



167/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 72 OF 2012

W N MAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 28 of 2012 by Hon. S.K. Mutai, SRM on 20/4/2012)

JUDGMENT

1. **W N M**, the appellant was charged with the offence of **defilement** of a girl contrary to **Section 8(1)** as read with **subsection (2)** of the **Sexual Offence's Act, 2006**. Particulars thereof being that on the **24th** day of **February, 2012** at about **1.00am** at **[particulars withheld] Village**, in **Mutomo District** within the **Kitui County** intentionally and unlawfully caused his penis penetrate the vagina of **K N** a child aged **10 years**.

In the alternative, he was charged with committing an **Indecent Act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**. Particulars of the offence being that the **24th** day of **February, 2012** at about **1.00am** at **[particulars withheld] Village**, in **Mutomo District** within the **Kitui County** committed an **Act of Indecency** with **K N** a child aged **10 years** by touching her private parts namely vagina and breasts.

2. Having pleaded not guilty to the charge, the appellant was tried, convicted on the main count and sentenced to **life imprisonment**. Being aggrieved with the conviction and sentence he appealed. In his amended grounds of appeal he stated thus; that the trial magistrate erred both in law and fact by failing to consider the fact that, his constitutional rights under **Article 25(c), 50 (2) (c) (h) (j) and (k)** of the **Constitution** were violated; the prosecution's evidence is highly inconsistent and contradictory; the prosecution did not prove their case beyond reasonable doubt; his defence was not considered contrary to **Section 169(1)** of the **Criminal Procedure Code**.

3. The case presented by the prosecution was that PW1 **K N** a child aged **10 years** old was asleep with her younger siblings when her father **N** took her to his bed and removed her clothes and had sex with her. She was in much pain but did not scream as he threatened to beat her. The appellant had sex with her three times. PW2, **S N** the mother to PW7 stated that she was asleep at midnight when her husband, the appellant woke up and went to where the children were. He took PW1 and had sex with her. She asked him what he was doing then left for her parents' house. Her mother referred her to the village elder.

4. PW3, **S M** the village elder on receiving the report at 1.00am, with the assistance of **PW4, Julius**

Kameta Singi went to arrest the appellant. The appellant declined to open the door. They had to break into the house. The appellant emerged armed with a bow and arrows. They subdued him and effected arrest. He was taken to **Mutomo Police Station**. PW6 No. **56626 Corporal Rose Wekesa** re-arrested the appellant and issued the complainant with a P3 form. She was examined by PW5, **Daniel Mulwa** a Clinical Officer at **Mutomo Health Centre**. He found her vagina reddish, the hymen was broken, there was foully whitish discharge. A vagina swab done showed the presence of spermatozoa. He concluded that the child had been defiled.

5. The appellant on being put on his defence said that in the month of **July** the previous year he went back home to find his wife had a relationship with a village elder. They even sired a child. On **23/2/2012** he found them at the river fetching water. His wife went back home. They had supper. At midnight his wife woke up their child, they went to the river. People then went and arrested him. He was taken to the Administration Police Camp. He was surprised to be told that he had defiled the child. He stated further, that both of them were examined but nothing was detected. No spermatozoa was found.
6. It is the duty of this court being a first appellate court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see or hear witnesses testify (see **Pandya versus Republic [1957] E.A. 336; Okeno versus Republic [1972]E.A. 32**).
7. I have carefully perused written submissions filed by the appellant and the oral reply thereto by the learned State **Counsel Mrs Abuga** who opposed the appeal.
8. The first issue in contention is whether the trial was null and void due to alleged violation of the appellant's rights. **Articles 25 (c)** of the **Constitution** provides.

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-

c) the right to a fair trial”

9. Article 50(2) (c) (h) (j) and (k) provides:-

“Every accused person has the right to a fair trial, which includes the right -

(c) To have adequate time and facilities to prepare a defence;

(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 this right promptly;

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) To adduce and challenge evidence”.

10. A perusal of the court record shows that the appellant was arraigned in court on the **27th February, 2012**. The charges were read to him as provided by the law and he denied the charges. Consequently a plea of not guilty was entered. The appellant was informed of the charge and particulars of the offence as set out in the charge sheet. That is what he pleaded to. The appellant was therefore informed the substance of and every element of the charge.
11. The case was fixed for hearing on **12th March, 2012**. This was **14 days** later. The case was not heard until **20 days** later. On the **19th March, 2012** the appellant was asked whether he was ready to proceed. He answered thus:-

“I am ready to proceed.”

His answer prompted the court to proceed with the trial. There is absolutely nothing on record to indicate that he asked to be furnished with statements and he was denied. Prior to him being put on his defence he was notified of his right on how to give evidence pursuant to the provisions of

Section 211 of the **Criminal Procedure Code** whereby he replied thus:-

“I will give an unsworn statement I have no witness. I am ready to defend myself today”.

12. The appellant cannot authoritatively state that he was denied a chance to prepare for his trial. The record proves otherwise.

13. Regarding the issue of legal representation at the state expense it has been argued that such a right mainly applies to accused persons who are charged with offences that carry death penalty. (See ***the case of John Swaka versus. The DPP & 2 others {2013} eKLR.*** The Court while referring to the Court of Appeal case of ***David Njoroge Macharia versus Republic- Criminal appeal No. 497 of 2007*** states thus:-

“The Court of Appeal thus expanded the Constitutional requirement that: legal representation be provided at State expense where “substantial injustice might otherwise result” to include all situations where an accused person is charged with the offence whose penalty is death.”

14. In the instant case the appellant has not established how complicated his case was that would have required protection by the Court as some substantial injustice would have resulted. Imprisonment meted out cannot be viewed to be substantial injustice. In the premises the appellant’s rights were not violated.

15. The victim’s evidence as to her age was not challenged. Medical examination of the complainant proved that there had been penetration of her genital organs namely, vagina. Spermatozoa was found present in her organ. The evidence adduced by the prosecution was not contradictory or inconsistent as alleged. Proof was beyond reasonable doubt. In reaching its finding, the trial court took into consideration the defence put up by the appellant. The court did find the prosecution’s case overwhelming.

16. In the instant matter, in reaching its finding the trial court stated thus:-

“I find that the prosecution has proved its case of defilement and indecent Act with a child contrary to Section (1) (2) and 11(1) respectively of the Sexual Offences Act No. 3 of 2006 beyond reasonable doubt against the accused. I therefore, convict the accused accordingly.”

17. A duplication of conviction of the main and alternative counts is irregular. That was misdirection on the part of the trial court. I therefore quash the conviction on the alternative count, acquit the appellant of the same and convict him on the main count.

18. On sentence, a person found guilty of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** shall be sentenced to **life imprisonment**. In the case of ***Kiwalabye versus Uganda, court of appeal Criminal Appeal No. a 143 of 2001***, the Court of held thus:-

“The law is well settled that whenever a trial court has exercised its discretion on sentence, the appellate court will not interfere unless the discretion has been exercised unjudiciously or wrong principles. Here the trial court gives reasons; the appellate court will interfere only if the reasons given are clearly wrong or untenable. Where no reasons are given for the decisions, the appellate court will interfere if it is satisfied the wrong (sic).”

19. In the instant appeal, I find no reason to interfere with the trial court’s decision. In imposing the sentence the trial court considered mitigating factors, the seriousness of the charge and circumstances in which the offence was committed. The learned trial magistrate acted properly in sentencing the appellant to **life imprisonment** as provided by the law.

20. In the result, I dismiss the appeal for lack of merit. I do uphold the sentence imposed.

21. It is so ordered.

22. **DATED, DELIVERED and SIGNED** this 22nd day of **JANUARY, 2014.**

L.N. MUTENDE

JUDGE