



IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NUMBER 257 OF 2010

ALFAYO KOFIA MUSOTSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 3198 of 2006 in the Chief Magistrate's Court at Kakamega delivered by Hon. J.M.Githaiga (PM) on 17th November, 2010)

JUDGMENT

Background

1. **Alfayo Kofia Musotsi**, the appellant herein was charged with defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act (*hereinafter referred to as the Act*).

The particulars of the charge are that on 14th October 2006 at [particulars withheld] village, Ikoli, East Kakamega District unlawfully had carnal knowledge of P. N, a girl aged 14 years

2. Appellant was also charged with indecently assaulting the complainant on 14th October 2006 at [particulars withheld] village, Ikoli, East Kakamega District.

The prosecution's case

3. The prosecution called 6 witnesses in support of the charges. **PW2, J N**, the complainant's mother stated that complainant was her daughter. She recalled that on 13.10.06 at about 9.00 pm, she locked complainant and another small child in the house and went for a funeral meeting. That when she returned about 2.00 to 3.00 am, she went in the house and upon lighting a lamp saw a blue cap on the bed. That she also saw appellant defiling the complainant. That appellant tried to flee but she screamed and M, N and P answered her distress call and arrested the appellant. That complainant was later taken to hospital and appellant was charged. **PW3 P I and PW4 N S** stated that on 14.10.06 at about 3.00 am, they went to PW2's home to answer a distress call and they found her struggling with the appellant who was attempting to flee from the house. That they arrested appellant and handed him over to a village elder. **PW5 E M**, a village elder recalled that when the appellant and complainant were taken to him by PW3 and PW4, he referred them to the assistant chief for assistance. **PW6 F W**, a clinical officer stated that complainant was examined by his colleague **V A** who filled a P3 form PEXH. 2 in which he noted that complainant was mentally handicapped, her pants were bloodstained and she had bleeding bruises and ulcers in her vagina. **PW7 PC Agnes Wanjiku**, the investigating officer testified that upon receiving PW2's report, she referred complainant to hospital where a P3 form was filled confirming that she had been defiled. She produced a piece of cloth torn from appellant's trousers as PEXH. 1 (a); a cap recovered from the scene and which was alleged to belong to the appellant as PEXH. 1 (b) and complainant's certificate of birth showing that she was born on 12.10.92 as PEXH. 3.

4. When put on his defence, the appellant gave a sworn testimony in which he denied the offences or being arrested in the act.

5. *In a judgment* 17.10.10, appellant was convicted and sentenced to serve 20 years imprisonment.

The Appeal

6. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 2.12.10, appellant raised six (6) grounds as follows:-

1) That he pleaded not guilty to the charges

2) That the trial court based his conviction on uncorroborated evidence

3) *That he was exonerated by the medical report*

4) *That age of complainant was not proved*

5) *That the sentence is harsh and excessive*

6) *That his mitigation was not considered*

7. When the appeal came up for hearing on 4.9.18, appellant relied wholly on the grounds of appeal and submissions filed on 4.9.18. His submission raise mitigating factors including the fact that he had already served 8 years, was remorseful and sickly

8. Mr. Juma, learned State Counsel opposed the appeal and urged the court to fully refer to the evidence on record.

Analysis and Determination

9. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190**that:-

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

10. From the evidence on record, I have summarized the issues for determination as follows:

- a. Was complainant defiled
- b. Was complainant's age proved
- c. Where was the appellant arrested from
- d. Who defiled the complainant
- e. Was the sentence is harsh and excessive

Was complainant's age proved?

11. The complainant's certificate of birth produced by PW7 as PEXH. 3 shows that she was born on 12.10.92 and was therefore 14 years when the offence was committed

Was complainant defiled?

12. The P3 form produced by PW6 as PEXH. 2 shows that complainant's pants were bloodstained and she had bleeding bruises and ulcers in her vagina. Contrary to the appellant's submission, there is evidence that complainant was indeed defiled.

Where was the appellant arrested from?

13. PW2's evidence that he found appellant in her house where complainant was defiled has been corroborated by PW3 and PW5 who found PW2 and the appellant struggling inside PW2's house as the appellant was trying to flee. In view of the overwhelming evidence regarding appellant's place of arrest, his defence that he was arrested while selling milk was rightfully rejected by the trial court.

Who defiled the complainant?

14. The evidence on record shows that complainant did not testify as the trial court noted that she was not able to communicate. The P3 form shows that complainant was mentally challenged. PW2's testified that she found the appellant in the act. As duly stated hereinabove, there is overwhelming evidence that appellant was arrested inside PW2's house where complainant was sleeping and where she was defiled. From the foregoing; I find that there was irresistible evidence that it was the appellant that defiled the complainant was well founded.

Was the sentence is harsh and excessive

15. As earlier stated, the complainant was 14 years when the offence was committed.

16. Section 8 of *the Act* which provides for sentences for the offences of defilement depending on the age of the complainant states as follows:

(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

17. Appellant was convicted and sentenced to 20 years imprisonment. The sentence imposed by the trial court is lawful and cannot be faulted.

Determination

18. In view of the foregoing analysis, I reach a conclusion that the case against the appellant was proved beyond any reasonable doubt rendering the conviction and sentence safe. For this reason, the appeal is dismissed. It is so ordered.

DATED THIS 19TH DAY OF SEPTEMBER 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER 2018

WILLIAM M.MUSYOKA

JUDGE

In the presence of-

Court Assistants - Erick/Polycarp

Appellant - Present

For the State - Mr.Juma