



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 24 OF 2019

KENNEDY KATA KITUKU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction vide judgement delivered on 7.2.2019 and sentence passed on 19.2.2019 of the Principal Magistrates Court at Kangundo by the Senior Principal Magistrate D. Orimba in Kangundo SPMCC Criminal Case S.O.28 of 2018)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

KENNEDY KATA KITUKU.....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction vide undated judgement delivered on 7.2.2019 and sentence passed on 19.2.2019 by **Hon. D. Orimba SPM, in Criminal Case SOA No. 28 of 2018**. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. He pleaded not guilty to both charges.
2. The appellant, after a full trial was sentenced to life imprisonment. Being aggrieved by the said conviction and sentence, the appellant lodged the present appeal.
3. The appellant's case is four-fold. Firstly, that the prosecution did not prove its case beyond reasonable doubt. Secondly, that no exhibit was found in the possession of the appellant; Thirdly, that the court did not consider the appellant's rights under Article 50(2) and 49(c) of the Constitution and finally that the trial court dismissed his defence. The appellant sought leave under section 350 v of the Criminal Procedure Code and added further grounds wherein he challenged his conviction for being based on evidence that was riddled with inconsistencies, he also averred that the charge sheet was defective; that there was violation of section 214 of the Criminal Procedure Code; that he was a victim of mistaken identity and that mitigation factors were not considered when the sentence was passed on him.
4. The appellant on the issue of proof of the prosecution case, submitted that the prosecution did not meet its standard of proof; that he was framed. In placing reliance on the case of **Roria v R (1967) EA 583** and **R v Turnbull (1976) 3 All ER 549**, the appellant submitted that he was a victim of mistaken identity. The appellant added that the charge sheet was defective because there was a variance on the date indicated on the charge sheet as against the evidence that was tendered. It was submitted that the prosecution ought to have invoked section 214(1) of the Criminal Procedure Code and had the court amend the charge sheet. On the issue of fair trial, the appellant submitted that he was convicted on a defective charge sheet. The appellant took issue with the failure of the trial court to consider mitigating factors and in this regard relied on the case of **Joseph Kaberia Kahinga & Others v A.G. (2016) eKLR**. He urged the court to acquit him of the charges.
5. The state opposed the appeal vide submissions dated 24.6.2020. Learned counsel submitted in placing reliance on section 2 of the Sexual Offences Act and the case of **FOD v R (2014) eKLR** that Pw4 caught the appellant in flagrant delicto with the victim and that the medical evidence via the P3 form proved that there was penetration and that a sexual act took place. It was submitted that age was proven vide the health card of the victim. On the element of sentence, counsel submitted that the sentence meted on the appellant was a mandatory sentence

and he urged the court to uphold the conviction and sentence that was passed by the trial court.

6. This is the first appeal and this court has to evaluate the evidence afresh and make its own independent conclusion as to whether to uphold the decision of the trial court. **PW1** was **DMW** and after a voir dire was conducted and the court satisfied that she understood the essence of truth she was sworn in. She testified that she was in class four and that she met the appellant when she was in standard two. She told the court that the appellant told her to follow him to Kahuwani to do bad things; that he took her to the coffee farm, removed her short and removed his trouser and laid on her then did bad things to her and released her. She stated that this happened twice. She added that N saw her and informed her mother; that she was taken to Hospital and the report made to the police where she recorded a statement.

7. **PW2** was **SNW** the victim's mother who testified that the victim was born in 2007 and presented her clinic card. She testified that Nziza informed her that she had found the appellant defiling Pw1 and when she confronted the appellant, he retaliated by slapping her. She told the court that Pw1 informed her that the appellant threatened her and she took Pw1 to hospital for examination where it was confirmed that she had been defiled. She tendered the PRC and P3 form as well as the outpatient record that were marked for identification by the court. She identified the appellant as her neighbour.

8. **Pw 3** was **Dominic Mbindyo**, a clinical officer based at Kangundo Level 4 hospital. He testified of an examination that was carried out on 23.4.2018 on Pw1 with a history of defilement by a person known to her. The examination revealed that the hymen was broken and that there was evidence of defilement. He told the court that he signed the P3 form on 25.4.2018 and he produced the treatment notes and the P3 form

9. **Pw4** was **ENK** who testified that on 17.4.2018 she was on her way to fetch firewood inside the coffee farm when she saw Pw1 on the ground and she saw the appellant running while holding his trouser. She told the court that Pw1 informed her that she was having sex with the man in the coffee farm and that they had done it several times. She told the court that she reported the matter and the clan elder arrested the appellant who was rearrested by the Nyumba Kumi.

10. **Pw 5** was **MNM** who testified that on 17.4.2018 she was informed by Pw4 that she had found Pw1 with a man in the coffee farm.

11. **Pw6** was **Matthew Ndunda Mutua** who testified that he was the village elder and that on 17.4.2018 he received a report from Pw4 to the effect that Pw1 had been found with a man in the coffee farm having sex. He added that he knew the appellant as his neighbor in the village.

12. **Pw7, Pc Daniel Marwa** who was handed over a file with instructions to produce the statement of Pc Abel Mokaya the investigating officer which he did. The prosecution closed its case.

13. The court was satisfied that a prima facie case had been established against the appellant who was placed on his defence. He elected to tender sworn evidence. He testified that he was confronted over a claim of defilement on 12.4.2018 and that he was brought to court on 12.4.2018. He testified that he was on duty on the day of the commission of the offence.

14. **Dw2** was **Francis Kanyira** who testified that the appellant is his laborer and that he remembered an occasion where Pw.2 came and alleged that the appellant had defiled Pw. He testified that he did not know anything concerning the defilement and did not witness anything.

15. The court found that penetration was proven vide the p3 form; that age was proven vide the health card (Exh. 1) that confirmed that the victim was aged 11 years and there was an eye witness account of the incident vide the account of Pw1 and Pw4 and that the appellant could not have been mistakenly identified; that he did not doubt the prosecution's overwhelming evidence and further that the appellant's evidence was a mere denial. The appellant was found guilty and was sentenced to life imprisonment.

16. Having looked at the appellant's and state's written submissions, the grounds of appeal and the evidence on the court record, the following are the issues for determination:

a. Whether or not the prosecution had proved its case beyond reasonable doubt.

b. Whether the appellant was convicted on the basis of a defective charge sheet

c. Whether the sentence was passed erroneously

d. What orders the court may issue.

17. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a. That the victim was below 18 years of age.

b. That a sexual act was performed on the victim.

c. That it is the accused who performed the sexual act on the victim.

18. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See **Ssekitoleko v Uganda [1967] EA 531**). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence of defilement with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof

beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

19. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case. The prosecution opposed the appeal and submitted that the prosecution proved its case. A perusal of the list of exhibits in the trial court showed a health card in the names of **Pw1** as the victim born on 3.9.2007, a P3 form signed on 25.4.2018 as evidence of penetration in the names of **Pw1** that reported that the victim had an absent hymen. There is an eye witness account of the incident; from Pw1 the victim and Pw4 who saw the conduct of the appellant at the time of the incident as well as the condition of Pw1. In the case of **Mshila Manga v R (2016) eKLR** the court observed that under the proviso to section 124 of the Evidence Act for a conviction to be made the court ought to be satisfied that the witness was truthful and record reasons thereof.

20. It is the direct evidence of Pw1 and Pw4 that tells of the event and I see no reason to disbelieve them and I am satisfied that their account of events was free from error. From the evidence on record it was established that the appellant was at the scene of crime. The complainant had known the appellant for a long time as she stated that the appellant had been defiling her since she was in class two.

21. The appellant has neither disputed nor admitted that he was at the scene on the material day. The trial court rightly relied on the P3 form to prove that there was penetration.

22. The evidence as listed above is direct and cogent evidence pointing irresistibly to the appellant as the defiler. From the record, the health card is sufficient proof of age and is indicative that the victim was 11 years at the time of commission of the offence. The evidence with regard to age has met the test.

23. The appellant has assailed the prosecution evidence on identification that as indicated above was free from error. If his aspersions were anything to go by, in the case of **Maitanyi v Republic (1986) KLR at page 198** the Court of Appeal held:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant’s aid, or to the police. In this case no inquiry of any sort was made...if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description.”

24. I find that the evidence that was given by Pw1, the chain of events of how Pw4 saw him and reported the matter to the clan elder in no way disconnect the appellant from the wrongful act; I am satisfied that the appellant was identified as the perpetrator.

25. In the case of **Donald Atemia Sipendi v R (2019) eKLR** Justice Mativo observed that in evaluating the accuracy of identification testimony, the court should also consider such factors as:

- a) What were the lighting conditions under which the witness made his/her observation?
- b) What was the distance between the witness and the perpetrator?
- c) Did the witness have an unobstructed view of the perpetrator?
- d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?
- e) For what period of time did the witness actually observe the perpetrator?
- f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?
- g) Did the witness have a particular reason to look at and remember the perpetrator?
- h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?
- i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?
- j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?
- k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

26. In evaluating the above factors as against the evidence of Pw1 and Pw4, there is cogent evidence that identified the appellant as the perpetrator. The incident took place in broad daylight and that Pw4 found the appellant and the complainant in flagrant delicto (in the act) and thus there was no issue of mistaken identity as contended by the appellant. This means that this ground raised by the appellant has no merit.

27. The appellant in his memorandum of appeal has assailed the trial court for failing to consider his defence. However, the record shows

that he did not set up any credible defence for the court's consideration. The appellant also assailed the trial court for failing to produce an exhibit. It is noted that the nature of weapon that was used as indicated in the P3 form was part of the appellant's body which could not be produced. If I were to read the mind of the appellant, did the appellant expect the same to be detached from his body so as to be produced in court? What exhibit did he expect to be produced in court? This ground raised by the appellant is simply preposterous to say the least.

28. On the issue of a defective charge sheet this court would have to direct itself as to whether or not the charge sheet did not specify the offence that the appellant was charged, did not give information as to the nature of offence charged and whether the appellant was prejudiced or the same occasioned any miscarriage of justice. A perusal of the charge sheet indicates that the charges were in my view clearly elaborated. In addition, the Appellant was fully present during his trial, was aware of the charges facing him and at no point did he raise an application regarding the charges that he faced. I am satisfied that it was not correct that the charge sheet was defective.

29. The appellant challenged his sentence on the ground that mitigation was not considered. From the record, he stated that he was a first offender and he prayed for mercy; this is all that there was to it. That mitigation was duly considered by the trial court. I therefore find no error by the trial court sentencing him as it did. The provisions of section 8(2) of are patently clear that and states thus;

“(2) 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 appellant was sentenced to the minimum sentence possible in law namely life imprisonment. That sentence was lawful in all respects. However, following the decision of the Supreme Court in **Francis Karioko Muruatetu and another Vs R (2017) eKLR** persons serving minimum sentences have been given a window of opportunity to approach the courts for resentencing hearings. Several decisions have been made by the appellate courts. For instance, in the case of **Jared Koita Injiri Vs R (2019) eKLR** the Court of Appeal reduced a sentence of life imprisonment on a similar offence like the present one to thirty years. Looking at the appellant's circumstances I find that he merits a reduction in the sentence. The offence committed was heinous as it has psychologically messed up the complainant who will live with those scars for the rest of her life. I find a sentence of thirty years would be appropriate and which will commence from the date of arrest namely 11.6.2018 as he had remained in custody during the trial.

30. In the result the appellant's appeal partly succeeds. The conviction is upheld while the sentence of life imprisonment is set aside and substituted with a sentence of thirty (30) years from the date of arrest namely 11.6.2018.

Orders accordingly.

Dated and delivered at Machakos this 23rd day of July, 2020.

D. K. Kemei

Judge