REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 19 OF 2019

JAMES MUGAMBI ..... APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(From Original conviction and sentence in Criminal (S.O.A.) Case No. 22 of 2018 of the Senior Principal

Magistrate's Court at Marimanti before S. M. Nyaga – S.R.M.)

J U D G M E N T

Introduction

1. The Appellant, James Mugambi, was convicted in ***Criminal (S.O.A.) Case No. 22 of 2018*** for the offence of defilement contrary to **Section 8(1)(3) of the Sexual Offences Act No. 3 of 2016** and sentenced to serve 20 years imprisonment by the Senior Resident Magistrate at Marimanti Law Courts.

2. It was alleged that on the 10th – 13th day of October 2018 in Tharaka North Sub-County within Tharaka Nithi, the Appellant intentionally caused his penis to penetrate the vagina of DK, a child aged thirteen (13) years.

3. In the alternative, the Appellant faced the charge of committing an indecent act with a child contrary to ***Section 11(1) of the Sexual Offence Act No. 3 of 2006.*** The particulars of the alternative charge were that on the 10th – 13th day of October 2018 in Tharaka North Sub-County within Tharaka Nithi County, the Appellant intentionally touched the vagina of DK, a child aged 13 years, with his penis.

4. He denied the charges and the matter proceeded to trial. A total of six (6) witnesses testified in support of the prosecution's case.

The Appeal

5. The Appellant, being dissatisfied with both the conviction and sentence by the trial court, filed a Petition of Appeal dated 24th July 2019 raising eight (8) grounds of appeal. He however substituted those grounds with the six (6) grounds contained in the document titled 'Amended Grounds of Appeal' which was filed on 18th September 2020. Accordingly, this appeal is based on the following grounds:

a. THAT the learned trial magistrate erred in both law and facts by failing to note that the Appellant was not examined to prove the allegations.

b. THAT the learned trial magistrate erred in law and fact by convicting the Appellant without considering that the fact evidence from prosecution witnesses clearly revealed that the Appellant was totally deceived by the complainant to believe that she was 18 years which is a defence as seen under **Section 8(5)(a)(b) of the Sexual Offences Act No. 3 of 2006.**

c. THAT the learned trial magistrate erred in both law and facts by failing to apply the Muruatetu case which makes the sentence to be harsh in the circumstances of this case.

d. THAT the learned trial magistrate erred in both law and facts by failing to note that vital witnesses were not summoned to court to clear doubt.

e. THAT the learned trial magistrate erred in both law and facts by failing to note that there was vendetta between the Appellant and the area chief.

f. THAT the defence of the Appellant was not considered.

6. Based on the foregoing grounds, the Appellant prays that this appeal be allowed, conviction quashed, sentence be set aside, and that he be set at liberty.

7. On 21st October 2020, this court ordered for the appeal to be disposed of by way of written submissions. The Appellant filed his written submissions on 12th January 2021 while the Respondent filed their submission on 19th May 2021.

Submissions

8. The Appellant submitted that the complainant deceived him to believe that she was over 18 years. It is the Appellant's assertion that he never forced the complainant to go to his place.

9. It is the Appellant's further submission that the prosecution failed to prove their case to the required standard. According to him, the evidence of the clinical officer did not support the evidence of defilement and vital witnesses were not called to court to clear the alleged doubt.

10. Finally, the Appellant submitted that the sentence meted upon him was harsh and excessive in view of the circumstances of this case.

11. On their part, the Respondent submitted that the evidence of the complainant was believable and corroborated by the evidence of the other prosecution witnesses which was cogent, consistent and sufficient to sustain a conviction. It is the Respondent's contention that the Appellant knew well that the complainant was a minor. Further, the Respondent submitted that there was no evidence that the Appellant was framed by anyone. Finally, the Respondent submitted that the sentence meted against the Appellant was sufficient and within the law. It was the Respondent's submission that the Appellant has wrongly applied the reasoning of the *Muruatetu case* as the same affected some sections of the Penal Code and not those of the Sexual Offences Act.

Issues for determination

12. Having considered the submission of the parties and the evidence tendered before the trial court, it is my view that the following are the main issues for determination:

a. Whether the appellant had a plausible defence and if so, whether the trial court failed to consider his defence (Ground no. 2 & 6)

b. Whether the prosecution failed to call crucial witnesses in this case (Ground no. 4 & 5)

c. Whether the sentence meted was harsh and excessive in the circumstances (Ground 3).

Analysis

13. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."**

14. The Court of Appeal in the case of **David Njuguna Wairimu V. Republic [2010] eKLR**, cited with approval the decision in **Okeno v. R [1972] EA. 32** in which the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court as follows:

> **"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."**

15. This court has been called upon to make its own findings and draw its own conclusion as the court in **Okeno v. R** *(Supra*) stated: -

> **"It is not the function 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."**

Prosecution's case

16. In summary, it was the prosecution's case that the Appellant defiled the complainant several times between the dates of 10th and 13th October 2018. PW1, MM, is the mother of the complainant. She testified that the complainant went missing on a Sunday and missed school

the following two days. PW1 then got a report that the accused had been seen carrying the complainant as a pillion passenger and the accused as the rider. PW1 confronted the accused who told her that her daughter had been married at the Mountain area. PW1 later got a report that the complainant was locked in a house at Gatithini. She informed PW2, Paul Kilonzo Mate who is the area chief Ntoroni Location, and together with the police and PW1's sister, they raided the suspected house and found the Appellant with the complainant. PW2 corroborated PW1's testimony.

17. PW3, Lilian Wahu, is a clinical officer at Marimanti Level 4 Hospital where the complainant was treated. She produced the P3 Form that was filed by her colleague who was off duty on the day she testified. She stated that she was conversant with her colleague's handwriting and signature. According to her testimony, the complainant was physically normal. Her genitalia was normal and hymen was broken although not freshly broken. She had a discharge and a bacterial infection. It was further her testimony that there was evidence of penetration.

18. PW4 was the complainant. She stated that she was thirteen (13) years old and identified her birth certificate. She stated that the Appellant had asked her to drop from school and promised to marry her. PW4 testified that she used to live with her grandmother and that the Appellant went and picked her from her grandmother's house. She stated that the Appellant had promised to marry her but she later realized that he was already married.

19. The testimonies of PW1 and PW2 were corroborated by PW5's testimony. PW5 stated that he was called by PW2 on Saturday 13th October 2018 at about 1.20p.m. PW2 informed him that there was a girl who had been locked in a house. They proceeded to the suspected house where they found the complainant and the Appellant and detained them.

20. PW6 was the investigating officer in the matter. She testified that the Appellant had eloped with a schoolgirl. PW2 and PW5 raided the house of the Appellant where they found him with the complainant. The victim was examined, and penetration was confirmed. PW6 then recorded the statements. It was PW6's testimony that after the arrest, the victim was taken in by the Appellant's family to live with the Appellant's first wife as a co-wife.

21. Keeping in mind the role of the first appellate court as expounded herein above, this court is now called upon to determine the merit of this appeal based on the grounds raised by the Appellant.

22. In his first ground of appeal, the Appellant faults the trial court for failing to note that the Appellant was not examined to prove the allegations. **Section 36 (1) of the Sexual Offence Act** provides that -

> **'(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.'**

23. It is however trite law that absence of a DNA test in a sexual offence case does not automatically lead to an acquittal. In the case of **Evans Wamalwa Simiyu v Republic [2016] eKLR** the Court of Appeal found as follows:

> **""In AML v Republic 2012 eKLR (Mombasa), this Court upheld the view that: *"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.""***

24. The same position was taken in the case of **Kassim Ali V Republic [2006] eKLR** where the court noted that:

> **"So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

25. The Respondent correctly submitted that the Appellant did not have to be examined to prove that he committed the said offence.

This ground of appeal therefore, in my view, fails. The next issue is whether the Appellant had a plausible defence and if so, whether trial court failed to consider his defence.

Whether the Appellant had a plausible defence

26. In **Dominic Kibet Mwareng vs. Republic [2013] eKLR** the court stated that -

> **'The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.'**

27. On the proof of the age of the complainant, it was the complainant evidence that she was aged 13 years at the time of the alleged defilement. In **Joseph Kibet Seet vs. Republic [2014] eKLR**, the court stated that -

> **'It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence.'**

28. The same position was adopted in **Musyoki Mwakavi vs. Republic High Court Criminal Appeal No. 172 Of 2012**, where the court was of the view that -

'…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…'

29. In **Hilary Nyongesa vs. Republic Eldoret Criminal Appeal No 123 of 2009** the Court of Appeal stated that: -

'Age is such a critical aspect in Sexual Offences that it has to be conclusively proved … And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.'

30. Both the complainant (PW4) and her mother (PW1) identified the complainant's birth certificate which was produced as P.Exh 1 by PW5. According to the said birth certificate S/No. 8574881, the victim was born on 2nd June 2005. Since she was allegedly defiled between 10th and 13th October 2018, then the trial court was correct to have referred and relied on the said birth certificate in finding that the complainant was thirteen (13) years at the material time. The age of the complainant was therefore proved to the required standard.

31. The second ground of appeal faults the trial court for convicting the Appellant without considering that the complainant allegedly deceived the Appellant to believe that she was 18 years old. The Appellant purports that the alleged deception by the complainant is a defence under **Section 8(5)(a)(b)** of the **Sexual Offences Act No. 3 of 2006** which provides as follows:

"It is a defence to a charge under this section if –

a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b) the accused reasonably believed that the child was over the age of eighteen years."

32. Section 8 (6) of the Sexual Offences Act *further provides that:*

"The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

33. It was the complainant's testimony that the Appellant was well known to her and that he had asked her to drop from school. The Appellant was also known to PW1, the complainant's mother. It was PW1's testimony that the Appellant asked to marry the complainant but PW1 refused. Certainly, the Appellant and the complainant had known each other way before the material incident. In addition, the Appellant stated at the point of taking his plea that he had seen the complainant's birth notification. In the circumstances of this case, it is doubtful that the Appellant did not know that the complainant was a minor and still attending school.

34. In **Eliud Waweru Wambui v Republic [2019] eKLR** the Court of Appeal made the following interpretation of subsections 5 and 6 of Section 8 of the Sexual Offences Act:

"Subsection (5) states that it is a defense to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it a rather curious provision in so far as it is set in *conjunctive* as opposed to *disjunctive* terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from deception in subsection (5)(a). We would therefore opine that the elements constituting the defence should be read disjunctively if the two sub-sections are to make sense.

We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years."

This law is meant to protect young girls from predators who prowl to the world seeking to feast on them. The accused described the complainant as a small child which she was and he could therefore not be misled on her age.

The appellant did not tender any evidence before the trial court to show that the complainant behaved like any adult. The appellant knew very well that the victim was a minor, see page 35 line 6 of the record where he said the complainant was a child aged 13 years and under the Sexual Offences Act she cannot give consent to sexual intercourse.

35. It is the further the Appellant's allegation that the trial court failed to note that there was vendetta between the Appellant and the area chief. In rejecting this line of defence, the trial court held as follows:

"He [The Appellant] further told court that the area chief (PW2) had a grudge when accused on 15/08/2008 deferred against the Chief's view in a public baraza that residents beat up land officers from Meru County who were set to begin the land adjudication process.

He also told Court that the same Chief was annoyed when accused failed to employ casuals from members of the chief family

and the locality.

These are allegations accused threw the Court without any evidence. He did not invite evidence to prove his allegations that I find is an afterthought since he failed to report to any authority before occurrence of the offence herein."

It should not escape the mind of this court that the appellant did not raise this defence before the trial court that he was missed by the complainant for the trial court to consider it on merits.

36. In view of all the circumstances of the case, I opine that the Appellant did not reasonably believe that the complainant was eighteen (18) years old. The burden of proving that deception or belief fell upon the appellant, and in my view, he failed to show he took any steps which would make this court reach a conclusion that he was indeed deceived. The next issue is then whether the prosecution called all the crucial witnesses.

Were crucial witnesses called by the prosecution?

37. Grounds no. 4 and 5 of the Appeal are dealt under this head.

38. It is the Appellant's contention that the trial court failed to note that vital witnesses were not summoned to court to clear doubt. **Section 143 of the Evidence Act** provides that the prosecution is not obliged to call any number of witnesses in order to prove a fact. One witness is sufficient to prove a fact unless a particular law requires otherwise. I note that the Appellant did not submit on the ground of failure to call crucial witnesses. He neither mentioned the witnesses who were not called yet they should been called nor did he identify the fact that the witnesses were to prove. In light of this, it is my view that the appeal fails on that ground. The prosecution did call all the material witnesses. It did not have to call a superfluity of witnesses to prove the same facts.

Whether the prosecution proved its case to the required standard

39. In his submissions, the Appellant alleged that the medical officer's report did not link him to the offence of defilement. He averred that the medical evidence showed that the complainant was a mature lady since her hymen was not freshly broken. The Appellant further averred that the evidence of PW3 showed that the complainant was physically normal and that her genitalia was also normal. He submitted that since there was not evidence of bleeding by the complainant, then she was not sexually assaulted.

40. Penetration is an essential ingredient in the proving the offence of defilement. **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 ..."

41. In the case of **Mark Oiruri Mose vs. Republic [2013] eKLR** the court held that -

"All that was required is proof of penetration in the victim's vagina by the appellant. Penetration may be partial or complete under the Act."

42. In **George Owiti Raya vs. Republic [2013] eKLR** it was held that: -

"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."

43. In the case of **Erick Onyango Ondeng vs. Republic [2014] eKLR** the Court of Appeal held as follows on the aspect of penetration: -

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

44. As stated herein above, it is the complainant's testimony that the Appellant was known to her way before the material incident. it was also her testimony that the Appellant had sex with her on three consecutive days before she was arrested in his house with the appellant. The trial court believed her testimony and found that there was penetration, and that the Appellant was positively identified. In the circumstances of the case, it is my view that the trial court did not err in finding that the Appellant guilty of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offence Act 2006**.

45. The final issue for determination by this court is whether the sentence meted out was harsh and excessive in the circumstances.

Whether the sentence meted was harsh and excessive in the circumstances

46. It was the Appellant's submission that the learned trial magistrate erred in both law and facts by failing to apply the Muruatetu case in determining his sentence.

47. The case of **Wanjema v. Republic (1971) EA 493** dealt with principles upon which a first appellate Court may act on in dealing with an

appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

48. Section 8(3) of the Sexual Offences Act provide that:

> **"(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

49. Citing the famous decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR,** the Appellant contends that the trial court ought to have factored in the decision before meting out a sentence against him. the Appellant also relied in the cases of **Evans Wanjala Wanyonyi v. Republic eKLR** and **Gideon Majau Gitire alias Kombo in the High Court of Kenya at Meru Criminal Appeal No. 131 of 2018**.

50. In the ***Muruatetu case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder. The appellant sentenced to twenty (20) years' imprisonment as provided under **Section 8(3) of the Sexual Offences Act.** In any case at page 34 of the record, the trial magistrate considered the mitigation by the appellant and a pre-sentencing report. She went on to hold that the offence was rampant. Although a mandatory minimum sentence may prevent the exercise of discretion, in this case the trial magistrate's exercise of discretion was not hampered. He simply said that the sentence he imposed was deserved. I have no reason to interfere with the sentence.

Conclusion

51. From the foregoing, it is my view the trial court addressed itself correctly on the facts and the law relating to the offence of defilement. It is therefore my view that this appeal lacks merit and dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 5TH DAY OF JULY 2021.

L.W. GITARI

JUDGE

5/7/2021

The Judgment has been read out in the presence of the accused virtually from Meru G.K. Prison.

L.W. GITARI

JUDGE

5/7/2021