REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 4 OF 2019

PETER MUNYAO MAKOSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate Court

at Kwale Criminal Case No. 86 of 2017 by Hon. P. Wambugu (SPM) dated 16th October 2018)

Coram: Hon. R Nyakundi

Mr. Muthomi Respondent

Appellant in Person

Judgment

The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates of the year 2016 and 20th March 2017 in Mivumoni Location of Kwale County within the Coast region unlawfully and intentionally committed an act, which caused his penis to penetrate the vagina of MM, a girl aged 15 years.

He was charge with an alternative count of committing an indecent act with a child contrary to section 11(1) if the Sexual Offences Act no. 3 of 2006. The particulars of the offence were that on diverse dates of the year 2016 and 20th March 2017 in Mivumoni Location of Kwale County within the Coast region indecently committed an act to MM, a girl aged 15 years by touching a private art namely vagina.

At the end of the trial, the Appellant was convicted and sentenced to 30 years' imprisonment. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds:

> ***1) That the learned Hon. Trial Magistrate erred in law and in fact in convicting me under the provisions of section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 without proper finding that:***
>
> > ***a) PW2 MN or MM was not a minor for even the trial court took her evidence under oath meaning that she was an adult.***
> >
> > ***b) That indeed of at all PW1 as per the first trial was not subjected to a voire dire examination as provided by the Children's Act and the trial court never even attempted to out her under such directives for she appeared to be an adult and not a child.***
>
> ***2) That the learned Hon, trial Magistrate erred in law and in fact and also failed to grant me a fair trial when he ordered me to continue with the case without having being given prosecution statements as provided under the provisions of Article 50(1)(2)(1) of the Constitution an omission which led to the losing of my case.***
>
> ***3) That the learned Hon. Trial Magistrate erred in law and fact in imposing upon me a sentence which was so harsh and excessive yet the provisions of our Constitution Article 50(1)(2)(p) propagate that an offender to be awarded the least server punishment in any conviction.***
>
> ***4) The ruling in Francis Karioko Muruatetu & Ano vs R Constitutional Petition 15&16 of 2015 held that mandatory punishment***

is unconstitutional.

i) The trial court on the 23rd January 2018 forced me to proceed with the case when I was sick thus infringing my right to fair trial hearing as provided under Article 50(1)(2)(C) of the Constitution of Kenya.

ii) That the learned Hon. Trial Magistrate erred in law and fact in convicting me in a case which was an open fabrication and very poorly investigated from my arresting officer one PC Kinuthia received the complaint three years before it being commissioned for he received the report on 11th September 2012.

a) PW2 told the court that she was born on 17th April 2000

5) That the Hon. Trial Magistrate erred in law and fact in unreasonably rejecting my defence, yet it was not impaired by the prosecution case for I could not lie to court, for why should I. With a clean and honest conscience, I told the court the truth and it has no any issue since I moved on to take her hand in marriage but things changed when I was unable to raise the demanded dowry.

Background

PW1 EK, the victim's mother told the court that on May 2017 she discovered that **PW2(MN)** was pregnant but she refused to disclose who was responsible. That when **PW2's** father came and asked who was responsible**, PW2** told them that the Appellant was responsible. **PW1** further said that they called some relatives and asked the Appellant about the pregnancy and that the Appellant accepted that he was responsible. That they informed the Children's officer who referred them to the police. **PW1** informed the court that **PW2** was born in 2002 and that the Appellant was **PW2's** grandfather.

PW2 MN, the victim gave evidence that in April 2016 at 9:00PM, the Appellant, who is her grandfather, went to their compound and told her that he loves her and that she accepted. That they started a sexual relationship from April 2016 and that the Appellant would give her Ksh. 300/- every time they had sex. That they continued with the relationship for the whole year. The victim became pregnant and stopped going to school in June 2017 and gave birth on 20th August 2017. After the child was born, they went for DNA testing.

PW3 Stephen Ibau a consultant gynaecologist observed the victim on the 12th September 2017. That the victim was 16years old and that she had given birth to a small child. He produced a P3 form (P. Exh.1) which indicated that she had a torn hymen. He also produced a Post Rape Care form (P. Exh.2).

PW4 PC Kinuthia No. 68930 from Msambweni Police Station told the court that he received a report on 11th September 2017 by the victim that the Appellant had defiled her and as a result she had given birth. He stated that he had the birth certificate of the victim, which indicated that she was born in 2002. He stated that he took the Appellant for DNA sampling and he had a received the result. He produced the exhibit memo (P. Exh.6) and a letter from the Children's department (P. Exh.3).

PW5 John Lawrence Oguda works with the Government Chemist. He stated that on 1st November 2017 he received samples from Eric Kimanthi for the victim, the Appellant and J the victim's child. That he conducted a DNA test and found that the Appellant was 99.99% the father of the child. He produced the DNA report (P. Exh.7).

At the close of the prosecution case, the Appellant was placed on his defence. He gave an unsworn statement and told the court that he was 58years old a widower and that the victim was his granddaughter. That he was to be married to the victim in January 2016 in accordance to Kamba customs. That he stayed with the victim and she got pregnant in June 2016. He stated that when it was discovered that he had impregnated the victim, it was agreed that he would stay with the victim and pay dowry of Ksh. 120,000/- That when he was unable to pay, his son wanted his land as dowry and that when he refused he was brought to court on defilement charges. He stated that the victim was 19years old when he married her and that she was 21years old at the time of the trial.

Submissions

<u>Appellant's written submissions</u>

On appeal, the Appellant relied on his written submissions. Firstly, he submitted that he was never given a fair trial as he was availed with the witness statements in contravention of Article 50(1)(2)(j) of the Constitution of Kenya. He further argued that on the 23rd January 2018 the court declined to grant him an adjournment and he was forced to proceed with the hearing while he was feeling unwell.

Secondly, it was submitted that the trial court erred in convicting him of defilement while the victim was an adult. He stated that the he knew the victim from the time she was born and that at the time of their relationship she was 19 years old. The Appellant stated that the victim's mother had failed to provide proof of the victim's age and merely stated that she was born in the year 2002. He further stated that the trial court swore in the victim as an adult and that it failed to conduct a voire dire examination. Additionally, he faulted the trial court of finding him guilty of defilement while he had a consensual relationship with the victim.

Thirdly, the Appellant submitted that the case had discrepancies. He stated that PW4 never stated who was the complainant and that the victim was not a minor at the time of their relationship. He relied on the case of **Alexander Nyachiro Marure vs Republic App No. 1590 of 1984** that there should be no material discrepancies between evidence in court and evidence given to the police.

Finally, the Appellant submitted that the sentence meted out by the trial court was excessive as section 8(4) of the Sexual Offences Act

(SOA) provided for a maximum conviction of 15 years. He further argued that the sentence as meted out prevented him from taking care of his child with the victim. He relied on **Francis Karioko Muruatetu & Ano vs Republic Petition 15&16 of 2015.**

Respondent's submissions

The Respondent replied on its written submissions dated 9th March 2020 and filed on the same day. It was the Respondent's submissions charge had been proved beyond reasonable doubt. That on the dispute on the age of the victim, the testimony of PW1 and PW3 as well as the birth certificate produced by PW4 proved that the victim was 16 years old by. The Respondent further submitted that the Appellant's defence that the victim was an adult was absurd and as the Appellant had not tendered any evidence that he reasonably believed the child to be an adult. On the trial court's failure to conduct a voire dire examination, the Respondent submitted that there was no need to conduct as voire dire examination as the victim was not a child of tender years. Reliance was placed on the case of **Japeth Mwambire Mbitha bs Republic [2019] eKLR** and **Samuel Warui Karimi vs Republic [2016] eKLR.**

On the Appellant's allegation that he his right to a fair trial was infringed, it was the Respondent's submission that there was no evidence that the Appellant had protested to not being issued with the witness statements. Further, it was submitted that the Appellant never objected to **PW1** and **PW2** being recalled for cross-examination if indeed he was sick.

Finally, on the issue of the sentence, it was the Respondent's submission that the sentence was neither harsh nor excessive as the Appellant had defiled the victim severally until she conceived resulting in her dropping out of school.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record. The issues for determination in this appeal is whether the Appellant's right to a fair trial were infringed; whether the prosecution proved its case beyond reasonable doubt and; if the sentence was manifestly harsh and excessive.

On the first issue, the Appellant contends that he was not issued with the witness statements until after the trial had begun. Article 50 (2)(j) of the Constitution provides that: -

"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

In **Thomas Patrick Gilbert Cholmondeley Vs. Republic {2008} eKLR,** the Court of Appeal pronounced itself as thus: -

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."***

The importance of furnishing an accused person with witness statements was aptly highlighted in **Joseph Ndungu Kagiri v Republic [2016] eKLR** Mativo J, held that: -

> ***"Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence… This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence..."***

Based on the foregoing, it is clear that the prosecution should furnish an accused person with witness statements before the trial beginnings and continuously throughout trial. In the present case, after plea was taken on 14th September 2017, the court on its own motion directed that the Appellant be supplied with copies of the witness statements at his own cost. When the matter came up for hearing on 24th October 2017, the Appellant informed the court that he was ready to proceed with the hearing. Further on the 23rd January 2018, when the case started de novo the Appellant never raised an issue with the trail court that he did not have the witness statements.

From the record, it is clear that the court played its part when it directed the Respondent to furnish Appellant with the witness statements. At no time during the whole trial did the Appellant inform the court that he had not been supplied with the statements but he proceeded with the hearing. It is trite that in certain circumstances an accused person has a duty to inform the trial court when his rights to a fair trial have been breached.

The Court of Appeal in **Hadson Ali Mwachongo v Republic [2016] eKLR** held thus: -

> ***"We are equally satisfied that the appellant's constitutional right to a fair trial was not violated. The record does not indicate the***

appellant raising any issue pertaining to access to witness statements. On the contrary, he is recorded informing the court that he was ready for the hearing of the case...In short, the appellant's complaint regarding denial of access to witness statements is simply not borne out by the record. As this Court stated in Francis Macharia Gichangi & 3 Others v. Republic, Cr. App. No. 11 of 2004 it is to be reasonably expected that an accused person who claims that his or her trial rights have been violated will at the very least raise the issue with the trial court."

Guided by the above decision, the Appellant failed to inform the trial court that he had not being supplied with witness statements during the hearing. There was no way the trial court could have known that he did not have the witness statements. From the record, the trial court was also ready to ensure that the Appellant's right to a fair hearing was protected and on its own motion it directed the Respondent to supply the Appellant with the witness statements. I find that this ground fails.

On whether the case was proved beyond reasonable doubt, with respect to the law, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic [2015] eKLR**.

Rule 4 of the Sexual Offence Rules of Court 2014 provides that: -

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

In the present case, **PW4**, the investigating officer told the court that he had the birth certificate of the victim which showed that she was born in the year 2002. However, I note that while the birth certificate had been marked earlier for production, the same was never produced as an exhibit. It is trite that documents that have been marked for identification but not produced as evidence do not have any evidentiary value. In **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** the Court of Appeal stated that: -

"19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case… If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21….

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. .. Until a document marked for identification is formally produced, it is of very little, if any, evidential value."

Having found that the birth certificate was not produced as an exhibit it therefore has very little evidential value.

However, the court is alive to the fact that age is not proved strictly by documentary evidence but can also be proved through the victim's parents or observation.

In the case of in **Thomas Mwambu Wenyi v Republic Criminal Appeal NO. 21 OF 2015 [2017] eKLR** the Court of Appeal cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that: -

"…Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense…." (Emphasis mine)

In **Richard Wahome Chege v Republic [2014] eKLR** the Court of Appeal sitting in Nyeri pronounced itself thus: -

"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself." (Emphasis mine)

During trial, PW2, the victim's mother, told the court that the victim was born in the year 2002 which made her 16 years at the time trial. This was further corroborated by the evidence of PW3, the gynecologist who stated that he examined the victim who was 16 years old. Guided by the above precedent and based on the facts on record I am satisfied that the age of the victim was satisfactorily proved. On the element of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was

held in Dominic Kibet Mwareng vs. Republic [2013] eKLR where the court stated that: -

> "**…**In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."

In this case, the victim **(PW2)** gave evidence how the Appellant approached her in April 2016 and told her that he loved her and

wanted to have sex with her. The victim accepted and they proceeded to have a sexual relationship, which resulted in the victim getting pregnant. This evidence was corroborated by the medical evidence by the P3 (P. Exh1) and the Post Rape care form (P. Exh2) produced by **PW3** and which showed that the victim's hymen was torn and that the victim had given birth to a child. Based on the foregoing I find that penetration was proved.

On the issue of identification, it is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in **Francis Muchiri Joseph – V- Republic [2014] eKLR** where it stated that:

> ***"In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…."***

In this case, it is evident that the Appellant and the victim were related as the victim referred to the Appellant as grandfather which was not denied. Further, **PW5** produced the DNA report (P. Exh7) that proved that the Appellant was the biological father of the victim's child. Additionally, the Appellant in his evidence admitted having sexual relations with the victim which resulted in the birth of their son JN. In view of the above there is no doubt that the Appellant was the one who defiled the victim.

The Appellant in his defence, stated that the victim was 19 years old when he started having sexual relations with her. The trial Magistrate in his judgement considered the Appellant's defence and found that the Appellant never tendered evidence in support of his defence. I am in agreement with the trial Magistrate. **Section 8(5) and (6)** of the SOA states that: -

> **(5) It is a defence to a charge under this section if—**
>
> **a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
>
> **b) the accused reasonably believed that the child was over the age of eighteen years.**
>
> **(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.**

The Appellant never gave reasons for believing that the victim was 19 years old at the time. Additionally, it was the evidence of the victim that she was still going to school up to June 2017 two month before she gave birth. It defies logic for the Appellant to claim that he believed that the victim was 19 years old yet she was a school going child. In the premise I find that the defence fails.

On the issue of contradictions, it was the Appellant's submission that the investigating officer, PW4 stated that the case was reported to him on 11th September, 2012. However, I have perused the handwritten court records and note that it indicates 11th September 2017 and not 2012. This was a simple typing mistake.

On sentence, the Appellant submitted that the same was excessive and harsh as it was higher than mandatory minimum as provided in the SOA. He further stated that mandatory sentences are unconstitutional and relied on the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** where the Supreme Court held that:

> ***"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."***

Many decisions from the Court of Appeal have adopted the decision of the Supreme court in holding that the mandatory sentences of the SOA takes away judicial discretion in sentencing. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where is stated thus: -

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the sexual offences act, which do exactly the same thing."***

However, it must be stated that the holding of the Supreme Court in **Francis Karioko Muruatetu & another v Republic (Supra)** did not abolish mandatory sentences. The Court of Appeal in **Samson Mumbaa Murigi v Republic [2020] eKLR** held that: -

> ***"In this instance, it is significant to note that at the time of committing the crime, the appellant was given the minimum penalty***

> ***of 20 years imprisonment which was the prescribed sentence for the offence of defilement under Section 8(3) of the Sexual Offences Act. The record indicates that the trial court took into consideration the mitigation of the appellant and the victim impact status report. The sentence imposed by the trial court and affirmed by the High Court cannot therefore be said to be unlawful or manifestly unjust. The trial Court took into a consideration both aggravating and mitigating factors and arrived at the correct conclusion. Consequently, the appeal against sentence fails."***

In the present case, the trial Magistrate when sentencing the Appellant took into consideration aggravating and mitigating factors and stated as thus: -

> "I find that because of his age and he being a first offender but also considering that he took advantage of a very young girl who was at school and who for all intents and purposes was a relative. I jail him for 30 years."

Additionally, it is trite that the court should not alter the sentence of a trial court unless it was based on a wrong principle or a material fact was overlooked, see **Ogolla s/o Owuor v R {1954} EACA 270.**

Guided by the above principle, I find that the trial Magistrate did not act on a wrong principle or overlook a material fact and therefore this ground fails. Consequently, I find that the appeal has no merit and the same is dismissed.

Orders accordingly.

Right to appeal 14 days.

Judgment delivered, dated and signed at Malindi this 18th day of December, 2020.

.....

R. NYAKUNDI

JUDGE

In the presence of:

The Appellant in person

Mr. Onyango for the State