



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 68 OF 2019.

JRK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the Honourable Resident Magistrate Hon. E. Soita

delivered on 12th of November 2019 in Molo CM's Court Criminal Case No. 2485 of 2019.)

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** with an alternative charge of **committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. Particulars of the main charge were that, on the 6th day of August 2015 at [Particulars withheld] area in Kuresoi South Sub County within Nakuru County intentionally and unlawfully caused his genital organ namely penis to penetrate into a genital organ namely vagina of **FC** a child aged 5 years in violation of the said Act.

2. Particulars of the alternative charge were that on the 6th day of August 2015 at [particulars withheld] area in Kuresoi South Sub County within Nakuru County intentionally and unlawfully caused his penis to come into contact with the vagina of **FC** aged 5 years in violation of the said act.

3. The Appellant denied both the main and alternative charge. The case proceeded for hearing with prosecution calling 3 witnesses in support of their case while the appellant opted to give unsworn defence and did not call any witnesses.

4. The appellant was found guilty and convicted of the main count a sentenced him to life imprisonment. The Appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, filed this petition of appeal dated 19th November 2019 challenging the conviction and sentence on the following grounds: -

i. The learned trial magistrate erred in law and fact in not properly directing his mind to the decree, standard of proof law relating to the burden of proof.

ii. That the learned trial magistrate did not properly analyse all the evidence on record and in his selective analysis failed to form the necessary balanced view and thus prejudiced the appellate case.

iii. That the learned trial magistrate failed to consider the obvious discrepancies, contradictions and inconsistencies in the prosecution case.

5. Both parties canvassed the appeal through written submissions

APPELLANT'S SUBMISSIONS

6. The appellant sort the Court to quash the conviction, setting aside the judgment and he be set at liberty. The appeal is strongly opposed by the prosecution through its state counsel.

RESPONDENT'S SUBMISSIONS

7. The state opposed the appeal on both conviction and sentence. **Ms. Rita Rotich** for the state submitted that in respect to the age of the minor, the P3 form produced in Court indicated that she was 5 years old and that the trial Court was guided by the case of **Francis Muiruri** which state that apart from medical evidence, the age can be adduced through observation and common sense; that the trial Court noted the child was of tender years. She stated to be in top class.

8. On penetration, the state counsel submitted that PW1 testified the accused defiled her and PW2 the clinician observed that she had a freshly torn hymen with foul smelly discharge from the vagina; that she was in pain in her private parts and was emotional during her examination. Further that PW3 the investigation officer testified that there was blood stained underwear and a piece of condom at the scene. She submitted the doctor concluded that there was penetration.

9. She further submitted that the complainant was defiled during the day and she was able to see the appellant clearly. She prayed that the appeal be dismissed.

ANALYSIS AND DETERMINATION.

10. 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 demeanour. 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.)”

11. Further the Court of Appeal for Eastern Africa in **Pandya -Vs- Republic [1957] EA 336** stated as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

12. In view of the above, I have considered the grounds of appeal and the lower court record and wish to consider two issues:-

(a) whether the Prosecution proved their case beyond reasonable doubt to warrant a conviction.

(b) Whether sentence imposed was harsh and excessive

(a) whether the prosecution proved their case beyond reasonable doubt to warrant a conviction.

13. The appellant was charged with the offence of defilement contrary to **Section 8 (1) as read with 8 (2) of the Sexual Offences Act.**

Section 8(1)

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Section 8(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.”

14. It is trite law that the prosecution has to prove all the 3 ingredients of the offence of defilement for a person to be convicted of defilement. The 3 ingredients being: -

i. Age of the complainant;

ii. Penetration; and

iii. Identification of the perpetrator.

(i) Age of the complainant

15. Record show that the trial Court relied on P3 form the doctor estimated age of the complainant was 5 years. From the record, the trial magistrate conducted *voire dire* examination, through the examination the Court was able to observe the complainant noted that she was a child of tender age. Estimate of age in the P3 form was not challenged. From the foregoing, the prosecution proved the age of complainant beyond reasonable doubt.

(ii)prove of penetration

16. PW1 testified the appellant was his grandfather and that he did “*tabia mbaya*” meaning bad manners to her. She stated that he found her in the kitchen, took her to her father’s bed, removed his trouser, laid on the bed and inserted his thing of urinating “penis” into her thing of urinating “vagina”. The complainant said that she felt pain; she further stated that the appellant gave her sweets and threatened to beat her if she told anyone.

17. PW2 two was a clinical officer at Olenguruone Hospital examined the complainant and found that her genitalia had bruises, was bleeding, her hymen was torn and had pus with a foul smell. He concluded that there was evidence of penetration.

(iii) Identification of the perpetrator

18. The complainant stated that the appellant is her grandfather; the offence occurred during day time; there is therefore no doubt on the assailant’s identity.

19. In his defence the appellant stated that there was a dispute between him and the child’s father over land. He however never availed any material evidence to confirm any disagreement between him and the child’s parents over property as he alleged.

20. He however admitted that the child knew him as they were relatives. He argued that the child’s parents never testified but record show that the child was able to explain what happened to her and her evidence was corroborated by evidence of the doctor who confirmed that she was defiled.

21. From the foregoing, I find that prosecution proved their case to the required standard of beyond reasonable doubt and will not interfere with conviction herein.

(b) Whether sentence imposed was harsh and excessive

22. The appellant was sentenced to serve life imprisonment. That is the minimum sentence provided by statute for defilement of a girl aged 5 years old. However, the Supreme Court in the case of **Muruatetu** declared mandatory minimum nature of sentence unconstitutional for taking away the discretion of the judicial officer. It renders mitigating factors raised by accused persons superfluous. Whereas I agree that in sexual offences deterrent sentence should be imposed, circumstances of each case should be taken into consideration while imposing sentence.

23. I have considered the age of the complainant; I also note that the appellant was 52 years old at the time of the offence; I also note that the appellant was a first offender and find it appropriate to reduce the appellants sentence to 20 years’ imprisonment.

24. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is allowed and sentence of life imprisonment set aside and replaced with 20 years’ imprisonment.
3. Sentence to run from the date sentence was imposed in the lower 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