



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 131 OF 2019**

**PIUS KELLY SAMMY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of Hon. P. Wambugu (Mr.), Principal Magistrate,*

*delivered on 10<sup>th</sup> December 2019 in Kwale Magistrate's*

*Court Sexual Offences Case No. 112 of 2017).*

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

1. The Appellant Pius Kelly Sammy was charged in Kwale Magistrate's Court Sexual Offence case No. 112 of 2017 with the offence of defilement contrary to Section 8(1) as read with Sections 8(3) of the Sexual Offences Act No. 3 of 2006.

2. Particulars are that Pius Kelly Sammy on the 10<sup>th</sup> day of November, 2015 at [particulars withheld] Village, Vanga Locations of Kwale County within Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of DK a girl aged 12 years.

3. The trial court took evidence of 4 prosecution witnesses and placed appellant on his defence, but he opted to remain silent. The trial court thus found appellant guilty based on the prosecution evidence on record and convicted him. The appellant was sentenced to serve 20 years imprisonment.

4. The appellant was aggrieved and he filed his petition of appeal based on the following grounds:-

(1) That the trial court erred in law by convicting him based on a charge sheet that was defective.

(2) That the learned trial magistrate erred in both law and fact by failing to see that the element of identification was founded on unsubstantiated allegations of a provision similar charge.

(3) That the trial court failed to see the crucial evidence of identification withheld by the prosecution.

(4) That the trial court then failed to observe that this was a classic case of fabrication.

(5) That the trial court relied on evidence emanating from a poorly investigated case.

(6) That the trial court also failed to take cognizance of the current jurisprudence pertaining to sentencing of offenders charged under Mandatory Minimum Penal Laws.

5. The appellant sought that appeal be allowed convictions quashed and sentence set aside.

6. The prosecution's case was that PW1 send her daughter the complainant to the shop at 10.00 a.m. and when she didn't return by 2.00 p.m. she started searching and informed the area chief. That in company of Mzee Abdalla they started visiting houses in the village and when they visited accused person's house they heard the complainant crying inside. When they went to report to chief the chief referred them to police station. The police didn't visit the scene and when they returned the accused disappeared and complainant go back home. That complainant went back home the following day and said appellant told her to go to his house and collect mother's debt but locked her in the

house and had sex with her.

7. PW1 too informed police and PW2 was taken to hospital. PW1 testified that appellant disappeared and was only arrested in October 2018. PW1 said appellant was a neighbour but she had never sold palm wine (Mnazi) to him.

8. The complainant testified as PW2 and said she was sent to buy soap by her mother when she met the appellant who told her he had her mother's cash which PW2 should collect.

9. That she went with the appellant to his house and appellant told her to pick a cup and give him water and when she refused to enter he became very harsh and held her by the cuff and pushed her inside the house. That when she went to fetch water the appellant held a knife and led her to his bedroom, and defiled her. She said that appellant moved her to his friend's place known as Mutisya at night and that when she heard people outside appellant didn't help her. She said appellant beat her and had sex with her twice at his house and the next day at Mutisya's house.

10. PW2 said appellant threatened to kill her but she ran away when she tricked him that she was going to the toilet.

11. Complainant testified that she met appellant thereafter and he told her he would attack her again but then disappeared and was only arrested in 2017. The complainant said they don't sell alcohol. She said appellant lured her to his house saying he was going to give her her mother's money but then held a knife and had sex with her.

12. PW3 produced P3 for complainant. He said the complainant came with history of defilement and on examination her hymen was broken. PW3 said that he established PW2 related with a mature man.

13. PW4 P.C. **Joseph Kiprotich Rono** of Lunga Lunga police station took over investigations of the complaint herein and preferred charge against accused who was arrested at Jego area on 11<sup>th</sup> November, 2017. He said the offence was committed on 15<sup>th</sup> November, 2015.

14. This appeal was canvassed by way of written submissions. The appellant submitted that the charge sheet was defective for reasons he was charged under section 8 (1) as read with Section 3 instead of Section 8(3) of the Sexual Offences Act. The appellant relied on the holding in **Rashid Mwabeja Mbovu –vs- Republic HCCR Appeal No. 199 of 2014** to support his position. That a conviction cannot stand on a defective charge sheet. The appellant argued that prosecution wanted to depict him as a habitual offender and thus created confusion as to whether he had been previously arrested for the same matter and that the matter was vitiated by manner in which charges were read over to him.

15. The appellant further argued that the evidence of Abdalla was crucial but that he was not called to testify. He also said that Mutisya whom PW2 alleged he was taken to his house didn't also testify and that it can be presumed that their evidence would have been adverse to the prosecution.

16. The appellant argued that the case was poorly investigated and it is not understood why police handled the matter casually when it was so serious.

17. The appellant further submitted that the trial court over relied on the evidence of the complainant to convict him. He said no reasons were given why the trial magistrate believed the evidence of PW2.

18. He said that medical evidence didn't corroborate PW2's evidence as PW2 was examined 4 days after the date of alleged incident of defilement and it lacked probative value necessary to link the appellant to the incident. He said PW2 can't be considered a truthful witness because she didn't make distress call and even when allegedly taken to Mutisya he didn't tell him what was happening to her. He said evidence by PW2 cannot sustain conviction without corroborations.

19. The appellant alleged he was fabricated. He said the section under which he was charged prescribed penalty of 10 years and not 20years. He said that ass.....was rightly convicted under Section 8(1) as red with Section 8(3) thus the court should consider the jurisprudence in Muruatetu case and adjust the sentence to a more lenient one as in **Yusf Shunzi Kunani Pet. No. 24/2019 at Mombasa** and reduce sentence to 7 years.

20. The respondent's submission was that there was an error on face of charge as it ought to have been section 8(1) as read with Section 8 (3) of the Sexual Offences Act and not as read with Section 3 of the Sexual offences Act. It was however argued that the nature of charge was known to the appellant and there was no confusion and/or prejudicial suffered. That from the proceedings the appellant understood the charge against him as he extensively cross examined the witnesses and didn't raise an objection at an earlier state during the trial as per section 382 of Criminal Procedure Code.

21. It was submitted that the evidence presented showed that the appellant had inappropriate Sexual contact with PW2 and holding otherwise only because of a minor error would be against justice sought.

22. It was also submitted that appellant was positively identified by PW1 as a neighbour as well as PW2. That questions in cross examination revealed that he wasn't a stranger to PW1 and PW2. It was submitted that appellant was arrested by members of public and taken to police station and he was charged and the investigating officer properly discharged his duties.

23. The Respondent urged the court to dismiss the grounds that appellant was fabricated as ungrounded.

24. On the jurisprudence as to mandatory minimum penal laws, the Respondent argued that the trial magistrate applied it and was correct on

the sentence handed out.

25. The Respondent's counsel urged the court to dismiss the appeal in its entirety.

26. The mandate of the appellate court is well settled in that it is to re-evaluate relook and re-analyze evidence in lower court records and come up with its own independent conclusion taking into considerations that it didn't have the opportunity to see and hear evidence from the witnesses 1<sup>st</sup> hand.

27. Issues of determination are whether the prosecution proved ingredients of the offence of defilement beyond reasonable doubt that is:-

- That there was penetration
- The age of complainant
- Identity of assailant

28. This court has considered the argument by applicant that charge was defective but it is obvious that citing of section 3 was typographical error as Section 8(1) can't be read with Section 3. They don't go together. The age of the complainant 12 years militates against offence having been brought under section 3 of Act No. 3 of 2006 as it provides for rape. Rather than defilement.

29. The Applicant participated in the proceedings with full knowledge that the offence before court was committed against a 12 year old minor and not an adult. I agree with the Respondent counsel that there is an error of such immaterial error in sections 382 of the Criminal Procedure Code.

30. Whether appellant was properly identified, PW1 and PW2 knew him as a neighbour and that there was no mistaken identity. The appellant had the opportunity to testify and defend himself and he did not. He opted to keep quiet. The evidence of PW1 that she was defiled was corroborated by Medical evidence on record and identity of the assailant by PW1 was not challenged and thus the trial magistrate properly arrived at the conclusion that the prosecution had proved the case beyond all reasonable doubt.

31. This Court finds appeal lacks merit and the same is dismissed. Orders accordingly.

32. Right of appeal 14 days explained.

**Dated, signed and delivered in Open Court /online through MS TEAMS, this 22<sup>nd</sup> day of July, 2021**

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

**JUDGE**

***In the presence of:-***

*Ogwel – Court assistant*

*Ms. Karanja for Respondent*

*Appellant – present in person*

***Hon. Lady Justice A. Ong'injo***

***Judge***