



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CRIMINAL APPEAL NO. 25 OF 2019**

**SMW.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No.38 of 2018 in the Senior Principal Magistrate's Court, at Engineer, D. N. Sure, SRM)

**JUDGMENT**

1. SMW, the appellant was charged and convicted with defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**. On 30<sup>th</sup> July, 2019 he was sentenced to life imprisonment. The particulars were that on 7<sup>th</sup> August, 2018 at [Particulars withheld] Village, Kinangop, he intentionally and unlawfully caused his penis to penetrate the vagina of PWW a child aged ten (10) years.
2. In his amended grounds of appeal, filed with his submissions, he contests the conviction and sentence on the following grounds:
  - a. That the appellant was sick during trial and unprepared as he was not supplied witness statements.
  - b. That there was no proof of penetration.
  - c. That he was a juvenile aged 17 at the time of the trial a factor not considered by the trial court.
  - d. That his defence was not considered.
3. The Court's duty in a first appeal is to consider the evidence adduced at the trial in the lower court, re-evaluate it and reach its own conclusion thereon taking into account that it did not itself hear the witnesses and see their demeanour (**Okeno v Republic [1972] EA 32**).
4. The prosecution case was made out through five (5) witnesses. The complainant gave unsworn evidence as PW1 after the court took her through a *voir dire* examination. She testified that she was sent by the accused to buy a Safaricom card for Kshs 20/= . There was none at the shop so she returned the money to the accused whom she knew as M. As he took the money he held her, forcefully pulled her to the bedroom, undressed her and got on top of her. He penetrated her with his "thing". When she told Mama M what had happened, Mama M beat M. Thereafter, both of them were taken to Engineer Hospital where they were examined.
5. PW2 TM is the complainant's grandmother. On 7<sup>th</sup> August, 2018 she had left the complainant at home and gone to cut grass. She then received a call from her daughter-in-law H (PW3) to go back home urgently. On the way she met (PW3) who told her she had seen the complainant come out of the house pulling her clothes down and the accused putting on his trouser. They went to report at Kinangop Police Station and were referred to Engineer District Hospital where the complainant was examined and treated.
6. PW3 HM is the complainant's aunt. On 7<sup>th</sup> August, 2018, she met the accused with her niece, and saw him send her to the shops. He idled about, so she got curious and decided to watch what was going on. The complainant returned to the house and entered with the accused. They locked the door. Shortly, PW3 went there and tried, unsuccessfully, to open it. She heard the accused tell her niece not to disclose what had happened. She then telephoned PW2. She watched as the complainant came outside straightening her clothes. On entering the house, she found the accused putting on his trouser. She alerted her husband who came with a village elder. They alerted the chief who told them to go to police station, and later they took the complainant to Engineer Hospital. She identified the accused in the dock.

7. The investigating officer was PW4 PC Emily Kirwa. She said the complainant and accused were brought to the police station by members of the public on 7<sup>th</sup> August, 2018, on the allegation of defilement. She booked the report and took the complainant to Engineer Hospital where, on examination, defilement was confirmed. She arrested the accused, and availed a P3 Form to the complainant. She produced the complainant's birth certificate as P. Exhibit 3. It shows the complainant was ten (10) years old.

8. Dr. Julius Ntwiga PW5 testified as the last prosecution witness. He is the Medical Superintendent at Engineer County Hospital. He availed the P3 Form filled by his colleague Dr. Rotich, and a PRC Form filled by himself. The Forms or P. Exhibits 1 (a) and 1(b). Rotich found that the child's vagina was moist with bruising, they hymen was broken and fresh hymen tags with a tear at around 6.00 O'clock. He concluded that the injuries had been inflicted by penile vaginal penetration.

9. Applying the facts to the grounds of appeal the following are clear on penetration.

10. The appellant submitted that, had there been penetration the child would have cried; that no spermatozoa were found in or on the vagina or vaginal area, and that there was no corroborative evidence. On the other hand, the DPP submitted that the child's evidence was clear that the accused:

**“Did bad thing here (points to her vagina). I use this area to urinate. M was using his thing for urinating..... M penetrated my vagina with his thing.”**

11. In my view, the doctor's evidence corroborates the penetration, which is defined in Section 2 of the Sexual Offences Act as follows:

**“ ‘Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”** (Emphasis supplied)

12. The medical report shows that there had been recent sexual contact with the vagina which had:

**“.....bruise at 3 and 9 O'clock; hymen broken with fresh hymenal tags and tears at 6 O'clock.”**

The complainant also knew the accused who she referred to by name and this identification of the perpetrator was proved beyond reasonable doubt. On this, the trial magistrate's conclusion cannot be faulted, and this ground of appeal fails.

#### **On the Appellants age of 17 years**

13. The accused after taking plea stated that he was 17 years old. He submits that the medical assessment of his age, which showed he was 18 years old, should be read to include a plus (+) or minus (-) 1 year difference. He should therefore be deemed to be 17 years, a juvenile who in law has a right not to be detained and had a right to continue with school where he alleges he was in Form 2.

14. In his defence statement, the accused stated

**“On the date of alleged offence I was 18 years.”**

Having admitted that he was not a minor at the time of the offence, no case is made out for him to be treated as one; and his ground of appeal fails.

#### **On the Accused taking plea while sick and not being given witness statement for his defence**

15. The appellant submitted that the hearing was hurried and not fair. He cited pages 8 and 9 of the proceedings to show that he was unfairly treated by not being supplied with witness statements.

16. The State submits that the hearing commenced four months after plea was taken; that the accused raised the issue of statements and the court ordered that the same be provided; and that thereafter the issue was not raised again and the accused fully cross-examined the witnesses.

17. The proceedings show that: On 22<sup>nd</sup> August, 2018 the court on its own motion ordered that the accused be supplied with witness statements, charge sheet and exhibits. On 18<sup>th</sup> December, 2018, the accused stated that he had not been supplied with medical evidence and the prosecution was ordered by the court to comply. On 10<sup>th</sup> January, 2019 the accused again stated he had not been supplied with witness statements, whereupon the court ordered (since the accused was out on bond), that:

**“Accused be remanded in custody at Kinangop Police Station so as to be supplied with witness statements.”**

Hearing was then fixed for 17<sup>th</sup> January, 2018.

18. The issue of witness statements did not arise again thereafter. Indeed at the hearing of 25<sup>th</sup> February, 2019, the accused stated that he was ready for the hearing and the second and third witnesses testified. He cross-examined them. On 21<sup>st</sup> May, 2019, the accused again said he was ready for hearing and PW4 testified. He cross-examined PW4. On 10<sup>th</sup> June, 2019 the accused stated he was ready for the final witness

(PW5) who he also cross-examined.

19. With regard to the accused being unwell when the 1<sup>st</sup> witness was called, the trial magistrate observed the demeanour of the witness and concluded he was well and proceeded with PW1. The accused cross-examined the witness.

20. All in all, I do not see any basis for holding that the accused's case was hurried whilst he was unwell or that he did not get witness statements and could not properly defend himself. The accused was released on bond early in the case, had to be detained in police station in order to be given witness statements to avert the complainant that the same were not being availed. Finally, neither during the proceedings nor in his defence did he raise any issues concerning any limitations he had faced in defending himself. There is no evidence of any prejudice suffered by the accused.

21. There are numerous authorities on this point and the DPP pointed to two cases: **SMK v Republic [2019] eKLR** and **Francis Kanyi Kirunda v Republic [2019] eKLR** where the courts were dealing with allegations of unfairness to accused person alleging breach of fundamental rights founded on failure to be availed witness statements. In both cases, the courts relied on the court's record of proceedings to determine whether:

- the appellant complained of not having statements.
- the appellant did or did not make attempts to get statements.
- the court ordered supply of statements.
- there is evidence that the appellant was supplied the statements.
- the appellant readily or willingly proceeded with the trial.
- the appellant was able to cross-examine the witnesses; and
- Whether the appellant has shown he was prejudicial in any way.

22. After perusal of the trial court's record, as stated, I am able to conclude that the appellant did receive the witness statements, was able to cross-examine the witnesses and actively stated he was "ready" to proceed. On that basis, I see no prejudice suffered by the accused and this ground of appeal also fails.

23. The appellant's defence in his sworn statement was that on the material day he was on the road heading home at about 5.00pm. He met four people on the road headed towards his homestead where he lived with his grandmother. One of them was PW3 who was with two village elders and a young girl. PW3 pointed to him and he was detained. He attributed this to a family dispute in which PW3 used to bring cattle to his grandmother's land and he chased them away, leading to friction between the two. He was then taken to Kinangop Police Station then to Engineer District Hospital. Later he was charged with defilement.

24. When the accused cross-examined PW3 on the issue of cattle she denied that she had ever brought cattle to his grandmother's land. She also denied there was any dispute between her and him.

25. I have read the trial magistrate's judgment and note that she did consider the accused's defence. She said:

**"Accused blamed his woes on PW3 who he alleges had threatened him with dire consequences because he thwarted her cattle grazing efforts in his grandmother's land."**

The learned magistrate concluded that she did not discern any collusion, ill will, or malice as would cause her (PW1) to implicate the accused in the defilement.

26. On all its grounds the appeal fails and is hereby dismissed.

27. With regard to sentence which the appellant sought to be set aside, I note as follows. The trial magistrate expressed that her hands were tied and she thus imposed the mandatory life sentence. In the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** the Supreme Court held that where a mandatory sentence of death is under consideration for imposition, the accused has a constitutional right to have a full hearing on sentence. That principle has been extended by the Court of Appeal in respect of other heavy mandatory sentences including defilement. See **Dismas Wafula Kilwake vs Republic [2019] eKLR** and others.

28. I have perused the mitigation in the record which is as follows:

**"Accused : I pray for non-custodial sentence. I am a student at [Particulars withheld] Secondary School. On 7<sup>th</sup> August, 2018. I was 18 years old.**

**State Counsel : Age assessment was done and accused was 18 years old.**

**Court : Mitigation duly noted; sentence in Sexual Offences Act duly noted; my hands are tied; I therefore sentence the accused to life imprisonment.**

29. The trial court clearly did not exercise any discretion when taking the mitigation into account, as the sentence was stated to have "tied" the trial magistrate's hands. The accused was sentenced to life imprisonment. Accordingly, the sentence was irregular.

30. In light of all the foregoing, this court's ultimate orders are as follows:-

1. The appeal as to conviction fails on all its grounds.

2. On sentence, however, I direct that a fresh sentence hearing be held at which the appellant shall elaborate on his mitigation for the court to exercise its discretion in sentencing.

3. I further direct that the Prison's Service and the Probation Officer do file Pre-sentence reports to be taken into account at the sentencing hearing to be conducted on a date set at the reading of the judgment.

**Administrative directions**

31. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

32. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

33. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 8<sup>TH</sup> DAY OF MARCH, 2021**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. SMW - Appellant in person in Naivasha Maximum Prison

3. Court Assistant - Quinter Ogutu