



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 30 OF 2019

HILLARY MUNENE MOSES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the judgment of the Hon.J.Ndengeri (SRM) delivered on 28/09/2019 in Criminal Case No.5 of 2016 Embu)

JUDGMENT

1. The appellant **Hillary Munene Moses**, was charged with the offence of defilement of a girl contrary to **Section 8(1) as read with 8(3)** of the **Sexual Offences Act**. The particulars of the charge are that on the 17th day of January, 2016 in Mbeti North Location within Embu County, the appellant intentionally caused his member to penetrate the private parts of **GNM** a child aged twelve (12) years.

2. The alternative charge was the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; the particulars are that on the abovementioned date the appellant intentionally touched the private parts of **GNM** a child aged twelve (12) years.

3. The prosecution called a total of five (5) witnesses to prove its case; and the appellant was found guilty and was convicted on the main charge and sentenced to seven (7) years imprisonment.

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed six (6) grounds of appeal which are summarized inter alia;

(i) The medical examination was conducted after 72 hours from the date of the alleged incident; the contents of the medical report were inconsistent with offence of defilement; the prosecution failed to prove its case to the desired threshold;

(ii) The trial court passed an erroneous sentence; that the sentence was harsh and excessive in the circumstances;

(iii) The trial court disregarded the appellants defence.

5. At the hearing hereof the appellant was represented by learned counsel Ms Migwi whereas Ms. Chemenjo represented the State; both counsel canvassed the appeal by filing and exchanging written submissions; hereunder is a summary of the parties rival submissions;

APPELLANTS CASE

6. The appellant submitted that the alleged victim testified that she was held from behind and lost consciousness; she did not see the person who held her from behind but alleges to have seen “Macharia” running away when she gained consciousness. It then remains unclear why the appellant was charged while the complainant testified that she did not see anyone else after she regained consciousness but only saw a Macharia who was not charged.

7. The appellant submitted that there was no eye witness in this case, the trial court instead relied in the evidence of the victim which was inconsistent noting that the timelines did not add up and did not support the alleged offence. The inconsistencies in the evidence of the single witness were contradictory in nature but the trial court proceeded to admit the evidence and further erroneously convicted and sentenced the appellant.

8. On the medical report produced by the prosecution, the appellant submitted that it was prepared by relying on medical notes conducted after the expiry of Seventy Two hours from the date of the alleged offence. The same contained information that was overwhelmingly inconsistent with the offence of defilement. On the description and detail on the injuries sustained, the medical report indicated that the hymen was perforated by a clinician from Kibugi Health Centre while the discharge indicated that there was a whitish creamish discharge.

There was nothing consistent with the offence alleged.

9. The appellant submitted that the foregoing averments led to a miscarriage of justice. He relied on the case of **Chrispine Waweru Njeri v Republic (2015) eklr** where the court held that “ *where there is doubt, that benefit of doubt should lead to quash and set aside the conviction and sentence meted upon the Appellant.*”

10. In his final submissions, the appellant submitted that the trial court convicted and sentenced him based on evidence that was not proven beyond reasonable doubt as it is by law required and prays that the sentence be set aside.

RESPONDENTS CASE

11. In response the appeal was opposed and counsel submitted that the key ingredients for the offence of defilement which are proof of the age of the complainant, proof of penetration and positive identification of the assailant were proved by the prosecution to the desired threshold; the appellant was rightly convicted on the main offence of defilement;

12. **On age;** the complainant's age was proved by the production of 'PEXh.3' which confirmed that the minor was aged twelve (12) years at the time the incident occurred; **On penetration;** PW4 physically examined PW1 and produced the P3 Form together with the Post Rape Care Form as the medical evidence to establish penetration; **On identification;** the appellant was positively identified by the complainant;

13. **On the defence;** the testimonies of the prosecution were sufficient and cogent and the appellant's defence failed to dislodge the prosecution's case and for this reason the trial court disregarded it; secondly, the appellants alibi defence was considered an afterthought by the trial court as no prior notification was given to the prosecution to give it a chance to rebut or cross-examine it so as to establish its correctness;

14. **On sentence;** the trial court rightly sentenced the appellant as an adult as he was seven (7) months shy of attaining the age of 18 years when he committed the offence;

15. Counsel prayed that the appeal be disallowed on account of the aggravating factors amplified in the circumstances under which the offence was committed, the age of the minor and the seriousness of the offence of defilement.

ISSUES FOR DETERMINATION;

16. After taking into consideration the submissions of both the Appellant and Respondent this court has framed the following issues for determination;

- (i) Whether the prosecution proved its case to the desired threshold;
- (ii) Whether the trial court disregarded the appellants '*alibi*' defence;
- (iii) Whether the trial court imposed an illegal sentence on a minor;
- (iv) Whether the sentence was harsh and excessive in the circumstances.

ANALYSIS

17. This court being the first appellate court, it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the prosecution proved its case to the desired threshold;

18. The appellant contends that the prosecution failed to prove the offence of defilement to the desired threshold; in response the respondent stated that the prosecution had proved the three key ingredients of the offence of defilement to the desired threshold; these three key ingredients that the prosecution must prove are identification, age and penetration;

19. **On identification;** In this instance it was not identification, but a case of recognition of the appellant as being one of the assailants; recognition is usually more satisfactory and reliable than identification of a stranger because it is dependant on personal knowledge of the assailant;

20. **PW1** had indicated in her evidence that she knew the appellant by the name Munene and that she had seen him at the canteen near Nguvio Girls on three to four occasions prior to the incident; on that material date he was among the two men whom she saw walking behind her; and the last thing she remembered before losing consciousness after being drugged was seeing the appellant's face as he covered her mouth; **PW2** stated that the complainant had informed her that the appellant had defiled her and she stated that she knew Munene as he hailed from a nearby ridge in the same locality;

21. The testimonies of the **PW1** and **PW2** point to incident having taken place between 5.30- 6.30pm; this court notes that there were no inconsistencies in the evidence of **PW1** and **PW2** on the issue of time and being early evening the conditions for identification of the

appellant are found to be favourable; case law referred to **R vs Turnbull & Others [1976] 3 ALL ER 549;**

22. The trial court made a finding that the identification was by way of recognition; that the appellant and **PW1** were persons known to each other and hailed from the same location; it is this court's considered view that the trial court had the opportunity to see and observe the demeanor of **PW1** and found her evidence to be consistent and credible; therefore, upon having re-examined the evidence on record on identification this court finds no good reason to interfere with the trial court's finding as it is satisfied that **PW1** was able to positively recognize the appellant;

23. **On age;** this court notes that the Charge Sheet indicates the age of the minor as being twelve (12) years; the trial court indicated that the complainant was twelve (12) years when it conducted the '**voire dire**' examination; **PW2** produced documentary evidence in the form of a Birth certificate "**PEXh.3**" that indicated the complainant's age at the time of the incident as being twelve (12) years;

24. This court finds no reason to interfere with the trial court's finding on the age of the complainant.

25. **On penetration;** Penetration is defined under the provisions of Section 2 of the Act and it reads as follows; "**penetration**" means the **partial or complete insertion of the genital organs of a person into the genital organs of another person;**

26. The complainant clearly described how she met the appellant on the material date when she had gone to buy milk; she gave a detailed account on how the appellant followed her and had covered her mouth and drugged her; when she came to consciousness she found she that she had been defiled; upon informing her mother (**PW2**) she was taken to hospital and the matter was reported to the police;

27. The P3 Form and Post Rape Care Report Form was presented as exhibits (**PEXh.2**) by the doctor (**PW4**) whose testimony was that upon examination of the minor she found the complainant's hymen was freshly perforated in a manner consistent with penile penetration and noted blood spots on **PW1's** underwear; after the examination the doctor's findings were that the injuries were indicative of defilement;

28. This court is satisfied that the evidence of **PW1** which was corroborated by the medical evidence tendered by **PW4** sufficiently proved this element of penetration; and finds no reason to interfere with the trial court's finding that the appellant was the person who had defiled the minor.

29. This court finds that the three elements of defilement; that is age, penetration and identification were proved by the prosecution to the desired threshold;

30. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court disregarded the appellants 'alibi' defence;

31. In his defence the appellant raised an '**alibi defence**' and stated that on that material day which was a Sunday he was not at Nguvio on that date; but was at Kagumoini watching football; his contention is that the trial court disregarded this '**alibi defence**'

32. The trial court made a finding in its judgment that '**the alibi alluded to was raised late in time and this denied the prosecution a chance to interrogate and establish if it checked out.**'

33. Indeed, the appellant in this case raised his '**alibi defence**' belatedly; the ideal position would have been to have raised it either during cross-examination or to have brought it up at the earliest possible moment in order to give the prosecution an opportunity to inquire into the **alibi**; nevertheless, it is trite law that there is no statutory provision that requires an accused person to disclose his defence prior to being called to his defence;

34. Firstly, the court record reflects that the appellant called no witnesses to corroborate his evidence as to his whereabouts on that material date; secondly, this court opines that the belated disclosure of the '**alibi defence**' goes to the credibility of the appellant's evidence; and upon weighing the appellant's '**alibi defence**' against the prosecution's evidence this court finds that it is a mere denial and is satisfied that it does not dislodge the prosecution's case;

35. The trial court was justified in disregarding the appellants '**alibi defence**'; this ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court imposed an illegal sentence on a minor;

36. From the onset of the trial to time of sentencing the record reflects that the trial court had taken into consideration the fact that the appellant was a minor at the time the incident was committed; and upon meting out the sentence the trial court made the following observation;

"The court observed that the accused was seven (7) months shy of 18 years when he committed the offence.

.....I have interrogated the law and precedents when it comes to sentencing minors who turn 18 during and at the conclusion of the trial process. I have considered the gravity of the offence and the psychological effect the offence shall have on the complainant.

.....*The purpose of sentences provided for under the Children’s Act is to correct and rehabilitate a young offender.*

The accused though a minor when he committed the offence needs to be brought to bear the responsibility of his omission or lack of judgment by serving a custodial sentence. The accused is now of a majority age and I am of the view that he cannot be released to society without assistance to understand the consequences of his mistake.”

37. This court notes that in its ruling on sentence the trial court cited the case of **R vs Dennis KiruiCheruiyot [2014] eKLR** and finds that it correctly applied the principles set out by the Court of Appeal for sentencing an offender who was a minor turning into an adult at the time of sentencing or at the time of appeal;

38. This court finds no reason that justifies interference with the custodial sentence imposed by the trial court; this ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the sentence was harsh and excessive in the circumstances.

39. It is now settled law that the sentencing of an accused person is a matter that lies in the discretion of the trial court; and that the mandatory provisions of law must not be interpreted in a manner so as to take away the discretion of the court when sentencing; reference is made to the cases of **Dismus Wafula vs Republic (2018) eKLR** and **Muruatetu vs Republic [2017] eKLR**; in the latter case the Supreme Court declared that a mandatory sentence denies an accused person the right to mitigate and also takes away the trial courts discretion when sentencing;

40. Therefore, a court of law should be left to freely exercise its discretion and the sentence imposed by the trial court should be dependent on the facts and circumstances of each case;

41. This court reiterates the fact that the sentence must in the end depend upon the particular facts and circumstance of that case; there is no doubt that the trial courts hands were not tied by Section 8(3) which sets out the mandatory sentence of twenty (20) years imprisonment; this court notes that the trial court invited the appellant’s counsel to mitigate on behalf of the appellant; and that the trial court was able to exercise its discretion and thereby accorded a justifiable sentence to the appellant, who was a first offender;

42. Contrary to the contention of the appellant that the sentence was harsh and excessive this court finds no good reason that warrants interference of the sentence imposed of seven (7) years for the offence of defilement; and the sentence is found to be lenient;

43. This ground of appeal is found lacking in merit and is hereby disallowed.

FINDINGS & DETERMINATION

44. In the light of the forgoing this court makes the following findings and determinations;

- i. The prosecution is found to have proved the key ingredients of the offence of defilement to the desired threshold; the conviction is found to be safe and it is hereby upheld;
- ii. The trial court is found to have considered the appellants ‘*alibi*’ defence and gave good reasons for disregarding it;
- iii. The trial court is found to have taken into consideration the age of the appellant at the time of the commission of the offence; and the custodial sentence imposed is found to be legal;
- iv. This court finds no good reasons to justify interference with the sentence imposed of seven (7) years which is found to be very lenient in the circumstances; the sentence is hereby upheld.
- v. The appeal is found lacking in merit in its entirety and it is hereby dismissed.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 19th day of November, 2020.

HON.A.MSHILA

JUDGE