



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCRA NO. 13 OF 2017

SML.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. Gicheha SPM Hon. delivered on 31st January 2017 in Nakuru CMCC No.41 of 2016)

JUDGMENT

1. The appellant was charged with the offence of **defilement contrary to section 8 (1) of the sexual offences Act No.3 of 2006**. Particulars are that on diverse dates between 1st February 2015 and 16th February 2015 in Nakuru West Division within Nakuru County accused intentionally and unlawfully committed an act of inserting a male genital organ namely penis to a female genital organ namely vagina of XY a child aged 9 years which caused penetration.

2. The alternative charge is the offence of **indecent act with a child contrary to section 11(1) of the sexual offences Act No.3 of 2006**. Particulars are that on diverse dates between 1st February 2015 and 16th February 2015 in Nakuru West Division within Nakuru County accused intentionally and unlawfully committed an act by touching private parts namely vagina of XY a child aged 9 years which caused penetration.

3. The appellant denied both the main and alternative charge. The case proceeded for hearing with prosecution calling 4 witnesses while the accused in his defence gave unsworn statement. The appellant was found guilty, convicted for the main charge and sentenced to life imprisonment. Being aggrieved by the decision of the trial magistrate on both conviction and sentence, the appellant filed this appeal on the following grounds: -

i. That the learned trial magistrate erred in law and fact by failing to appreciate that the appellant was never accorded an opportunity to cross examine PW1;

ii. That the learned trial magistrate erred in law and in facts by failing to find that the medical evidence adduced did not corroborate the charge as drawn;

iii. That the learned trial magistrate erred in law and in facts by failing to appreciate that there existed a grudge between the appellant and PW2;

iv. That the learned trial magistrate erred in law and facts by sentencing the appellant to the mandatory minimum sentence; and

v. That the learned trial magistrate erred in law and in facts by failing to appreciate that the charge sheet was incurably defective.

APPELLANT'S SUBMISSION.

4. The appellant submitted that he was not given an opportunity to test the veracity of the complainant's evidence even though the trial magistrate found that she was fit to testify under oath. That the trial magistrate indicated that cross examination was Nil instead of indicating that there was no question. He submitted that his right to fair trial was violated as enshrined in **Article 50 (2) (c) of the Constitution**.

5. Appellant further submitted that he was not given an opportunity to adequately prepare for his defence and stated that when the trial magistrate noted the appellant had no questions to ask PW1 the Court should have adjourned to allow the appellant time to frame questions for cross examination.

6. Appellant further submitted that the medical evidence adduced does not corroborate the charge; that PW3 did not demonstrate to the Court how he arrived at the conclusion there was penetration; that his evidence was not conclusive enough to prove penetration; thus the offence of defilement was not properly proved.

7. The appellant further submitted the trial magistrate erred by failing to appreciate there existed a grudge between the appellant and PW2; that they were living as husband and wife but had since separated; that there was a likelihood PW1 was coached by PW2 and that complainant was not her biological daughter as PW2 was not his daughter as he married PW2 with her and complainant had tendency of visiting him and PW2 took advantage to frame him up. He submitted that in her evidence, PW2 testified she had a grudge with the appellant.

8. On sentence, the appellant submitted that the trial magistrate imposed sentence provided by statute. That the trial court failed to exercise discretion and cited several case laws to demonstrate that the mandatory minimum sentences provided by the statutes has been outlawed.

9. Lastly the appellant submitted that the charge was defective for failing to provide penalty section; that the charge reads as follows:-

“Defilement contrary to Section 8(1) as read with Section 8(1) of the Sexual Offences Act No. 3 of 2006.”

And submitted that an accused person ought to promptly be informed of the offence he/she committed to allow them adequately prepare for the defence and the evidence adduced should support the charge.

PROSECUTION'S SUBMISSION

10. In response the state counsel submitted that on age PW2 who was the mother of the complainant stated that she was 8 years old and PW3 who was a doctor confirmed by producing age assessment report.

11. On identification, she submitted that the complainant identified the appellant as L and stated that he used to cook chips in the village. She submitted that the complainant testified that the appellant used to live alone and that he took her to his house severally. Further that she stated that the appellant had lived with her mother but they separated; and PW2 who was complainant's mother said the appellant was her husband but they had separated when the complainant was 4 years old. She further stated that on several occasions appellant took the child to his house and she found the child there.

12. On penetration, the state counsel submitted that the child testified that the appellant defiled her severally in his house; and the doctor who examined the child confirmed that her hymen was broken; that she had scars and lacerations on her private parts. She further submitted that the doctor found that the child had been defiled for a long time.

13. On accused's allegation that he had gone to police station to report that her things had been stolen, the state counsel submitted that the appellant did not avail OB extract to confirm that.

14. On allegation of existence of grudge between the appellant and the child's mother, the appellant submitted that he failed to demonstrate that there was a grudge in cross examination. She submitted that the incident occurred about 5 years after the appellant had separated with the child's mother.

15. In a rejoinder, the appellant submitted that child's mother went with her cousins to beat him after infecting him with a sexually transmitted disease. He said he had documents to prove that he was treated in remand.

ANALYSIS AND DETERMINATION

16. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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.)”

17. In view of the above I have perused the lower court proceedings and considered submissions herein. I will therefore consider the following issues : -

(i) Whether ingredients for the offence of defilement were proved beyond reasonable doubt

(ii) Whether the sentence imposed was harsh and excessive.

(i)Whether ingredients for the offence of defilement were proved beyond reasonable doubt

18. For offence of defilement, three ingredients have to be proved being age, penetration and identification. In respect to age, PW3 testified that age assessment was done by **Dr. Mbata** and the child found to be between 7 to 8 years old. She produced age assessment report as exhibit. The doctor's findings were not challenged age was therefore proved beyond reasonable doubt.

19. On penetration, the child testified that the appellant took her to his house on several occasions and had carnal knowledge of her. This was confirmed by doctor's evidence which showed torn hymen and lacerations in her vagina. The child's mother PW2 also confirmed that together with her friend they found the child in appellant's house after looking for her when she delayed arriving from school. There is therefore no doubt that there was penetration into the child's genital organ.

20. Identification is not an issue as the child knew the appellant as he had lived with him and her mother about 4 years before the incident. The appellant in his defence stated that the child's mother was his ex-wife.

(ii)Whether the sentence imposed was harsh and excessive

21. There is no doubt that the Court imposed minimum sentence provided by statute which is life imprisonment. The Supreme Court however in the case of **Muruatetu** declared mandatory nature of sentences unconstitutional for taking away discretion of the judicial officer to impose sentence as per circumstances of each case.

22. In view of the above, I have considered circumstances of this case, the age of the child; I note that the appellant took advantage of the trust the child had towards him having previously lived with her mother and looked up to him as a parent. In view of the above I find it appropriate to reduce the appellant sentence to 20 years.

23. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is allowed. The sentence of life imprisonment is set aside and replaced with 20 years' imprisonment.
3. Sentence to start from the day the appellant was sentenced in the lower court.

Judgment dated, signed and delivered via zoom at Nakuru

This 19th day of November, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant - present