REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 37 OF 2018

JOSEPH MACHARIA GITHAIGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case Number 76 of 2017 in the Chief Magistrate's Court at Nakuru before Hon. Y. I. Khatambi (SRM) dated 2nd March 2018)

J U D G M E N T

1. The appellant Joseph Macharia Githaiga was on 2nd March 2018 found guilty, convicted for the offence of **Defilement Contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act**, where it was proved that on 12th April 2017 at [particulars withheld] area within Nakuru he intentionally committed an act that caused penetration with a child by inserting his male genital organ into the genital organ of GWM a girl aged fifteen (15) years old.

2. The trial court sentenced him to serve thirty (30) years in prison.

3. Aggrieved by the conviction and sentence he filed this appeal on 27th March 2018 on the grounds;

i. The Learned Trial Magistrate erred in law and in fact in finding that the Prosecution had proved its case beyond reasonable doubt when the evidence as presented did not sufficiently support the charges.

ii. The Learned Trial Magistrate erred in law and fact by sentencing the Appellant with manifestly excessive and illegal sentence in the circumstances of the case before him.

iii. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant pursuant to Section 215 of the Criminal Procedure Code, without sufficient evidence and without making a specific finding on the conduct of the Appellant before and after the alleged offence facing the Appellant.

iv. The Learned Trial Magistrate erred in law and in fact by relying solely on the evidence of the Complainant in arriving at the conclusion that the Accused had committed the offence without cautioning himself.

v. The Learned Trial Magistrate erred in law and in fact by failing to consider the inconsistencies in the prosecution's evidence and in failing to consider the evidence as a whole and especially for the defence.

vi. The Learned Trial Magistrate erred in fact and in law in failing to take into consideration the defence put forward by the Appellant, in shifting the burden of proof to the Appellant.

vii. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant in the absence of compelling evidence from the prosecution.

viii. In whole the finding and holding of the Learned Trial Magistrate as contained in the judgement delivered on the 2nd of March 2018 is inconsiderate, erroneous, unlawful biased and untenable in law.

ix. The Learned Trial Magistrate erred in law in dismissing the Appellant's defence.

x. The conviction of the Appellant is against the weight of the evidence.

xi. The judgement of the Learned Trial Magistrate is full of misdirection and errors which resulted in miscarriage of justice.

4. The case for the prosecution was well summarized by the trial court.

Brief facts

PW1 GW, stated that on 12th April, 2017 she went to the accused person's home to fetch water. She was in the company of her sister SW. They waited for the accused, accused arrived at his home and appeared drunk. He sent them to pick mangoes. SW ran off towards the mango plantation. The accused got hold of PW1, pulled her into his house, lay her on the bed, removed her panty and defiled her. She got up after the incident, dressed up and left the house with the accused. She met he sister and they ran off, she informed the accused person's neighbour who later called the complainant's mother and informed her of the incident. A report involving the alleged offence was lodged at Ndundori Police Station. She was escorted to hospital, where she was examined and treated. She identified the accused as her assailant.

PW2 SW, stated that on the material day she was at the accused person's compound in the company of PW1. Accused arrived and told them to get mangoes. She ran towards the mango plantation, on arrival she realized that she was alone. She went back to Macharia's house, tried to open door realized it was locked. The accused warned her against opening the door. She saw the PW1 and accused walk out of the house. They (she and PW1) went to the neighbouring homestead. She stated that they used to fetch water from the accused person's home and that the accused person used to go to their home.

PW3 RWM, testified that on the material day she sent PW1 and PW2 to fetch water from the accused's compound. She received a call from a lady. She went to the lady's home, where she found PW1 and PW2. PW1 was crying, on inquiry, PW1 informed her that she had been defiled by the accused. Matter was reported to the police station. They were referred to the hospital, where the complainant was examined and treated. They identified the accused upon his arrest.

PW4 Peter Mutea, a medical officer stated that he examined the complainant, filled the P3 form and PRC form. He noted that the complainant's vagina was red, painful with lacerations. Her hymen was perforated. He noted whitish discharge from the complainant's vagina and the presence of spermatozoa. He concluded that the complainant had been defiled.

PW5 PM, the complainant's brother testified that he received a call from PW3 on 12th April 2017 at 6.00 p.m. PW3 informed him that the complainant had been defiled and requested for money to cater for the medical expenses. He travelled home and apprehended the accused and handed him over to the District Officer and police.

PW6 No. 68594 PC Zachary Opande, the investigating officer, testified that on 12th April 2017, he received a report concerning a defilement case. He interrogated the complainant, who informed him that she had gone to fetch water in the company of her sister when the accused got hold of her and defiled her. He referred the complainant to hospital. A P3 form was issued. Accused was arrested and that the accused was identified.

5. The accused was placed on his defence. The trial court summarized it thus:

"The accused defence was to the effect that on the material day the complainant's father went to his home. They left together for Mwalimu Kaniaru's home. He stated that there was only one vacancy, which he filled leaving the complainant's father without a job. He stated that it was the complainant's father who caused his arrest and framed him. He alleged that he was being framed over a debt of Ksh. 1,600 which the complainant's father owed him."

6. *In a* well reasoned judgment the trial magistrate relying on **WK v R [2015] eKLR** found that the prosecution had established penetration, age of the victim and the identity of the perpetrator of the offence.

7. In written submissions filed on 30th September 2019 by the firm of B. M. Kanyiri and Company for the appellant counsel only addressed the issue of sentence and relying on **Alfred Musila Wafula v Republic [2019] eKLR** and **Ben Rodgers Muthui v Republic [2019] eKLR** urged the court to find that the sentence imposed of thirty (30) years imprisonment was unlawful.

8. It was also argued in the submissions that the trial magistrate had failed to consider the appellant's mitigation and the Probation Officer's Report contrary to the Sentencing Policy Guidelines, leading to the excessive sentence.

9. For this the appellant relied on **Ahmed Adolfathi Mohammed & Another v Republic Criminal Appeal Number 135 of 2016** where the court held;

"Court will not normally interfere with the exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors, took into account irrelevant considerations, or on the whole that the sentence is manifestly excessive."

See also **Bernard Kimani Gacheru v Republic Criminal Appeal Number 188 of 2000.**

10. To emphasize the point it was argued for appellant that the "mandatory" sentence prescribed by **Section 8(3) of the Sexual Offences**

Act was twenty (20) years imprisonment and the trial magistrate had no reason to give thirty (30) years. Citing **Francis Karioki Muruatetu & Another vs Republic Supreme Court Petition Number 16 of 2015 [2017] eKLR, i**t was argued for appellant that the mandatory nature of those sentences had been done away with and there was no mandatory minimum sentence. It was further argued that on appeal against a sentence the Court had the power to *"increase, reduce or alter"* the nature of the sentence.

11. In opposing the appeal Ms. Nyakira for the state urged the court to sustain both the conviction and sentence. That the offence had been proved beyond a reasonable doubt. That the appellant had threatened the complainant's sister when she knocked on the door of the house where he had locked himself in together with complainant. That he also came out with a panga. That he had dragged the complainant to his house and defiled her. That this brutality amounted to aggravating circumstances leading to the sentence.

12. This is a first appeal and appellant is entitled to a consideration of the evidence, re-assessment and for this court to lay its own conclusions, **Okeno vs Republic (1972) EA 372**

13. From the evidence on record, the complainant and her sister went to fetch water as was usual from the appellants place. The appellant arrived while drunk, he told them to go fetch mangoes, complainant's sister left, he grabbed the complainant into his house where he proceeded to defile her. From the evidence on record the complainant's age was proved, the penetration was proved and the appellant was no stranger to the complainant. It is noteworthy that the appellant's submissions did not address any issue regarding the conviction. I have read the judgment of the trial court, and on the evidence before it. I am persuaded that the conviction was sound.

14. On the sentence, it is true that the law provides for a sentence, "*not less than twenty (20) years*". However, it is now clear from **Dismas Wafula Kilwake v Republic [2018] eKLR** that the mandatory nature of sentences even in the **Sexual Offences Act** has been declared unconstitutional giving courts the discretion to consider the circumstances of each case.

15. In meting out the thirty (30) year imprisonment sentence the trial magistrate stated;

> *"I have carefully considered the pre-sentence report. Accused in mitigation and the offence duly considered. I am of the considered view that there is need to impose a deterrent sentence noting that defilement is rampant in the area of court jurisdiction."*
>
> The prosecution had submitted that the appellant did not have any previous records. The appellant had submitted that he was the sole bread winner of his family, had two (2) children whom he took care of having separated from his wife in 2007 and that he was an orphan.

16. I have read the two (2) authorities cited by the appellant regarding sentencing. I find them persuasive.

17. By virtue of Section **353 (3) (b) Criminal Procedure Code,** the **Muruatetu** case, and **Dismas Kilwake**, the appellant is entitled to a relook at the sentence.

18. In **Alfred Musila Wafula** the court reduced the sentence of life imprisonment for a fifteen (15) year term of imprisonment for defilement of an eight (8) year old. In **Ben Rodgers Muthui**, the court set aside a sentence of fifteen (15) years to one of seven (7) years.

19. In this case the complainant was aged fifteen (15) years, the appellant was a first offender. From the pre-sentence report, he was the one with the sole custody and care of the two (2) children, a fact that came out even during the trial. He continued to deny the offence, and the Probation Officer was of the view that he did not express any remorse for what he had done.

20. The express reason for the appellant's long imprisonment sentence was as a deterrent to others, because 'defilement is rampant'. While that might be the case there was no specific evidence placed before the trial magistrate that giving the appellant a long sentence in this case would serve as a deterrent to others within the court's jurisdiction. Without belittling the horrendous thing that had happened to the complainant in this case, and with due respect to the trial court, there was nothing peculiar to the case to call upon the trial court to treat this as a case *'kuwa funzo kwa wengine'*. In any event, I am not aware from the record that any evidence was placed before the court to form the basis that long sentences in Kenya for sexual offences have served as a deterrent.

21. **Sexual Offences Act** sentences are already long, it was necessary for the trial court to express the reason, on the part of the appellant as to why he deserved a sentence of ten (10) years above the "minimum" sentence and how that would impact on him as the offender.

22. A sentence is not just for the community, but also for the victim and the accused person. It must address the justice of the case while trying to balance the expectations of these three.

23. I am persuaded that the sentence was excessive and harsh in the circumstances of the case. The most the appellant could have received was the "minimum" of twenty (20) years imprisonment, though the complainant was already above fifteen (15) years, by three (3) months, if we are to follow the law strictly. He was also in custody from 13th April 2017 to 9th March 2018 when he was sentenced.

24. Taking into consideration all foregoing, I find it appropriate to substitute the sentence of thirty (30) years with one of ten (10) years

25. The appeal succeeds in part. The conviction is sustained. The appellant will serve ten (10) years imprisonment with effect from 13th April 2018.

Delivered, Dated and Signed at Nakuru this 23rd day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of:- Via Zoom

Ms Odero for state

Edna Court Assistant

Appellant present