



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NUMBER 31 OF 2018

JAMES MUTWIRI MWANIKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

On the 28th August, 2018, the Principal Magistrate's Court at Runyenjes found the Appellant, James Mutwiri Mwaniki, guilty of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. He was convicted and sentenced to imprisonment for life. Being aggrieved by the sentence he filed the present Appeal raising the grounds contained in the amended grounds of Appeal as follows;

1. The Magistrate erred both in law and fact by failing to consider that the Appellant was entitled to the guaranteed benefit of the law under Article 27(1) (2) and (4) of the Constitution hence imposed a harsh sentence.
2. The trial Magistrate erred in law and in fact by failing to consider that the Appellant was a first offender and thus entitled and qualified for least severe punishment as stipulated under Article 50 (2) (P) of the Constitution.

He prays that the sentence be substituted with an appropriate lenient sentence.

The particulars of the offence were that; on the 25th day of October, 2017 within Embu County, intentionally and unlawfully caused his penis to penetrate the vagina of TAN a child aged 9 years.

He also faced 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. The particulars being that; on the 25th day of October, 2017 within Embu County, intentionally and unlawfully touched the vagina of TAN a child aged nine (9) years.

The prosecution called four (4) witnesses in support of their case. The complainant who testified as PW1 stated that on the 25th October, 2017, she was going to school at 7.30am and had an umbrella when she met the appellant who requested her to share the umbrella with her, to which she obliged. That on reaching the river, the Appellant took the umbrella and pulled her hands into a bush which was near the river. The Appellant inserted his finger into her vagina, then he inserted his penis into the vagina and released her to go to school. She screamed but nobody answered her call as there were no other people on the path.

She proceeded to school but when she got home she informed her mother who took her to Runyenjes

District Hospital for medication. The mother later reported the matter at Runyenjes police station. They took a P3 form the following day.

PW2 the mother to the complainant stated that the complainant was born on 4th August, 2008. She produced the birth certificate as exhibit 1. She testified that on 25th October, 2017 she woke up, prepared her daughter (PW1) and gave her an umbrella. On arriving back home at about 1.30pm, she appeared sick and on asking her, she told her that a boy who had asked for her umbrella had pushed her to a thicket, undressed her panties, inserted his finger in the vagina and then inserted his penis into the vagina.

She checked the complainant's vagina and she had blood. She took her to Runyenjes General Hospital where she was treated and a P3 form issued to her. While heading to the shop with the complainant on 4th November, 2017, they saw the Appellant and the complainant confirmed that he is the one who defiled her. She made a report at Janja A.P camp and the Appellant was arrested on 5th November, 2017.

The Clinical Officer gave evidence as PW3. He examined the complainant and filled the P3 form for her. The patient could not walk straight because she had pain in genital area. He also examined the clothes which had dry blood stain in the under pants and the dress that she was wearing on the material day. He prepared the PRC form on the 25th October, 2017. The vulva and majora were swollen and there was pulse discharge from the vagina.

The Investigating Officer (PW4) stated that on 25th October, 2017, the complainant was escorted by her mother to the Runyenjes Police Station to report a case of defilement. He advised them to go for check-up in hospital. She was examined and discharged. He took witness statements. He later preferred charges against the Appellant.

In his defence, the Appellant testified under oath and called two (2) witnesses. It was his evidence that he was at home on 25th October, 2017 and on 5th November, 2017 he was asleep when he heard a knock on his door and on opening, there were police officers who said he had defiled the complainant. He was arrested and escorted to Runyenjes Police Station where he was detained and later charged. He denied having committed the offence and stated that the same was fabricated.

The Appellant's mother testified as DW2 and stated that on 5th November, 2017 at about 5.30am, three police officers went to their compound and arrested the Appellant and escorted him to Runyenjes Police Station. He was alleged to have defiled the complainant.

The father to the Appellant who testified as DW3 told the court that he knew about the allegations on the 5th November, 2017 when his son was arrested and escorted to Runyenjes Police Station. He followed the Appellant and enquired why he was arrested. He stated that his son was on medication and he is mentally unstable.

When the Appeal came up for hearing, the Appellant relied on his written submissions. The counsel for the Respondent made oral submissions but informed the court that she did not oppose the appeal in as far as the sentence is concerned. She agreed with the Appellant that the court should set aside life sentence and impose a definite sentence. She relied on the case of **Dismas Wafula Kilwakwe vs. R. (2018) eKLR** which sets out the factors that the court should consider when sentencing an accused person who is facing a sexual offence.

On the other hand, she urged the court to consider the gruesome circumstances of the case and the sentencing policy guidelines (2016) and asked the court to apply the community protection objective and give the Appellant a sentence that will protect young girls and women generally, from sexual offences.

The Appellant on his part submitted that the sentence was arbitrary and harsh and asked the court to consider that he is remorseful. He urged the court to be guided by the case of **Muruatetu, petition No. 15/2015** and find that the mandatory nature of the sentence that was imposed deprives this court of its jurisdiction to exercise its discretion in sentencing.

The court has considered the submissions by both the Appellant and counsel for the Respondent.

On the sentence and principles that the court should consider when sentencing, the same have been highlighted by many courts in Kenya for example, the case of ***Dahir Hussein vs. R. (Criminal Appeal o. 1 of 2015) eKLR*** in which the High Court held that the objectives of sentencing include deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm due to the victim. These are also in line with the 2016 Judiciary of Kenya Sentencing Policy Guidelines.

In line with those objectives and considering the mandatory nature of the sentence that deprived the court the discretion to impose a lesser sentence and the mitigation offered by the Appellant, the court hereby finds that the sentence was excessive and in view of Muruatetu case, I do allow the Appeal and reduce the sentence imposed on the appellant from life sentence to 20 years imprisonment.

It is so ordered.

Dated, Delivered and signed at EMBU this 23rd day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent