



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 31 OF 2017.

SETRICK KHANGAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from against both the conviction and the sentence of Resident Magistrate

Hon. Kelly E. delivered on 21st of March 2017 in Nakuru Chief Magistrate's Court

Criminal Case No. 221 of 2014.)

JUDGEMENT

1. The Appellant was charged before the Nakuru Chief Magistrate's Court with one count of defilement of a child aged less than twelve years contrary to **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the Charge sheet were that on diverse dates between 30th of September 2014 and 5th of October 2014 within Nakuru County, intentionally and unlawfully committed an act of inserting your male genital organ namely penis into a female genital organ namely vagina of GK, a female aged 10 years.
2. The Appellant also faced an alternative charge of indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. of 3 of 2006**. The particulars of the offence is that on diverse dates between 30th September 2014 and 5th October 2014 within Nakuru County, intentionally and unlawfully committed an indecent act with a child by touching the private part namely of GK, a female aged 10 years.
3. After a fully-fledged trial, the Trial court convicted the Appellant and sentenced him to serve life imprisonment as mandatorily stipulated in the law.
4. The Appellant is dissatisfied with the conviction and sentence and has appealed to this court. The grounds of appeal are that:-
 - a. *The Learned Trial Magistrate erred in law and fact by convicting the Appellant while relying in the evidence of PW 1, a minor whereas the same had not been supported by any medical document contrary to the law*
 - b. *The Learned Trial Magistrate erred in law and fact by accepting the complainant evidence as safe whereas the same was insufficient and incredible*
 - c. *The Learned Trial Magistrate erred in law and fact by admitting evidence that was inadmissible*
 - d. *The Learned Trial Magistrate erred in law and fact by failing arrive at a finding that the prosecution had failed to prove its case to the standard required in law, that is prove beyond any reasonable doubt.*
 - e. *The Learned Trial Magistrate erred in law and fact by shifting the burden of proof from the prosecution to the Appellant contrary to the law,*
 - f. *The learned trial magistrate erred in law and fact by imposing a sentence of life imprisonment against the Appellant whereas he was a resident magistrate who had no jurisdiction to pass a life sentence as provided for in section 6 of the CPC.*

g. The learned magistrate erred in law and in fact by failing to give adequate reasons as to why she disregarded the Appellants alibi defense

5. On the issue of identification, the Appellant submitted the Trial Magistrate erred in arriving at a finding that the complainant had positively identified the Appellant. He submitted that PW 1 never recognized him because she did not describe the Appellant to PW 2 and PW 3. The clothes described had not been produced as exhibits in court. PW 1 was notable to register the name of the Appellant. He concludes that prosecution had not proved that the Appellant was the perpetrator of the heinous crime.

6. On the issue of penetration, the Appellant submitted that the medical evidence of presented as exhibits in court was not supported by the evidence of the medical practitioner. There is no oral evidence of the medical practitioner. He further states that the evidence does not disclose that PW 1 had been defiled. This evidence would have only been proved by Dr. Wekesa and therefore PW 5 evidence is not admissible

7. On the issue of age of the victim, the Appellant complains that “no one” mentioned the complainant’s date of birth during the trial. Therefore this remains unproved. On the issue of alibi, the Appellant states that the witnesses called by the prosecution did not displace the defense of alibi.

8. During the hearing of the appeal, Mr. Chigiti for the prosecution submitted on three issues:

a. On the age of the minor, that it had been proved by documentary evidence that she was 10 -- by, the birth certificate, produced as exhibit 4.

b. On the identity of the perpetrator, that PW 1 mentioned the Appellant by name.

c. On Penetration, that PW 1 testified directly to it and that she was clear in the words she used of what happened. She also talked of what the Appellant had promised. The medical evidence also showed defilement. **Duty of the first appellate court:**

9. **Okeno v R [1972] EA 32** and **Kariuki Karanja v R [1986] KLR 19** stated that

“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 neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that”.

10. Per Nyakundi J. in **Joseph Maina v Republic [2016] eKLR**

“This being the first appellate court it is mandated to look on the evidence adduced at the trial court afresh, re-evaluate and re-assess it and reach its own conclusion”.

11. In the court below, the following evidence emerged. The prosecution called six witnesses in total, in support of its case. It was GK’s testimony that the Appellant took her to a maize garden where he defiled her on five different days, gave her sweets and Kshs 400 shillings to buy herself “something”. The Appellant also put an egg in her vagina.

12. GK’s mother, WK, testified as PW3. She testified that she saw GK walking with difficulty during a church service. She also thought GK looked disturbed. When she asked GK to explain what had happened, GK reluctantly told her what had happened; that she had been defiled. WK says that upon examination, she saw an egg shell and yolk in GK’s underwear.

13. WK’s employer, DKO also saw the egg and the yolk in her private parts and panties. She testified that GK was crying. Dr. Matana, a Medical Officer, testified as PW4 and presented the P3 Form and PRC Form which had been filled up by Dr. Wekesa who was unavailable. The medical forms showed that GK had a freshly torn hymen, a bruised vulva with hyperemic and tender vagina. There were also pieces of broken shells of eggs seen in the vaginal canal. The doctor classified the injuries sustained as maim. No sperm cells were seen but there were pus cells and epithelial cells.

14. The Investigating Officer, PC Elian Mureithi testified that on 05/1/02014, the Complainant was brought to the Central Police Station, Nakuru. He referred them to Nakuru PGH Hospital for examination and attention after booking the incident. He later investigated the offence and re-arrested the Appellant after he had been arrested by members of the public.

15. 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**.

16. The offence of defilement has three elemental ingredients which must be proved by the Prosecution beyond reasonable doubt:

a. The age of the Complainant;

b. Proof of penetration; and

c. Identification: proof that the Appellant caused the penetration.

17. On the age of the Complainant, a Birth Certificate was produced. It proved that the Complainant was below twelve years old. So did the PR3 Form and the oral testimonies of the Complainant and her mother. There can be little doubt on this aspect of the case.

18. There is also little doubt that there was penetration. The oral evidence of the Complainant as well as the medical evidence are quite sufficient in that regard.

19. The only issue in contention is whether it was the Appellant who caused the penetration. The Appellant raises two issues in this regard. In the first place, he has continued to press his defence theory of an alibi: that he was away when the offence occurred. In the second place, he has made arguments that there is no evidence that he was described adequately when the report was first made.

20. The Appellant's alibi defence was considered by the Learned Trial Magistrate and dismissed as insufficient to raise reasonable doubts to the Prosecution case. In reaching that conclusion, the Learned Trial Magistrate considered that the Prosecution called two rebuttal witnesses. One of the witnesses poked holes at the receipts produced by the Appellant to show that he had travelled to Nairobi on the dates in question. The Learned Magistrate reached the conclusion that the receipts produced were likely forgeries given that the witness, an employee of the Transport Company that allegedly issued the receipts disowned them as authentic.

21. Secondly, the Investigating Officer testified that the motor vehicle indicated in the alleged receipt was in fact not a Passenger Service Vehicle but a private vehicle. He also testified that investigations had shown that the "hotel" the Appellant allegedly spent the night in – Mlolongo Hotel – does not exist.

22. Based on the evidence available, I am unable to say that the Learned Trial Magistrate committed any error at all in her approach to the alibi evidence. Indeed, she correctly apprehended the law – including the fact that the alibi defence had been raised quite late in the day. She still subjected it to the test of credibility and found it wanting.

23. Turning now to the question of identification, I have also come to the conclusion that nothing comes from the Appellant's complaints. The Complainant testified that she knew the Appellant before the defilement and that she knew him as "Dickson". She testified that she had even met him in Nakuru West on one occasion. The testimony here was one of identification by recognition. The defilement acts happened during the day; and on many occasions. There is really no chance that the Complainant misidentified the Appellant.

24. Based on this analysis, it is my finding that all the ingredients of the offence of defilement were proved beyond reasonable doubt and the conviction was safe.

25. Turning to sentence, the Learned Trial Magistrate imposed a sentence of life imprisonment in line with section 8(2) of the Sexual Offences Act which provides that as the minimum sentence.

26. In the recent past, our case law has departed from the position that the minimum sentences provided for in the Sexual Offences Act are categorical and immutable prescriptions from which a sentencing Court cannot depart regardless of the circumstances of the individual case before them. This was perhaps most clearly held 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.

27. 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.

28. In the present case, the Appellant offered mitigation in the Trial Court. He told the Court that he was still quite young – at only twenty-three years old. His family depended on him heavily. The Court ordered for a Probation Officer's Report. It supported view. It established that the Appellant was a respected young man in the community who had good antecedents.

29. I have also noted that the offence in question is definitionally serious as it involves preying on a young girl and the possibility that the

trauma will be with her for the rest of her life. A sexual assault at a tender age tends to affect one's life for a long time. However, I note that the defilement here was achieved by means of subterfuge rather than violence.

30. All factors considered, I am of the view that a life imprisonment sentence in the circumstances of this case is excessive. I would, instead, revise it downwards to imprisonment for a period of twenty-five (25) years.

31. The upshot is that the appeal against conviction is dismissed. I allow the appeal as regards sentence alone. The sentence of life imprisonment is hereby set aside. In its place, I substitute therefor a sentence of twenty-five (25) years imprisonment. The prison term shall run from 09/10/2014 – the date the Appellant was first arraigned in Court – since he remained in custody since that day.

32. Orders accordingly.

Dated and delivered at Nakuru this 7th day of August, 2019

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JOEL NGUGI

JUDGE