



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 169 OF 2019

SILAS MURIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. H.N Ndungu CM in Meru S.O No. 33 of 2017 on 04/06/2019)

JUDGMENT

1. **Silas Murimi ('the appellant')** was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (4) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 04/10/2017 in Imenti North Sub-County within Meru County, he intentionally caused his penis to penetrate the vagina of **MKK ('the complainant')** a child aged 17 years old.

2. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on the same day and place, he intentionally and unlawfully caused his penis to come into contact with the vagina of MKK a child aged 17 years.

3. He denied the charges and at the trial in which the prosecution paraded 6 witnesses in support of their case, he was convicted on the main charge of defilement and sentenced to 15 years' imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant lodged the instant appeal setting out 5 grounds of appeal which I have coalesced into 3 as follows;

a. The trial court erred in law and fact by failing to note that the complainant, whose birth certificate was not produced in court, stated that she did not know the person who defiled her.

b. The trial court erred in law and fact by rejecting the appellant's defence without giving cogent reasons.

c. The trial court erred in law and fact by meting out to the appellant the 15 years' mandatory sentence contrary to article 25(c) of the constitution yet his report was not adduced despite the fact that he was taken to the hospital alongside the complainant.

5. The evidence before the trial court was that, on the material day at around 5.00 a.m., the complainant, **PW1**, a form 2 student at [Particulars withheld] School, showered and put on her uniform, a light green panty, a sky-blue skirt, white T-shirt and grey pullover in readiness for school. At about 5.30 a.m. she went out to the toilet for a short call and while there, she saw a person behind her wearing a white/red cap, black pullover and brown trousers. Although it was dark, there was an electric bulb in the kitchen a few meters away (20 meters). That person came, held her by the hand and took her to the corner of the shamba. She did not know who he was all he while. He removed his trousers, removed her skirt and pants and then inserted his penis into her vagina. He then put Ksh.100 in her pockets and told her not to report the incident. However, on arriving home, she reported the same to her mother, **PW2**. When asked by **PW2** if she had recognized the person, she said that she had been seeing him at the road for about 2 weeks. That **PW2** informed her father, **PW4**, who went in search for the person. The matter was reported to the area chief, **PW5**, and then to Meru Police Station after which she was referred to the hospital for treatment and issued with a P3 form. She confirmed that she had been defiled by the appellant and denied having any relationship with him. She handed her blood stained panty and skirt which she wore on the material day to the police.

6. During cross examination, the witness stated that the appellant had been arrested at Giantune and she saw him every day as he worked near there. She also stated that the appellant found her as she was going to the police station and confirmed that she did not scream on the date of the alleged offence.

7. **PW2 NK**, the complainant's mother, stated that on the material day, at about 5.30 am, she was sleeping when her daughter, **PW1**, who had prepared herself for school, left but shortly returned and told her that she had met Silas Murimi, the appellant who had defiled her at the

nearby shamba. Thereafter, PW2, her husband, PW4 and one Samuel, traced the said Silas, whom she knew, to his dwelling house, confronted him with the accusation and he admitted to her that he had had sexual intercourse with her daughter on the basis that the two had an intimate relationship. PW2 and the said Silas went to the nearby chief's office to report the matter after which the accused was arrested, taken to Meru Police Station and subsequently charged after the complainant and the appellant had been taken to Meru General Hospital for examination and treatment.

8. During cross examination, PW2 asserted that the appellant worked some distance from her home, which had no gate, and therefore she did not know how the appellant gained entry. She further stated that they found the appellant at his place of work on the date of arrest.

9. **PW3 Dr. Ibrahim Hassan**, a Medical Officer at Meru level 5 Hospital, produced the P3 form on behalf of his colleague Dr. Mume Mutunga who had examined the complainant on 4/10/2017. He stated that the complainant's skirt as well as her inner wear were blood stained and that there was blood on the inner sides of the thighs, blood within the vaginal canal and also blood on the external vagina and a tear on the right lateral vaginal wall all suggestive of sexual assault. During cross examination, he stated that although there was blood, there was no sign of forced removal of clothes.

10. **PW4 SK**, the complainant's father, testified that the complainant was aged 17 years having been born on 23/10/2000 even though he had no birth certificate. During cross examination, he stated that he found the appellant draining water at 6.00 am on the day he was arrested.

11. **PW5 John Mwenda**, the chief Ntakira Location, testified that on the material day at around 6.20 am he was at home when he heard PW2, PW4 and the appellant making noise outside his home. That upon enquiry, PW2 told him that her daughter had been defiled by Cyrus whom he arrested and took to Meru Police Station. That the said Cyrus was staying in a house just outside his gate and near the complainant's home. During cross examination, he maintained that the appellant was brought to his house by PW2 and PW3 after which he arrested him because the complainant alleged he had defiled her.

12. **PW6 No.54999 Senior Sergeant Mulwa** of Meru Police Station stated that on the material day at around 7.00 am, he was summoned by the OCS to his office where he found PW1, PW2, PW5 and the appellant. The complainant narrated what had transpired and the OCS told him to take action against the appellant who had defiled PW1. The OCS handed to him the complainant's blood stained skirt as well as her inner wear and the appellant's boxer which he produced as exhibits in court. During cross examination, he stated that he visited the scene where he found *Sukuma wiki* and seedlings planted there but there was no damage.

13. In his defense, the appellant told the court that he had been framed up and denied raping the complainant. He stated that night PW1 kept calling him all night but he refused to pick up before it was later alleged that he had defiled her.

14. In its reserved judgment, the trial court in convicting after determining what ingredients the prosecution was bound to prove said: -

“In the current case before me the medical evidence overwhelmingly suggest that there was penetration of the complainant's genitallia. The complainant was also a child. Her father SK, PW4, gave evidence that she was born on 23/10/2000. He exhibited before court the complainant's birth certificate indicating she was born on 23.10.2000 and therefore 17 years of age and a child at the time of the offence”. (emphasis added)

15. The parties filed their respective submissions on 07/09/2020 and 08/04/2021. The appellant's submissions were to the effect that the blood on the complainant's clothes could be as a result of anything including menstruation and not forceful sexual intercourse. He stressed the evidence of PW3 that PW1's clothes were not forcefully removed. Submissions were made to the effect that the complainant never identified the appellant at the scene; that there was no evidence on how the appellant's boxer was collected and when and that the report on him was never produced in court. It was concluded that the appellant's conviction was unsafe given the full circumstances of the case; the mandatory minimum sentence meted upon him was clearly harsh and excessive. The court is urged to quash the conviction and set aside the sentence on the appellant and set him at liberty. He relied on **Faustine Mghanga v R (2010) eKLR** and **Mangunyu v R (2016) eKLR** for the proposition that birth can be proved otherwise than by birth certificate by oral evidence of who was there like the mother who was never asked to prove date of birth. The decisions in **Denis Kinyua vs R (2017) eKLR** and **Evans Wanjala Wanyonyi vs R (2016) eKLR** were cited for proposition that the maximum sentence was not an appropriate one for a first offender and that every accused person is entitled to the right to mitigate.

16. On their part, the prosecution submitted that the age of the complainant had been undisputedly proved by the birth certificate which had been produced in court. According to them, the complainant recognized the appellant as she and the appellant were friends who knew each other well so there could be no margin of error as to the identity of the assailant. There was an otherwise odd submission on section 8 of the Sexual Offences Act, which I consider odd and misleading because no evidence was led to justify the sexual act. That is the kind of submission that was wholly unnecessary having been picked from the air. It was concluded that the prosecution proved their case beyond reasonable doubt and urged the court to dismiss the appeal in its entirety. The prosecution relied on **F.M.N v R (2008) eKLR**, **Irene Atieno Ochieng v R (2017) eKLR** and **Francis Musyoka Nzau v R (2013) eKLR** on the ingredients of the offence charged and the application and interpretation of Section 8(5) and (6) of the Act in support of their position.

17. In determining this appeal, the court, being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa reiterated the mandate of a first appellate to that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 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 (Shantilal M. Ruwala V. R [1957] E.A. 570). It is not the juncture 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; it must make its own findings and draw its own 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, see (Peters V Sunday Post 1978) E.A. 424.)”

18. The issues for determination are whether the offence of defilement was proved beyond reasonable doubt and whether the appellant was the perpetrator.

19. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the person before court was the perpetrator of the offence. See George Opondo Olunga v Republic [2016] eKLR.

On age, the complainant’s evidence was that she was a form 2 student at [Particulars withheld] School aged 17 years which, other than being hearsay in character is no more illuminating. PW4, the complainant’s father, testified that **“I do not have her birth certificate min (5) she was born 23rd October 2000.”** The birth certificate which allegedly showed that the complainant was born on 23/10/2000 was never produced in court. It was only marked for identification as MFI 5. It is trite that documents that have been marked for identification but not produced as evidence do not have any evidentiary value. In Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR the Court of Appeal stated that:

“The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case... If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”

20. PW2, the complainant’s mother who apparently ought to have known when her daughter was born did not say anything about her age during her entire testimony. The medical report produced as PEh 3 indicated 16 years as the estimated age of the person examined namely the complainant. In Kaingu Elias Kasomo v R(2010)(UR) the Court of Appeal stated that;

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

21. In Hadson Ali Mwachongo v R [2016] eKLR the court stated that;

“The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim.”

22. In Alfayo Gombe Okello v R [2016] eKLR, the court stated as follows;

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).”

23. There was never cogent evidence that the complainant was a minor aged 17 years. I find the evidence by the father to be insufficient in proving the date of birth. While it is true that not birth certificate alone amounts to proof of age, it is also true that some plausible evidence needs to be led. I have in mind documents like medical cards of ante and post-natal clinic visits, baptismal cards or just the evidence of both parents to corroborate each other. I am therefore not satisfied that the complainant at the time of commission of the alleged offence was 17 years old. Consequently, there was no evidence that the complainant was a minor to help ground the charge and the trial court was obviously in outright misapprehension of the evidence in finding that the birth certificate was produced when PW4 was unequivocal that he did not have the certificate. That alone is sufficient to find that the offence was never proved.

24. The next element is penetration which is defined under **Section 2 of the Act** to mean *“the partial or complete insertion of the genital organs of a person into the genital organs of another person”*.

25. The evidence on record which the trial court relied on to convict the appellant was the complainant’s own testimony together with the collaborative testimonies of PW2 and PW3 along with the P3 adduced therein which I have critically analyzed. It is not clear why the Post Rape Care form was not filled in respect to the complainant. I have also noted that the P3 form was filled by one Dr. Winnie but when PW3 testified, he stated that the same had been filled by his colleague Dr. Mume Mutunga. The P3 form showed that there was dried blood on the upper thighs with no wounds and although the external genitalia was normal, there was dried blood around the exterior of the vagina, a tear on the right lateral vaginal wall and the presence of spermatozoa. I have also noted that the complainant’s inner wear was not produced as exhibit. The skirt was marked for identification but it is unclear whether the same was ever produced as exhibit. Clearly a doubt has been created which must now be construed in favour of the appellant. In Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995 where the Supreme Court held that:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual

intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

26. I do find that the evidence let on penetration was never watertight to merit a conviction. It is in doubt who completed the P3 form and that doubt is reasonable and I resolve it in favour of the appellant.

27. On the third limb of whether the appellant was the perpetrator, PW1 testified that *'I had not known who it was...I did not scream'*. During cross examination she stated **"you found me as I was going to the police station."** PW2 told court that *'she traced him to his dwelling and he told me he had sexual intercourse with my daughter but they had a relationship and that they went to the scene but there was no damage'*. She admitted that both the complainant and the appellant were taken to the hospital for examination which was confirmed by PW6. PW3 during cross examination stated that although there was blood, there was no sign of forced removal of clothes. It has not been explained why the medical report in respect to the appellant was not produced in court. This type of evidence does not present the quality towards proof beyond reasonable doubt and cannot support a conviction. The trial court thus in error when it convicted the appellant.

28. Having found that the conviction was unsafe owing to the quality of evidence led, the other limbs and grounds of appeal on the severity of the sentence become superfluous for my consideration. However, the power of the court in sentencing where a mandatory sentence is circumscribed by statute merit some comment by the court. Since **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR** manner Kenyan court treat mandatory penalties has taken a new approach. The law now stands that such prescriptive sentences **'deprive the court of the use of judicial discretion and can only be regarded as harsh, unjust and unfair. The mandatory nature deprives 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, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Such sentence is out of sync with the progressive Bill of Rights enshrined in our Constitution Specifically Articles 25(c) 27, 28, 48 and 50(1) and 2(9)'**.

29. The emergent jurisprudence from the decision of **Muruatetu (supra)** is that court's hands should no longer be tied by mandatory prescriptive nature of a sentence. It is now trite that consideration of mitigating factors constitutes an element of fair trial as enshrined under **articles 25 and 50 of the Constitution**. It is therefore ostensible that if courts were to continue being bound by the prescriptive nature of minimum sentences, mitigation would be rendered superfluous because at the end of the day, it would matter less if a convicted person spends 4 hours giving mitigating circumstances or just 5 seconds to simply pray for leniency. Strict and constricted application of mandatory sentences would make the legal right to mitigate a pretense which would then derogate on the courts otherwise wide and unfettered discretion in sentencing. Here, the trial court recorded the mitigating circumstances and still handed the appellant the prescribed mandatory sentence. In **Jare Koita Injiri -v- R [2019] eKLR**, the court of appeal while substituting a mandatory life sentence handed to an appellant with a 30 years sentence stated that:

"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence, stipulated by Section 8(1) of the Sexual Offences Act and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. We would set aside, the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

30. For the reasons I have set out herein, I find that the appellant's conviction was unsafe and the sentence clearly imposed on the basis of a mandatory minimum was manifestly harsh and excessive. It follows that the appeal succeeds and is thus allowed in whole, the conviction is quashed, sentence set aside and the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY VIA MICROSOFT TEAMS, THIS 17TH DAY OF MAY 2021.

PATRICK J.O OTIENO

JUDGE