



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 125 OF 2019

NYANJE MWERO NYANJE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. T.A Sitati, Principal Magistrate on 29th August 2019 in Chief Magistrate's Court at Kwale S.O Case No. 59 of 2018)

JUDGEMENT

1. Nyanje Mwero Nyanje lodged his petition of appeal on 5th December, 2018 against conviction and sentence of life imprisonment in Kwale Magistrate's Court Sexual Offence No. 59 of 2018. The judgement was delivered on 29th August 2019 and sentence passed on even dated.

2. Initially the appeal was based on the flowing grounds:

- 1) That the trial magistrate erred in law and fact by failing to consider that the sentence was harsh and excessive in consideration of the offence.**
- 2) That the learned trial magistrate erred in law and fact in failing to see that the victim's age was not proved as required by law.**
- 3) That the learned trial magistrate erred in law and fact in failing to see that some crucial witnesses were not called to testify.**
- 4) That the learned trial magistrate erred in law and fact in failing to consider his reasonable defence.**

3. When the appellant filed his submissions on 15th March 2021 he annexed a notice of motion praying that he be allowed to file grounds of appeal out of time.

4. The respondent counsel made defence to the current grounds in their submissions. The grounds are:-

- 1) That the learned trial magistrate erred in law and fact by convicting him to serve life imprisonment without considering that he denied a right to a fair trial pursuant to Article 50(2)(c) of the Constitution.**
- 2) That the learned trial magistrate erred in law and fact by convicting him without considering that the evidence of PW 1 was wanting and highly questionable for it to sustain a conviction.**
- 3) That the learned trial magistrate erred in law and fact by convicting the appellant to serve life imprisonment without considering that the sentence meted out was harsh, excessive, unjust unfair and unconstitutional and in disregard of his mitigation submissions.**

5. The appeal was canvassed by way of written submissions.

6. The appellant claimed that his right to fair trial was violated and said that the prosecution after delaying to present their evidence for a long time availed all the four witness and upon close of prosecution case he was placed on defence and made to defend himself without being

given time to prepare his defence. He said that he was denied the time within which to keenly go through his in preparation of defence. He said he was not accounted the time and latitude that had been granted to the prosecution. He said that right to fair trial cannot be limited. The appellant relied on the holding in the authority of **Joseph Amos Omino vs Rep CA. Cr. Appeal No. 450 of [2001] eKLR** where it was held;

“The appellant may not have been aware of his constitutional rights as an advocate would hence he relied wholly on the counts to ensure compliance with such rights by the prosecution. The trial court and 1st appellate court in absence of their jurisdiction should have on their own ensure that the constitutional rights of the appellant were fully complied with notwithstanding that the appellant did not raise the same.”

7. The appellant drew court’s attention to provisions of Article 21(1) and required that as per Article 165(3) of the constitution it should determine whether his right of a fundamental freedom in the bill of right was denied, violated, infringed or threatened by the trial court.

8. The appellant further submitted that the evidence of PW 1 was wanting and lacked corroboration and should not have been relied upon to convict him. He argued that reasons given by the trial court for believing the complainant were inadequate and not persuasive since they did not constitute conclusive evidence that it was him who defiled the complainant. He said medical evidence did not link him to the offence. He said no test was conducted to establish he is the one who infected her with vaginalis. He said the complainants alleged previous defilements were never reported.

9. He further submitted and relied in the case of Paul Gitari vs Republic to argue that the complainant did not on her own volition report any of the alleged incident of defilement to anybody until PW 2 spotted her with 2 coins whose source was unknown and when PW 2 inquired PW 1 opened up and talked about the alleged defilement. He said there was need to corroborate the allegation of defilement concerning sentence the appellant urged the court to exercise discretion in passing sentence against her while considering not only aggravating circumstances but also his mitigations. He said the court should consider that he is a family man with children who depend on him for their upkeep. He said it should also be considered that he was in remand custody from 6th June 2018 to 29th August 2019. He referred the court to the authority of Baraka Safari vs Republic HCCR Appeal No. 75 of 2016 where life imprisonment was reduced to 15 years imprisonment.

10. The respondent counsel’s submissions were that appellant was granted his rights under Act 50(2) of the Constitution of Kenya confirmed he was furnished with evidence that the prosecution relied upon early enough to enable him prepare for the trial. It was argued that appellant extensively cross examined the prosecution witnesses and that showed he was prepared.

11. It was also submitted that the appellant did not ask the court for time to prepare his defence and he acknowledged this in his submissions it was contended that appellant had complained that his trial had delayed and he cannot be heard to complain of that he had no time to prepare defence,

12. The State counsel argued that prosecution proved all the ingredients of the offence of defilement to the required standards of beyond all reasonable doubts.

13. On conviction the State submitted that same was safe.

14. On sentence the respondent counsel appreciated the jurisprudence that emerged from **Francis Kariko Muruatetu and Another vs Republic [2017] eKLR** but urged the court to consider the circumstances of this case and find that the sentence imposed was justifiable, fair and correctly handed out. The court was urged to uphold the conviction and sentence and dismiss appeal.

15. Being 1st appellate court I have considered and re-evaluated the evidence on record in the trial court as was as the judgement by the trial magistrate and confirmed that indeed the prosecution witnesses testified on 29th August 2019 and upon close of prosecution case the appellant was placed on defence and after he closed his case the trial magistrate delivered judgement on the same day at 4.00 p.m. perusal of the trial court records show that this trial was conducted during service week for children cases. This was an exercise conducted nationwide to reduce backlog of cases involving children whether as victims or children in conflict with the law. It is also in compliance with Article 159(2)(b) of the Constitution which requiresand to be conducted and expediently under the Children Act No. 8 of 2001. The appellant had previously complained of financial hardship in attending court and claims that he did not have time to prepare his defence after having been supplied with copies of witness statements way back is not done in good faith. He did not ask the court that he needed time to prepare his defence.

16. Whether complainant’s evidence was corroborated PW 1 told the court the appellant found her fetching fire hood and pulled down her panty and told her to hold his hand and he defiled her after lowering his short. After defiling her he gave her 10/= . Complainant said the appellant repeated this act on the 2nd, 3rd and 4th day and after every episode he gave her 20/=, 30/= and 50/= respectively. It was the last time PW1’s mother saw her with money and inquired and she reported that appellant had been defiling her whenever she went to fetch fire hood and give her money to buy goodies during school breaks. She said that appellant told her not to scream and also not to tell anyone. PW 1 said appellant was not armed. She said she did not bleed. She said accused used to visit them at home but had stopped.

17. PW 3 examined the complainant and found to have been sexually abused. The infection in the complainant’s genitalia was indicative of a sexual interaction with a male organ. The medical evidence therefore corroborated the complainant’s evidence that she was defiled. The fact that she did not inform her mother or even report to any one that appellant has severely defiled her cannot be fatal to her case.

18. The appellant timed when the complaint’s mother – PW 2 had visited PW 1’s father at the hospital and followed her where she went to fetch fire wood besides the stream and entered her using coins to have sex with her. The appellant was an adult of sound mind and stood in the position of a parent to PW 1 and taking advantage of her knowing full well that her father was admitted in hospital following RTA was malicious and evil on the part of the appellant.

19. This court confirms the conviction and substitutes the life imprisonment sentence to a definitive sentence of 30 years imprisonment.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 1ST DAY OF JULY, 2021.

HON. LADY JUSTICE ADWERA ONG'INJO

JUDGE

In the presence of:-

Ogwel - court assistant

Respondent - Ms. Karanja

Appellant - present in person

HON. LADY JUSTICE ADWERA ONG'INJO

JUDGE