REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 9 OF 2019

JMM...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the original conviction and sentence in criminal Case No. 3994 of 2009 of the Chief Magistrate's Court at Makadara delivered by Hon. A.R. Kithinji)

JUDGMENT

1. The Appellant was charged, tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve a fifteen (15) years imprisonment.

2. Being aggrieved by the said conviction and sentence, he approached this court by way of an appeal which he filed in person. On 28/2/2020 his Advocates on record filed an Amended Petition of Appeal and raised the following grounds for purposes of this judgment: -

a) Prosecution evidence was insufficient and uncorroborated.

b) crucial prosecution witnesses were not called to testify

c) the prosecution case was full of contradictions

d) The burden of proof was shifted to the appellant

SUBMISSIONS

3. The Appellant filed written submissions which were at the trial highlighted by Ms Nganga, while the prosecution opposed the appeal through oral submissions made Ms Chege.

4. It was submitted on behalf of the appellant that the evidence adduced at the trial where insufficient and uncorroborated. It was submitted that the complainant went for medical check-up two days after the alleged incident and that no exhibits were recovered as the same had bathed and changed her clothes. it was submitted that the fact that she had an old hymenal tears was not proof that penetration was done by the Appellant. It was contended that PW1's evidence that the Appellant forcefully penetrated her was contradicted by the evidence of PW2 to the effect that she had not physical injuries.

5. It was submitted that the evidence of PW1 required corroboration and that the evidence of PW2 and PW5 did not support or corroborate her narration as required by Section 124 of the Evidence Act for which the case of **BONIFACE CHITSANGO NGOBA v REPUBLIC [2018] eKLR** was tendered in support.

6. It was submitted that several crucial prosecution witnesses were not availed to testify so as to support the finding of the trial court, who included the guard whom the complainant met at the stairs and who responded to her screams, the strange woman who assisted her as she left the lodging, the husband of PW2 and the family friend who accompanied her to the club. It was further submitted that the prosecution case was full of contradictions as to how the appellant was arrested and whether PW1 was HIV positive at the time of examination or whether she was found to be HIV and placed on ARV's.

7. It was finally submitted that the trial court failed to consider his mitigation while passing sentence and therefore fell into error as per the holding in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC.**

8. On behalf of the prosecution, Ms Chege submitted that the age of the complainant was proved to be 13 years, it was submitted further that

the Masai guard could not be called as a witness since he had gone back to his country of Tanzania and the lady who rescued the complainant was also not available to testify. It was contended that Section 143 of the Evidence Act gave the prosecution the discretion of whom to call as a witness.

9. It was submitted that the complainant in cross examination clarified the alleged contradiction s in the prosecution case and that the medical report from Nairobi Women Hospital confirmed that the complaint had an old tear in the vagina, with a white discharge thereby confirming penetration. It was submitted that the complainant could not have been defiled by somebody else other than the appellant whom she had spent the night with before he escaped when an alarm was raised.

10. It was submitted further that Section 200(3) of CPC was complied with and PW1 was recalled to testify but Dr. Kamau who had testified as PW2 was not recalled, the Appellant did not suffer any prejudice since he was present at the time when his evidence was taken.

11. On sentence it was submitted that the appellant was sentenced to the lawful sentence provided in law under Section 8(3) of the Sexual Offences Act and therefore the doctrine of MURUATETU was not applicable.

12. This being a first appeal, the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion, though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v REPUBLIC [1972] EA 32:-**

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [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."***

PROCEEDINGS

13. It was PW1's evidence that she was born on 15/4/1997 and in class five at the time. On the material day some lady had made an allegation that she had stolen her phone, which made her run away from home to [Particulars Withheld], where she entered into a dancing hall. The appellant then sent some man to call her and he then gave her chips which she ate. She then decided to go to her grant mother place when the appellant followed her and asked her for her name and where she was going which she told him.

14. The Appellant then covered her mouth and pulled her into a court where he said he was living with his wife and children, but took her into a lodge where he paid Kshs.200/= to the Masai at the gate who left and went away. The appellant then told her that he would sleep with her up to morning, before letting her go home, he then asked her how much money she wanted to be paid, to which she replied that she would accept any money given.

15. He then took her by force and defiled her as she screamed and struggled, before she managed to get out of the room and reported to the guard what the appellant had done. Once the appellant left, she went back to the room and slept until morning, before going to her grandmother, where her uncle took her to Nairobi Women Hospital for examination. In cross examination she stated that she ran away from home for fear of her mother after her friend had accused her of stealing her phone.

16. PW2 DR. ZEPHANIA KAMAU examined the complainant on 29/9/2011 on an allegation of defilement. She had no physical injuries, with a history of bleeding from her private part. Her hymen was absent – in what he called old case with no sign of STD. He also examined the Appellant who had no physical injuries on his sexual organ.

17. Her mother, MA, stated that the complainant had gone to church on 13/9/2009 but did not return back home, causing her to make a report at the Chief's camp. On 15/9/2009 some woman went to her and told her that she had rescued PW1, who told them that she had been defiled. She was taken to Nairobi Women Hospital where she was examined, she led them to [Particulars Withheld] where the appellant was arrested. She stated that the woman who rescued PW1 told her that she was afraid of coming home and that she suspected that she had been defiled. PW1 then led them to the club where the appellant was arrested from and took them to the lodge where he defiled her in.

18. PW3 PC RUTH MAITHYA received the minor and her mother at the police station, where she recorded their statements. She later on escorted the appellant to the Police Doctor for examination and confirmed the date of birth of the complainant through the clinic card, confirming that she was 13 years old. She then visited View Park Restaurant and confirmed that the appellant was working there at the butchery. She further stated that she met the Masai guard at the lodge, who confirmed the information given by the complainant.

19. PW5 DR. NGATIA MAINA produced a medical report on the complainant on behalf of Dr. Mulomba where it was stated that she was HIV positive, using ARVs. Her vaginal examination was normal with an old hymenal tears with a white discharge on the vagina. When put on his defence the appellant opted to keep quiet in exercising his constitutional rights and offered no evidence.

ANALYSIS AND DETERMINATION

20. From the proceedings, the Memorandum of appeal and submissions herein, I have identified the following issues for determination: -

> **a)** Whether there were contradictions in the prosecution case.
>
> **b)** Whether there was need for corroboration of the complaint's evidence.

c) Whether failure to call some prosecution witnesses was fatal to the prosecution case.

d) Whether the prosecution case was proved beyond reasonable doubt.

e) Whether the sentence was lawful.

21. On whether there were contradictions on the prosecution case, it was the appellant's contention that there was contradiction between the evidence of PW1, PW3 and PW4 as to what happened to PW1 and when the defilement allegedly occurred. I have gone through the proceedings herein and it is clear that she had gone to church with her two sisters, when on the way from church she was accused of stealing some lady's phone, causing her to run away to [Particulrs Withheld]in fear of what her mother would have done to her. It is at [Particulrs Withheld] where she met the appellant who defiled her. She then took two days before going back home. Her evidence was corroborated in material particulars by that of PW3 (her mother) and PW4, the police woman. Any contradictions on their testimony as to when the offence occurred were of minor nature which did not go to the root of their prosecution case.

22. On the issue of corroboration, as stated herein above, the complainants account was corroborated by the evidence of her mother, and PW4 the police women who received her report at the police station and who later on went with her to the scene and to the place where the appellant was working. Further this being a sexual offence, the appellant could still be convicted on the sole evidence of the complainant as provided for under Section 124 of the Evidence Act, provided the same was telling the truth. I have looked at the evidence of the complainant as recorded and have no reason to doubt her truthfulness.

23. On whether failure to call some crucial prosecution witnesses was fatal to the prosecution case:- Section 143 of the Evidence Act states that there is no legal requirement on the number of witnesses necessary to prove a fact and as was stated in the case of **KETER v REPUBLIC [2007] 1 EA 135.**

> ***"The prosecution is not obliged to call a superfluity of witnesses but only those such witnesses how are sufficient to establish the charge beyond any reasonable doubt."***

24. On the other hand the court may make adverse inference on the prosecution case, as was stated in the case of **BUKENYA & OTHERS v UGUND[1970] EA 549** as follows:-

> ***"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) The court has right and duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tendered to be averse to the prosecution."***

25. The Court of Appeal in the case of **JULIUS KALEWA MUTUNGA v REPUBLIC Criminal Appeal No. 31 of 2005** had this to say: -

> ***"….. As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless for example it is shown that the prosecution was influenced by some oblique motives."***

26. The appellant in his submissions has mentioned the Maasai guard at the lodge, but the record clearly shows that at the time of the trial he had gone back to Tanzania and could therefore not be secured to testify. He has also mentioned the lady who rescued the complainant and her father who escorted her to the police and to the scene where the appellant was arrested, but from the proceedings, it is clear that the nature of their evidence was covered by PW1, PW2 and PW3. There is therefore no adverse inference which can be made as there was no evidence given which would have required their answer and which would have been favourable to the appellant.

27. On proof of the prosecution case, in a case of defilement the following elements of the offence must be proved: -

a) The identification of the Appellant.

b) The age of the victim.

c) The fact of penetration.

28. On the identification of the Appellant, the complainant's evidence was unchallenged that she met the same at a club where the appellant was selling meat. She stayed with him for some time until he finished his work, when he took her to a lodging and the room had electricity. She had adequate time to identify him and the conditions prevailing were also ideal for positive identification. The complainant was able to take her mother, father and the police to the scene where he was arrested from, having been positively identified by her. The Appellant did not challenge that evidence in cross examination. I am therefore satisfied that this identification was positive and free of error as was stated in the case of **KARIUKI NJIRU & 7 OTHERS v REPUBLIC CRIMINAL CASE NO. 6 OF 2001.**

29. The age of the complainant was proved through her testimony, her mother and the two doctors and as corroborated through the Child Health Card and the P3 form produced as exhibits at the trial. Penetration was also proved beyond any reasonable doubt through the evidence of the complainant and the two doctors who confirmed that her hymen was absent as at the time of the examination though an old

one. From the evidence tendered, it is clear that the same was examined three days after the incidence and whereas there is possibility of the same having been sexually active, I would agree with submissions by Ms Chege that there is no possibility of the same having been defiled by someone else rather than the Appellant within the three days. The complainant's account of her whereabouts during the said three days was never challenged.

30. I am therefore satisfied that the prosecution case against the Appellant was proved beyond any reasonable doubt and that his conviction was safe and free from error and therefore dismiss his appeal on conviction.

31. On sentence, sentencing is at the discretion of the trial court and the appellate court would only interfere with the same where there is material misdirection by the trial court as was well stated by Odunga J in the case of **SIMON KIPKURUI KAMORI V REPUBLIC [2019] eKLR** thus: -

> ***"Since the appellant is only appealing against sentence, it is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:***
>
> ***"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"***

6. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> ***"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."***

7. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows: -

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

8. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R -v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -

> ***"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***

9. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."***

32. The appellant was charged with the offence of defilement under Section 8(3) wherein the sentence produced for upon conviction is imprisonment for a term of not less than twenty years. The appellant here was sentenced to an imprisonment for a term of fifteen years which was lower than the minimum term provided for in law. Having stated that sentencing is at the discretion of the trial court and the appellant having not been given notice of enhancement of the sentence, I will not interfere with the same.

33. The upshot of this is that the appeal herein lacks merit both on conviction and sentence which I hereby dismiss and affirm the trial court's finding both on conviction and sentence. The appellant has right of appeal and it is ordered accordingly.

Dated, Signed and Delivered at Nairobi This 28th Day of October, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE

In the presence of: -

Mr. Okeyo for the Respondent

No appearance for the Appellant

Appellant present

Court clerk Karwitha