



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 68 OF 2018

PETER MULE NTHIWA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence of Hon. C.A Muchoki (RM) in Tawa Senior Resident Magistrate's Court Sexual Offence Case No. 11 of 2017 delivered on 4th December, 2018).

JUDGMENT

1. **Peter Mule Nthiwa** the Appellant herein was charged with the offence of defilement of a child contrary to section 8(1) as read with sub-section 2 of the Sexual Offences Act No. 2 of 2006. The particulars being that the Appellant on the 24th day of August 2017 at [Particulars Withheld] village, Kalawani sub-location Itetani location in Mbooni West district within Makueni county intentionally and un-lawfully caused his penis to penetrate the vagina of **C.M. K** a child aged 11 years.

2. The matter was heard and the Appellant was found guilty, convicted and sentenced to twenty (20) years imprisonment. Being dissatisfied he filed this appeal raising six (6) grounds of appeal which he later amended as follows.

i. **That**, the learned trial Magistrate erred in both law and facts and misdirected herself by holding that the case for the prosecution was proved to the required standard whereas on the basis of record the burden of proof was not discharged and indeed left reasonable doubts that ought to have been resolved in Applicant's favour.

ii. **That**, the learned trial Magistrate erred in law and fact by convicting him without regard to his basic right of disclosure of the prosecution evidence which was intended to be brought against him as laid down under Article 50(2)(c)(j) of the constitution of Kenya 2010 in that the witnesses' statements were never supplied to him.

3. The prosecution case was that Pw1 (**M.K**) aged 11 years then, was at home alone. The Appellant who was there herding goats and cows removed her pant and his underwear and defiled her. He thereafter gave her Kshs.10/= for use. He told her to tell no one. Pw1 went to Pw2's home and reported to her. Pw2 informed her parents who live in Makueni. They came and she was taken to Tawa hospital and the matter was also reported.

4. Pw2 **Anne Munyiva Mulandi** was at her home on 24th August 2017 at 4:00 pm when she saw a child coming towards her gate while crying. On being asked what the issue was the child told her she had been raped. On checking her clothes, she saw they had blood and she had dirt on her buttocks. She advised the child to shower. She reported to the village elder who inturn called the child's parents who lived in Wote. The Appellant whom she knew denied committing the offence.

5. Pw3 **DKM** is the father to Pw1. He confirmed receiving a report of the incident of 24th August 2017 and he travelled home on 25th August 2017. He testified saying that the Appellant was his domestic manager for one and half (1 ½) years. He produced Pw1's birth certificate (EXB1). Pw4 **Jeniphar Ndunge** is the clinical officer who examined Pw1 on 28th August 2017. She had not been treated. Her findings were as follows: -

- Hymen not intact
- No obvious discharge or blood stains.
- Urinalysis revealed blood stains and glucose deposit of blood stains and pus cells
- HIV and syphilis tests were negative.

6. Her finding was that there was sexual defilement. She produced the P3 form as EXB3.
7. Pw5 **No. 70602 P.C Paul Kiplangat** of Mbooni police station received the Appellant on 27th August 2017 from Kalawani Administration Police camp on allegations of defiling a child on 24th August 2017. The child was treated at Tawa hospital and a P3 form filled at the said hospital.
8. When placed on his defence, the Appellant elected to say nothing. He however called one witness (Dw1) who is his mother.
9. Dw1 **Magdalene Mule** testified that the Appellant took care of Kyalo's boma but his children were crooks who slept in the bush with their friends. The men would sleep with Kyalo's child. She denied the Appellant's involvement in the offence with which he was charged as he was at home after herding. In cross examination he said he did not know the names of these men who used to come and sleep with the child in Kyalo's boma.
10. Both parties filed written submissions as directed by the court.
11. The Appellant has argued his grounds of appeal simultaneously. He submits that Pw1 did not elaborate on the circumstances under which the offence was committed and where this occurred. He says there is a doubt on the date of incident when one considers Pw1's evidence and that of the clinical officer (Pw4). That Pw4 said she saw Pw4 four (4) days after the incident but the injuries were two (2) days old. He argues that penetration was therefore not proved.
12. Finally, he raises an issue with violation of his constitutional rights as enshrined under Article 50(2)(j). He argues that he was never issued with witness statements since he could not afford the cost as ordered by the trial court. It's his submission that there wasn't sufficient evidence to support a conviction.
13. In its written submissions, the Respondent through learned counsel Mrs. Anne Gakumu opposed the appeal. In explaining who a complainant is, she referred to section 208(1) of the Criminal Procedure Code. She also cited the case of **Republic –vs- Mwaura 1979 KLR 209 and Ruhi –vs- Republic 1985 KLR 373** in support of this. She further submitted that there was no evidence of the existence of a grudge as alluded to by the Appellant. That the evidence by Pw1 was not shaken and it was direct evidence.
14. Counsel contends that the age of the victim and penetration were proved, same to identification of the perpetrator. It is her submission that even without the medical evidence a conviction would stand based on Pw1's evidence by virtue of section 124 of the Evidence Act. She referred to the case of Geoffrey **Kioji –vs- Republic Criminal Appeal No. 270 of 2010 (Nyeri)** in support of this submission.
15. On contradictions and inconsistencies, he submits that any inconsistencies in the instant case could not render the prosecution case as falling below the required standards of proof. She cited the case of **Richard Munene –vs- Republic (2018) Eklr** on this.
16. She finally argues that the sentence meted out is lawful as the Sexual Offences Act provides for mandatory sentences for most of the offences. That section 8(2) Sexual Offences Act provides for a sentence of life imprisonment yet the Appellant was given twenty (20) years imprisonment.

Analysis and determination

17. This is a first appeal and this court is guided by the principles set out in the case of **Okeno –vs- Republic (1972) E.A 32** where the Court of Appeal stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters Vs Sunday Post [1958] E.A 424.”

18. In a later decision in **David Njuguna Wairimu –vs- Republic (2010) eKLR** the Court of Appeal similarly held that

“That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

19. In line with the above principles, I have considered the evidence on record, grounds of appeal, both submissions and the law. I find the following issues to be falling for determination: -

- a) Whether the Appellant's rights under Article 50(2) of the constitution were violated.

- b) Whether Pw1's age was determined correctly by the trial court.
- c) Whether there was improper, intentional and unlawful penetration of Pw1's genital.
- d) Whether the Appellant was positively identified.

Issue no. (a) Whether the Appellant's rights under Article 50(2) of the constitution were violated.

20. The Appellant submitted that he was disadvantaged when the trial court ordered that he be provided with witness statements at his own cost yet he could not afford the cost. He was therefore unable to prepare for his defence in advance. Article 50(2) provides: -

Every accused person has the right to a fair trial which includes the right to-

(c) to have adequate time and facilities to prepare a defence,

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

21. The right to be provided with witness statements of the witnesses, the prosecution intends to rely on what was emphasized by the Court of Appeal in the case of **Thomas Patrick Gilbert Cholmondeley –vs- Republic Nairobi C.O.A Cr. Appeal No. 116 of 2007 (2008) eKLR**, where the court observed that: -

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under Our constitution, the prosecution is non under a duty to provide an accused person with and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”

22. The Court of Appeal further reiterated this in the case of **Ahamad Abolfathi Mohammed & Another –vs- Republic 2018 eKLR** where they stated that:

“Our reading of Article 50(2) (j) of the constitution does not grant the Appellants the blanket right to access all the information in possession of the police including intelligence reports. What the Appellants were entitled to was the evidence that the police intended to rely on at the trial and of course any other evidence in possession of the police that could have exonerated them from the charges they were facing, even though the police did not wish to use that evidence indeed, even the right to access the evidence that the police intend to rely on is not totally unfettered; it is qualified by the constitutional requirement that the access should be reasonable, the determination of which must depend on the circumstances of each case.”

23. The Appellant contends that he was never supplied with witness statements. According to the record of the court, there was an order on 7th December 2017 for witness statements to be supplied at the Appellant's own cost. When the matter came for hearing on 18th January 2018, the Appellant was not ready to proceed as he was on medication.

24. On 12th April 2018 which was the next hearing date the Appellant indicated to the court that he was ready to proceed. That was the position throughout whenever the matter came for hearing and witnesses were present. He never at any time raised the issue of witness statements. He never complained to the trial court that he had been unable to pay the cost for the witness statements. He cannot be heard to complain now when he would have done so before the trial court. It is either that he was supplied with the said statements or he elected to do without them.

Issue (b) Whether Pw1's age was determined correctly by the trial court.

25. The element of age in a case of defilement is very important. The reason is that sentence under the Sexual Offences Act is pegged on age. In the instant case, the particulars of the charge state that the victim was aged 11 years. Pw3 **DKM** who is Pw1's father told the court that the victim was 11 years old then. He also produced Pw1's birth certificate (EXB1 which shows that Pw1 was born on 7th November 2006. She was therefore ten (10) years and nine (9) months which is close to eleven (11) years than 10 years. I therefore find that age was proved.

26. Another ingredient necessary to prove the charge of defilement is the fact of penetration. The Sexual Offences Act 2006 defines “penetration” as

“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”

27. The Court of Appeal in the case of **Sahali Omar –vs- Respondent (2017) eKLR** held that:

“..... penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act”.

28. The Appellant has in his submissions dismissed the evidence of Pw1 and Pw4 as being uncertain. Pw1 explained what was done to her in the best way she could. She talked of removal of her panty, removal of the man's underwear and “tail” and being slept on. Pw2 who saw Pw1 soon thereafter said she saw blood on her clothes and dirt on her buttocks. She advised the child to shower. It may have been the best

advice to give in light of what had happened to the child.

29. Pw4 **Jeniphar Ndunge** who examined the child was of the opinion that the child had been defiled. This was based on the fact that the hymen was not intact, while the urinalysis revealed blood stains, red blood cells, pus cells and glucose. Pw4 examined Pw4, four days after the incident.

30. Section 124 of the Evidence Act provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

31. From the above provision it is clear that the evidence of Pw1 alone if believed can prove penetration without corroboration. I am satisfied that she was telling the truth, supported by what Pw2 saw and Pw4 found on examination. I do find that the evidence established that Pw1 was penetrated and that penetration was improper and unlawful.

Issue no. (d) Whether the Appellant was positively identified.

32. Pw1 stated that the Appellant was at home alone with the Appellant who used to herd goats and cows. This was on 24th August at 3:00 pm. Her two brothers were at the market while her parents lived in Makueni, and so were not at home. Her father (Pw3) confirmed that indeed the Appellant had been his domestic manager for 1 ½ years taking care of his goats and cows. Upon being informed of the incident he travelled home the next day when he reported the incident.

33. Pw2 to whom the child reported the incident said she knew the Appellant. She even said a meeting was held by the village elder attended by her Pw1’s parents and the Appellant but the Appellant denied having committed the offence.

34. The Appellant has submitted that the date of defilement was at odds with that of Pw4. That is not correct because Pw4 stated clearly that she examined Pw1 on 28th August 2017. She is not the one who treated Pw1. The report received at the police station according to Pw5 was that the offence had been committed on 24th August 2017, and that is the evidence of Pw1 –Pw3 and Pw5.

35. The Appellant elected to say nothing when placed on his defence. His witness Dw1 was his mother who made various allegations with no single evidence to support them as she was not at the *locus quo*. She however confirmed that the Appellant was an employee of Pw3.

36. This incident took place in broad daylight. The Appellant was well known to Pw1 since he worked for the family. Pw1 went straight to Pw2’s home to report what had befallen her. He was therefore positively identified by way of recognition. There were no contradictions or inconsistencies in the evidence of the prosecution witnesses.

37. It is my conclusion that the prosecution was able to discharge and satisfy the ingredients necessary for the offence of defilement to the required standard of beyond reasonable doubt. The Appellant elected to remain silent and called his mother who was not at the scene or Pw3’s home.

38. On sentence, section 8(2) of the Sexual Offences Act provides as follows on sentence:

“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”

39. As I stated earlier, Pw1 was aged four (4) months less than eleven (11) years. The sentence provided for under the Sexual Offences Act is life imprisonment. The learned trial Magistrate in his discretion awarded the Appellant twenty (20) years imprisonment which is a legal sentence. There is nothing to make me interfere with that sentence.

40. The upshot is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong’udi

Judge