REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 21 OF 2017

GERALD MOMANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(***An appeal against conviction and sentence (Hon. Okuche, SRM) delivered on 16th May 2017 in criminal case No38 of 2015 at Kajiado)***

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 9th day of September, 2015 in Kitengela Township within Kajiado County, he intentionally caused his private organ to penetrate the private organ of RN, a child aged 10 years.

2. He faced alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. Particulars being that on the 9th day of September 2015 in Kitengela Township, he intentionally touched the private organ of RN, a child aged 10 years.

3. The appellant pleaded not guilty to both the main and alternative counts and after a trial in which the prosecution called 5 witnesses and the appellant's defence, he was convicted on the main charge and sentenced to life imprisonment.

4. The appellant was aggrieved with both conviction and sentence and lodged an appeal and raised the following grounds, namely:

> ***1. The learned magistrate erred in law and fact when he convicted him yet the case was not supported by the P3 form.***
>
> ***2. That the learned magistrate erred in law and fact by convicting him yet his right to representation was violated.***
>
> ***3. That the learned trial magistrate erred in law by convicting him on insufficient evidence.***
>
> ***4. That the learned trial magistrate erred both in law and fact by convicting him yet failed to find that crucial witnesses did not testify.***
>
> ***5. That the learned trial magistrate erred in law and fact by dismissing his defence.***

5. The appellant filed amended grounds of appeal filed on 4th March, 2020 stating that:

> *1.* ***The conviction was unsafe as the charge was not proved beyond reasonable doubt.***
>
> *2.* ***That the trial court erred in convicting him under section 5 of the Sexual Offences Act which is on a different charge hence the charge was defective.***
>
> *3.* ***That the prosecution did not discharge the burden of proof.***
>
> *4.* ***That he was not given witness statements thus he was prejudiced.***
>
> *5.* ***That PW2 and PW3 did not give direct evidence.***
>
> *6.* ***That medical evidence namely, treatment notes and PRC were not produced and the P3 form was not credible to warrant his conviction.***

7. ***That the trial court gave disproportionate sentence.***

8. ***That the trial court did not give due weight to his defence.***

9. ***That the court did not consider his long stay in remand and***

10. ***That he was prejudiced by an unfair trial contrary to Articles 25(1) 29(f) and other Articles of the constitution.***

6. During the hearing of the appeal, the appellant who was unrepresented, relied on his written submissions and urged the court to allow the appeal, quash the conviction and set aside the sentence.

7. In the written submissions, the appellant argued that the prosecution did not prove its case beyond reasonable doubt; that there was no penetration and that there was no corroboration. He also argued that the witness's evidence was not credible. He further argued that the house girl to whom the report was first made did not testify and relied on ***NRB HCRA No. 133 of 2015.*** The appellant further relied on ***Charles Wamukoya v Republic (***Criminal Appeal No. 72 of 2013) and ***Hamisi Bakari & another v Republic*** [1987] for the submission that where heavy minimum sentence is involved, the trial court should be particular to see that each ingredient in the charge sheet is reflected in the particulars of the offence.

8. Mr. Njeru, learned Assistant Prosecution Counsel, opposed the appeal, supported conviction and sentence. According to counsel, the prosecution proved its case against the appellant as required.

9. On the issue of age, he argued that age of the victim was established and that penetration was proved through the evidence of PW1 and PW4, the victim and Doctor respectively. Regarding identification of the perpetrator, counsel argued that the appellant was known and was found committing the offence. He therefore argued that the prosecution proved its case beyond reasonable doubt. On sentence, Mr. Njeru submitted that the sentence meted out was lawful. He urged the court to dismiss the appeal, uphold conviction and affirm the sentence.

10. I have considered this appeal submissions and authorities relied on. I have also perused the record and considered the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reevaluate, reconsider and reanalyze the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. (***See Okeno v Republic*** [1972]EA 32.

11. In ***victor Owich Mbogo v Republic,*** criminal appeal No. 152 of 2015 [2020] eKLR, the Court of Appeal stated:

> ***"It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify***."

12. PW1, a child aged approximately 11 years at the time of testifying, told the court that she was born on 23rd October, 2005; that she was in the house when the appellant who was working for them asked her to take a tissue to him outside which she did. The appellant grabbed her, gagged her using his hand and threatened to kill her if she raised an alarm. He then removed her trouser and also removed his then defiled her. When he was done, he left her but threatened to kill her if she revealed what had happened. She went to the toilet and discovered that she was passing urine with blood. Her aunt told her to get out of the toilet where she had locked herself. She then informed her uncle and her brother what had happened. Her uncle called her father who asked them to take her to hospital where she was treated.

13. In cross-examination, the witness told the court that the appellant defiled her but she could not raise an alarm because he had gagged her.

14. PW2 EW testified that on 9th September, 2015 at 8 am, Sammy called and asked her to send someone to help him with some work. She sent the appellant to assist him. Later that day at 8pm, Sammy, his brother and PW1 went to the butchery where she was and asked her if she had seen the appellant. Sammy told her to take PW1 to hospital because she had been defiled by the appellant. On the way she asked PW1 what had happened but she did not respond. She pleaded with PW1 and that was when PW1 what explained that she had been defiled. At the hospital, the doctor examined her and confirmed that PW1 had been defiled and asked her to report the matter to the police. In cross-examination, the witness told the court that the appellant owed her Kshs 21,000/- which was a short fall from the butchery and that they had agreed on the mode of re payment which was long before the incident.

15. PW3 SNM testified that on 9th September, 2015 he was at PW2's house boiling soup. The appellant asked for tissue but he told him that he did not have any. The appellant left for about 30 minutes. When he went to check on him, the house girl asked him whether he had seen PW1. He went to check on PW1 and found the appellant between the pit latrine and the house wearing his trouser. He went to the house and the house help told him that PW1 had gone to the house running; that she had locked herself in the toilet and that when she opened the door, she told her what had happened. He called her father who instructed him to take her to hospital. He took PW1 to her mother's place of work and the mother took her to hospital.

16. In cross-examination, the witness told the court that he found the appellant dressing up and that PW1 had locked herself in the toilet. She only opened the door after he threatened to break it and that when PW1 got out, she was crying.

17. PW4 Ruth Lengete, a clinical officer, testified that according to the PRC PW1 was seen at Nairobi Women Hospital, Kitengela on 9th September, 2015. On examination, her labia were swollen, there was colorless discharge and her private organ was inflamed. She was sent for lab investigations and put on treatment. She produced the PRC which was signed by Onguka Leraine as PEX 3.

18. PW5 No. 47577 CPL Susan Mutuku attached to Kitengla police station testified that on 11th September, 2015, PW2 reported that her

daughter had been defiled by her worker. She issued PW1 with a P3 form which was filled and confirmed that the minor had been defiled. The minor's age was confirmed through age assessment. She produced the P3 form as PEX 2. The appellant was arrested about a month later and charged with the offence.

19. At the close of the prosecution case, the appellant testified on oath and told the court that on 16th October, 2015 he woke up and went to his place of work and took meat to the butchery. At around 10 pm, police went to his butchery in the company of PW2, a lady he used to work for and who he owed Kshs, 37,000. They arrested and charged him with the offence which he denied committing.

20. In cross-examination, he told the court that PW2 had lent him Kshs. 37,000 to pay for his child's medical bills and when he came back from home, he offered his own business to her and they had an agreement in writing which he however said was at home. He admitted that he used to work for PW2 but stated that at the time of the incident, he was not working for her. He denied having a grudge with pw1.

21. The trial court considered the evidence adduced by the prosecution and the appellant and was satisfied that the prosecution had proved its case beyond reasonable doubt convicted and sentenced the appellant triggering this appeal.

22. The appellant has challenged the conviction and sentence on several grounds. However, in my view, the issue that arises for determination is whether the prosecution proved its case beyond reasonable doubt.

23. This being a defilement case, the prosecution was required to prove three ingredients namely; age of the victim, penetration and identification of the attacker.

24. On age, the victim, PW1 told the court that she was born on 23rd October, 2005 and that she would be 11 years on 23rd October. There is also a birth certificate, PEX 1 which showed that PW1 was born on 23rd October, 2005. PW2, mother to PW1, also confirmed that PW1 was born in 2005. That evidence sufficiently y established the ingredient of age.

25. On penetration, the law defines penetration as partial or complete insertion of a person's private organ into another's private organ. PW1 told the court that the appellant defiled her. According to the witness, the appellant grabbed her; gagged her mouth; removed her cloths; then removed his cloths and defiled her. She felt pain and when he was done, he left threatening to kill her if she revealed to anyone what had happened. She went to the toilet where she realized that she was passing urine with blood.

26 . PW4 Ruth Lengate, a clinical officer who testified on behalf of the clinical officer who examined PW1, testified that according to the PRC, PW1's outer labia was swollen; that she had colorless discharge, and her private organ was inflamed. The PRC showed that there was no bleeding and was silent on the hymen.

27. PW5 produced the P3 form which also showed that the genital organ was inflamed with colorless discharge but no bleeding. The probable weapon used was identified as male organ.

28. Taking into account the evidence of PW4; the PRC and P3 forms, PEX 2 and 3 respectively, there is no doubt that there was sexual assault. What could have caused inflammation and swelling of PW1's private organ?

29. Taking into account the totality of this evidence and the definition of penetration under section 2 of the Sexual Offences Act, I am satisfied, as the trial court was, that there was cogent evidence to prove the ingredient of penetration.

30. The third and final ingredient is identification of the perpetrator. The appellant argued that the prosecution did not prove that case and that the trial court disregarded his defence. In his defence he denied committing the offence and stated that he was not working for PW2 at the time of the incident.

31. PW1 testified that the appellant defiled her after gaging her and threatening to kill her. He again threatened her after he had defiled her that he would kill her if she disclosed what had happened.

32. PW2 testified that she sent the appellant to assist Sammy perform some tasks. PW3 testified that on that day he was boiling soup at PW2's house when the appellant asked for tissue but he told him he had none. The appellant left for some time and when he went to check on him, the house girl asked him whether he had seen PW1. As he was checking on PW1, he found the appellant between the latrine and the main house dressing up his trouser. He learnt from the house help that PW1 had gone to the house running and locked herself in a toilet in the main house. PW1 only opened the door after PW3 threatened to break the door. She explained what had happened. The appellant was known to the victim and PW3.

33. In a criminal trial, there should never be any doubt in the mind of the court that the accused committed the offence he is charged with. In ***Stephen Nguli Mulili v Republic*** [2014] eKLR, the Court of Appeal expressed this view thus:

> ***"[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR."***

34. In ***Miller v Ministry of Pensions,*** [1947] 2 All E R 372, ***Lord Denning*** stated on proof beyond reasonable doubt:

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable***

doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

35. And in ***Bakare v State (***1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, amplified on that phrase, thus:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.***"

36. The appellant admitted in his defence that he used to work for PW2 and that he had no grudge with PW1. He stated that he owed PW2 Kshs, 37,000 but never made any allegation of a grudge between him and PW2. With this evidence there was no doubt that the appellant was known to the victim and PW3 whose evidence proved the identity of the attacker beyond reasonable doubt.

37. The appellant alleged that his rights were violated in that he was not given witness statements. It is an accused person's constitutional right to have witness statements that the prosecution intended to rely on and given an opportunity to prepare his defence.

38. According to the record, on 21st October 2015 the trial court ordered that the appellant be supplied with witness statements and documents from the prosecution. Thereafter, the appellant participated in the trial and cross examined witnesses. He did not complain to the trial court that he was not supplied with witness statements. There is nothing on record to show that his was the case. In the circumstances, it is difficult for this court to agree with the appellant that he was given statements and therefore his rights were violated.

39. Regarding sentence, the appellant argued that the trial court handed him a disproportionate sentence given the evidence on record. He also argued that he trial court did not take into account the period he had spent in remand while awaiting conclusion of his trial. The respondent argued that the sentence was appropriate and urged the court to uphold it.

40. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Act. Section 8(2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The section provides for a mandatory sentence of life imprisonment. The appellant committed the offence with a child aged 10 years and therefore he was sentenced to life imprisonment as provided by law.

41. Mandatory sentences have been held to be inappropriate as they deprive courts discretion to impose appropriate sentences depending on the circumstances of each case.

42. In ***Francis Karioko Muruatetu & Others*** Supreme Court Petition No. 15 of 2015,[2017] eKLR, the Supreme Court held with regard to section 204 which provides for a mandatory sentence that:

> ***"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."***

43. Flowing from the above decision, imposing mandatory sentences does not conform to the tenets of fair trial guaranteed to an accused person. That means the appellant's right to be sentenced to a less severe sentence was violated when he was sentenced to life imprisonment which I find to have been severe and excessive. Given that the victim was nearing eleven years, a sentence of 15 years would be appropriate in the circumstances of this case.

44. The appellant was arrested on 20th October 2015 and charged in court on 21st October 2015. Although he was granted bond, he did not raise the bond terms and therefore spent time in remand during trial until 16th May 2017 when he was sentenced. Section 333(2) of the Criminal Procedure Code requires courts to consider the period spent in remand or custody by an accused person when meting out sentence. As the appellant was sentenced to life imprisonment, this period could not be taken into account.

45. Having considered the appeal submissions and the authorities relied on; I find no merit in this appeal on conviction. Consequently, the appeal on conviction is dismissed and the conviction upheld.

46. Regarding sentence, I find that the sentence was excessive. Appeal on sentence is therefore allowed and the sentence of life imprisonment set aside. In place therefor, the appellant is sentenced to fifteen years imprisonment. The sentence of fifteen years shall run from the date of appellant's arrest, that is; 20th October 2015.

Dated, signed and delivered at Kajiado this 30th day of April, 2020.

E. C. MWITA

JUDGE