



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 25 OF 2018

JAMES MUTWA KWENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the decision of Hon. L.N. MESA (SRM) in Marimanti Principal Magistrate's Court No. SOA No.10 of 2017 dated on 29th June 2018.)

J U D G E M E N T

1. **JAMES MUTWA KWENGA**, the Appellant herein, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of **Sexual Offences Act**. The particulars of the charge were that on 13th August 2017 at [Particulars Withheld] village, Gaceraka Sub-Location, Tharaka South within Tharaka Nithi County, the Appellant defiled (name withheld) a child aged 10 years.

2. The Appellant was found guilty after trial, he was convicted and sentenced to life imprisonment. He was aggrieved by both the conviction and sentence and preferred this appeal.

3. A brief summary of the evidence tendered at the trial reveal that the mother to the minor/victim was not at home during the incident as she was held up in her canteen or shop. The following day she found her daughter unwell walking with difficulties and on checking found that her underwear was smelling. She took her for treatment and later reported the matter at Chiakariga Police Post who issued her with P3 form.

4. According to the minor, she was going to her home, when she met the Appellant on his way and that the Appellant forcefully defiled her after slapping her. According to her the ordeal occurred at 6pm and that she was released by the Appellant at 9 pm to go home. She maintained that the Appellant who lived just across the road from their home inserted his penis on her vagina.

5. According to the medical officer (PW2), a clinical officer who examined, the victim, there was evidence of defilement because the victim's hymen was broken. He tendered P3 he had filed as P. Exhibit 1 to back up his findings.

6. When placed on his defence, the Appellant denied the charge and claimed that he was framed up. He told the trial court that he had been taken to court three times by the complainant's family owing to a land dispute. His testimony on the existence of a dispute was supported by his sister EK (DW3) and his mother MK (DW4).

7. The trial court in its Judgment faulted the Appellant's time of defence holding that it was an afterthought as the Appellant did not bring up the issue in his cross-examination of prosecution's witnesses. The trial court further found that the medical evidence tendered proved that the child had been defiled and given that the age of the victim had been established to be 10 years, the prosecution's case had been proved beyond reasonable doubt.

8. The Appellant as I have noted above felt aggrieved and has raised the following four grounds namely:-

i. That the learned magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies and that the case was not proven beyond reasonable doubt.

ii. That the learned magistrate erred by failing to note that the case was framed up because of a land dispute.

iii. That the prosecution failed to produce independent witnesses.

iv. That the magistrate erred by rejecting the Appellant's defence without giving cogent reasons.

9. In his written submissions, the Appellant contends that he was not positively identified and that the investigations done was shoddy. However, this court notes that the issue of identification is a new additional ground raised without leave of this court as provided under **Section 350 of the Criminal Procedure Code.**

10. The Appellant further contends that the minor had attended a party in the neighbourhood as narrated by the mother and the Appellant avers that the girl could have been defiled at the party where he had gone without anyone accompanying her.

11. The Appellant submits that the victim's mother gave contradicting evidence because she testified that she took the child to hospital because she was unwell and that the doctor did not tell her what was wrong with her daughter.

12. The Appellant further contends that the prosecution failed to call the victim's father who reported to her about the defilement and one Mr. Gatheru should have been called by the prosecution to testify. He contends that a failure by the prosecution to call them as witnesses was fatal to their case and has relied in the case of **Bukenya -vs- Uganda (1972) E.A.R**

13. The Appellant has also faulted the medical evidence tendered stating that the clinical officer failed to indicate if the hymen was freshly broken or state any injury on the minor's private parts. He submits that because the minor had changed clothes, there was no evidence collected linking him with the offence. He avers that the underwear worn by the victim said to be in an envelop was not tendered as an exhibit.

14. The Appellant further submits that the evidence tendered by the victim's mother showed that there was a grudge and that overall the prosecution's case against him was not proved to the required standard. According to him he was erroneously charged and convicted. He urges this court to overturn the conviction.

15. The Respondent has opposed this appeal though its written submissions filed on 20th July 2020. The Respondent contends that identification of the Appellant was not an issue during trial and that the Appellant has raised the issue as an afterthought. It avers that the victim woke up in the Appellant's house at 9.p.m. but had already identified him during the day when he committed the act.

16. The Respondent maintains that the evidence of the prosecution was consistent and unshaken. According to the Respondent the elements of the offence namely age, penetration and identification were established and proved through the testimonies given by the prosecution's witnesses.

17. In response to the allegation of failure to procure attendance of '**crucial**' witnesses, the Respondent maintains that it called relevant witnesses and that it was upto it to decide who to call to prove its case.

18. The Respondent has also responded to the Appellant's allegations that his defence was not considered by stating that the same was considered and according to the Respondent the same was found wanting pointing out that the defence pursued a different line of defence from the questions asked in cross-examination. The State avers that the defence witnesses failed to substantiate the claims made regarding the existence of a grudge or a l and dispute.

19. On sentence, the Respondent has supported the life sentence meted out arguing that the scars left by incident will leave a permanent physical mark on the victim who was a minor of tender years.

Analysis and Determination

20. The Appellant as I have observed above was charged with the offence of defilement and under **Section 8(1) Sexual Offences Act**, defilement is described as;

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

The role of this court as an appellate in a first appeal is to re- evaluate or re-asses the evidence tendered during trial and weigh the evidence in its entirety with a view to coming up with own conclusions already reminding itself that the trial court had advantage of observing the demeanor of the witnesses as testified.

21. This court has perused through the evidence tendered by both the prosecution and the Appellant during trial. The main question posed is whether the prosecution's case against the Appellant was proved beyond reasonable doubt in the face of what the Appellant has termed as '**inconsistencies**' and '**conflicting evidence**'

22. In answer to the above question, this court must address itself to the elements of the offence for which the Appellant was charged and convicted. In the case of **John Mutua Munyoki -vs- Republic [2017] eKLR**, the Court of Appeal faced with the same question had this to say;

“ Under the Sexual Offences Act the main elements of the offence of defilement are as follows:-

i. The victim must be a minor, and

ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice. Therefore, in order for the offence of defiling to be committed, “ the prosecution must prove each of the above ingredients beyond reasonable doubt.”

23. This court has perused through the evidence of the minor (PW3) and the medical evidence (P3- P Exhibit 1) tendered and contrary to the Appellant’s contention that evidence tendered by the prosecution was inconsistent and never met the threshold, the evidence tendered was overwhelming. The minor, a girl aged 10 years (as per the immunization card tendered at P. Exhibit 2 and P3 tendered as P Exhibit 1) clearly told the trial court what transpired. This is what she said in part;

“ I was at the home of Gatheru. I left and started going home. I met Mutwa (Appellant). He carried me on his shoulder and took me under a Muthithi tree. He asked me if I had ever been fucked. He told me to sleep (sick). I refused. He told me that he will beat me with slaps and forced me to lie down. He then removed his penis and started to fuck me..... When I refused he slapped me until I lost consciousness. When I came to, I found myself in the accused person’s house.....”

24. In the light of the above ordeal that the minor vividly and candidly told the trial court, it is evident that even with the evidence of the minor alone as proved under **Section 124 of Evidence Act**, it was sufficient for the trial court to reach a verdict of conviction. However, the evidence of the minor was collaborated by the medical evidence (P3- P Exhibit 1) tendered by the clinical officer (PW2) and the victim’s mother. The doctor was an independent witness contrary to the Appellant’s assertion that the State failed to procure independent witnesses. The police officer (PW4) who recorded the initial report made to Chiakariga police post and issued the complainant with a P3 form was also independent.

25. This court finds that even if I was to find that the issue of identification had been properly raised (and this court has already found out that it was not) I would still have found that the Appellant was properly identified because the incident happened at 6 pm and the victim clearly identified the Appellant because she stated that he lived just across the road and knew where his house was and how it was.

26. The Appellant has faulted the prosecution for not calling certain witnesses.

As rightly submitted by the respondent, the decision to call witnesses rests with the respondent as long as the witnesses called provide sufficient evidence to sustain the charge. As stated above, the evidence of the minor suffices even if the other witnesses had not been called. In any case, it has not been said how the absence of the two witnesses mentioned by the Appellant could have aided the Appellant. This ground of appeal therefore is not merited.

27. The Appellant also states that the medical evidence is not sufficient. He faults the fact that he was not examined and that the clothes of the victim were not examined to link him to the offence. However, the other evidence adduced clearly links him to the offence. The P3 form confirms defilement. The clinical officer also confirmed the girl was in pain therefore they could not insert a speculum to conduct additional tests. This evidence means that the girl had been very recently defiled so it would be immaterial whether the hymen was freshly broken or previously broken. Furthermore, the evidence as per the P3 clearly show that the incident had occurred a day earlier.

28. In any event this as this court has observed above, in sexual offence cases, even the evidence of the victim alone can be found sufficient even in the absence of other evidence whether medical or other witness accounts so long as the trial court is satisfied that the victim is telling the truth. In the case of **Patrick Kihara Mwangi -vs- Republic [2015] eKLR**, **Meoli J** made the following observations which I find relevant,

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that the defilement was perpetrated by the accused person. Indeed under the proviso of Section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief. What the Court of Appeal had said in *Kassim -Vs- Republic* is that:

“[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence.”

This court finds that the evidence of the minor was credible and was well corroborated by the evidence of the clinical officer. It is the finding of this court therefore that based on the evidence placed before the trial court, the prosecution’s case was proved to the required standard of proof beyond reasonable doubt. I am not persuaded by the Appellant’s assertions that there were significant inconsistencies on the evidence tendered by prosecution’s witnesses.

29. On the question of sentence, it is apparent that the Appellant did not and has not contested the fact that the minor was aged 10 years. The sentence prescribed under **Section 8(2) of Sexual Offences Act** is life imprisonment. The trial court was of course at liberty to exercise its discretion and impose any other appropriate sentence following the Supreme Court’s decision in the case of **Francis Karioko Muruatetu** that removed the ropes that had hitherto tied the court hands in situations where the statute prescribed mandatory sentences with no room to exercise court’s discretion. I have noted that the trial court took into consideration the mitigating factors which were well expressed by the Appellant, but the trial court noted the mandatory nature of sentence prescribed under **Section 8(2) of Sexual Offences Act** and imposed life imprisonment. As I have observed above, the mandatory sentences prescribed by any law no longer ties trial court’s hand. A trial court has discretion to pass an appropriate sentence including the maximum sentence where circumstances demands or in order to meet the ends of justice. In this instance I am satisfied that the life sentence imposed was rather harsh given the circumstances and mitigating circumstances well captured by the trial court.

In the end, this appeal on conviction fails for the aforesaid reason but on sentence this court finds merit on the appeal. The conviction is therefore upheld but life imprisonment is set aside and in its place the Appellant shall no serve an imprisonment of 30 years from the date of judgment in the lower court.

Dated and signed by;

HON. JUSTICE R. K. LIMO.

SIGNED DATED 14TH SEPTEMBER 2020.

Dated, signed and delivered in the open court on 22ND day of SEPTEMBER 2020.

By:

HON. LADY JUSTICE L.W. GITARI