



REPUBLIC OF KENYA



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**Morris Nzioki Mbithi v Republic (Criminal Appeal 91 of 2015)
[2017] KEHC 3812 (KLR) (31 July 2017) (Judgment)**

Morris Nzioki Mbithi v Republic [2017] eKLR

Neutral citation: [2017] KEHC 3812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 91 OF 2015**

DK KEMEI, J

JULY 31, 2017

BETWEEN

MORRIS NZIOKI MBITHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Sentence of Principal Magistrate's Court
at Mavoko delivered by Honourable L. A. MUMASSABBA, (Resident
Magistrate) on 15th May, 2015 in MAVOKO P.M.CR. S. O. No. 20 OF 2014))*

JUDGMENT

1. The Appeal arises from the judgment of Hon L. A. Mumassabba – Resident Magistrate in Mavoko Principal Magistrate's Court Criminal Case No. 20 of 2014 dated the 8th June, 2015.
2. The Appellant had been charged 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. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual offences Act No. 3 of 2006.
3. The particulars of the main charged were that on the 27th day of May 2014 at [particulars withheld] in Athi River District within Machakos County intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of F.O. a child aged 5½ years.
4. The particulars of the alterative charge are that on the 27th day of May, 2014 at [particulars withheld] area in Athi River District within Machakos County intentionally caused his male genital organ (penis) to come into contact with female genital organ (vagina) of F.O. a child aged 5½ years.



5. The Appellant was found guilty of the main charge of defilement and was convicted and sentenced to serve life imprisonment.
6. Aggrieved by the said conviction and sentence, the Appellant raised the following grounds of appeal:-
 - (a) The Learned Magistrate erred in law and fact in finding the Appellant guilty of the charge of defilement while the same was not proved beyond reasonable doubt.
 - (b) The Learned Magistrate erred in law and fact in convicting the Appellant purely on the uncorroborated testimony of minors who admitted to have been coached
 - (c) The Learned Magistrate erred in law and fact in failing to consider at all the testimonies of the defence witness.
 - (d) The learned Magistrate erred in law and fact in failing to consider the submissions of Counsel for the Appellant.
 - (e) The learned Trial Magistrate erred in law and fact in failing to consider the Appellant's mitigation in passing the sentence.
 - (f) The learned Magistrate erred in law and in passing a sentence which was too harsh and excessive in the circumstances.
7. The Appellant now prays that the Appeal be allowed and the conviction and sentence set aside and he be acquitted.
8. This being the first Appellate Court, it is obligated to re-evaluate and re-examine the evidence tendered before the trial court and to come to its own independent conclusion bearing in mind that it did not have the opportunity to see or hear the witnesses testify and to make an allowance for that (see OKENO =VS= REPUBLIC [1972] EA 32 PANDYA =VS= REPUBLIC [1957] EA 336, PETER =VS= SUNDAY POST [1958] EA 424.
9. Summary of the Prosecution's Case.

PW.1 F.O. (name withheld) testified that on the material date namely 27/05/2014 she was in the house around 5 p.m. with her brother when the Appellant herein who is a neighbour requested her and the Appellant's daughter to accompany him to the railway line where he ordered them to undress and he then defiled them in turns and then released them to go home. Later she and her brother informed their mother about the incident. She was later taken to hospital for examination and the issue reported to the police. She maintained that it was not the first time for the Appellant to defile her as he had done so in the past in his house. On being cross – examined, she maintained that the Appellant defiled her and the Appellant's daughter inside a bush near a railway line. She stated that she told her mother about the ordeal after being beaten and further admitted that her mother told her to state to court what she had intended to say to her before being beaten.

PW.2 PAULINE KIMEU, a Clinical Officer based at Athi river health Centre testified that she examined the Complainant minor and noticed bruises on the labia minora and that the hymen was torn. She formed the opinion that the girl had been defiled. On cross – examination she stated that the bruises were fresh like a day old.

PW.3 S M who was mother to the minor testified that she was bathing her when she noticed some sperms in her vagina and on enquiring about it the girl started laughing and she was forced to threaten to beat her up when she revealed to her that the Appellant had called her and Appellant's daughter and then did bad manners (tabia mbaya na dudu yake). The witness further testified that she learnt from



the minor that the Appellant had defiled her previously. On cross-examination she maintained that she had no differences with the Appellants who is the Plot's caretaker.

PW.4 C.M. (name withheld) who was aged 7 years and brother to the complainant testified that on the 27/05/2014 the Appellant called the Complainant and Appellants daughter to join him outside the gate and later joined the Appellant in his house where he defiled both the girls and he later accompanied them towards the railway line. The witness claimed that he peeped through a hole on the door and witnessed the incident. He also stated that he also witnessed a subsequent similar incident. The witness admitted on cross-examination that he too had had sex with the Appellant's daughter in which the Appellant's assaulted him over the same. He also admitted to have had sex with the Complainant who is his younger sister.

PW.5 PAULINE KATUNGE was the investigating officer testified that she received the report and began investigations. She visited the plot and made enquiries and learned that the Appellant was in the habit of playing with children and had thus become popular with them and further learnt that he was in the habit of defiling them. He charged him with the offences.

10. The Appellant's case:

The Appellant's was put on his defence and he tendered a sworn testimony and called one witness.

The Appellant testified that he was the caretaker of the plot where the Complainant and her mother reside. He averred that his relationship with the Complainant's mother worsened when her son started engaging in sex with other children and even the Complainant which forced the Appellant to beat him and which annoyed the Complainant's mother. He also averred that the Complainant's mother had started defaulting in rent payment and had started arriving from work late and making noise to the discomfort of the other tenants. He was therefore surprised to be taken to the police station where he learnt of the allegations. He maintained he was at his grocery from 8.00 – 9.00 p.m. and did not leave even for a short call. He also averred that the Complainant and his daughter were playing outside and he was taking care of them. He denied defiling the Complainant.

DW.2 MONICA KARIRI NZIOKI who was the Appellant's wife testified that on the material date her husband was at the grocery and only relieved him during lunch break and worked together until 7.00 p.m. She stated that Complainant's older brother had earlier defiled the Appellant's daughter and sister in law which forced the Appellant to beat him up which seems to have not gone down well with the Complainant's mother. She further stated that the Complainant's mother's conduct in bringing men to her single room might have corrupted the moral of her son.

11. Submissions :

Parties filed submissions. Counsel for the Appellant merged all the grounds of appeal (a –f) and submitted that the evidence of the Prosecution witnesses had several contradictions and further that the Prosecution failed to call the Appellant's daughter who should have been a key witness. It was submitted for the Appellant that the Prosecution's case had not been proved beyond the required standard of proof.

Counsel for the Respondent submitted that the Prosecution's case had been proved beyond reasonable doubt. The Respondent's Counsel urged this Court to uphold the lower courts conviction and sentence.

I have considered the submissions of learned counsels for the parties and authorities cited. I have also considered the evidence adduced before the trial Court. I find the following issues necessary for determination:-



- (1) Whether the Prosecutor had proved its case beyond the required standard of proof.
 - (2) Whether the sentence imposed by the trial court was appropriate.
12. As regards the first issue it is noted that the Prosecution presented five (5) witnesses in support of its case. As the charge is one of defilement, the essential ingredients needed to be established were the age of the complainant, proof of penetration and positive identification of the perpetrator. On the issue of the age the Complainant's mother stated that the girl was born on 21/07/2008 as per the child immunization card and further the doctors assessed her age to be 6 years. On the issue of penetration, Section 2 of the Sexual offences Act describes it as "the partial or complete insertion of the genital organ of another person." The Complainant stated that the Appellant beckoned her and the Appellants' daughter and defiled them in turns. The Clinical Officer established that the Complainant's labia minora had bruises and that the hymen had been torn and further determined the age of the injuries as just a day old as the bruises were still fresh. The aspect of penetration was therefore established. On the issue of the identity of the assailant, it was the evidence of the Complainant that the Appellant defiled her together with the Appellant's daughter. The Complainant further stated that the defilement had been going in the past. She further stated that she knew the Appellant as a neighbour. In fact the Appellants in his defence evidence and that of his witness confirmed that indeed he had known the Complainant since he used to take care of her and her brother on many occasions when their mother was away. Therefore the Appellant was not a stranger to the girl. The Investigating officer stated that he visited the scene and learnt that the Appellant was in the habit of playing with children and had become popular with them. Again the evidence of the Complainant's brother who claimed to have seen the Appellant in the act left no doubt as to the identity of the Appellants as the perpetrator.

The Counsel for the Appellant has submitted that the evidence of the Complainant and her brother was not enough since the Appellant's daughter who was also allegedly defiled together with Complainant was not called by the Prosecution. Indeed under Section 143 of the Evidence Act the number of witnesses to be called by the Prosecution are not limited for the purposes of proving facts. Therefore even one witness could be sufficient as long as that particular witness is able to prove any fact needed to be proved. Again under Section 124 of the Evidence Act the evidence of a child who is a victim of a sexual offence shall be sufficient without the need for corroboration as long as the trial Court records that it was satisfied that the child is telling the truth. The trial Magistrate in her judgment indicated that the Complainant was telling the truth. The Complainant was sworn after a *voire dire* examination had been conducted and she was cross – examined at length and that from her testimony it could be gathered that she was consistent. Again the evidence of the Complainant's mother and brother as well as that of the Clinical officer corroborated the evidence of the Complainant and left no doubt that indeed she had been defiled. The Appellant's Counsel has submitted that the Complainant had been coached on what to say in court and hence her evidence should not have been believed by the trial court. There is need to relook at her evidence on page 44 of the record of appeal line 16 which is as follows:-

“..... I did not tell mama Grace after I was defiled. I laughed when my mother was washing me. I was beaten by my mother before I said what happened. I wanted to tell her what I have said. I have been told by my mother to say. She did not promise me anything afterwards.”

The above response came from the Complainant on being cross-examined by the Appellant's counsel. A plain reading of the above response clearly shows that the minor had not revealed the ordeal prior to the beating by her mother and was saying that she wanted to tell her about the incident as now narrated to court and that the mother wanted her to tell the Court about what she had intended to



tell her before the beatings. Clearly, it cannot be said that what the minor stated to Court emanated from her mother but that it was her own testimony of how she had been defiled by the Appellant. The testimony of the Complainant appeared from the record to have come out clearly as being that of an innocent child without any guile.

Turning to the Appellant's testimony, he did admit that he had seen the Complainant and her brother as soon as they arrived from school. He maintained that he was running the grocery as his wife went to prepare lunch. Even though he stated that he was at the grocery for the whole day up to 9.00 p.m. he did admit that he got a break around 4.30 p.m. to go for lunch. His wife confirmed that she relieved her husband to go for lunch. The evidence of the Complainant and her brother was that the incident took place around 5 p.m. which is just around the time the Appellant had taken off from the grocery for the lunch break. This therefore seems to fit within the time of the alleged offence and placed the Appellant at the scene and which therefore corroborated the evidence of the Complainant and her brother. The trial court analyzed the Appellant's defence and rejected it as unbelievable. I find the Appellant's evidence did not shake that of the Prosecution in that it was highly unlikely for the Complainant's mother to use her own young and vulnerable daughter to act as a victim of defilement so as to settle scores with the Appellant over issues of unpaid rent and alleged disturbances to tenants on the part of the Complainant's mother. Again the Appellant's claim that the Complainant had earlier been defiled by her brother is not helpful since same was not reported and that of concern is the defilement that occurred on the 27/05/2014 in which he was implicated by Complainant herself. It transpired from the evidence that the Appellant had been well known to the Complainant as he confirmed in his defence that he used to cater for her as a parent during her mother's absence. The Complainant had definitely gotten acquainted with him as she used to play with the Appellant's daughter. There is therefore no reason at all for the Complainant to come up with the falsehoods against him. The Complainant from her evidence came out as a forthright and consistent witness

In the result it is the finding of this Court that the Prosecution had proved its case against the Appellant before the trial Court. The learned trial Magistrate properly analyzed the evidence and correctly arrived at a guilty verdict against the Appellant on the main count.

13. As regards the second issue, it is noted that the Appellant was sentenced to serve life imprisonment under Section 8(1) and 8(2) of the Sexual Offences Act it is provided as follows:-

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

- (3) a person who commits an offence of defilement with a child aged eleven (11) years or less shall upon conviction be sentenced to life imprisonment.

The above provisions indicate that when it comes to sentencing upon a conviction being arrived at it does not give the Court a leeway on sentencing. The Court's hands are tied by the statutory provisions. Indeed the trial Court received a pre-sentence report but the Court had no option but to mete out the appropriate sentence namely life imprisonment. The pre-sentence report only helped in further orders regarding the issue of the need to refer the victim to a Gender Based Violence Recovery Centre for protection. Hence I find the sentence passed by the trial court was appropriate in all respects.

It is so ordered.

Dated, signed and delivered at **MACHAK OS** this 31ST day of **JULY, 2017**.

D. K. KEMEI

JUDGE

In the presence of



Mutua for King'oo for Appellant

Machogu for Respondent

C/A: Kituva

