REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 77 OF 2017

BETWEEN

MALACHI MUYERA AMAYOTI.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence of twenty years imprisonment for the offence of Defilement contrary to Section 8(1) as read with 8(4) of the Sexual Offences Act, 2006 in a judgment delivered by Hon. F.M Nyakundi, Resident Magistrate on 18th July,2017 in Butere Criminal Case No. 36 of 2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant was charged with the offence of ***defilement contrary to Section 8(1) as read with 8(4) of the Sexual Offences Act No. 3 of 2006*** and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act. The particulars are that the appellant on the 23rd day of November 2016 at [particulars withheld] village, Township sub-location, Nabongo location, Mumias sub-county within Kakamega County, intentionally caused his penis to penetrate the vagina of a girl named ML who was aged 14 years.

2. At the conclusion of the trial, the learned trial magistrate found the appellant guilty on the main count of defilement contrary to s***ection 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006*** and sentenced him to twenty years imprisonment.

The Appeal

3. Being aggrieved by the entire judgment of the learned trial magistrate aforementioned the appellant filed this appeal on 28th July 2017. The appeal is premised on the following grounds:-

1. THAT the learned trial magistrate grossly erred in law and facts in taking the appellant through a trial that did not meet the threshold of article 50(2) of the Constitution of Kenya, 2010.

2. THAT the learned trial magistrate grossly erred and or misdirected himself in law and facts in basing my conviction and sentence on inadequate and inconclusive medical evidence, without observing that the appellant was not subjected to medical investigation to establish corresponding results especially whether the appellant is sexually active or not.

3. THAT the learned trial magistrate grossly erred in law and facts in holding the evidence of the complainant as truthful and free of error and doubt without observing that the same lacked consistency, credibility and pointed to external influence.

4. THAT the learned trial magistrate erred in law and facts in basing my conviction on flimsy, fabricated inconclusive and doubtful evidence of the prosecution.

5. THAT the learned trial magistrate gravely erred in law and facts in failing to observe that there existed bad relationship between the appellant and the prosecution witnesses sufficient enough to warrant a fabricated case.

6. THAT the learned trial magistrate erred in law and facts in shifting the burden of proof on the appellant without observing the existence of doubts in the prosecution's case.

7. THAT the learned trial magistrate misdirected himself in law and facts in rejecting my defence without proper evaluation and handing me a harsh sentence in the circumstances.

4. On this first appeal, this court is guided by the principles set out in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** where the Court of Appeal stated:-

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

5. In ***Okeno vs. Republic [1972] EA 32,*** the Court expressed itself thus:-

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

Issues For Determination

a)The following are the issues that fall for determination on this appeal:-

b)Whether the trial in the lower court met the threshold set out by Article 50(2) of the Constitution.

c)Whether ML's age was assessed and determined correctly by the trial court.

d)Whether there was improper, intentional and unlawful penetration of the vagina of ML.

e)Whether the Appellant was positively and properly identified.

f)Whether the sentence imposed by the trial court was in accordance with the law.

a) Whether the trial in the lower court met the threshold set out by Article 50(2) of the Constitution

6. The appellant submitted that the trial court erred in not informing him of his rights to legal representation as contemplated under ***Article 50(2)(g) and (h) of the Constitution of Kenya, 2010***

7. The said provisions of the Constitution state that:

> ***"50.Fair hearing***
>
> ***(1)…….***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(a)……..***
>
> ***……***
>
> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
>
> ***(h)to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
>
> ***……"***

8. The above provisions were discussed by the Supreme Court of Kenya, in the case of ***Republic v Karisa Chengo & 2 others [2017] eKLR,***

in which the Court held, *inter alia*, that:

> ***"The issue of fair trial and fundamental rights also touches on the interpretation of the Constitution, and related legislation. It also has a bearing on the rights of accused persons to have their appeals determined according to law. Article 20(3) (b) of the Constitution thus requires Courts "to adopt the interpretation that most favours the enforcement of a right or fundamental freedom***
>
> ***……..***
>
> ***In that regard, the right to legal representation at State expense, where the interests of justice demand, did not commence with the promulgation of the Constitution of 2010. This is a global right that has been in place for sometime now. The International Covenant on Civil and Political Rights(ICCP) adopted on 16th December 1966, for instance, provides in Article 14(3)(d) that legal assistance should be assigned to a party in any case where the interests of justice so require, and without payment in the case of a party who lacks the means to pay for it. Needless to add that Kenya is a party to this Convention having acceded to it on 1 May 1972.***
>
> ***Before the promulgation of the Constitution, 2010, Kenya recognized that in the interest of justice, persons charged with the offence of murder required legal representation and provided counsel to such people through the pauper briefs scheme and by Gazette Notice of 2016, the retired Chief Justice sent out directions on pauper briefs under the current Constitution. In August 2010, Kenya enshrined in Article 50(2)(h) of its Constitution the right to legal representation at State expense, in both civil and criminal cases, to deserving Kenyans. In respect of criminal cases, Article 50(2)(h) thus declares that "Every accused person has the right to a fair trial, which includes the right … to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly….***
>
> ***……..***
>
> ***It does not define what "substantial injustice" means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result…." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.***
>
> ***In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".***

9. The Supreme Court also referred to section 43 of the Legal Aid Act and stated that a court dealing with an issue under ***Article 50(2) of the Constitution*** shall:-

> ***"(a) promptly inform the accused of his or her right to legal representation;***
>
> ***(b) If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her;***
>
> ***…….***
>
> ***(6) Despite the provisions of this Section, lack of legal representation shall not be a bar to the continuation of proceedings against a person."***

10. The supreme Court went further and cited case law from other jurisdictions an din particular from India and stated:-

> ***In recognizing the discretion exercisable by any Court in making the determination as to whether the accused person is entitled to legal aid, the Supreme Court of India held as follows:***
>
> > ***"The Court may Judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the Court."***
>
> ***In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction***

must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings."

(Also see Mativo J in the case of ***Joseph Ndungu Kagiri v Republic [2016] eKLR,*** **G.W** Ngenye-Macharia J in the case of ***Maina Njenga v Republic [2017] eKLR,*** and R. Nyakundi J in the case of ***Joseph Kiema Philip v Republic [2019] eKLR)***

11. In the instant case, the record shows that at the start of the trial, the court only read out the charges to the accused during plea taking. There is nowhere in the record that indicates that the trial court informed the appellant of his rights under ***section 43 (1) of the Legal Aid Act, 2016*** and ***Article 50(2)(g) and (h) of the Constitution*** regarding the right to legal representation. There is no doubt in my mind that the trial court was under a duty to do so.

12. The issue that this court must grapple with is whether this omission by the trial court was so serious that it prejudiced and occasioned substantial injustice to the appellant thereby vitiating the entire trial. I do not think so. The record shows that the trial proceeded without any hitch, as it is clear from the appellant's cross-examination of the respondent's witnesses and his readiness to proceed during the course of the trial. I also find that the nature of the case against the appellant did not justify such an expense, nor would the cost of the proceedings justify such a cost. I also find and hold that no substantial injustice befell the appellant because of the said omission on the part of the trial court. This ground of appeal must therefore fail and I hereby dismiss it.

Whether ML's age was assessed and determined correctly by the trial court

13. The Appellant submitted that the age of ML was found to be fifteen years by one **JW**, PW7 though no birth certificate was tendered in evidence.

14. ***Section 8 of the Sexual Offences Act No. 3 of 2006*** provides as follows:

"8. Defilement

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

(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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

15. ***Section 11(1) of the Sexual offences Act No. 3 of 2006*** provides as follows:

"11.Indecent act with child or adult

(1)Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

16. The Sexual Offences Act defines *"**Child**"* within the meaning of the ***Childrens Act No. 8 of 2001*** which defines a *'**child**'* as ***"….any human being under the age of eighteen years."***

17. The reason why it is important for the prosecution to prove the age of a victim under the ***Sexual Offences Act*** is because the punishment prescribed by the Act is determined by the age of the victim. Such proof is through medical evidence or through a birth certificate, or through the testimony of the parent or guardian of the victim. In the absence of any of the foregoing, the age of a child can be estimated through careful observation or common sense on the part of the trial court. See the Court of Appeal holding in ***Hadson Mwachongo versus Republic [2016]eKLR.***

18. In the instant case, ML testified as PW1 and stated that she was 14 years old and that she was born in the year 2002. ML's mother, **EM** testified as PW2 and stated that she was ML's mother and that ML was born on 3rd August 2002 but that she had not obtained a birth certificate. **JW** testified as PW7 and produced an age assessment report as *PExhibit 4* which indicated that ML was around 15 years old when he examined her on 8th December 2016. This would mean that as of the material date, ML was around 15 years because the incident happened some three months before ML was examined.

19. I therefore find that the age assessment report provides the best evidence as to the age of ML which was around 15 years as of the material date. What this means is that any sexual activity with her falls within the ambit of '**Defilement**' under ***section 8(1)*** and the punishment within ***section 8(3) of the Sexual Offences Act*** or ***section 11(1)*** of the Act is the offence proved is one of committing an Indecent act with child or adult.

Whether there was improper, intentional and unlawful penetration of the vagina of ML

20. ML testified that she had just left the toilet when the appellant held her, covered her mouth and put his penis into her vagina. ML added that as the appellant defiled her, two people walked in on them and that the appellant told them to keep quiet in exchange for some money which he promised to give them.

21. PW2 testified and stated that ML told her that she had been defiled by the appellant. On cross examination, PW2 stated that she examined ML and noticed that she had injuries on her private parts and had a whitish fluid coming out of her vagina. PW2 added that ML could not walk properly at the time.

22. **Alice Majoni,** testified as PW3 and stated that she saw the appellant defiling ML and that she called her cousin to come and see what was happening. The appellant then told them to keep quiet and that he was going to give them **"something small**". On cross-examination, PW3 reiterated that she saw what happened to ML at the hands of the appellant.

23. **Sabina Ambani** testified as PW4 and stated that she was walking with PW3 when they saw four legs in the bathroom and that is when she saw the appellant and ML who was down with her skirt up and the appellant with a black short which was unzipped. PW4 added that the appellant came out and told her he was going to give her "**something small**". On cross-examination, PW4 similarly reiterated that she saw the appellant in the act.

24. **Hannington Saidi Wafula,** a clinical officer, testified as PW5 and stated that ML reported that she was forced to have unprotected sex with a person well known to her and that the assailant grabbed her and closed her mouth as he defiled her. On medical examination, PW5 stated that ML's blue pants were stained with a colourless fluid, her hymen was torn and she had minimal bleeding. PW5 added that there was presence of spermatozoa and that there was friction in her vagina. On cross-examination, PW5 stated that ML had indeed been penetrated.

25. **Corporal Maurice Otieno** testified as PW6 and stated that ML, in the company of PW2 reported to him that she had been defiled after being dragged into a maize farm near the toilet she was in and penetrated her. PW6 added that ML was only helped by PW3 and PW4 who were passing by.

26. **Boniface Mitumwea** testified as PW8 and stated he is a clinical officer and that that he had examined ML on the material day. PW8 stated that ML informed him that she had had unprotected sex with a person well known to her and that on examination, he noted that ML was in fear, her blue pant was stained,hymen broken with blood coming out. PW8 stated that he did confirm that ML had been defiled. On cross-examination, PW8 stated that ML's private parts were sore and that she had an infection on the vagina. I am satisfied that the fact of penetration was proved.

27. From the above provision, it is clear that the evidence of ML does not require corroboration for it to be proven. I am satisfied that she told the court the truth and consequently proved the ingredient of penetration. ML was able to consistently tell her story to PW2, PW5, PW6 and PW8. In any case, ML's testimony was corroborated by that of PW5 and PW8 who medically proved that ML had been penetrated and that the penetration was improper and unlawful.

28. The Court of Appeal, in the case of **Sahali Omar v Republic [2017] eKLR**, noted that:

> ***"…penetration whether by use of fingers, penis any other gadget is still penetration as provided for under the Sexual Offences Act."***

Whether the Appellant was positively and properly identified.

29. ML testified that the appellant is a person well known to her being the land agent of the owner of the plot where they lived and that the appellant lives in the same plot. ML testified on cross-examination that the appellant used to send her to buy cigarettes. ML was adamant even on cross-examination that it was the appellant who had defiled her.

30. ML's testimony was corroborated by PW2, PW3 and PW4 who all said that the appellant was a person well known to them and that they were neighbours. PW3 and PW4 both testified that they saw the appellant defiling ML and placed him at the scene. The appellant in his defence admitted to knowing ML.

31. The Court in the case of ***Titus Wambua v Republic [2016] eKLR*** cited the Court of Appeal in ***Karanja & another V Republic (2004) 2 KLR 140, 147*** (Githinji JA, Onyango Otieno & Deverell Ag JJA) to the effect that:-

> ***"The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court states as follows:-***
>
> ***"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them…… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said:-***

'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." (Also see the case of Maitanyi v Republic [1986] eKLR)

32. I find that the appellant was positively and properly identified by recognition by ML, PW2,PW3 and PW4. The appellant's own testimony proved that he knew ML and that she knew him. Further, the offence took place at mid-day, thereby ruling out the possibility of mistaken identity.

33. The appellant complained that he was not subjected to medical investigation to establish corresponding results on whether he was sexually active or not. ***Section 36(1) of the Sexual Offences Act No. 3 of 2006*** provides that:

"36. Evidence of medical, forensic and scientific nature

(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

34. It is to be noted that the wordings of ***section 36(1***) above are couched in discretionary, rather than mandatory terms. The above provision was deliberated on by the Court of Appeal in the case of ***Robert Mutingi Mumbi V R. Criminal Appeal No. 52 of 2014 (Malindi)*** where the appellate court stated:

"Section 36(1) of the Act empowers a Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the Accused person and the offence. Clearly that provision is not couched in mandatory terms."

Decisions of this Court abound which affirm the principle that Michael or DNA evidence is not the only evidence by which commission of a Sexual offence may be proved."

35. From the above, it is clear that medical examination of the appellant was not mandatory but discretionary and that there are ways other than Michael or DNA evidence to prove the commission of a sexual offence. In any event the issue of whether the appellant was sexually active or not was not relevant since he had been caught in the act.

Sentence

36. On the issue that the sentence imposed was very harsh in the circumstances, I note that s***ection 8(3) of the Sexual Offences Act*** provides that ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

37. The Supreme Court of Kenya, in the case of ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*** held that the mandatory minimum sentences such as the death penalty are unconstitutional since they deprive the sentencing court of its discretion to pass sentence that is commensurate with the circumstances of the case, such as age of the offender, gravity of the crime, previous criminal antecedents, remorsefulness of the offender among other factors.

38. Recently, the Court of Appeal, in the case of ***Evans Wanjala Wanyonyi v Republic [2019] eKLR,*** applied the Supreme Court of Kenya findings in the ***Muruatetu case*** and quashed the mandatory minimum sentence imposed in respect of a conviction for defilement under the Sexual Offences Act, no. 3 of 2006, and imposed a reduced sentence.

39. In the present case, the learned trial magistrate meted out the mandatory sentence provided for under ***section 8(3) of the Sexual Offences Act, 2006*** which was twenty years imprisonment. As stated before, the Court of Appeal has since held that the mandatory sentences stipulated by the ***Sexual Offences Act,2006*** are unconstitutional. My understanding of this development is that courts will now have to consider factors such as but not limited to mitigation from accused persons while following the guidelines set by the Supreme Court of Kenya in the ***Muruatetu case*** (above) together with pre-sentencing reports/statements from victims, if any, in deciding the appropriate sentences to be imposed on accused persons convicted of sexual offences.

40. In the present case, the respondent stated that the appellant had no previous criminal records meaning he was a first time offender. The appellant mitigated that his wife died and that he was left with four children and that the girls had also given birth to children. The record indicates that the learned trial magistrate considered the mitigation but noted that defilement of young children was on the rise and hence the appellant deserved a deterrent sentence and added that his hands were tied because of the mandatory sentencing provisions under the Act. This court takes note of the fact that the appellant physically and mentally injured ML who was 15 years old at the time. In light of both aggravating and mitigating factors, I find that the sentence of 20 years was excessive and harsh. I am of the view that the appellant has a chance of rehabilitation which can enable him reform from his criminal disposition and become a law abiding citizen.

Conclusion

41. In the end, I make the following final orders on this appeal:-

1. **The appellant's appeal on conviction be and is hereby dismissed.**

2. The appellant's appeal on sentence be and is hereby allowed to the extent that the sentence of 20 years imprisonment is quashed and substituted with a sentence of 10 years (ten years) imprisonment with effect from 18.7.2017.

3. Right of appeal within 14 days from the date of this judgment.

42. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 29th November, 2019

WILLIAM M. MUSYOKA

JUDGE

In the presence of:-

Appellant present in person

Ms. Omondi for respondent

Erick – Court assistant