



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.291 OF 2014

KEN WANJALA MBUGUSWAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. J. N. NTHUKU (SRM) ON 24TH NOVEMBER 2014 IN CRIMINAL CASE NO.122 OF 2013).

JUDGEMENT

1. 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 No 3 of 2006. The particulars of the offence were that on the 22nd day of June 2013 within Nakuru county intentionally and unlawfully committed an act by inserting a male genital organ (penis) into a male child genital organ (anus) of BNK a child aged 9 years which caused penetration.
2. The alternative charge was Committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act no. 3 of 2006. The particulars of the charge were that on the 22nd day of June 2013 within Nakuru county unlawfully and intentionally committed an indecent act by touching parts namely anus of BNK a child aged 9 years with his penis.
3. The appellant after a full trial was convicted and sentenced to life imprisonment hence this appeal. The appellant has raised several grounds of appeal namely that there were manifest contradictions and inconsistency in the evidence; violation of a fair trial; defective charge sheet and that the sentencing was excessive. But before looking at them it shall be appropriate at this juncture to summarise the facts and evidence as presented during trial.
4. **PW1** the complainant testified that he was a class 3 pupil at [Particulars withheld] Academy and he was 9 years old. He said that the appellant was their herder and on 22nd June 2013 at around 1pm he called him to his house where he had promised to give him a toy car which was remotely controlled. When they arrived he locked the door and told him to remove his trouser. He then laid on his bed and he sodomised him and warned him not to scream. He also warned him not to tell anyone or he would kill him.
5. He told him to wait for the toy car which he did near a dam till around 9pm when he heard someone calling him. The appellant sneaked him back to their house. He did not tell his parents what had happened but the following day in school he opened up to his teacher. He was taken to Mwariki police post and thereafter to the hospital.
6. When cross examined by the appellant the complainant said that he knew him very well and that on the material day there was some boy called Julius who was giving the cows water. He said that he laid him on the bed and threatened to kill him. He also showed him photos of his kids in his house.
7. **PW2 MG** the mother to the complainant testified that PW1 came back from school and he went with the appellant who was her herds boy. They did not come back till 6 pm when they started looking for him in vain. At 10 pm he was brought by the appellant although her husband had already reported his disappearance at the police station.
8. She said that the child was shaken but refused to talk. The appellant was arrested and taken to the police station but was later released. On 25th July 2013 she went to school and told the teacher to interrogate him as she saw that he was not sitting well. The complainant opened up to the teacher and told him what the appellant had done to him.
9. She took the child to the hospital where P3 form was filled and it was found that the complainant had been defiled. She said that the appellant had worked for her for about 6 days although he used to do casual work for her and was very close to the complainant. She

produced the birth certificate indicating that he was born on 18th April 2004.

10. When cross examined by the appellant she said that the child told her that the appellant had promised to buy him a toy car and that he could not open up as he had threatened him.

11. **PW3 DO** a teacher at [Particulars withheld] Academy testified that he was called by the head teacher on 24th June 2013 and told that one of his students had disappeared but was later traced. The mother came with the complainant and told him to carry out an interrogation of his whereabouts the previous night. The child opened up and told him what the appellant had done to him. He said that he had promised to buy him toy car. He defiled him and took him near a dam where he told him to wait as he gets the toy car. He thereafter informed the head teacher what pw1 had told him.

12. **PW4 DR. EMMANUEL WEKESA** from the Nakuru provincial hospital produced the p3 form on behalf of Dr. Dida who was on leave. The report indicated that there was tenderness on the legs and he had difficulty wearing his trouser. There were also injuries on his anus as there was tenderness and signs of pain and penetration. There was however no discharge.

13. **PW5 PC ZABLON BIGINGI** from Mwariki police post carried out the investigation after the appellant was brought to the station. He recorded statements from the witnesses and preferred charges against the appellant. When cross examined by the appellant he denied that he colluded with the complainant's mother.

14. When he was placed on his defence the appellant gave unsworn defence denying the charge. He said that he worked for pw2 who gave him kshs.100 but took it back. He said that they were with the complainant but parted ways at 7pm but pw2 came asking for the complainant. He also searched for pw1 but did not find him. The complainant's uncle however came with him and the appellant was arrested although the child did not disclose anything.

15. He said that pw2 wanted him sacked so that she could get another worker. He said that there were girls in the home but he did not do anything with them.

ANALYSIS AND DETERMINATION.

16. The parties so as to determine this appeal were directed to file written submissions which they have complied. The appellant in particular aligned his submissions to the grounds of appeal. He said that there was variance on the date when the incident occurred. The charge sheet read 22nd June 2013 which dates were confirmed by pw1. PW2 however said that the incident occurred on the 24th June 2013 after the child had come from school. She reported the matter to the teacher on 25th July 2013 when she went to school with the complainant. The investigating officer talked of 23rd of June 2013.

17. The appellant in his submissions argued that the three dates contradicts each other, namely 22nd, 23rd and 24th as the date of the occurrence of the offence.

18. There learned state counsel supported the findings by the trial court. She said that there were no contradictions in the evidence as presented neither were the appellants rights of fair trial violated. All along the appellant participated in the proceedings and even went ahead to cross examine the witness without any let or hindrances. As to his submissions that the sentencing was excessive she submitted that the same was valid for the simple reason that the appellant was not remorseful at all.

19. This being a first appeal the court is enjoined to examine that evidence afresh and come up with an independent findings noting that it did not have the benefit of seeing the witnesses and their demeanour. See **OKENO.V. REP. (1973) E.A. 32.**

20. There are three ingredients of the offence herein which must be proved namely, the age of the victim, penetration, and the identity of the perpetrator.

22. The age of pw1 was well proved by the production of the certificate of birth. There was no contest that he was 9 years old.

23. As to whether there was penetration this was proved by the testimony of the minor whose evidence was candid and the same supported by the medical evidence in particular the P3 form. His mother found his sitting to be abnormal and she alerted his teacher whom he explained to what the appellant had done to him.

24. Was the appellant the perpetrator? The trial court found so and this court does not see any reason to consider otherwise. The appellant for example did not deny the fact that he was with the minor on that particular afternoon. There was no other person whom the minor identified. As a matter of fact, he lured him with a promise of a toy car. For such young lads such promise will usually allure them.

25. More significantly, the whole incident was seamless. From the disappearance of the boy that afternoon, the tracing later in the evening and the following day revealing to his teacher what he had undergone was not broken at all. There is no evidence that the minor was malicious in his evidence. Even the issue of whether there were any differences between the appellant and pw2 was not an issue of concern to the minor.

26. This court finds that the minor was truthful as envisaged under the **proviso to Section 124 of the Evidence Act** which states that;

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of the alleged

victim is 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.”

27. The appellants unsworn evidence does not hold water for the twin reasons that it was of no probative value as it was unsworn and further that the issue of kshs.100 given and taken back by pw2 was not raised when pw2 testified. In short it was an afterthought.

28. The dates which the incident occurred which the appellant wishes to capitalise on does not aid much to his case. This is for the simple reason that the incident occurred on the 22nd June 2013, and the child disclosed to the teacher on the 23rd after the mother was suspicious. Even if there were contradictions on the dates during the abduction of evidence the same was not so material to affect the fact that the minor was defiled.

29. There could have been slight differences but the charge sheet and in particular the minor agrees on when it occurred. The minor contradiction on the dates does not in my view go into the root of the matter. The minor was graphic on how, where and when the incident occurred and there was nothing to suggest that he was defiled by someone else other than the appellant.

30. The other ground raised by the appellant was the nature of the sentence. In his view the sentencing to life imprisonment was excessive. The learned state counsel relying on the authority of **C.M V. REPUBLIC 2020 ECLR** found the same to be in order for the reason that the appellant was not remorseful at all.

31. This court finds that the trial court was right in sentencing the appellant to life imprisonment as that is the sentence provided in law. However, with the advent of the now famous case of **FRANCIS MURUATETU & ANOTHER VS REPUBLIC (2017) eKLR**, and other myriad authorities flowing therefrom the courts are now generally inclined to tamper with mandatory sentencing. There must be however compelling reasons which the court must consider if at all it has to interfere with the mandatory sentence for instance the gravity of the offence and the character of the accused or the appellant for that matter.

32. In this case, the offence was grievous as the appellant betrayed the trust bestowed on him by a young child who by all indications was like his child. The alluring of a toy car was too much and there was no way he would have resisted. In any case this was a person employed by his parents and thus was so to speak, a family member.

33. Nonetheless, the court takes into consideration that the appellant was a first offender and in his mitigation he prayed for leniency. This court in the premises based on the above Supreme Court of Kenya decision is inclined to interfere with the sentence.

34. The appeal is otherwise dismissed for being unmeritorious. The sentence of life imprisonment is hereby set aside and substituted with a custodial sentence of 20 years effective from 28th June 2013 as the appellant was in custody all through.

35. Dated signed and delivered electronically at Nakuru this 4th day of March 2021.

H .K. CHEMITEI

JUDGE.