REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 45 OF 2016

JARED MOKAYA MASESE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence delivered by Hon. J. Nthuku at Nakuru on the 10th day of March 2016 whereby the Appellant was convicted for the offence of Defilement Contrary to Section 8(3) of the Sexual Offences Act)

JUDGMENT.

1. The Appellant Jared Mokaya Masese was charged with the offence of defilement of a 12 (twelve) year old girl on the 5/7/2014 within Nakuru County.

On the 10/3/2016, he was convicted and sentenced to serve twenty (20) years imprisonment.

2. Dissatisfied with both the conviction and sentence, the appellant lodged this appeal on grounds stated in his Petition of Appeal filed on the 23/3/2016 that

(a) The prosecution failed to summon crucial witnesses

(b) The trial magistrate failed to consider a previous criminal case No.2153/2014 where he was charged with the offence of stealing farm produce.

(c) That the trial magistrate relied on evidence that was inconsistent, contradictory uncorroborated and not proved beyond reasonable doubt to sustain a conviction.

(d) That the medical evidence relied upon was incredible.

3. **Section 8(3) of the Sexual Offences Act** provides for the offence of Defilement and the penalty if the victim is aged between 12 years and 15 years thus

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

4. A first appellate court is expected, and is its duty to reconsider the evidence presented before the trial court and make its own findings and draw its own conclusions, and only then can it decide whether the trial magistrate's findings should be supported, and in doing so, should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses testify **– Okeno Vs. Republic (1972) EA 32.**

Prosecution Evidence

5. The complainant, **TA testified as PW1.** The record shows that the complainant was taken through a **voire dire** examination, upon which the trial magistrate was satisfied that she did not understood the importance of telling the truth, and therefore gave unsworn evidence.

6. Her evidence was that on the material date, the 5/7/2014, while in the company of her cousin S and while coming from buying charcoal, the appellant, whom she knew, having being going to eat at Es hotel, and while going back after purchasing the charcoal, the appellant pulled her from the road into the bush, removed her skirt and pants, then removed his trouser and lay on her and raped her. She testified that at the time, the appellant had a panga and he threatened to kill her if she screamed.

7. She further testified that upon pulling her from the road into the bush, he gave the complaint's cousin money and told him to take the charcoal home. Later after the event, she testified that the appellant took her back to her Aunt's hotel.

The complainant further testified that the appellant had previously defiled her four times and that it was the appellant who told her Aunt, E that he had been defiling her and that for this last episode, it was her cousin, S, who told her Aunt of the events.

8. **PW3** was the complainant's Aunt EA.

Her evidence was that she had sent the complainant and her cousin S to buy charcoal for her on the 5/7/2014 at about 8.00p.m., while she was left at her hotel cooking.

Her testimony was that only S (S) went back with the charcoal, and told her that the complainant was left at the road with the appellant after he bought him chips (fresh fries) and that she later went back at about 10:00p.m accompanied by the appellant. She did not tell her where she had been. She testified that the appellant was her customer at her Hotel for about three years, and that she knew him well.

9. **MO PW4** testified to have seen the complainant walking with legs apart, on the following day, and upon enquiry the problem, she stated that it was the appellant who had defiled her. She took the complainant to hospital for examination and also reported at the Kiamunyi Police Station. She had known him for over two years as a customer in the hotel.

On cross-examination by the appellant PW4 reiterated that the defilement was committed on the 5/7/2014 night, and that on the 8/7/2014, he had been arrested for stealing potatoes at the prison.

10. The arresting officer **PW5,** PC Samuel Rono produced the age assessment report that had been ordered by the trial magistrate as PExhibit 3. The complainant was assessed to have been between 12 and 13 years old.

11. **Doctor Matara,** a registered Medical Practioner at the Nakuru Provincial Hospital produced the Medical report on behalf of his fellow Doctor Mukaindo, who examined the complainant on the 8/7/2014, with a conclusion that the young girl had been defiled. The appellant had no questions for the doctor save to confirm that the complainant was examined at the hospital on the 8/7/2014.

Defence Evidence

12. The appellant opted to give sworn evidence, and called seven witnesses.

In his defence evidence, the appellant testified to having been arrested stealing from the prison farm on the 5/7/2014, detained at Kiamunyi Police Station upto 7/7/2014 when he was taken to court; and detained in custody up to 16/7/2014 when he was placed on probation.

He testified that upon release, he was arrested for the offence facing him, defilement, which he denied having committed the offence testifying that he was in custody on the material date, the 5/7/2014.

13. **DW 2 PC Kigen,** and **DW3 Joseph Chesire** both from G.K. Prison farm about testified to have found the appellant stealing potatoes but he ran away, but was later arrested at Kiamunyi Police Post on the 8/7/2014 and arraigned in court on the 9/7/2014 6.00A.M on the 8/7/2014.

On the offence of stealing of farm produce, **DW4, Cyrus Karanja** the then Executive Officer at Nakuru Law Courts produced the Register for **Criminal Case No.2153/14 Republic Vs. Jared Mokaya Masese.** The appellant was the accused, and the charge was registered on 9/7/2015 and accused placed on probation on 9/7/2004.

14. Evidence of **DW5** Patrick Masese was that the appellant was framed, but confirmed that he did not witness the incident. **DW5, DW6, DW7** and **DW8** testified that they knew nothing about the defilement offence.

It is upon the above prosecution and defence evidence that the appellant was convicted for the offence of defilement.

Analysis and Determination.

15. The issues that arise for determination from the evidence adduced before the trial court are

a) Whether the appellant was in police custody for another offence – Criminal Case No.2153/2014 on the 5/7/2014 when the offence of defilement was alleged to have been committed by the appellant.

b) Whether the appellant was positively identified as the offender.

c) Whether the offence of defilement was proved beyond reasonable doubt.

16. I have carefully considered and re-evaluated the entire evidence as mandated of the first appellate **Court – Okeno Vs. Republic (Supra).** I have also combed through the trial court's judgment.

A defence of alibi was raised by the appellant before the trial court; that on the 5/7/2014 when the offence of defilement was allegedly committed, the appellant was in police custody having been arrested and arraigned in court for the offence of stealing farm produce.

17. I have considered the register of criminal cases produced by the Executive Officer of the Nakuru Law Courts (DW 4). The court record is clear that the offence of stealing from prison farm was committed on the 8/7/2014. The appellant was arrested for the said offence on the same day at about 12 noon at Kiamunyi Police Post where he had been taken for another offence (the defilement case) – Evidence of DW2, DW3.

18. I have looked carefully at the court file in CMCR NO.2153/2014. The record shows that the appellant, then the accused was taken to court – first appearance on 9/7/2014. The charge sheet states that the offence was committed on the 8/7/2014 at 6:00a.m, and was arrested on the same date, and placed under police custody, and arraigned in court on the 9/7/2014

By the above narrative, it is clear, beyond any guesswork, that on the date the offence of defilement was allegedly committed on the 5/7/2014, the offender was not in custody.

19. I therefore agree with the trial court's finding that the alibi defence of alibi was of no use to the appellant. All the defence witnesses testified to have had no knowledge as to why they were summoned to court. To that end, I find and uphold the trial court's findings that the alibi defence was disapproved by his own witnesses, who essentially supported the prosecution evidence.

20. To that extend, I am persuaded that the prosecution sufficiently disapproved the alibi defence – **Kiarie Vs. Republic (1984) KLR** where the Court of Appeal held;

> ***"An Alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable------"***

See also **Wesley Kibet Koskey Vs. Republic (2019) e KLR,** where court dismissed the defence of alibi as it was not supported by any reasons.

On Identification.

21. There is plenty of credible evidence that the appellant, also known as "Nyambane" was well known by PW2, the complainant, PW3, PW4 as well as DW2, DW3 and DW5. Evidence that was not challenged is that the appellant was a common customer of PW3 and PW4 in the Hotel where for more than two years he used to be served. Indeed, the complainant testified that she knew him as he used to eat in her Aunt's hotel (PW3), and that after the incident (defilement), he took her back to PW3 hotel.

I am persuaded that the circumstances in the case at hand were favourable for positive identification – **Joseph Hare Mumba Vs. Republic (2019) e KLR**

Inconsistent and Contradictory Evidence

Upon perusal and consideration of the evidence on record, I find no evidence that is contradictory or inconsistent. Indeed, the defence evidence by and large corroborated the prosecution evidence. The appellant in his written submissions points no single evidence that is either contradictory or inconsistent. It is not enough to state. Evidence ought to be pointed out to support the allegation. I dismiss that ground of appeal as baseless.

Medical Evidence.

22. I have stated earlier that the appellant posed no questions to the Doctor who produced the P3 to support the findings that penetration took place.

The findings were that the complainant had bruises on the vestibula, tenderness on labia minora and torn hymen, but found no discharge.

Section 8(1) of the Sexual Offences Act Provides:

> ***8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

Proof of penetration is one of the core ingredients in a sexual offence, among the other two, proof age and positive identification of the offender – **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013.**

23. The appellant did not challenge the complainant's evidence that he had defiled her, not once, but four times. Upon the medical examination, the hymen was found broken and injuries on the genitalia of the complainant. He too failed to question the medical findings when given the opportunity.

24. **Section 2 of the Sexual Offences Act** defines **"Penetration"** as

> ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person".***

Upon examination of the complainant's genitals, they were found to be tender and bruised as well.

It is now trite that a broken hymen on its own is not sufficient proof of penetration. There must be other credible evidence of tear of the hymen. In this case, there were bruises and tenderness around the complainant's genitalia.

25. In the absence of any contradictory evidence, the court may perfectly well find that penetration is proved – **George Owiti Raya Vs. Republic (2013) e KLR.**

To that extent, I am convinced that penetration occurred, and thus defilement proved in the circumstances – **Michael Mumo Nzioka Vs. Republic (2019) e KLR.**

For the foregoing, I find and hold that the Appellant's appeal on conviction lacks merit. It is likewise dismissed as baseless.

The sentence.

The appellant was sentenced to serve **20 years imprisonment.** This is the mandatory minimum sentence upon conviction under the **Sexual Offences Act, Section 8(3),** if the victim is between the age of 12 and 15 years old.

While the said sentence is lawful, the court may reconsider the severity of the sentence against the circumstances peculiar to the offence and the manner it is committed, and upon its discretion, revise and or vary the sentence.

26. Under the **Judiciary's Sentencing Policy,** the court is urged to consider the objectives of sentencing, which was reinstated by the **Supreme Court in the Francis Karioko Muruatetu & Another Vs. Republic (2017) e KLR.**

This decision gave courts unfetted discretion in sentencing by considering the peculiar circumstances, and also untied the courts hands. In offences where mandatory minimum sentences are statutory.

27. The **Court of Appeal** in the case **Denis Kinya Njeru Vs. Republic (2017) e KLR** expressed the view that sentences provided under **Section 8 of the Sexual Offences are "Straight Jacket"** penalties that left no room for the exercise of discretion by a sentencing court. However, since the *"Muruateti"* decision, the recently the Superior Courts, upon their discretion have varied such sentences. Cases in point are **Kisumu Criminal Appeal No. 202 of 2011 Christopher Ochieng Vs. Republic 2018 and Jared Koita Injiri Vs. Republic (2014) and EMS Vs. Republic (2019) e KLR,** among others.

28. Guided by the *"Muruatetu"* decision, and in line with decisions cited above and in exercise of my discretion, and upon consideration of the mitigating factors adduced before the trial court the appellants submissions and all the peculiar circumstances appertaining thereto **, I set aside the 20 years imprisonment and substitute it with a jail term of 7 (seven) years imprisonment commencing from the trial Court's judgment, the 10/3/2016.**

It is so ordered.

Delivered, Signed and Dated electronically at Kerugoya this Day of 24th September, 2020.

J.N. MULWA

HIGH COURT JUDGE.

PARTIES:

Appellant in Person, C/O GK Prison at Nakuru.

Ms. Odero, State Prosecutor, Nakuru.