



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 62 OF 2015

JOSEPH MURUNGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence dated 29/06/2015 in

Nanyuki CM Criminal Case No 857 of 2013 – E Bett, SRM)

J U D G M E N T

1. The Appellant in this appeal, **Joseph Murungi**, was convicted after trial of **defilement** contrary to **section 8(1) & (3)** of the **Sexual offences Act, No 3 of 2006**. It was alleged in the particulars of the charge that on 04/10/2013 in Meru County, he intentionally caused his penis to penetrate the vagina of one M K, a child aged 13 years. He was sentenced to serve **twenty-five (25)** years imprisonment. He has appealed against both conviction and sentence.

2. The Appellant filed his appeal in person from prison. He set out the following grounds of appeal (appropriately rephrased) –

- (i) That the evidence adduced by the prosecution was inconsistent and unreliable.
- (ii) That the trial court did not properly consider the Appellant’s defence.
- (iii) That the charge was not proved beyond reasonable doubt.

3. At the Appellant’s request the court provided him with counsel.

The advocate filed supplementary grounds of appeal which introduced a new ground of appeal against the sentence, which was rendered as follows –

- (iv) That the trial court erred in law in sentencing the Appellant to 25 years imprisonment “without considering the provisions of section 8(3) of the Sexual Offences Act.”

4. The Appellant’s learned counsel filed written submissions which he highlighted orally. The learned prosecution counsel made oral submissions. I have considered those submissions, including the cases cited.

5. I have also read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, the fact that I did not see and hear the witnesses, and I have given due allowance for that fact.

6. A number of aspects of the Appellant’s trial have disturbed this court. The original trial magistrate (V K Kiptoon) did not complete the trial. He/She took the evidence of the complainant (PW1) and her mother (PW2). That court conducted a *voire dire* examination of the complainant. The court ruled –

“The subject to be affirmed as she does not know what an oath is.”

This was on 30/04/2014. Needless to say an affirmation is really a form of oath. In any case, the record of the trial court shows that the complainant was in fact sworn before she testified, despite the finding that she did not understand what an oath was.

7. The case was taken over by a new trial magistrate (E Bett) and directions were given under **section 200(3)** of the **Criminal Procedure Code** that the trial start afresh.

8. On 08/10/2014 (that is just over 5 months after she initially testified) the complainant was subjected to another *voire dire* examination by the new trial magistrate. He/She found that the complainant understood the duty of telling the truth and was possessed of sufficient intelligence. The complainant therefore gave sworn testimony.

9. The record of the new trial court shows clearly that during cross-examination of PW1 (complainant) and PW2 (her mother) by the Appellant, the court allowed them to ask the Appellant questions and recorded those questions. This was irregular; the duty of a witness, particularly during cross-examination, is to answer questions as asked unless the court rules any question improper. Permitting witnesses to ask the accused questions when he is cross-examining them does not augur well at all for a fair trial as it amounts to harassment of the accused.

10. The Appellant in his defence chose to give an unsworn statement. That is his right under **section 211(1)** of the Criminal Procedure Code, and should never be subject to adverse comment by the trial court. In the present case the trial court stated as follows in its judgment when discussing the Appellant's defence –

“I have considered the accused's defence and the following is worth mentioning. Firstly the same was unsworn and uncorroborated and could not be relied up to rebut the prosecution case....”

11. An adverse comment regarding an accused person's choice of manner of defence is not acceptable at all and is an indication of bias in the mind of the court. Secondly, an accused is under no obligation to prove his innocence. It is always the burden of the prosecution to prove the charge against the accused beyond reasonable doubt. That burden never shifts to the accused.

12. The trial of the Appellant was thus not satisfactory at all. It cannot be said to have been fair, and the conviction resulting from it is not safe at all.

13. Besides this, there were material inconsistencies in the testimonies of PW1 and PW2. The medical evidence was also lacking in certain material aspects. But in view of my findings regarding the trial itself, I need not examine the evidence in any detail.

14. Suffice it to say that it is my finding that the Appellant's conviction is not free from error. It is not safe. I will in the event allow this appeal in its entirety, quash the conviction and set aside the sentence imposed upon the Appellant. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 24TH DAY OF OCTOBER 2018

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 25TH DAY OF OCTOBER 2018