



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 60 OF 2018

WILSON OUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in S/O Criminal Case No.2 of 2018

at Chief Magistrates Court Kibera by Hon. E. Boko –SPM on 29th March 2018)

JUDGMENT

1. **Wilson Ouma**, 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. Particulars being that on the 3rd day of January 2017, at Kibera [Particulars Withheld] in Kibera Sub-County intentionally and unlawfully caused his penis to penetrate the anus of SA a child aged 10 years.
2. In the alternative, he faced a charge of committing an indecent act with a child contrary to section 11(1) of the sexual offences Act. Particulars were that on the 3rd day of January, 2017 at Kibera [Particulars Withheld] in Kibera Sub-County intentionally touched the anus of SA a child aged 10 years with his penis.
3. Having been taken through full trial he was found guilty, convicted for the main charge and sentenced to serve life imprisonment.
4. Aggrieved, he appeals on grounds that the trial magistrate erred in law and fact by failing to find that penetration was proved beyond reasonable doubt; age was not conclusively proved and vital witnesses did not testify.
5. To prove the case the prosecution called five (5) witnesses. PW1, the complainant testified that he went to fetch water in company of his siblings M and B who left him at the river. That an individual he identified as the Appellant took him to a dilapidated house and did bad 'manners to him' through his buttocks. It was dark hence he had not seen his face, but, one Kyalo went to the scene in question and found them in the act **of the penis having been thrust in the buttocks, and the light from** the torch that Kyalo had enabled him to see the Appellant.
6. **PW2, Charles Kyalo**, stated that he was passing by the unoccupied cracked mud-walled house when he heard a child crying. He flashed the torch that he had and saw the Appellant in the act. He was kneeling on the child who faced downwards with his trouser lowered. He ran to the entrance of the structure to find the child behind the door while the Appellant stood holding the child's lower garments, looking confused with an erected penis. He rang the police who responded by going to the scene. The Appellant was arrested.
7. **PW3, GM**, the mother of the complainant, recalled to have sent the complainant with B and M to the river on the fateful evening but he did not return home with the others. At 12.30am, she learnt of what transpired. According to her the complainant was born on the 16.8.2007.
8. **PW4, Kinuthia Edward Mbugua**, adduced in evidence a Post Rape Care (PRC) form that was filled for the complainant.
- PW5, No. 100674 PC (W) Dorine Wakhungu**, investigated the case and charged the Appellant.
9. Upon being put on his defence, the Appellant stated that on the material date he reached Kibera, having come from his place of work at about 9.00pm. As he walked, he heard a person shouting accusing him for having slept with a child. The mother of the child was called and

he was arrested. He denied having defiled the complainant.

10. The trial court evaluated evidence adduced and found that the Appellant was caught in the act of defiling the complainant by PW2, therefore convicted him.

11. The appeal was canvassed by way of written submissions. It was the argument of the Appellant that the only medical document that was adduced in evidence was the PRC which was not a P3 form, which had many anomalies and was capable of being manipulated that should not have been relied on. He faulted the trial court for making inferences not supported by evidence. In that regard he quoted the case of **J.O.O. v. Republic (2015)elkr** where the court stated that:-

“whereas a court of law is always called upon to make decisions or inferences on some set of circumstances, such a court should endeavour to make such decisions or inferences on the basis of the available evidence as adduced before it and it ought to be slow in making assumptions not supported by facts as tendered before court.”

12. On the issue of age, he urged that there was disparity on age as stated in the charge sheet and what the complainant’s mother, and PW2 told the court, therefore age was not conclusively proved.

13. He faulted the court for not calling the youth who were alleged to have gone to the scene of the incident with police officers, neighbours and members of the community policing.

14. The State through prosecution counsel, Ms. Elizabeth Kibathi, opposing the appeal submitted that penetration was through the anus which is a genital organ. Citing the case of **John Onzare Kambi v Republic (2013) elkr** where the court stated that:-

“ I find that there was, at least, partial penetration of the complainant's anal orifice. The said penetration was by way of the appellant's penis. Therefore, I find that the ingredients of the offence of defilement were proved beyond any reasonable doubt.”

She argued that the Appellant did insert his penis into the anus of the complainant which was penetration. That the testimony of PW2 corroborated the minor’s testimony and when taken to hospital the minor had bruises on the anal area. She cited the case of **Phillip Nzaka Watu v Republic (2016) elkr** where the court of Appeal stated that:-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”

15. On the issue of age, she urged that an immunization card was produced which indicated that the minor was born on 16th August,2007, therefore, the minor having testified on 16th July 2017, it was exactly one month to his tenth birthday.

16. On sentence, she called upon the court not to interfere with the sentence as the trial court did not act on wrong principles, neither did it overlook some material factors, as held in the case of **Ogolla s/o Owour vs Republic (1954) EACA 270**.

17. This being a first appellate court I am required to re-evaluate the evidence and come to an independent conclusion as to the decision reached by the trial court, bearing in mind that

I neither saw nor heard witnesses who testified. (**See Okeno v Republic(1972)E A 32**).

18. Of crucial importance in this matter is whether the case was proved to the required standard? The prosecution had the duty of proving the case beyond reasonable doubt. Section 8(1) of the Sexual Offences Act provides thus: -

“...A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

19. The prosecution was therefore required to prove:-

a) Age of the complainant;

b) The act of penetration, and;

c) positive identification of the perpetrator of the offence.

20. In the case of **Francis Omuroni vs Uganda, Criminal Appeal No.2 of 2000**, it was held that:-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may

also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...

21. In the case of **Mwalengo Chichoro Mwajembe vs Republic Criminal Appeal No.24 of 2015(2016) eKLR**, the Court of Appeal stated as follows: -

“...the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable ...”

22. PW3 the complainant's mother adduced in evidence an immunization card issued to the complainant which had an entry of his birth as the 16th day of August, 2007. As at 3rd January 2017 he was Nine years, seven months, therefore, the age stated in the charge sheet, an apparent age of 10 years was not detrimental to the prosecution's case. Previously the specific age of the child had to be proved because sentencing depended on the age, but following jurisprudence that has developed, a case cannot fail for want of strict proof of the particular age. What the prosecution must prove is the fact of the complainant being under the age of 18 years which was established in this particular case. **(See Section 2 of the Children Act).**

23. Section 2 of the Sexual Offences Act defines penetration as:-

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

24. In this case, the complainant testified that the assailant did 'bad manners to him inside his buttocks'. It is argued that bad manners refers to discourteous manner that ignores acceptable social usage, a phrase that does not appear in the sexual offences Act. The complainant explained that the act that he referred to as bad manners was done to him after the individual removed his trousers and lay on him while on the floor. PW2 whose attention was attracted by a child crying went and flashed a torch through the hole/crack on the wall. He found the Appellant having inserted his penis into the child's anus. He stated that upon finding them in the act, the boy got up and ran behind the door while the Appellant who looked confused stood gazing at the torch while his penis remained erected.

25. The complainant was subjected to medical examination per the PRC filled at 4.50 am, some six hours or thereabout after the incident, where the clinical officer who attended to him found him having sustained bruises at the anal area. It is however the contention of the Appellant that the prosecution should have tendered medical evidence in the form of a medical examination report (P3).

26. Evidence confirming the fact of the Appellant having penetrated the complainant was adduced by PW2 who found him in the act. The evidence that corroborated that of the complainant that the court found truthful. In the case of **Fappyton Mutuku Ngui v Republic [2014] eKLR** while considering a similar issue of medical examination in a defilement case, the Court of Appeal stated:-

“In our view, such evidence was not necessary and, in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her.”

In the circumstances, I find the act of penetration into the complainant's anal area having been proved to the required standard.

27. On the issue of essential witnesses not being availed to testify, Section 143 of the Evidence Act provides as follows: -

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”

28. In **Keter vs. Republic [2007] 1 EA 135**, it was held, inter alia, that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

29. Individuals mentioned by the Appellant were not eye-witnesses to what happened to the complainant. Evidence adduced by the prosecution was sufficient to prove the case, therefore, failure to call neighbours as well as community policing members who accompanied the police who arrested the Appellant, was not fatal to its case.

30. On sentence, section 8 (2) of the Act provides thus:

“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”

31. In the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, the court of appeal pronounced itself on the issue of an appellate court interfering with sentence as follows:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

32. In **Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015**, the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court delivered itself thus: -

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."

33. In **Dismas Wafula Kilwake v R [2018] eKLR**, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing. Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

34. From the foregoing, although the trial court did not misdirect itself, following jurisprudence that has developed in the recent past, I affirm the conviction, but, find it necessary to interfere with the sentence imposed of life imprisonment, which I set aside and substitute with a sentence of fifteen (15) years imprisonment, to be effective from the date of sentence by the trial court.

35. It is so ordered.

Dated, Signed and Delivered Virtually at Nairobi this 3rd Day of March, 2021.

L. N. MUTENDE

JUDGE.