



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 128 OF 2017

JOHN KIMWELE MUNGENGEI.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTION

JUDGEMENT

1. The Appellant was charged with the following charges:- **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) AS READ WITH SUB-SECTION 2 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.**

2. On the 31st day of July 2015, at Katuma Village, Ndituni Sub-location, Kiteta Location in Mbooni East district within Makueni County, **John Kimwele Mungengei** intentionally and unlawfully caused his penis to penetrate the vagina of **CMM**, a child aged ten (10) years.

3. **ALTERNATIVE CHARGE WAS: COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.**

4. On the 31st day of July 2015 at [particulars withheld] village, Kiteta Location in Mbooni East District within Makueni County, **John Kimwele Mungengei** intentionally and unlawfully did indecent act to **CMM** a child aged ten (10) years by touching her private parts namely vagina with his penis.

5. The Appellant denied the offence and pleaded not guilty. The matter was heard and the appellant was convicted and sentenced to serve life imprisonment.

6. Being aggrieved by the above trial magistrate decision, the appellant lodged appeal and set out five grounds. Namely:-

1) ***That, the learned magistrate erred in law and fact by failing to consider the charge sheet was defective.***

2) ***That, the learned magistrate erred in law and fact by failing to consider that no age assessment report was produced by the prosecution.***

3) ***That, the learned magistrate erred in law and fact in failing to consider the sharp contradiction in the evidence.***

4) ***That, the learned magistrate erred in law and fact by failing that no injuries connected to the dates of the offence.***

5) **That**, the learned magistrate erred in law and facts by failing to consider my defence.

7. Later he lodged amended grounds which were as follows:-

1) **That**, the trial court faulted the points of law and fact when reaching the decision to convict while failing to observe that the evidence adduced by the prosecution witness lacked corroboration hence made up of pure malice that was choreographed in order to fix the appellant.

2) **That**, the trial court gravely erred in law by not informing the appellant of his rights of legal representation as is enshrined in the constitution of Kenya 2010 under Article 50(2) (h).

3) **That**, the trial court grossly erred in point of law and fact when passing the verdict to convict while failing to note that the prosecution did not prove their case beyond shadows of doubts as is required of them by the rule of law.

4) **That** the trial court misdirected itself in points of law and fact when basing the conviction relying on the medical evidence without finding that the evidence adduced in support of the same left a lot to be desired by the Hon. Court.

5) **That**, the trial court further erred in law and fact when rejecting the appellants defence of alibi without giving any cogent reason for so doing as is provided under Section 169(1) of the C.P.C.

8. The parties agreed to canvass appeal via written submissions.

9. The appellant filed and served the respondent. The respondent did not file but opted to tender oral submission.

10. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

11. In reaching its decision, this court has to bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

12. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364**. See also **OKENO – VS- REPUBLIC**.

13. The prosecution evidence was given by five witnesses as follows:-

14. A *voire dire* examination was carried out to the minor and the court found out that she was intelligent enough to testify. She was thereafter sworn and did testify that on 31/07/2015 at around 1:00 p.m. while she was all alone in their home, the accused person told her to open the door.

15. He took her to his bed, he removed his pants and thereafter the accused person inserted his penis in her vagina for one minute. The accused person then gave her a loaf of bread so that she may not report.

16. The following day, she reported the incident to her mother. She was taken to the hospital and then to the police station.

17. On cross-examination, PW1 testified that she could not remember when she was defiled.

18. PW2, TM testified that on 31/07/2015, at 1:00 p.m. she gave PW1 lunch and then left for the market. The following day, she heard Esther ask PW1 what had been done to her. They came to the police station and reported the matter. This witness was not cross examined by the accused person.

19. PW3 EN testified that on 01/08/2015, in the morning hours as she was preparing beans with PW1, the accused person came with half a loaf of bread and gave it to PW1. Later on, PW1 told her that she had been defiled by the accused person the previous day.

20. She examined her private part and saw lacerations and small wounds. She took her to Tawa Hospital, then to Machakos Hospital. She thereafter reported the matter to Tawa patrol base.

21. On cross-examination, PW3 testified that the accused person has never bought them bread.

22. PW4 Esther Mbele a clinical officer attached to Tawa Sub-County hospital testified that on 01/08/2015, she examined PW1 and referred her to and referred her to Machakos for further tests. Her vagina had minor bruises. She made a conclusion that there must have been penetration. This witness was not cross-examined by the accused person.

23. PW5 Ephantus Kenyatta of Tawa patrol base, testified that on 02/08/2015, he was minuted this case to investigate. He recorded the statements of the witnesses and issued PW1 with a P3.

24. He thereafter arrested the accused person and charged him with the offence before court. He produced the birth certificate of PW1 as exhibit in this case.

25. The accused person was put on his defence and he testified on sworn testimony without calling any witnesses. He testified that he knows nothing about this case and that the complainant's mother wanted to chase him away before paying him.

26. On cross-examination, the accused person testified that his relationship with PW3 has been so good.

27. The accused person submissions were as follows:-

28. That the entire evidence as was adduced by the prosecution witnesses were based on malice in order to fix him the appellant and thus urge the Hon. Court to disregard the same.

29. That it is the duty of the Hon. Court to find out whether there was penetration or not, and if there was, must be proved beyond all shadows of doubt. According to PW4, the clinical officer who examined the complainant and filled the PW3 P3 form, she told the court that there were bruises on the vaginal wall but after examining patient; she referred her to Machakos Level 5 for further examination and treatment after only issuing her (PW1) with painkiller.

30. Had the trial court really a live to its finding it would have noticed that;

1) There was no collaborative evidence adduced by the prosecution witnesses.

2) That the medical report was not conclusive to justify penetration if there was any.

3) The investigations were shoddy hence did not reach the threshold of the required standard to be relied upon to base the conviction.

31. Ignorance of the law can sometimes only culminate substantial injustice and such it was incumbent upon trial court to invoke and uphold the rule of law as stated under **Article 50(2) (h)** of the Constitution of Kenya 2010. The offences falling under Sexual Offences Act no. 2006 are by their very nature indictment whose consequences upon conviction are grave.

32. Thus it is imperative that the court of law should at all times invoke constitutional right under the above quoted Article of the rule of law because it is an integral of the fundamental rights and freedom of all citizens that states as follows: **Article 50(2) (h)**:

“Every accused person has the right to a fair trial including the right to have an advocate

assigned to the accused person by the state and at the state expenses if substantial injustice would otherwise result, and to be informed of these right promptly”

33. The trial court shifted the burden of proof from the shoulders of the prosecution to that the accused person in breach of the law. It is not the duty of accused person to prove his innocence before the court but it is the duty of the prosecution side to prove their case beyond all shadows of doubt.

34. The state counsel Ms. Gitau replied orally. She submitted that the victim's evidence was corroborated by evidence of PW1 and 3. PW3 victim's mother got report that the appellant defiled the victim. She examined victim's genitals and saw bruises. PW4 a doctor examined the victim and observed bruises and opined that there was prove of penetration.

35. The appellant was known to the victim as he was working as their employee for 6 months. On issue of his denial of representation under Article 50(2) (h) of the constitution, it is submitted that, the same right is not absolute. The appellant was able to defend himself and he was not prejudiced. In any event, he never sought assistance on the same.

36. The age of the victim was proved via a birth certificate produced and the P3 form. All the ingredients of the offence namely, age of the victim, penetration of her genitalia and identification of the perpetration were proved beyond reasonable doubt.

37. The defence tendered was a mere denial. The evidence on the said ingredients of the offence charged was never challenged.

38. After going through the evidence on record, I find the issues are:-

- Whether the ingredients of the offence charged were proved?

- Whether appellant's right to fair trial were violated?

39. On ground one, the prosecution case on facts was geared to prove **Penetration of victim genitalia, Age of child and identity of the penetrator**. See NGUI CASE.

40. PW1 **CM** testified that she is ten years old. PW5, the investigating officer produced PW1's birth certificate which showed that she was born in 11th April 2005. The trial court was convinced that PW1 was 10 years old and therefore a minor as at the time when the alleged offence took place.

41. Pw1 testified that on 31/07/2015 at around 1:00 pm, the accused person took her to his bed, he removed his pants and then inserted his penis in her vagina for one minute. She positively identified the accused person in court to have been the person who inserted his penis in her vagina.

42. In Sexual Offences the evidence of the medical practitioner is very critical in corroborating the evidence of the victim PW4. The clinical officer testified that when she examined the minor on 01/08/2015, she found out that her vagina had bruises. She made an inference that there was some sign of penetration because there were bruises on the vaginal wall of the minor.

43. PW3 further corroborated the testimonies of PW1 and PW4 as she testified that when she examined the private parts of PW1, she saw lacerations and small wounds.

44. The evidence of the key prosecution witnesses was very very consistent and well corroborated and I had no reason to doubt the same.

45. The accused person in his defence testified that he knows nothing about this case. The trial magistrate found appellant defence to be a mere denial. I find that from the evidence on record, the trial court was justified to arrive at the above conclusion.

46. On the complaint that the appellant's right to fair trial was violated, the court notes that the issue is being raised in the appeal for the first time.

47. However, the provisions are mandatory on the issue of information of that right and appointment of a legal representation if appellant is not able to afford one and if substantial injustice would otherwise result.

48. The Supreme court in **R –VS- KARISA CHENGO PET NO 5 OF 2015** In the above context, held that;

“It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

-the seriousness of the offence;

-the severity of the sentence;

-the ability of the accused person to pay for his own legal representation;

-whether the accused is a minor;

-the literacy of the accused;

-the complexity of the against the accused;

In concluding on the above issue, it is our finding that in addition to the specific guarantee of legal representation afforded to an accused person by Article 50(2) (h) of the Constitution, there is now in operation an elaborate legal aid scheme that is in the process of implementation following the enactment of the Legal Aid Act No. 6 of 2016.”

49. However, there is no general or specific parameters set other than instances cited above to measure the instance where the substantial injustice may result to meeting the threshold contemplated by the constitution nor does the constitution prescribe that failure to comply with the stated provision would result with mistrial or the proceedings being nullified.

50. However, the court of appeal in **JULIUS KAMAU MBUGUA –VS- REPUBLIC, CRIMINAL APPEAL NO. 50 OF 2008** which was decided on **8th October, 2010** after reviewing several local and foreign decisions on this constitutional issue, the Court of Appeal came to the conclusion that violation of an accused's constitutional right does not render the trial a nullity. The accused's remedy in such circumstances lies in a claim for compensation by way of damages.

51. In view of the decision in **JULIUS KAMAUMBUGUA –VS- REPUBLIC (SUPRA)** I find and hold that the violation of the appellant's constitutional rights did not render his trial a nullity.

52. The court thus reject the ground and states that the appellant is at liberty to pursue his claim in a different forum.

53. The court thus finds no merit on appeal and make the following orders:

1) The appeal is dismissed, conviction is affirmed and sentence confirmed.

SIGNED, DATED AND DELIVERED THIS 20TH DAY OF SEPTEMBER, 2017.

C. KARIUKI

JUDGE