



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 81 OF 2017

WAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from original Conviction and Sentence in **Criminal Case No. 3042 of 2015** at Chief Magistrate's Court in **Kiambu**)*

J U D G M E N T

1. **WAS**, the Appellant, was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act 3 of 2006**. The particulars of the offence were that on the **26th** day of **December, 2015** within **Nairobi County**, he intentionally caused his penis to penetrate the vagina of **PK** a child **aged 10 years**.
2. In the alternative he faced a 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 of the offence were that on the **26th** day of **December, 2015** within **Nairobi County**, he intentionally touched the vagina of **PK** a child **aged 10 years** with his penis.
3. He was **tried, convicted** of the offence of defilement and sentenced to **life imprisonment**.
4. Aggrieved, he now appeals on grounds that one of the key elements namely, penetration was not proved to the requisite threshold; explicit contradictions and inconsistencies recorded were fatal to the prosecution's case; the grudge between him and **PW2** that forms the basis of the charges was disregarded and that the jurisprudence of **Francis Muruatetu and Another, Petition No. 15 of 2016** be considered.
5. It is the contention of the Appellant that one of the witnesses had a score to settle with him as he had not paid dowry for her as required by the customary law. He urged that penetration was not proved as on examination the complainant's genitalia had no visible injuries. That inconsistencies noted displaced the credibility of various witnesses.
6. The Respondent through learned counsel for the State, Mr. Ongira, opposed the appeal. He argued that the act of penetration was proved by evidence adduced by the minor (complainant) and **PW4**, the Doctor, who confirmed that the child was defiled. That the defence raised of bad blood between the Appellant and the mother of the victim was raised and considered by the court. He called upon the court to affirm the conviction and sentence.
7. Facts of the case were that on the 26/12/2010 at about 4.00 p.m. **PW2 PO** the mother of the complainant was seated outside their house with neighbours when she sent her to take some money (KShs.10/=) into the house. To reach the handbag she climbed the bed on which the Appellant, her step father lay. He held her and threatened to kill her if she screamed. In the process he violated her sexually as he had done in the past. When the minor took too long inside the house **PW2** entered to check on what was happening only to find them in a compromising situation. The Appellant managed to run away. They reported the matter to the chief then the police. The child was subjected to medical examination. Subsequently the appellant was arrested and charged.
8. Upon being put on his defence the Appellant testified on oath that he had a quarrel with his wife **PW2** the previous night following her complaint that he had not paid dowry to her parents and on the morning of the material date she threatened to take action if he forgot the fact of failure to pay dowry. His sister had invited him therefore he extended the invitation to **PW2** but she declined. Hence he went to Kawangware alone. When he returned his wife accused him of infidelity and since he got annoyed he left going to see a friend. While on his way home he encountered her with two (2) men who arrested him.
9. This being a first appeal, I am expected to re-evaluate the evidence tendered at trial and come to an independent conclusion bearing in mind that I neither saw nor heard witnesses who testified. **(See Okeno v Republic (1972)EA 32)**.
10. As correctly submitted by the Appellant the prosecution was required to prove all the three (3) elements of defilement, thus:

1) Penetration of the victim's genital organs

2) The age of the victim

3) Positive identification of the perpetrator of the act. (Also see **Fappyton Mutuku Ngui vs Republic Criminal Appeal No. 296 of 2001**).

11. The act of penetration into the complainant's genitalia has been challenged. Penetration is defined by Section 2 of the Sexual Offences Act as:

".... the partial or complete insertion of the genital organs of a person into the genital organs of another person"

The prosecution argued that the heinous act of penetration into the victim's genitalia was done on the 26th day of December 2015 in the evening. At about 8.15 p.m. on the material date she was seen by **PW4 Suhaiya Aboud**, a clinician at Juja Road Hospital. She did not note any visible injuries on the vagina but it was wet with some watery discharge. Her hymen was reddened but it had no tears. She opined that there was partial penetration and adduced in evidence the post rape care form (PRC) that she filled.

12. Subsequently the complainant was examined by Doctor Kevin who filled the P3 form. It was adduced in evidence by **Dr. Wauda Hosea** who was erroneously indicated as **PW4**. According to his findings the hymen was not intact as there was water and discharge on the vagina which was consistent with sexual assault. The explanation given by the complainant was that the Appellant would insert his genitalia into hers and remove it. This was evidence of penetration.

13. **PW2** the mother of the Complainant gave her age as ten (10) years. A birth certificate serial number 5312764 was adduced in evidence. She was born on the 30.05.2004. This was sufficient proof of age. (See **Mwalango Chichoro Mwachembe V. Republic (2016) e KLR**).

14. The Complainant identified the Appellant, her stepfather as the perpetrator of the act. Her evidence was confirmed by **PW2** her mother who opened the door which had not been locked and found the Complainant with pants down and the Appellant's trousers lowered as he pulled them up. She screamed and attracted the attention of **PW3 NS** their neighbor who ran to the house and saw the Appellant attempt to cover **PW2's** mouth prior to pushing her out of the house whereby she sustained an injury. She also saw **PW1** with her pants lowered to the ankles and when she asked the Complainant what happened she mentioned the Appellant as her assailant.

15. It is contended that there were inconsistencies in the evidence adduced by the prosecution. In the case of **Twehangane Alfred Vs Uganda, Cr. Appeal No. 139 of 2001 (2003) UGCA** it was held that:

"...with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case"

The inconsistencies alluded to were in respect of the events that unfolded. That the victim said the mother (**PW2**) found them in the act, while **PW2** said she found the victim standing with her panties at her ankle while the Appellant was wiping his genitalia regarding and the chores the Complainant was assigned to do prior to being found in the compromising situation.

16. **PW3** their neighbor confirmed having entered the house at a point when the Complainant had pants down and witnessed the Appellant assaulting **PW2**. Thereafter the Complainant was examined and found to have been penetrated. In the premises the inconsistencies did not go to the substance of the matter.

17. The trial magistrate has been faulted for not appreciating the bad blood that existed between the Appellant and **PW2** his wife and mother of his two (2) biological children and the Complainant being his half daughter. In her testimony **PW2** stated that prior to the incident her relationship and that of the Appellant was good as they enjoyed a normal marriage relationship. On cross-examination she admitted having reminded him previously to pay dowry but denied having threatened him. There seems to have been some marital disaffection between the Appellant and **PW2** but it was not suggested that there was emotional estrangement in the marriage that would prompt **PW2** to couch the victim to frame up charges against the person she referred to as "father" even at the point of having been molested. Looking at the questions put to her on cross-examination, it was not suggested that the Complainant could have lied or been asked to lie.

18. From the foregoing the learned trial magistrate did not fall into error in reaching the decision to convict the Appellant.

19. On sentence, the Appellant called upon this court to be persuaded by the emerging jurisprudence on the unfettered discretion on the sentence to be imposed. In particular, he cited the case of **Evans Wangila Wanyonyi V. Republic (2019) eKLR**.

20. In the cited case the Appellant was charged in the primary case before the lower court with the offence of defiling a 14 year old minor. The trial court sentenced him to fifteen (15) years imprisonment. On appeal the High Court enhanced the sentence to twenty (20) years imprisonment, being the minimum prescribed sentence for an offence of defilement perpetrated against a child, the age of the complainant. On appeal to the Court of Appeal, it rendered itself thus:

"On enhanced 20 years term of imprisonment meted upon the appellant by the learned Judge we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the Appellant raises a question of law. This court in Christopher Ochieng V Republic (2018) e KLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri V Republic

Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This court noted that the Supreme Court in Francis Karioko Muruatetu and Another V. Republic SC Petition No 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

“In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & Another -vs.- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng -vs.- Republic (supra) and Jared Koita Injiri -vs.- Republic, Kisumu Criminal Appeal No.93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 years term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015”.

21. Guided by the reasoning above I do take into consideration the mitigating factors, the fact of the Appellant having been a first offender and there being room to reform. In the premises, I affirm conviction, set aside the sentence meted out and substitute it with **twenty (20) years imprisonment** to be effective from the date of conviction and sentence in the trial court.

22. It is so ordered.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS 8TH DAY OF AUGUST 2019

L. MUTENDE

JUDGE