



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 26 OF 2018

DCT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Criminal Case no. 12 of 2017 delivered on the 23rd day of April, 2018 by by Hon. J. Nthuku, SRM]

JUDGMENT

1. The appellant was on 23/4/2018 convicted and sentenced to imprisonment for life for the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act with particulars that he “on the 11th day of May 2017 in Mogotio Sub-County within Baringo County intentionally and unlawfully did cause his penis to penetrate the vagina of DJ a child aged 7 years.”
2. The appellant's grounds of appeal cited lack of sufficient evidence to prove the charge as follows:

“GROUND OF APPEAL

1. **THAT** the learned trial magistrate erred in law and fact by failing to appreciate that the medical evidence adduced was insufficient to corroborate the charge.
 2. **THAT** the learned trial magistrate erred both in law and fact by failing to appreciate that the age of the complainant was not proved.
 3. **THAT** the learned trial magistrate erred both in law and fact by failing to advance reasons as to why she dismissed the appellant's defense yet the same raised considerable doubt against the prosecution case.
 4. **THAT** the learned trial magistrate erred both in law and fact by failing to appreciate that there were crucial witnesses who were not called upon to testify.
 5. **THAT** I pray to be supplied with the certified copy of the trial proceedings and its judgment.
 6. **THAT** further grounds shall be adduced at the hearing of this appeal.”
3. The DPP opposed the appeal and by oral submissions before the Court at the hearing urged dismissal of appeal from conviction but on sentence conceded the ameliorating effect of Muruatetu decision of the Supreme Court as follows:

“DPP

The appeal is opposed.

Appellant was convicted for defilement contrary to section 8 (1) (2) of Sexual Offences Act and sentenced to serve life imprisonment on 23/4/18.

Pw2 was a minor aged 7 years at the time. Pw3 testified that the complainant was her sister's child and she did not know her age. Age assessment indicated she was 7 years. Pw2 testified that she knew the appellant well. She used to call him Baba or MM. She used to live in same house with the appellant his wife and their children.

On the material day the appellant sent the other children his biological children to go and bring goats while we remained with the complainant. He later sent the complainant to go to the bush and fetch sheep and he followed from behind and defiled her in the bush, the complainant cried and tried to scream but the appellant hit her on the head and threatened to kill her. Pw2, later went home and informed a lady by the name L and Pw3 who was her aunt and wife of the appellant.

She told me it was the appellant who had defiled her. Pw3 testified that the complainant told her what had happened and she took her to Mogotio Sub-County Hospital and later reported the matter to the Police. Pw1 is the Clinical Officer who examined the complainant. He testified that on examination the complainant was frightened. She has pain in her lower abdomen and the hymen was torn but non-recent. She had inflamed and reddened external vagina. There was blood from her vagina and there were epithelial cells.

Her urine also had blood but not spermatozoa. She also had pus cells meaning she had an inflammation. She classified degree of injury as grievous harm.

Pw1 further testified that the complainant informed him that the appellant had defiled her severally and had threatened to kill her if she told.

Evidence of Pw1, Pw2 and Pw3 corroborated each other and point at the appellant as the only person who defiled the complainant. In his defence the appellant stated that Pw3 who was his wife that forced him because he wanted to marry a second wife. We submit that this was afterthought as it was not raised in cross-examination.

Appellant was sentenced to life imprisonment in accordance with the law. The evidence is overwhelming and I urge the Court to dismiss the appeal from conviction. The Court may consider that the appellant is a first offender and review the sentence in accordance with Muruatetu case. ”

Determination

4. The Court has re-evaluated to evidence of the trial Court and made its own conclusion as below. See **Okeno v. R** (1972) EA 32. The Court also takes note of the guidance of the Supreme Court in **Muruatetu v. R** (2017) eKLR on the constitutionality of mandatory sentences.

5. The defence's unsworn statement is remarkable as it alleged a frame up by the appellant's wife so that he could break up with another lady that he intended to marry. It is set out in full as follows:

“DW1

I am DC. I stay in Mukurin (Mogotio). I recall I came home after doing casual work. I bought meat, cabbage and flour and went home. I found children at home and their mother wasn't home. I told them to cut the cabbage and I went to the shamba to look for a goat that had gone missing. I got home at 6 pm and my wife told me that D had been injured by my bicycle after I left. I told her to take the child to hospital. She called her sister on phone and left with the child. She didn't come back that evening. She came the following evening and said the Kshs.600 I gave her wasn't enough to they had to borrow Kshs.1000. we stayed peacefully without any issue being raised. I told her the other lady I intended to marry was sick and I need to bring her home. My wife got angry and I pleaded with her to calm down. She said she will do something to separate me from the younger wife. I didn't take it seriously. On 5th June, 2017 I went to work and on my way back we entered Plaza butchery and ate. Around 7 pm Police Officers came and demanded our Id cards. We complied. I was arrested and I was told I will only know the reason for my arrest at the Police Station. I was told I was in custody for defiling DJ. I was charged with this offence.

My wife framed me so that I break up with the other lady who I intent to marry. I told her my vision 2030 is to have at least 30 children since I don't have brother or sisters. She is temperamental but she hates my other wife. I didn't defile the child. I lost my child while still in custody.”

6. The trial Court carefully examined the child witness offered as Pw2 and found that “the child understands the importance of telling the truth but not meaning of Oath.” In accordance with the law, the trial Court properly permitted the appellant to cross-examine the child on her unsworn evidence.

7. Pw2 knew the appellant as “MM” and “Baba” and there was no issue of identification, and in any event she had ample opportunity to identify the assailant who defiled her repeatedly as stated in her unsworn statement as follows:

“PW2

I am DC. I stay in Mugurin. I am in standard one at [Particulars withheld] Primary. At home I stay with KC standard seven, G standard five, Godwin standard two, SC standard two, C not yet in school. We also stay with my mom (ST). She isn't my biological mother. My mother is called S and she stays in Molo.

On 11th May, 2017 I went to school and at 12 noon I came home and found our small children. We saw L and the children said “ndiye huyo baba” we used to call him baba. That's when I saw this man (points at accused person).

He told me to cut vegetables for him but I told him I didn't know how to do it. He told me to hold meat for him as he cuts it and I agree. He then told the other children to go and bring the goats home. They went leaving me and the accused person. He then told

me to go bring the sheep from the grazing field. I went out to look for the sheep and I saw the accused person following me. He told me to wait for him and I waited. He said we can go fetch the sheep together. He led me to a dense bush and told me to lie down. I refused: he laid me on the ground and removed my clothes. I had a full dress and panty and petticoat. He folded the dress up together with the petticoat then removed my panty. He also removed his trouser to knee length and lay on top of me. I was lying with my back to the ground. He also removed his underwear and put the thing he uses to pass urine in my part for passing urine. I cried and tried to scream but hit me on the head saying he will kill me. I kept quiet and when he finished I told him I will tell my mother. He pleaded with me not to tell anyone and I promised him not to tell anyone. I dressed and walked some distance far away then I shouted at him telling I will report what he had done. I then went home and found a certain lady called L. I told her what C had done to me. When my mom came I told her that baba had laid on me in the bush. She took me to hospital. Baba is called alias MM.

He did bad manners to me at 1 pm. All the other children I mentioned are children of the accused but I am not his child. His wife is my aunt.

Cross examination by accused person

I know you by your first name MM but I used to call you baba. I have not lied to Court. You inserted your thing in my thing for passing urine.”

8. Pw1 was the Clinical Officer who examined the complainant and he testified as follows:

“PW1

I am Edwin Kamulwa Clinical Officer Registration No. 8032. I am based at Mogotio Sub-County Hospital. I have a treatment card for DJ aged eight years. She complained of having been defiled on 21.05.2017 near a bush. The defiler had requested her to accompany him to the bushes to look for goats then he carried her, undressed her and had sexual intercourse with her. She also said he had defiled her sexually severally but he threatened her. On examination I found her to be frightened. She had pain in lower abdomen. **Her hymen had been torn but not recent, she had inflamed external vagina and reddening. She had blood in her vagina. High vagina swab was done and it showed blood and epithelial cells. This means there was friction and injuries in the vagina. Her urine had blood but no spermatozoa. She also had pus cells meaning she had an infection. HIV and syphilis were negative.**”

The history of the complainant on the treatment card exh. 1 (a) is consistent with evidence of Pw2.

9. The complainant’s auntie Pw3 who is also the appellant’s wife testified as follows, with the trial Court properly applying the provisions of section 127 (3) of the Evidence Act.

“PW3

I am ST. I stay in Mugurin. I do manual jobs. In 11th May, 2017 I went for casual work at 7 am and came home at 6 pm. C i.e Pw2 told me that baba had done bad manners to her earlier that day. She said he led her to the bush and inserted his penis in her. I called AT the lady who gave her to me I had told her to come and collect the child. **I had stayed with her for two years i.e from 2016. She is my sister’s child but I didn’t get her from her mother.** I don’t know the accused person before Court.

Court: Is the accused your husband?

(witness keeps quiet).

The child’s aunt AT said my husband will come back in a coffin so I don’t want anything to do with this case.

Court

Under Section 127 (3) of the Evidence Act, in Criminal Proceedings the wife or husband of the person charged shall be a competent and compellate witness for the Prosecution or defence without the consent of such person, in any case where such person charged with...(b) offences under Sexual Offences Act. This is a sexual offence so the witness is compellable.

HON. J. NTHUKU – SRM

Witness continues;

The accused is my husband. We used to live together as husband and wife before this case. The lady who brought her to me is called Ann Rotich she said I met her on the road with the child. I agreed and we both took the child to Mogotio Sub-County Hospital that same day. I am illiterate I went with the child to the Police Station and recorded statements. We were issued with the child P3 forms (PMFI 2) I don’t know Diana’s date of birth.

Cross examination by accused person

I didn’t witness the incident. I know this case can cause marital issues. It has already started causing us problems. I didn’t ask

you if it's true or talk to neighbours."

10. Pw2's unsworn statement is corroborated by the evidence of the Clinical Officer Pw1 who found evidence of penetration notwithstanding lack of spermatozoa as spermatozoa need not result from penetration and they may be kept off by use of condom. The Court notes the minor age of the child who only said the appellant "*put the thing he uses to pass urine in my part for passing urine.*"

11. Pw3 the appellant's wife confirmed receiving the report by the complainant Pw2 that the husband had defiled her. The appellant's defence that Pw3 had framed the charge in chagrin over his intention to marry another lady is not borne out from the evidence, which to the contrary showed a lot of hesitation on the part of the wife (Pw3) to testify against the appellant until the Court's ruling that she was a compellable witness under section 127 (3) of the Evidence Act. The story about bicycle injury does not oust the evidence of the Clinical Officer on penetration.

12. On the evidence, I find that the Prosecution has proved its case beyond reasonable doubt, and I convict the appellant for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act.

13. The child's age assessment report (Exh. 3) placed the complainant at between 7 years 5 months and 7 years 8 months prompting the amendment of the charge sheet on 1/2/18 to show 7 years rather than 8 years as initially charged by charge sheet dated 7/6/2017. Section 8 (2) of the Sexual Offences Act in any event applies to children victims aged below 12 years and it is immaterial whether she was 7 or 8 years old.

Orders

14. Accordingly, for the reasons set out above, the appellant's appeal from conviction is dismissed, the Court noting the trial Court's observation on the demeanor of Pw2 as speaking the truth.

15. As regards the sentence being mindful of the discretion of the trial Court as upheld by the Supreme Court in *Muruatetu v. R* (2017) eKLR, I consider the imprisonment term for life to be excessive and reduce it to a term of 20 years. The said sentence of 20 years imprisonment shall run from 23/4/2018 the date of sentence in the trial Court.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.