



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO 158 OF 2014

ROBERT NYAMBANI MARIARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable M. Otindo Resident Magistrate, delivered on 11th July, 2014 in Nakuru Chief Magistrate's Court Adult Criminal Case No. 98 of 2012)

JUDGMENT

1. The Appellant was charged before the Chief Magistrate's Court in Nakuru with a single count of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows:

On diverse dates between 1st November, 2011 to 29th February, 2012 at [Particulars Withheld] in Njoro District within the Rift Valley Province unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female organ (vagina) of ENK a child aged 6 years which caused penetration.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. The details of the particulars of place, time and victim are the same as that in the main charge save that in the alternative charge, the Appellant was accused of unlawfully touching the genital organs namely (vagina) of the victim with his genital organ namely (penis).

3. The Appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the Prosecution case, the Appellant was placed on his defence. He gave sworn testimony and called no witnesses. The Learned Trial Magistrate returned a guilty verdict and imposed the mandatory imprisonment for life sentence on the Appellant. The Appellant is aggrieved and has filed the present Appeal.

1) That I pleaded not guilty at trial

2) That, the learned trial magistrate erred both in law and fact when he failed to consider my cogent though short defence that was rich in truth.

3) That, the learned trial magistrate erred both in law and fact when he failed to consider that the doctor's findings had no facts that associated me with the alleged offence.

4) That, the learned trial magistrate erred both in law and fact by relying on evidence of single identification by the alleged defiled minor who could have been coached.

5) That, the learned trial magistrate erred both in law and facts by failing to consider the long period taken by the intermediary to report the matter and for me to be arrested despite the fact that I had not escaped.

6) That, the learned trial magistrate erred both in law and fact when she failed to consider the prosecution's failure to call a witness from the scene of arrest to support their evidence.

7) That, the learned trial magistrate erred both in law and facts by failing to consider the fact that there was ill blood which existed between me and the intermediary (mother to the child) which led to the frame up of the case.

4. The Appellant argued his appeal by way of Written Submissions and had nothing to add during the oral hearing. The Learned State Counsel made oral submissions in opposition to the appeal.

5. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See **Okeno v R [1972] EA 32** and **Kariuki Karanja v R [1986] KLR 190**.

6. During the trial, the evidence that was presented was as follows. ENK, the Complainant testified as PW2. She testified that sometime in 2011 the Appellant, who was employed by her father as a herds boy, called her to bed and told her to cover herself with a blanket. That he proceeded to lift her dress and told her to remove her panties. That when ENK refused to remove her panties, the Appellant proceeded to do so himself. That the Appellant, then, removed his trousers and inserted his “thing” in her “groin”. The Complainant testified that the Appellant repeated this on several other days. She told the Court that she told her father what had happened but that her father told her not to tell anyone. At the time, the Complainant’s mother was admitted in a hospital following a road traffic accident.

7. The Complainant testified that she told her mother, AG, what had happened when she went to visit her in hospital a few days later. A testified as PW1. She confirmed this narrative. She said that her daughter told her at the hospital that the Appellant had been “doing bad manners” to her and that she had informed her father who had not taken any steps.

8. A testified that when she was discharged from hospital on 11/12/2012, she reported the matter to the Police Station. She testified that her daughter was six years old and produced her immunization card as evidence.

9. Robinson Kipsut, a Clinical Officer who was stationed at Njoro District Hospital at the time, testified as PW3. He was testifying on behalf of his colleague, Dr. Chelimo who did a physical examination on the Complainant. He produced a P3 form for both the Complainant and the Appellant. He testified that upon examination, Dr. Chelimo found a torn hymen and the presence of pus cells. Both are indicative of penetration – and the presence of pus cells are an indication of recent sexual behavior. Robinson also produced the treatment card.

10. Finally, PC Nelius Wambua testified that she assisted in the investigations of the case. She testified that on 26/04/2012 she was in the office checking the Occurrence Book when she noted a defilement case had been reported. She said she called the Complainant for interrogation. The Complainant reportedly told her the same narrative she repeated in Court. She testified that she took the Complainant to Njoro Health Centre for examination. She then arrested the Appellant and recommended that he be charged with defilement.

11. The main charge which the Appellant faced is defilement. Sections 8(1) and 8(2) of the Sexual Offences Act provide that:

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

12. Section 2 of the Act defines "penetration" as:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

13. Going by this definition of defilement, I agree with Mr. Chigiti on the issues which the Court needs to determine on appeal. The first is whether there was penetration of the complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

14. Was there penetration? The *viva voce* evidence of the Complainant was categorical that the Appellant inserted his “thing” into her groin. The P3 form produced also had the conclusion that the Complainant had been defiled. In addition to a torn hymen, the examining doctor found evidence of pus cells – a certain indicator of sexual activity. There was, therefore, no question that there was penetration.

15. As to the age of the Complainant, there does not appear to be any dispute that she was six years old at the time of the incident. An immunization card was admitted into evidence which showed that she was six years old at the time. So did the P3 form which was produced. Both the Complainant and her mother testified that she was seven at the time of the trial. Hence, the age of the Complainant was proved beyond reasonable doubt.

16. Hence the only question that remains to be answered is whether it was the Appellant who caused the penetration of the Complainant? In testimony that the Learned Trial Magistrate concluded was eminently credible, the Complainant testified that it was the Appellant who defiled her several times. She testified that she reported it to her father immediately it happened but that the father chose to do nothing about it. She then reported it to her mother who was by then in the hospital. It was only when the mother was released from hospital that she took action. The narrative by the minor has been consistent and believable. It remained so during cross-examination. The Learned Trial Magistrate made a finding that it was so. There is absolutely no reason to depart from that finding. The Appellant was well known to the Complainant since he worked for her father as a herds boy. The defilement occurred on different occasions. Hence, the possibility that there was a mistaken identification are almost nil.

17. The Appellant complains that his defence that the mother of the Complainant had a grudge against him and that she was using the charges to get back at him. He says that the grudge arose because the mother of the Complainant had complained that the Appellant had helped her husband to solicit prostitutes. In his Amended Grounds of Appeal, the Appellant elevates this to a major ground of appeal. He says the Court should have drawn negative inferences against the Prosecution case since the Complainant’s father did not offer to testify for the Prosecution. He draws attention to the fact that the father of the Complainant actually stood as a surety for him during the trial.

18. In law, no negative inferences against the Prosecution needed to be drawn from the two facts presented by the Appellant. The Prosecution was under no duty to call the father if he had no probative evidence to give about the charges brought. Similarly, no permissible reference is possible from the fact that the father of the Complainant stood as surety for the Appellant. If anything, that cements the Complainant's narrative that her father did nothing when she first reported to him about the defilement.

19. There are two procedural grounds that the Appellant relied on in his Appeal. First, he complains that the trial was null because he was not supplied with witness statements contrary to the Constitution (at Article 50(2)(j)).

20. Article 50(2)(j) of the Constitution of Kenya provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. Article 50(2)(c), on the other hand, provides for the right of the accused to have adequate time and facilities to prepare his defence.

21. Long before the promulgation of the Constitution in 2010, the Court of Appeal had explained the imperative nature of the duty of the Prosecution to supply witness statements in obeying this norm of fair trial in **Thomas Patrick Gilbert Cholmondeley vs Republic [2008] eKLR**. In that case, the Court held as follows:

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.

22. Our Courts have uniformly interpreted the constitutional provisions on fair trial to include the duty of the Prosecution to furnish the Accused Person with witness statements and exhibits which the Prosecution intends to rely on in their defence in advance of the criminal trial. In the present case, however, there is no demonstration that the witness statements were not supplied to the Appellant. The record reflects that at the first scheduled hearing of the trial, an attorney holding brief for the Appellant's advocate asked for an adjournment citing the reason that he had not been supplied with witness statements. The Court ordered that the statement be supplied on that same day in Court and rescheduled the hearing.

23. When the case came up on the rescheduled date, the Appellant was no longer represented by Counsel. He, however, indicated to the Court that he was ready to proceed with the trial and the case took off. In the circumstances, the Trial Court was entitled to presume that the Appellant had the witness statements which it had earlier ordered to be supplied to his advocate. In that case, it is unavailing for the Appellant to make this claim on appeal.

24. The second procedural complaint the Appellant raises is that section 211 of the Criminal Procedure Code was not adhered to. He alleges that the Learned Trial Magistrate did not explain the substance of the charge to him at the time he put the Appellant on his defence. However, this allegation is unfounded. The Trial Court records clearly shows that on 28/04/2014, the Learned Trial Magistrate read out the ruling finding that the Appellant had a case to answer then the Court recorded the following:

Court: Section 211 of CPC explained to the Accused Person.

Accused Person replies:

"I will give sworn statement. I have no witness."

Court: Defence hearing 06/06/2014

25. It is clear from the Court record that section 211 of the Criminal Procedure Code was complied with. Indeed, the Appellant understood the case against him sufficiently to offer a sworn statement in his defence.

26. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve life imprisonment in line with Section 8(2) of the Sexual Offences Act. That section provides that:

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

27. This is what the law provides and it is what the Learned Magistrate used to impose the sentence she did. However, in a recent decision, in **Dismas Wafula Kilwake v R [2018] eKLR**, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

*In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015**], 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.*

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory

sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

28. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

29. In the present case, the Appellant offered mitigation in the Trial Court. He told the Court that he was a first offender. He was also the sole bread winner for three of his siblings. He prayed for leniency. The Prosecutor confirmed that the Appellant had no previous record. These are mitigating circumstances. There are, on the other hand, serious aggravating circumstances in the case. First, the victim was a child of really tender years: six years old. She will likely be scarred for life by this traumatic sexual assault. Second, the Appellant repeatedly defiled the victim; it was not a singular act. Third, the Appellant abused his relationship of trust with the victim. He was an employee in the homestead and was, practically, a member of the household. He abused that relationship to lure the victim to bed and sexually assault her. He used that special relationship to cover up for his actions. Were it not for the brave and insistent actions of the mother of the victim, the Appellant would likely have gone scot free with the heinous crime.

30. In my view given the age of the Appellant and the fact that he did not use sadistic or gratuitous violence on the victim, life imprisonment in the circumstances of this case would be disproportionate. Considering the mitigating and aggravating factors, I am of the view that a sentence of thirty years imprisonment would properly serve the sentencing objectives in this case.

31. The upshot of all this is that the Appellant's appeal against conviction fails. However, the appeal against the sentence is hereby allowed. Accordingly I set aside the sentence of life imprisonment and substitute therefor a sentence of thirty (30) years imprisonment with effect from the date of sentence by the Trial Court.

32. Orders accordingly.

Dated and delivered at Nakuru this 30th day of May, 2019.

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JOEL NGUGI

JUDGE