



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 54 OF 2019**

**JOHN MWANGI KIMANI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence for ten (10) years by Honourable A. Ndung'u*

*Resident Magistrate in Shanzu Criminal Case No. 581 of 2015 delivered*

*on the 1<sup>st</sup> day of December 2017).*

**J U D G M E N T**

1. The appellant John Mwangi was convicted and sentenced to serve 10 years' imprisonment by Hon. A. Ndungu Resident Magistrate in Shanzu Chief Magistrates Court Criminal Case No. 581 of 2015.
2. The charge was Sexual Assault contrary to section 5 (1) (a) (i) & (ii) of the Sexual Offences Act No. 3 of 2006. Particulars were that John Mwangi Chege on diverse dates between 1<sup>st</sup> to 8<sup>th</sup> of May 2016 within Kilifi County unlawfully used his fingers to penetrate the vagina of GM a girl aged 6 years.
3. In the alternative the appellant was charged with offence of indecent act with a child contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006.
4. PW 1 the complainant's mother noticed the child walking with difficulties and when she inquired the complainant said that it was urine. When PW 1 examined PW 2's private part she found it was wet and swollen. That she gave her a bath and informed her husband PW 3. On 8/5/2015, PW 2 was taken to Mtwapa Health Centre and they were referred to Coast General Hospital.
5. PW 1 and PW 3 said Post Rape Care form was duly filled. When PW 2 finally opened up. She said it is the appellant who used to call her to his house lay her in bed and take photographs of her private part, licked her private part, put his finger in her private part and then do 'tabia mbaya' with his 'mdudu'.
6. PW 1 and PW 3 reported at Kijipwa Police Station and when the appellant declined to accompany PW 3 to the station, members of public wanted to lynch him and he gave in and went to station.
7. PW 4 investigated the report and preferred charge against the appellant. PW 5 Dr. Abdullahim Hussein Abdullahi from Mtwapa Health Centre produced P3 form filled in respect of the complainant by Dr. Hussein. He said that there were abrasions on the vestibular and whitish discharge. The child was put on antibiotic and antifungal medicine – EXP 1.
8. He also produced Post Rape Care Form – EXP 2. The P3 form indicated that the offence didn't occur once but 8/5/2015 was the last incident. He said there was superficial penetration and that is why the hymen was intact.
9. When placed on defence the appellant gave shown statement and said that on 21/5/2015 while he was sleeping in the house PW 3 went to his house and said some people wanted to speak to him. That when he got out he found neighbors including PW 1. That PW 3 told him to accompany him and he accepted and they went to the Chief. That PW 3 asked him what was going on between him and PW 3's wife. He told PW 3 that he had differed with PW 1 at the water point and had not spoken to her.

10. That PW 3 removed his jacket and pulled out a knife threatening to finish with the appellant there and then. That he suggested they go to police station and they boarded a motorcycle to Mtwapa Police Station where he reported that PW 3 had a knife which he used to threaten him. That before issue of threats could be investigated the investigating officer herein came and PW 3 pointed at appellant as the one. The appellant said he didn't understand and police officers were asked to place him in cells as PW 3 left the station.

11. He was arraigned in court the following day and charged with the offence herein. He said he had lived in Mtwapa for 20 years and no one had ever made such allegation about him and he had never been taken to the police station. The Appellant testified that he was surprised the village elder and the Chief were not witnesses.

12. In cross examination he admitted having been neighbors with complainant's parents and claimed that the complainant's mother may have wanted him for friendship but he didn't understand.

13. The appellant was aggrieved by the conviction and sentence and he lodged his petition of appeal on 4<sup>th</sup> April 2019 but when he filed his submissions he filed together with application for leave to amend grounds of appeal on 17<sup>th</sup> February 2021.

14. The said amended grounds of appeal are as follows: -

**i. That the learned trial Magistrate erred in-law and fact in convicting the appellant without considering that the appellant was denied a right to fair trial contrary to article 50(2)(b).**

**ii. That the learned trial Magistrate erred in-law and fact in convicting the appellant without considering that the sentence meted out was harsh excessive, unjust, unfair and unconstitutional basing on the circumstances of the case.**

**iii. That the learned trial court Magistrate erred in law & fact in convicting the appellant without considering the pre-trial custody pursuant to Section 333(2) of the criminal procedure code.**

15. The appellant prayed that the appeal be allowed and sentence set aside. The appeal was canvassed by way of written submissions. The appellant's submission was that he was only challenging sentence and not conviction. He prayed that the period he spent in remand custody should be considered pursuant to Section 333(2) of the Criminal Procedure Code.

16. The Appellant relied on the holding in **Gaston January Stephen vs Republic** and **Nyamawi Nyawa vs Republic** to support his position for review of his sentence. He said his children had dropped out of school and now on the streets trying to fend for themselves. He said his family is suffering psychologically and this has also affected his health in prison. He implored the court to give him a lenient sentence.

17. He also relied also on the holding in **John Kalama Chea vs Republic HCCR. Appeal No. 94 of 2015** where Said Chitembwe J held:

***“He was a 1<sup>st</sup> Offender I do find that life imprisonment is not proportionate to the gravity of the offence, the circumstances of the offence or case does not call for such punishment. I do find that the appellant has reformed and the period already served in prison is sufficient punishment. The life imprisonment is set aside and replaced with the period served of 4 years”.***

18. The Respondents Counsel Ms. Mwangeka submitted that the ground that appellant was not accorded fair trial as per Article 50(2)(b) should be dismissed as the appellant didn't raise it at trial.

19. It was also submitted that sentence was not excessive as the offence to which he was convicted attracts a maximum penalty of life imprisonment. It was submitted that appellant had continually sexually assaulted the child and it was only when PW 1 noticed child walking with difficulty that it was discovered she had been sexually abused. This is because the appellant had threatened and warned child not to tell anyone.

20. The Respondent submitted and relied in the authority in **Shadrack Kipkoech Kogo vs Republic** CR. A. No. 253 of 2003 – Eldoret where the Court of Appeal held that sentence is an exercise of discretion by the trial court and to interfere it must be shown that the court took into account an irrelevant factor or that a wrong principle was applied or that short of these sentence itself is so excessive and therefore an error of principle must be interfered.

21. The Respondent argued that owing to the nature of the offence the sentence meted out was commensurate. The court was urged to dismiss the appeal.

22. It is noted that appellant dropped the ground that he was not accorded fair trial and he didn't submit on it and only submitted on the ground that the trial Court didn't factor in the period he spent in remand custody. It is not in dispute that the appellant was in remand custody during trial in the lower court from 22<sup>nd</sup> May 2015 to 1<sup>st</sup> December 2017 when judgment was delivered and he was convicted.

23. The Respondent's counsel has not made any submissions as to why that period should not be factored on his sentence pursuant to Section 333(2) of the Criminal Procedure Code which provides:-

***“Subject to provisions of Section 38 of the penal code every sentence shall be deemed to commence from and to include the whole of the day of the date on which it was pronounced except otherwise provided in this code. Provided that where the person sentenced under subsection (1) has prior to such sentence been held in custody the sentence shall take account of the period spent in custody”.***

24. The provision to section 333(2) of Criminal Procedure Code is in mandatory terms, the appellant is therefore bound to benefit from it. In the circumstances the appellants 10 years' imprisonment shall run from 22<sup>nd</sup> May 2015.

Orders accordingly.

Right of appeal 14 days.

**Dated, signed and delivered at Mombasa this 08<sup>th</sup> day of July 2021.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:**

*Court Asst. -*

*Respondent -*

*Appellant –*