



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 96 OF 2018

CHARLES MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's

Court Criminal Case 1484 of 2012, Hon. P. M Mugure, RM on 2nd August, 2013)

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES MUTUKU.....ACCUSED

JUDGEMENT

1. The appellant, **Daniel Muthama Mukumbu**, was charged before the Chief Magistrate's Court at Machakos in Criminal Case 1484 of 2012 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant on the 14th day of October, 2012 in Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of **RBM**, a girl aged 10 years. Alternatively, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he intentionally and unlawfully touched the vagina of **RBM**, a child aged 10 years with his penis.

2. Upon being found guilty, the appellant was convicted of the main charge of defilement and was sentenced to life imprisonment. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal.

3. The summary of the prosecution's case was that on 14th October, 2012, the complainant was sent by PW3 at 4pm to go and fetch firewood in her farm. At 6.30pm the complainant returned with a lot of firewood and placed them in the kitchen. She later learnt from PW2 that the complainant had been defiled though she did not notice anything and the complainant did not tell her anything. According to her the appellant was living with her daughter though they were not married. While she acknowledged that the appellant and PW2 had problems, she could not tell if that could lead to fake accusations.

4. PW1, the complainant, testified that on 14th October, 2012, she was in a *shamba* alone collecting firewood when she saw the appellant in a lorry going to the river. According to her the appellant was her uncle who was married to her physically disabled aunt called Esther who had left home to go and live at the market. The appellant then returned walking held her hands, pulled her to the side of the *shamba* and threw her on the ground and removed her underpants. He then removed his penis and inserted it in her vagina. When the appellant heard children passing nearby he wore his pants and left leaving the complainant on the ground. According to her the appellant was kneeling while she was lying on the ground. Although she felt pain, she did not shout as she feared being beaten by the appellant. According to the complainant the said children saw the appellant leave and they went to school and informed their fellow children and the teacher. The complainant did not however inform anyone about the incident since she was afraid of being beaten. The following day she went to school but on 16th October, 2012 due to headache she did not. On 17th October, 2012 when she was informed that she would be punished by the teacher, she started walking towards Machakos but was seen by her teacher who put her in a vehicle and took her to the Hospital gate where she found PW2, her aunt and was taken to the hospital. At the hospital they were told to report the matter at the police which they did and recorded their statements.

5. PW5 testified that on 14th October, 2012 at 5pm she had gone to River Mwea to fetch water with one **Mueni** when she saw the appellant alight from a lorry that was going to fetch sand. The appellant then left the lorry and went to defile the complainant. According to her the complainant was playing in a *shamba* alone. After fetching the water, she saw the appellant get hold of the complainant's hand and carry her to the bush. It was her evidence that the appellant was lying on the complainant on the ground and thereafter the appellant left. She saw the appellant putting on his pants. According to her when the appellant also saw them staring from the road, he stood up and went towards them. After that they went home. The following day 15th October, 2012 she reported the incident to her teacher, PW6 when PW6 sought to know where the complainant was. It was her evidence that though she was not related to the complainant she knew the appellant. She stated that she had never talked to the complainant since then.
6. PW6, was the complainant's class teacher. On 16th October, 2012 she got a report from her students that the complainant was absent from school. She accordingly notified the school deputy head teacher of the same. According to her when she called the register and the complainant was absent, the students laughed in class and shouted that the complainant had done bad manners. It was her evidence that this was after PW5 had narrated the incident to the students.
7. PW7, the deputy head teacher upon being informed of the complainant's absence also narrated the matter to the head teacher on 17th October, 2012 since there were rumours that the complainant had been defiled by the appellant.
8. PW4, the headmaster was briefed by PW7 about the incident on 17th October, 2012. He then sent some students to the complainant's home but only the complainant was at home. A report was then given to him that the complainant had been seen walking towards Machakos at 10.40am and the complainant was taken in a *matatu* and dropped at the Hospital at Kathiani. PW4 had dropped a note to PW2 about the matter and PW2 went to wait for the complainant at the gate to the Hospital.
9. On 17th October, 2012 PW2, the complainant's aunt was at home when some 3 students were sent to call her by the head teacher. Upon going to school, the head teacher, PW4 inquired from her why the complainant was not in school and was told to go and wait for the complainant at Kathiani Hospital. At the Hospital the complainant was examined and the complainant disclosed to her that she had been defiled.
10. The age assessment of the complainant was done by PW8 who found that the complainant was not more than 12 years of age. PW9 examined the complainant on 17th October, 2012 and found that her hymen was torn and her *labia minora* was bruised. She had red blood cells above 20. In his view there was complete penetration though he did not expect to find any sperms after three days. He however stated that the hymen can be torn by insertion of other objects and extraneous exercise.
11. PW10 was the arresting officer and also the one who issued the P3 form.
12. Upon being placed on his defence, the appellant denied the offence stating that in the evening of 14th October, 2012 he was at Lumwa Market doing casual labour and went to the river in a lorry which was ferrying sand as a loader. After loading he went home. It was his evidence that he was in the lorry fulltime and never walked on foot. He denied knowing the complainant. He however alleged that the accusation could have been due to the fact that PW2 owed him Kshs 2,500/-.

Determination

13. The facts of the case were that the complainant had been sent by PW3 to go and fetch firewood. While there the appellant confronted her and defiled her in a *shamba*. However, some children including PW5 saw her being defiled and reported the matter to the school authorities. The complainant however did not disclose this to anyone else due to fear. She instead attempted to flee but was prevented from doing so by a teacher and was instead taken to the Hospital for treatment. Upon examination it was found that her hymen was broken and she had lacerations in her *labia minora*. Her age was ascertained as not more than 12 years. The appellant on the other hand denied that he defiled the complainant. Though he admitted being at the river, it was his evidence that the case was fabricated by PW2 with whom they had a grudge.
14. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“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.”

15. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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 findings and 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.

16. Section 8 of the *Sexual Offences Act* provides as follows:

8. (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.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

17. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. 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. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013, where it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

18. In this appeal the appellant contends that he was not supplied with witness statements hence his rights were violated. From the record the court directed that he be supplied with witness statements and thereafter the issue was not taken up by the appellant. Accordingly, there is no basis on which I can find that the appellant's rights were violated based on the ground. The appellant also contended that the witnesses were coerced. However, he did not elaborate on this and there is no evidence on record that that was the case.

19. In this case it was the complainant's evidence which evidence was confirmed by other witnesses that the appellant was married to an aunt of the complainant. Therefore, the appellant was well known to the complainant despite his denial. The age of the complainant was confirmed by the medical evidence. That the complainant was penetrated was also confirmed by the medical evidence adduced in court.

20. Although the appellant denied having been present at the time of the commission of the offence, he admitted being within the vicinity of the place where the offence was committed. The incident was confirmed by PW5 a 15 years girl who was going to fetch water. Due to the embarrassment that the complainant felt she decided to run away from school and was only apprehended by a teacher on her way to Machakos. While the burden was on the prosecution to prove the offence beyond reasonable doubt, it is clear that without such evidence being shaken the learned trial magistrate properly convicted the appellant. That evidence could only have been shaken had the appellant called those with whom he was loading sand to corroborate his testimony.

21. Accordingly, the learned trial magistrate cannot be faulted for finding that the appellant was guilty of the offence of defilement.

22. Regarding the sentence, the learned trial magistrate stated that the law provided for a mandatory sentence and proceeded to sentence the appellant to life imprisonment. I associate myself with the opinion of the Court of Appeal in Jared Koita Injiri vs. Republic [2019] eKLR where it held that:

"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life

imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

23. In the same vein I set aside the life sentence imposed upon the appellant herein and substitute therefore a sentence of 20 years' imprisonment to run from 17th October, 2012.

24. Judgement accordingly.

Judgement read, signed and delivered in open court at Machakos this 25th day of November, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Susan