occasion a miscarriage of justice on the appellant.

13. On the issue of identification, it was submitted that the appellant was not a stranger to PW1 and he was the one who pulled her into the bush. The prosecution maintained that the offence took place in the bush and there was no doubt about that.

14. On the failure by the Investigating Officer to visit the scene of crime, Mr. Muthomi submitted that it did not occasion a miscarriage of justice. He cited the case of **JEO v Republic**, High Court Criminal Appeal No. 22 of 2018 where the court was of the view that visiting of the scene of crime by an Investigating Officer is desirable. He prayed for the appeal to be dismissed.

EVIDENCE ADDUCED BEFORE THE LOWER COURT.

15. PW1, SM [name withheld] was a 10 year old girl. She was taken through voir dire examination. The Trial Court found her to be intelligent enough to give sworn evidence. She recounted that on 10th May, 2015 she had gone to visit her Aunt. On her way home at 7:00p.m., she met her mother's friend and neighbour who was going in the opposite direction and greeted her and she proceeded on with her journey. PW1 stated that the neighbour was walking behind her. She (sic) caught up with her and grabbed her mouth using his mouth (sic) and led her to a bush. PW1 in her evidence before the Trial Court further said that the person threatened to kill her if she screamed. When they got to the bush he forced her to lie down on the grass and removed her skirt and pant. He then removed his short. He was still warning her not to shout or scream.

16. It was the evidence of PW1 that after he removed his shorts, he removed his *mdudu* and put it inside her. He finished doing and she felt pain in her private parts. She testified that the appellant got up, put on his pair of shorts and left after warning her not to tell anyone what had happened. He left her there.

17. PW1 gave evidence that she also got up, dressed and went home. She told her mother that she had been defiled. Her mother called a friend of hers and they took her to Changamwe Police Station. She was later taken to Coast Province General Hospital. She was examined and a PRC and P3 forms filled. She was given medication. She stated that the person who defiled her was very well known to her as Ali, whom she identified as the appellant herein.

18. PW2, was BA [name withheld]. She was PW1's mother. She indicated that PW1 was born on 20th November, 2005 as per a copy of her birth certificate which she had in court. She testified that on 10th May, 2015 she, her sister and PW1 went to church. After church service, PW1 went to PW2's sister's (Aunt's) house. At about 7:00p.m., she went home. PW2 noticed that PW1 appeared uneasy. She said she wanted to go to the toilet. PW2 followed her and noted that she had difficulty in passing stool. She shouted to PW1 to get out and asked her what the problem was, she refused to open up. When PW1's father went home, PW2 told him what had happened. PW2 further testified that PW1's father asked for PW1's pant and on looking at it, he told her it had fresh sperms. PW1 still refused to tell them what had happened. She opened up after being threatened with being taken to the police station. She told them she had been defiled by Arafa, whom she described as the person who fetches water for people.

19. PW2 gave evidence that they reported the incident to Changamwe Police Station. They were sent to Coast Province General Hospital (CPGH) where PW1 was examined and found to have been defiled. A P3 form was filled. PW2 stated that she knew Arafa as the appellant herein and that he used to fetch water for residents.

20. No. 7368 Sergeant Josephine Mwangemi attached to Changamwe Police Station testified as PW3. It was her evidence that she was in her office on 12th May, 2015 when a 10 year old minor was taken to the police station by her mother, on an allegation of defilement by a person known to her. She indicated that PW1 reported that when she was on her way home from her Aunt's place, the appellant defiled her. PW3 stated that the appellant was arrested by members of the public on 12th May, 2015. PW3 clarified that the offence occurred on 10th May, 2015 in the appellant's house at Migadini. She further testified that she visited the house but recovered nothing.

21. PW4 was Doctor Jillian Njambi Muthoni, a Medical Officer at Coast Province General Hospital (CPGH). She had with her the P3 form for PW1 which was filled on 23rd November, 2015 by Dr. Muthla Mohamed. PW4 stated that the said Doctor was away for further studies and she was familiar with the handwriting and signature of Dr. Mohamed. PW4 testified that PW1 on being examined was found to have swelling in her private parts, her hymen was broken with an old scar. PW1 had a scar in the anal region at the 6 O'clock. She was examined after 6 months and a P3 form filled. A PRC form was filled on 11th May, 2015. She produced the P3 and PRC forms in evidence.

22. In his sworn defence, the appellant denied having committed the offence. He stated that one Monday, he received a call from a customer who wanted to be supplied with water. He fetched some water and then went back to the tap for more water. He indicated that PW1's father went to where he was and informed him that their house had been broken into the previous night and he was the suspect. As they argued, PW1 and her mother joined them. The appellant claimed that they alleged he had defiled PW1. They started beating him. He lost consciousness. His brother was called and he was taken to a nearby health centre. While there, the police went for him.

ANALYSIS AND DETERMINATION

23. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent decision, while bearing in mind that it has neither seen nor heard witnesses testify and make an allowance for the said fact. In **Kiilu and Another vs Republic** [2005] 1 KLR 174, the Court of Appeal stated as follows on the duty of the 1st appellate court:-

“1. An appellant on a first appeal 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.

2. 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; 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.”

24. The issues for determination are:-

(i) If the complainant was defiled;

(ii) If the inconsistency about the place the offence occurred is fatal to the prosecution's case;

(iii) If the prosecution proved its case beyond reasonable doubt; and

(iv) Whether the sentence is harsh or excessive.

If the complainant was defiled.

25. The complainant (PW1) was walking home from her Aunt's house on 10th May, 2015 at 7:00p.m., when she was accosted by a man whom she identified as the appellant. As per PW1's evidence, he led her into a bush and forced her to lie down on the grass. He removed her skirt and pant. He removed his pair of shorts and warned her not to shout or scream. He removed his *mdudu* (penis) and put it inside her. She felt pain in her private parts. The appellant got up and wore his shorts and left PW1 at the scene after warning her not to tell anyone what had happened. She then got up, dressed and went home.

26. PW1's mother testified as PW2. She noticed that PW1 was uneasy when she reached home. She followed PW1 to the toilet when she said she wanted to use it. She noticed that PW1 had difficulty in passing stool. At first PW1 refused to state what had happened to her but on being threatened with being taken to the police station, she opened up and told her parents that she had been defiled by Arafa, the person who fetches water for people. The incident was reported to Changamwe Police Station.

27. On being medically examined on 11th May, 2015 for purposes of ascertaining if PW1 had been defiled, the examining officer found that she had oedema of the labia majora. PW1 also had multiple vaginal abrasions. She had a broken hymen old scar. She also had a laceration at the 6 O'clock at her anal region.

28. Mr. Okanga, Advocate took issue with the fact that the P3 form was filled 6 months after the incident. A look at the PRC form MOH 363 in part A, at the sub-heading bears the following words ***“Ministry of Health National Rape Management Guidelines: Examination documentation form for survivors of rape/sexual violence (to be used as clinical notes to guide filling in of the P3 form)”***.

29. This court therefore concurs with Mr. Muthomi's submission that the PRC form is the primary document when dealing with sexual offences. This court adds that the exception to the rule would be where the said forms may be unavailable in some medical facilities for various reasons.

30. When PW1 was examined on 11th May, 2015 the injuries she sustained during defilement were fresh and the medical personnel who examined her captured the findings on the PRC form. The fact that the P3 form was filled 6 months later did not affect the veracity of the medical evidence that was tendered through the P3 form as the findings thereon were derived from the PRC form.

31. Further, from proceedings of the lower court. The reasons behind the late filling of the P3 form can be established from the proceedings of 20th November, 2015. On that day, the Investigating Officer attended court and informed the Trial Magistrate that the P3 form had not

been filled because the father of the child (PW1) had refused to avail her for the said purpose. She further said that she had spoken to the parents of the child and they were refusing to bring her. She explained that she charged the appellant on the basis of the PRC form and that PW1's father said that he was not interested in the case. As such the P3 form had not been filled.

32. PW1's father who was in court responded by stating that he did not refuse to take PW1 to hospital but he had certain challenges. He also said that PW1 was bored of going to the police and that he had been following the issue of the P3 form but had not been given. He said that the police officer (Investigating Officer) had been so harsh and the child was scared.

33. The Investigating Officer responded to the foregoing allegation by stating that PW1's father had never called her and that he was lying. The Trial Magistrate ordered for PW1's father to be remanded so that his wife could avail the PW1 to the police station for filling of the P3 form. It is clear from the said circumstances that PW1's father frustrated efforts to have the P3 form filled in good time.

34. This court's finding on whether PW1 was defiled is that there was sufficient medical evidence to support the said fact. As per the PRC and P3 forms, the multiple vaginal abrasions and anal ulceration at the 6 O'clock were consistent with the offence of defilement. The medical evidence corroborated PW1's evidence that she was defiled. The fact that PW1 had a broken hymen old scar does not vitiate the fact that she was defiled by the appellant. If she had previously been defiled by someone else long before the incident in issue, it was not a matter for determination by this court.

If the inconsistency and/or discrepancy about the place where the offence occurred was fatal to the prosecution's case.

35. PW1 was consistent in her evidence that she was accosted on the road and led into a bush by the appellant. When PW3 gave evidence, she stated that the offence occurred in the appellant's house. The lower court proceedings do not reveal that it was PW1 who told her that the offence took place in the appellant's house. It is clear that PW3 is the one who contradicted the evidence of PW1. At no time in her evidence did PW1 state that she was defiled by the appellant in his house.

36. The Trial Magistrate had the advantage of seeing and hearing the witnesses testify. He had the following to say about the demeanour of PW1.

"She impressed me as an intelligent girl keen on telling the truth. She told the court what happened to her and who did it to her, the way it happened. She braved cross-examination from the accused and responded to questions put to her calmly and confirmed that she knew the accused very well. She could even remember that the offence was committed on a Sunday. Considering the complainant's age and calm demeanour in court, I am satisfied that what she told the court was the truth for which the court would require no corroboration."

37. In the Court of Appeal decision of **John Nyaga Njuki and 4 Others v Republic** [2002] eKLR, the Court stated thus on the issue of discrepancies:-

"But what is important is whether discrepancies are of such a nature as would create doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

38. This court has no reason to disbelieve the evidence of PW1 that she was defiled in the bush. In this court's considered view, the inconsistency brought about by the evidence of PW3 does not render a fatal blow to the prosecution's case as PW3 was not an eyewitness to the commission of the offence.

Whether the prosecution proved its case beyond reasonable doubt.

39. The age of the complainant was not in issue as a copy of her birth certificate was produced in court to confirm that she was born on 20th November, 2005. She was therefore 10 years old on the date she was defiled. The identity of the appellant was also not in issue. He was known as Ali and was also known as Arafa by another name. PW1 in her evidence said he used to fetch water for people. In his defence, the appellant confirmed that he was a water vendor and that he knew PW1 and her parents.

40. Mr. Okanga raised a pertinent issue of PW1 not having disclosed where she was penetrated in her private parts. Section 2 of the Sexual Offences Act defines "**genital organs**" to include the whole or part of male or female genital organs and for purposes of the said Act, it includes the anus. PW1's evidence was to the effect that after the appellant removed his *mdudu* he put it inside her. He finished doing (defiling her) and she felt pain in her private parts. It was contended that the lack of specificity as to the organ which was penetrated should lead to the acquittal of the appellant. The finding of this court is that PW1 sustained injuries in both her vagina and anus. The particulars of the offence that the appellant was charged with was that he penetrated the anus of SM. Medical evidence revealed ulcerations at the 6 O'clock position of her anal opening. The inference to be drawn from the evidence adduced as a whole is that the appellant inserted his genital organ, penis, which PW1 described as *mdudu* into PW1's anus, thus the offence of defilement was proved beyond reasonable doubt. This court is not persuaded by the argument and authority cited by Counsel for the appellant.

41. The defence raised by the appellant cannot stand in light of the evidence which was adduced against him. It was properly dismissed by the Trial Magistrate, and rightfully so.

If the sentence is harsh or excessive.

42. The appellant herein was sentenced to life imprisonment. The Court of Appeal in the case of **Jared Koita Injiri v Republic** [2019]

eKLR applied the reasoning in the Supreme Court decision in **Francis Karioko Muruatetu v Republic** [2017] eKLR to the provisions of Section 8(2) of the Sexual Offences Act, where the victim of defilement was 9 years old and reduced the sentence therein from life imprisonment to 30 years imprisonment. The said court stated thus-

“... If the reasoning in the Supreme Court case was applied to this provision it too should be considered unconstitutional on the same basis—and set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

43. In the instant case, the victim of defilement was 10 years old. Guided by the decision in **Jared Koita Injiri v Republic** (supra), this court sets aside the sentence of life imprisonment imposed against the appellant and substitutes it with a sentence of 30 years imprisonment. This court notes that the appellant was out on bail pending trial. His sentence shall therefore be effective from 13th September, 2017 being the date he was sentenced by the Trial Court. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 6th day of March, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present

Mr. Okanga for the Appellant

Ms Mwangeka, Prosecution Counsel for the DPP

Mr. Oliver Musundi- Court Assistant