



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 185 OF 2014

FRANCIS MUTUA MULLI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. L. Simiyu Ag. SRM delivered on 24th September 2014 in Criminal Case No. 1173 of 2013 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted and sentenced to serve twenty five (25) years imprisonment for the offence of defilement of a child, contrary to section 8(1) (3) of the Sexual Offences Act. The particulars of the offence were that on 28th September 2013 in Kathiani District within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of FMW, a child aged 15 years.

The Appellant was also charged with the alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2016. The particulars of the offence were that on 28th September 2013 in Kathiani District within Machakos County, he intentionally and unlawfully touched the vagina of FMW, a child aged 15 years with his penis.

The Appellant pleaded not guilty to the main and alternative charge on 3rd October 2013. The hearing commenced before the trial magistrate who heard seven prosecution witnesses, put the Appellant on his defence. The Appellant gave unsworn testimony and did not call any witnesses and was convicted of the main charge.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition and Memorandum of Appeal both dated 6th October 2014, as well as the Amended Grounds of Appeal availed to this Court. In summary, the Appellant alleges that the trial magistrate erred in law and facts by convicting the Appellant without sufficient evidence and on uncorroborated evidence; , without taking into consideration the Appellant's testimony and evidence; and by convicting the Appellant when the evidence on record revealed that the Appellant was under the age of 18 years at the time of the commission of the alleged offence.

The Appellant also availed to the Court two sets of written submissions on his appeal wherein he mainly argued on the issue of being a minor at the time of the commission of the offence and referred the court to the testimony of PW1 during cross-examination where PW1 is alleged to have stated that the Appellant was 9 years old. He stated that he was under the age of 18 years at the time of the alleged offence and that the trial magistrate ought to have ordered for an age assessment report on the Appellant. He also submitted that the ingredient of penetration for the offence of defilement to be proved was not established

conclusively, as there was contradictory evidence in the testimony of PW1, PW2 and PW6.

Mrs Tabitha Saoli, the learned prosecution counsel, also availed written submissions filed on 3rd March 2016. It was urged therein that the prosecution through the testimony of its witnesses had proved the charges against the Appellant beyond reasonable doubt, and proceeded to analyse the evidence in light of the ingredients for the offence of defilement. Further that the identification of the Appellant was satisfactory, however that the trial Court ought to have considered a lesser sentence and non-custodial sentence considering that the Appellant was a minor.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

In this regard after going through the grounds of appeal, the arguments made and evidence of the five prosecution witnesses and that of the Defence, I note that the two issues raised by the Appellant are whether the Appellant was a minor at the time of commission of the offence, and secondly, if the Appellant was convicted for the offence of defilement on the basis of sufficient and satisfactory evidence.

On the first issue I find that the Appellant's ground as to his age are raised as an afterthought for various reasons. Firstly, the Appellant did not indicate to the trial magistrate that he was a minor or make any application for an age assessment during trial. Secondly the charge sheet clearly indicated that his apparent age was 30 years and there could have been no mistaking a 9 year old for a 30 year old at the time of charging, which in any event would have been apparent to the trial magistrate. Thirdly, there is a mistake in the typed record of the trial court that he relies upon for his argument that it showed that he was 9 years old. The original record of the trial court shows that upon cross-examination by the accused, PW1 stated as follows:

“I did not find you defiling my child, I followed what the minor told me. I have nothing against you. You are a young boy and I have totally nothing against you apart from this present case”

The witness therefore did not state that the Appellant was 9 years old, but that he was a young boy.

Lastly, this Court thought it prudent to confirm the Appellant's age in light of the ground of appeal he raised, and ordered that he be taken for an age assessment. The age assessment report filed in Court on 4th November 2016 by the Medical Superintendent Machakos Level 5 Hospital showed that the Appellant was found to be 34 years old. The Appellant was therefore 31 years old in 2013 at the time of the commission of the offence.

As regards the second issue as to whether the Appellant was convicted on the basis of sufficient evidence, the prosecution called seven witnesses to testify. PW1 was MW1 the complainant's mother, who testified that on 28th September 2012 at about 7 am she sent the complainant together with her younger son MW2 to a friend's house and later saw the son at 8.00am without the complainant. Upon inquiring where the complainant was, the son told her that the Appellant had given him money to buy *mandazi* and that when he took it back, the Appellant told him that the complainant had left for home. PW1 then inquired from the Appellant who told her that the complainant had left with another woman. PW1 later met the complainant who was walking with difficulty, and upon inquiry the complainant informed PW1 the Appellant had defiled her, whereupon PW1 reported the matter to a village elder and took the complainant to hospital.

The complainant, FMW was PW2, and testified that on 28th September 2013 after her mother sent her and her younger brother to the friend's house, they met the Appellant, who sent her brother to buy *mandazi* for him and told her to sit down and wait for him. After the brother left the Appellant grabbed the complainant, dragged her to his house, undressed her and threw her on the bed. That he then also undressed, covered the complainant's mouth with his hand and inserted his sexual organ into the complainant's sexual organ six times.

He then left her for a while in his house which he locked, and that when he came back he told her that her brother had returned and left, and continued inserting his penis into her private parts. Later on at about 2 pm, he opened the door gave her Kshs 150/=. The complainant testified that she told her mother the following day what had happened and the matter was reported to the Assistant chief and police, and the complainant taken to hospital. The complainant testified that the Appellant was well known to her and identified him in court

The complainant's younger brother MW2 who was PW4, reiterated the events of that date as narrated by PW1 and PW2, as did PW3, Samuel Mwelu Nduto, the village elder to whom PW1 made the report on the complainant's defilement.

The other witnesses who testified were Patrick Mutuku Mbithi (PW5) the Assistant Chief of Kitunduni, to whom the report of the defilement was made by PW3 and who then took the complainant to the police; Dr Mercy Korir (PW6) who examined the complainant and filled the P3 form; and Corporal Binti Hamadi (PW7) who was attached to Kathiani Police station and recorded the report of the defilement. She produced the money given to the complainant by the Appellant and the complainant's age assessment report as exhibits.

The Appellant when put on his defence testified that he was on the material day splitting wood, which he was also doing when he was arrested, and that the complaint was instigated by the mother of the complainant whose aunt is married to his brother. He denied that the money produced as an exhibit originated from him, and stated that the case against him is fabricated.

PW2 and PW4 testified that the Appellant was well known to them and they knew him by name and were able to positively identify him when they made the report of what happened leading to his arrest. PW2 in addition testified that the Appellant inserted his sexual organ into her sexual organs which was evidence of penetration. The evidence of PW6 corroborated the penetration She testified that upon examination of PW2, she found that PW2's hymen was broken. Lastly, the age assessment report produced by PW7 as the Prosecution's exhibit 3, showed that PW2 was 15 years old as at 17th October 2013.

The ingredients of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

From the evidence as analysed in the foregoing, it is my finding that this elements were sufficiently proved by the prosecution witnesses. The sentence was also legal, as section 8(3) of the Sexual Offences Act provides that 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. However, since the Appellant was found not to have any antecedent record and was a first offender, I reduce his sentence of imprisonment to twenty years, which is the minimum sentence provided by the law for the offence he committed.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (3) of the Sexual Offences Act, and reduce the sentence imposed upon the Appellant to a term of imprisonment of twenty years, which term shall run from the date of his conviction by the trial Court. This Appeal is accordingly dismissed.

It is so ordered.

DATED AT MACHAKOS THIS 22nd DAY OF NOVEMBER 2016.

P. NYAMWEYA

JUDGE