



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 55 OF 2017

JOHN MWAURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate Hon. Amwayi R. delivered on 6th of June 2017 in Molo CM Criminal Case No. 4 of 2017 Republic v John Mwaura.)

JUDGMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8 (1) as read together with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the charge sheet were that on the diverse dates between August 2016 and the 7th of January 2017, in [particulars withheld] Location, Londiani Sub- County within Kericho County intentionally caused his penis to penetrate the vagina of **ZG**, a child aged 15 years.

2. In the alternative, the appellant was charged with the offence of **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that, on the diverse dates between August 2016 and the 7th of January 2017, in [particulars withheld] Location, Londiani Sub- County within Kericho County intentionally touched the vagina of **ZG**, a child aged 15 years.

3. The appellant denied both the main and alternative charge and the case proceeded for hearing with the prosecution calling 4 witnesses. And the appellant chose to give unsworn statement and never called a witness. The trial magistrate found the Appellant guilty and convicted of the main charge and sentenced him to 20 years Imprisonment. The Appellant being dissatisfied with the conviction and sentence and have appealed to this Court on the following amended grounds: -

- i. THAT the trial court erred in law and in fact by failing to consider that the appellant was not served with prosecution witnesses' evidence.*
- ii. THAT the trial court erred in law and in fact by in concluding that penetration was proved to the required standards of law.*
- iii. THAT the trial court erred in law and in fact by relying on insufficient/uncorroborated evidence adduced by the prosecution.*
- iv. THAT the trial court erred in law and in fact by failing to consider the appellant was not properly identified as the perpetrator.*
- v. THAT the trial court erred in law and in fact by failing to consider the shallowness of the alleged investigations*

4. The appellant relied on submissions filed.

APPELLANT'S SUBMISSIONS

5. The Appellant submitted that it is the Prosecution's responsibility to ensure that the he received the statements and be given time to prepare his defence. This failure by the Prosecution was not noticed by the Trial Court which commenced and proceeded with the trial under such unfair situation.

6. He further stated that his constitutional right of an accused person was infringed. The Prosecution having in mind their responsibility did deliberately with intentions of only ambushing him during trial. He faults the Trial Court for not considering this and the effects it caused to

the law and how it occasioned failure of justice.

7. Appellant further submitted that there must be presence of other evidence to prove that it was actually penis that was inserted hence causing penetration for the Court to conclude that there was defilement as in the present case the only evidence by an expert doctor was of broken hymen. There were no injuries. He cited the case of **David Mwingirwa V Rep. App. 23/2015 at Nyeri sitting in Meru** the gist of the case is that the clinical officer noticed the hymen was broken but there were no injuries. He did not suggest that the said conclusion was based on any other observation beyond the broken hymen. There are times the hymen is broken by other factors other than sexual intercourse. He stated that he faulted the Court for not considering that their other factors that can occasion breakage/rapture of the hymen and the failure by the prosecution to prove the allegations of the complainant beyond reasonable standard was a blow to the case.

He stated that the evidence of Court ought to be straight forward so that justice can be reached. It is the law that the evidence of sole witness must be corroborated by other material evidence directly or indirectly linking or tending to link the alleged perpetrator to the offence; the Complainant being a young girl there should have been injuries to her genitalia in case she was making truthful allegation. The evidence of the doctor does not add up. He cited **Section 124 of the Evidence Act** and submitted that crucial witnesses that were not availed deliberately as their evidence would have changed the course of the matter as they would have shed some significant truth of the allegation.

RESPONDENT'S SUBMISSIONS

8. The state opposed the appeal on both conviction and sentence. The state counsel did oral submissions.

9. On penetration the state counsel submitted that PW 1 stated that she was defiled by the Accused on several occasions and the first time was on the 3rd of January 2017. PW 2, the doctor examined the minor and stated that she had a broken hymen P3 produced as exhibit 1 and treatment notes as Exhibit 2 and Exhibit 4 was the Accused's P3 form.

10. On identification Complainant stated that the Accused went by the name **Job Mwaura** and he was her friend. PW 2 stated that after befriending her he took her as his wife. He took her to his home. She positively identified the Accused in Court as the person who she resided with. PW 3 was the mother to the Complainant. She stated that the Accused was called **John Mwaura** and he knew him as a bodaboda operator. PW 3 identified the Accused in Court and stated that he was the same person found with the minor. PW 4 identified the Accused as the one who had been arrested and the minor found in his house. She prayed that the Appeal is dismissed.

ANALYSIS AND DETERMINATION

11. This being the first Appellate Court, I am expected to subject the entire evidence adduced before the Trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first Appellate Court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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 findings and conclusions; 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 v. Sunday Post, [1958] EA 424.)”

12. In view of the above, I have perused and considered the lower court proceedings. Record show that PW 1, the Complainant testified that in August 2016, she was in class eight, that she was 16 years old and that she met the appellant while assisting with the work in the hotel as schools were closed; she testified that they developed friendship and became lovers up to 3rd of January 2017 when she left home at 10.00pm and escaped with her clothes to the Accused's place while her mother was asleep. She said they stayed at Appellant's house up to 7th of January 2017; and while at Appellant's house, they lived like husband and wife; she said during the stay at Appellant's house, they had penetrative sex. She said her mother called the police who came and arrested them. On cross examination she stated that the Accused did not force her to go to his place.

13. PW 2, **Doctor Elizabeth Imudu Imalingat** produced the P 3 form that had been filled by **Dr. Kamau**. She said she had known him for 3 years and was conversant with his handwriting and signature. She indicated that the P3 showed that the pelvic region and the external genitalia was normal. She said the Complainant was on her menses at the time of examination and her hymen was broken. She noted that she could not conclusively say that there was sexual intercourse on penetration on that particular day but there was penetration due to the absence of the hymen. On cross examination, she stated that what was captured was that the Accused had sexual intercourse with the Complainant.

14. PW 3, **JN**, the mother of the Complainant, she stated that the Complainant was born on the 30th of March 2000. She stated that the Complainant left home in November and was missing for 3 days. She asked her son in law to look for her. He found the Complainant in the Accused's house and she refused to leave. She said she later went for her but one week later she disappeared again. She said she went to collect the Complainant from Appellant's house but the Appellant run away on seeing them.

15. PW 4, **P C MK**, testified that she received report of a missing child on the 2nd of January 2017. He stated that on the 7th of January 2017, the Accused had gone to the Complainant's home to seek for her hand in marriage. She took the Accused and the Complainant to the station. He took them to the hospital and they were examined by **Dr. Kamau**. On cross examination, he stated that the Complainant told him that from the 2nd to 7th of January 2017 she was staying with the Accused as husband and wife. He visited the scene and recovered nothing.

16. DW 1, the Accused gave his unsworn defence and stated that he was arrested as he was doing his work. He said he did not know the Complainant.

17. From the evidence adduce I find the following as issues for determination: -

- i. Whether the Prosecution discharged its burden of proof.
- ii. Whether sentence imposed was harsh and excessive.

(i) Whether the Prosecution discharged its burden of proof.

18. For an offence of defilement three ingredients have to be proved as laid down in the case of **Dominic Kibet Mwareng v Republic [2013] eKLR**, where the **Hon. Justice Linnet Ndolo** stated as follows:

The critical ingredients forming the offence of defilement are;

- i. age of the complainant,
- ii. Proof of penetration
- iii. Positive identification of the assailant.

(a) Complainant's age

19. In respect to age, the case of **Hilary Nyongesa Vs Republic (Eldoret Criminal Appeal No 123 of 2009)** as quoted in **Dominic Kibet Mwareng (Supra)**, where Mwilu J (as she then was) stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

20. And in the case of **GKS v Republic [2019] eKLR Njagi J**, stated as follows:-

“The age of a person can be proved by documentary, oral or by medical evidence.”

21. In the case of **Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No. 24 of 2015**, cited in **Edwin Nyambogo Onsongo Vs Republic (2016) eKLR** the Court of Appeal held as follows:-

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”” we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

22. Record show that Child health Card which showed that the Complainant was born on the 14th of July 2008 was produced as exhibit. There is therefore no doubt that the complainant's age was proved.

(b) proof of penetration

23. On penetration, findings in the P3 form were swollen, tender, inflamed anal region. In the case of **Republic v Peter Kariuki Njuguna [2017] eKLR Ngugi J** stated as follows:

“The doctor who examined FMK and testified in Court also reported her findings that FMK's anus was inflamed which is consistent with the reported sexual assault... There is absolutely nothing in the record or in the submissions by the Appellant to cause this Court to impugn that finding.”

(c) Proof of identification.

24. The appellant stated that she had known the appellant and developed love affair before she packed her clothes and went to accused's house. Her mother confirmed that she went missing from her home for three days and she was found in Appellant's house. There is therefore no doubt on identification.

25. From the foregoing I find that the three ingredients for the offence of defilement were proved.

ii. Whether sentence imposed was harsh and excessive

26. **Section 8(1) & (2)** under which the Appellant was convicted provide for mandatory minimum of 20 years' imprisonment. However, the Supreme Court in the case of **Muruatetu** declared mandatory minimum sentence unconstitutional and the judicial officer is denied opportunity to consider circumstances of each case and exercise discretion in sentencing.

27. In view of the above decision, I have considered circumstances of this case, age of the victim, age of the appellant and mitigating factors raised before the trial court and find it appropriate to set aside the sentence of 20 years imposed and sentence the appellant to 5 years' imprisonment.

28. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is allowed.
3. 20 years imprisonment is set aside and appellant sentenced to 5 years imprisonment.
4. The sentence to run from the date of sentence before the trial court.

Judgment dated, signed and delivered via zoom at Nakuru

This 30th day of September, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person