



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 21 OF 2019

(CORAM: F.M. GIKONYO J.)

From the conviction and sentence of Hon. A. N. Sisenda, RM in Narok sexual offences Case No. 17 of 2018 on 2nd April 2019

DAVID KIPKEL.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

Charge

[1] This appellant was 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. The particulars are that on 24th day of February 2018 at [particulars withheld] village in Narok North sub county, within Narok county, unlawfully and intentionally caused his penis to penetrate the vagina of MN, a child aged 12 years.

[2] He was charged in the alternative with committing an indecent act with a child contrary to section 11(1) of the sexual offences act no. 3 of 2006. The particulars are that on 24th day of February 2018 at [particulars withheld] village in Narok North sub county, within Narok county, unlawfully and intentionally touched the vagina of MN a child who was 12 years.

[3] Being dissatisfied with the said conviction and sentence he preferred an appeal as set out in his grounds of appeal.

Appellant's submission

[4] The Appellant submitted that after full trial the trial magistrate sentenced him to life imprisonment.

[5] He also submitted that there were contradictions in the testimony of **PW1** and **PW2** on identification of the appellant, yet, the Prosecution did not conduct an identification parade. He was of the view that his identification was not proved to the required standard. He has relied on the case of **Robert Gitau Vs Republic Cr. App. No. 63 of 1990**. He therefore urges this court to consider the evidence of **PW1** to be true according to section 124 of the CPC.

[6] The appellant submitted that he was a child (17 years) at the time of the offence and that the state should have granted him legal representation at the expense of the state. He was not represented in the proceedings making the whole process illegal and defective. That the proceedings were a contravention of sections 77(1), 186 (b) 190 (2) of the children's act.

[7] On that basis, he claimed that he was not accorded a fair hearing and that the sentence meted on him was not in accordance with the Children's Act 2001. He relied on section 77(1) (b) and section 190(1) of the Children's Act 2001. Thus, his right to fair hearing under article 25(c) of the constitution of Kenya 2010 was violated. He relied on the case of **K.M.M Vs Republic (2015) eKLR Cr App No. 114 Of 2015**.

[8] According to the appellant, the sentence meted on him was a gross violation of his rights as a child as guaranteed in article 53 (1) (f) (i) (ii) and 52 (1) (f) of the constitution.

[9] The appellant argued further that the prosecution did not prove the element of penetration beyond reasonable doubt. He relied on the case of **Mark Oiruri Mose Vs Republic Cr App No 295 Of 2012 (2013) eKLR**.

[10] He concluded this aspect of his appeal by submitting that the life sentence meted on him is unconstitutional as was stated in **petition 15 & 16 of 2015 Francis Muruatetu And Another Vs Republic**. He, therefore, sought for resentencing to be considered in this appeal.

[11] He also urged that his defence was not considered by the trial magistrate. He stated that the falsity of the defense lies with the prosecution to prove. To support this proposition, he relied on the case of **Victor Mwendwa Mulinge Vs Republic**

[12] Ultimately, he prayed that this appeal be allowed; conviction and sentence be set aside and quashed, respectively. That he be sentenced under section 191 (1) (g) and (i) of the Children's Act.

Respondent's submission

[13] M/S. Torosi, the prosecution counsel, submitted for the state that, the appellant was 18 years old at the time the offence was committed; a fact that was proved through age assessment. The investigating officer produced the age assessment report as **Pexh 4**. The age of the complainant was proved through an age assessment to be 11 years as per **Pexh.3**.

[14] According to the prosecution counsel, evidence of penetration was contained in the testimony of **PW1** and supported by the evidence of **PW4** who produced P3 form and clinical notes **Pexh 1 and 2**.

[15] The prosecution submitted that **PW1** was a credible witness and that at no given time did she contradict herself. Furthermore, her testimony was corroborated by documentary evidence adduced in court and the testimony of the other independent witnesses. That section 124 of the Evidence Act is relevant in this matter.

[16] On the defense of the appellant, the prosecution stated that he did not challenge the evidence they had adduced.

[17] That the incident occurred in broad day light and therefore there was no case of mistaken identity. The counsel for the respondent submitted that the conviction was safe as against the Appellant and urged the court uphold it.

ANALYSIS AND DETERMINATION

Court's duty

[18] As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. In the case of **KILU & ANOTHER Vs. REPUBLIC [2005]1 KLR 174** the Court of Appeal stated;

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

[19] I have carefully considered the petition of appeal and submissions presented. The grounds of appeal may be collapsed into three grounds:

- 1. Whether the prosecution proved their case beyond reasonable doubt;**
- 2. Whether the appellant was a minor and whether he was accorded a fair hearing**
- 3. Whether the sentence meted on the appellant is manifestly excessive in the circumstances.**

Did the prosecution prove their case beyond reasonable doubt?

[20] The Appellant was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act** which provides:

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

Section 8(2) of the Act provides:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

[21] Accordingly, to secure a conviction on the offence of defilement, the prosecution must prove beyond reasonable doubt;

- a) That the complainant was a child;**
- b) That there was penetration of the child; and**

c) *The appellant was the perpetrator of the offence.*

See the unreported case of *Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013*, which has been cited with approval in the reported case of *Kyalo Kioko v Republic [2016] eKLR* that: -

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

[22] *What does the evidence portend?*

Age of the complainant

[23] On age, **PW1** (the complainant) testified that she was 11 years old. **PW2** (the complainant’s father) testified that the complainant was 12 years old. **PW4** produced P3 form which indicated that the complainant was 11 years old. **PW5** testified and produced an age assessment report **Pexh. 3** which places the age of the complainant at 11 years old.

[24] I do note that the oral testimony by the complainant’s father was that the complainant was 12 years old. This testimony was not backed by any succinct details as to the actual date of birth of the complainant as to be taken to be most assuring that the complainant was 12 years. On the other hand, the age assessment report which was done by a professional doctor places the victim’s age at 11 years; the report has not been put to doubt in any respect. The report is also consistent with the evidence by the complainant that she was 11 years old. P3 form also indicated that she was 11 years old. Accordingly, there is quite cogent evidence which proves the age of the complainant to be 11 years. The seeming contradiction does not go to the root of the evidence as it is readily reconcilable by from the above pieces of evidence on age. I, therefore, find that the complainant’s age was sufficiently proved to be 11 years and therefore a child in accordance with **Section 2 of the Children Act** which defines child as **“any human being under the age of eighteen years.”**

Penetration and perpetrator thereof

[25] **Section 2(1) of the Sexual Offences Act** defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

[26] In the case of *Mark Oiruri Mose v R [2013] eKLR* the Court of Appeal stated that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.” (Emphasis added).

[27] **PW1** told the court that the appellant removed his penis.... pulled up her dress and removed and threw away her biker. He then started doing ‘tabia mbaya’ on her. The P3 form and treatment card produced by **PW4** show that the complainant had perineal tear about 3 cm long with lacerations on the anterior vaginal walls. She was bleeding from the perineal tear and vaginal wall. This piece of evidence is consistent with the evidence by the complainant, and is proof beyond reasonable doubt that there was penetration of the child. I so find.

Was Appellant the assailant?

[28] Positive identification that the appellant was the person who caused penetration of a child is crucial for conviction for defilement to ensue.

[29] I do not find anything which suggest any element of delusion on the part of the complainant in recognizing the Appellant as the person who penetrated her genitalia. Her evidence on identification alone may found a conviction as long as the court records reasons for believing the truth of the evidence in accordance with **Section 124 of the Evidence Act** which provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

[30] From a plain reading of the above section, it is clear that corroboration is not a mandatory requirement as long as the Court believes the victim is telling the truth and records the reasons for believing the victim.

[31] The complainant narrated to the court the events and how they occurred and she was categorical that the appellant removed his penis, removed her clothes and had carnal knowledge of her. She identified him during a broad day light. Her evidence was cogent, gave a picturesque of the incident with such succinct details of the manner it happened and the identity of the assailant. The testimony of the complainant was corroborated by **PW2** and **PW3**. The evidence leaves no doubt that the appellant caused penetration of her. I so find and

hold.

Of claims that the appellant was a minor and that he was accorded a fair hearing

[32] **PW4** (the investigating officer) established the age of the appellant through an age assessment. The age assessment report revealed that the appellant was 18 years at the time when the offence was committed. The age assessment report was produced as **Pexh 4**. The fact of age of the appellant was proved. No birth certificate was provided as had been advised by the trial court. The trial magistrate was therefore right in basing age of the appellant on the age assessment report. The said age assessment report is an authentic report and nothing detracts from its substance and integrity. I therefore find that the appellant was 18 years. He cannot, therefore, be considered to be a minor or get benefits due to a minor. As such, he cannot claim that he was not accorded fair hearing because he was not given the mandatory accommodations and rights due to a minor in conflict with the law.

Provision of legal counsel

[33] The appellant also argued that he was unrepresented and, was therefore, not accorded a fair hearing. In ***Francis Macharia Gichangi & 3 Others V R. Cr. Appl. No. 11 of 2004***, the Court of Appeal stated that it is to be reasonably expected that an Accused person who claims that his rights have been violated will at the very least raise the issue with the trial court. The appellant herein never raised any issue regarding violation of his rights with the trial court. Nonetheless, I will determine his complaints.

[34] Article 50(2)(h) of the Constitution provides that: -

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

[35] The likelihood of suffering substantial injustice is not limited to capital offences. See ***R v Karisa Chengo & 2 Others Supreme Court Petition No. 5 of 2015***.

[36] Section 43(1)(b) and (c) of the Legal Aid Act directs that, where substantial injustice is likely to result, the court must inform the accused of the right to legal aid and inform the National Legal Aid Service that it must provide legal aid.

[37] In determining whether substantial injustice would result, the court must consider the following factors:

- i) The severity of the charge and sentence;
- ii) The complexity of the case; and
- iii) The capacity of the accused to defend themselves (Section 43(1A), Legal Aid Act).

[38] ***Alugha Ndegwa v R (Court of Appeal at Nairobi Criminal Appeal (Application) No. 2 of 2014)***, the Court of Appeal allowed an application for legal aid from an appellant who had not been represented in the proceedings before two lower courts. The Court of Appeal held that because he had not previously been represented and because he was serving a life sentence, substantial injustice might occur if he was not represented during the appellate proceedings.

[39] During the first appearance, the trial court explained to the appellant the nature of the offence and that it attracts a sentence of life imprisonment if found guilty. No request was made for provision of legal counsel at the expense of the state so as to call into play the procedure for provision of an advocate at the expense of the state in Section 40(1), Legal Aid Act. The appellant was not a child as to enjoy the rights of a child and need to meet the requirements set out under Section 36(1), Legal Aid Act was necessary.

[40] As was held by the Supreme Court of Kenya in the case of ***Republic Vs Karisa Chengo & 2 others (2017) eKLR***, the right to legal representation is not open ended but is only available “if substantial injustice would otherwise result. The appellant continued with self-representation and did not show difficulties in conducting his defence. Nothing show complex issues of law in the case which would result to substantial injustice if no advocate was allocated to him. I do not find anything which occasioned a failure of justice or a breach of tenets of fair hearing. This ground of appeal, therefore, fails.

Of sentence

[41] Under Sexual Offences Act, age of the victim of sexual assault determines the severity of offence and sentence. In this case, the complainant was 11 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

[42] Following the decisional law in Muruatetu case, mandatory sentences offend the Constitution for taking away the discretion of the court to mete out appropriate sentence on the basis of the circumstances of the case. Such penalties are to be taken as maximum sentence for the offence. It is now generally accepted that this is a principle of law which should apply *mutatis mutandis* to all such penalties even in Sexual Offences Act. See the case of ***Evans Wanjala Wanyonyi v Republic [2019] eKLR*** in which the Court of Appeal imported the principle in ***Francis Karioko Muruatetu decision (supra)*** to sexual offences.

[43] Section 8(2) of the Sexual Offences Act is tinged with offensive mandatory nature of sentence. Nonetheless, if I take life sentence to be the maximum sentence for the offence, I should therefore, ask whether the life sentence imposed on the appellant is appropriate sentence in the circumstances of this case.

[44] I will be accordingly guided. The Court of Appeal in *Thomas Mwambu Wenyi vs. Republic [2017] eKLR* cited the decision of the Supreme Court of India in *Alister Anthony Pereira vs. State of Maharashtra* at paragraphs 70-71 where it was held on sentencing that: -

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

[45] Of important consideration: On the one hand: First, the victim of the offence is a child of 11 years. Second; the said child will forever live with the shame and great mental trauma caused to her by this savage act of sexual debauchery. Third; this is a serious offence of which extreme societal desire to get rid of society of these wickedness and sexual perversion has been expressed publicly and formally through Sexual Offences Act. See *James Okumu Wasike (2020) eKLR*.

[46] On the other hand: the appellant was merely 18 years old when he committed the offence; just at the threshold for majority age. He had a whole life ahead of him; but which was blown away by the thoughtless commission of this offence. The law is not insensitive, for it recognizes rehabilitation as one of the noble objectives of punishment. Such young life deserves a second chance to rebound to some semblance of life or productive life after prison rather than being condemned to oblivion in incarceration. Accordingly, life sentence in the circumstances of this case is excessive and harsh; it does not serve the interests of justice. See *S. V. Mchunu & Another (AR 24/11) (2012) ZAKZPHC6, Kwa Zulu Natal High Court*.

[47] Accordingly, I set aside the life imprisonment meted upon the appellant by the learned trial court. I substitute it with a term of the 20 years. The appellant had been in custody since he was arrested. Pursuant to section 333(2) of the Criminal Procedure Code, the sentence will commence from 24th February 2018. It is so ordered. Right of appeal explained.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 10TH DAY OF MARCH 2021

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F. GIKONYO

JUDGE

In the Presence of:

1. Ms. Torosi for the State
2. The appellant
3. Mr. Kasaso – Court Assistant

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F. GIKONYO

JUDGE