



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 119 OF 2016

DISMAS MUCHELA JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. E. Kigen (RM) in Eldoret Chief Magistrates' Court Criminal Case No. 3010 of 2014 on 14th October, 2016)

JUDGEMENT

1. The appellant was convicted for defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life. Aggrieved by the same he lodged this appeal on grounds that can be summarized as; That defilement was not proved to the required standards and that the trial court failed to inform the appellant of his right to representation.

2. NM (PW1) recounted that she was sent to go and collect maize from mama Gregory. The appellant was at the river washing clothes when he called NM and told her to get him water from the river. He told Sarah to go and that NM was to remain behind. He then removed NM's pant and took his thing and put it in her thing. She felt pain and went and told mama Sarah. She stated that the appellant informed her that he would buy her mandazi. PM (PW2) who is NM's mother stated that the minor was aged 7 years as she was born on 29th May, 2008. She produced NM's clinic card as P. Exhibit 1. She stated that she was informed by mama Sarah that the appellant had defiled NM That she reported the matter to Kapsoya Police Station. DN (PW3) recounted that she and NM her sister had gone to buy maize from mama George when the appellant who was at the river called NM That the appellant told NM to remove her clothes and did bad manners to her. That he gave her KShs. 100/- with which MM bought mandazi and gave her and Sarah KShs. 20/- each. She stated that she was able to see the appellant and NM at the river. On cross examination she stated that there were no people at the river at the time. The Director of Moi Teaching and Referral Hospital (MT & RH) (PW4) was called to produce the P3 form in respect of NM on behalf of Dr. Embenzi who examined NM but had since gone on transfer. The witness stated that NM's hymen was intact but was red. That no sperms were found and she did not have an STI or HIV. The P3 form was produced as P. Exhibit 2. Police Constable Andrew Mhando (PW5) of Kapsoya Police Station and who took over the investigation from Sergeant Bagila who was transferred to Tana River testified that NM was escorted to the police station by her mother. That NM had been sent for maize and on her way back the appellant held her and dragged her to the bush and defiled her. She was given a P3 form which was filled at MT & RH.

3. The appellant was put on his defence wherein he stated that he was on 24th April, 2014 from work at the construction site and at about 3.00 pm the officer from Kapsoya arrested him over a case that was in court 2 and was thereafter charged with the case at hand. He denied that he committed the offence.

4. This court has given due consideration to the appeal herein factoring in its duty as a first appellate court to re-consider and re-evaluate the evidence afresh to arrive at its independent conclusion. What lies for this court's determination is whether or not the offence was proved and whether or not the Appellant's right to representation was violated. The ingredients forming the offence of defilement are age of complainant, proof of penetration and positive identification of the assailant. NM's clinic card was produced as P. Exhibit 1. The said document revealed that she was 7 years of age therefore a child within the meaning of the Sexual Offences Act. Further, she gave a cogent account of the ordeal clearly stating that the appellant was the perpetrator. The said evidence was corroborated by PW3 who stated that she saw the appellant from afar. She too described the appellant as someone known to her. When interrogated by PW5, PW1 stated that it was the appellant who defiled her. In the circumstances and in view of **Maitanyi v. Republic [1986] KLR 198** where it was held as follows:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description

or identification of his assailants, to those who came to the complainant's aid or to the police...

I find that the appellant was positively identified. On penetration, PW4 stated that NM's hymen was intact but was red. Penetration is defined under the Sexual Offences Act No. 3 of 2006 to mean partial or complete insertion of the genital organ of a person into the genital organ of another person. Under the circumstances herein, I find that there was no penetration achieved.

5. Article 50 (2) (g) and (h) of the Constitution stipulates as follows:

“(2) Every accused person has the right to a fair trial, which includes the right—

(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;...

6. Article 50 (2) (h) was interpreted by the Court of Appeal in **David Njoroge Macharia v. Republic [2011] eKLR**. The Court pronounced itself as follows:

“Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

7. The Court of Appeal held the opinion that the State ought to provide legal representation to accused faced with capital offence. Further, the same can be availed through a case by case basis i.e. where there exists complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. It is my considered view that the appellant's case is not one such a case for the reason that he understood the charge and the case in particular and was able to conduct his case. I find and hold that he was not prejudiced by lack of representation. That ground therefore fails.

8. The lower court record reveals that the matter was initially being heard before Hon. Olando (RM) who appears to have been transferred. The matter was subsequently taken over by Hon. Kigen (RM) who appears not to have complied with the mandatory provisions of Section 200 of the Criminal Procedure Code. It was necessary for directions to be taken since the matter was partly heard by a judicial officer on transfer. Indeed the matter had reached defence hearing stage. Learned Counsel for the Respondent confirms that directions were not taken in line with the dictates of Section 200 of the Criminal Procedure Code and concedes to the fourth ground of the Appellant's grounds of Appeal. Learned Counsel sought for a retrial as witnesses are readily available. It is noted that the Appellant was convicted and sentenced on the 14/10/2016 and has barely served a fraction of the sentence imposed. There is no prejudice to be suffered by the Appellant if a retrial is ordered. The prosecution indicates that witnesses are available. I find in the premises an order for retrial will serve the justice of the case.

9. In the result, the appeal succeeds. The conviction is hereby quashed and the sentence is set aside. The Appellant is ordered to be produced before the Chief Magistrate Eldoret Law Courts for the purposes of retrial.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 22ND day of November, 2018.

O. SEWE

JUDGE