



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 48 OF 2019

AT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Accused in person

J U D G M E N T

The appellant was charged and tried of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. He was found guilty and sentenced to twenty (20) years imprisonment. Being aggrieved with conviction and sentence, he preferred an appeal to this Court on the following amended grounds:

(a). That the Learned trial Magistrate erred in Law and fact by giving the appellant a harsh and excessive mandatory minimum sentence of twenty (20) years imprisonment.

(b). That the Learned trial Magistrate erred in Law and fact by not considering mitigation.

In support of the appeal, the appellant relied on his written submissions and the principles in **Francis K. Muruatetu v R {2017} eKLR**, **Samuel Achieng Alego v R HCCR No. 187 of 2015**, **David Masila Githurui v R HCC APP No. 198 of 2014**. In essence, the appellant grievances seem to be on sentence largely than conviction.

As was submitted on behalf of the state by **Mr. Mwangi**, prosecution counsel, the evidence against the appellant was overwhelming in respect of the elements of the offence. Learned prosecution counsel urged the Court to uphold the conviction and sentence as founded by the trial Court.

During the appellant's trial, evidence was adduced by the victim (**PW1**) who after being sworn stated as follows. That it was on 22.4.2015 in company of the appellant walking towards an M-pesa agent to withdraw some money. She knew the appellant whom she referred in Court as her step-father. As they walked they came into an incomplete house and that is the place appellant removed a knife, held her throat with threats of inflicting personal injury if she does not give in to the sexual intercourse. Fearing for her life, (**PW1**) testified that she submitted to sexual act in which the appellant ripped off her 'dira' dress, the underwear and simultaneously inserted his penis to her vagina. In the testimony of (**PW1**), that sex ordeal lasted about an hour or so before the appellant walked away from the scene. Thereafter, she decided to go to the hospital and on examination her hymen was found to have been ruptured. Further on cross-examination in chief, the victim narrated to the Court that the sexual acts with the appellant continued unabated for some time on diverse dates. She said that from the criminal acts of the appellant, she suffered a lot of pain and trauma.

(PW2) – JAH. – testified as an auntie to (**PW1**). Her evidence mainly was on the role she played in reporting the incident to the police following the defilement incident committed by the appellant.

(PW3) – Mohamed Soiyanga, a clinical officer based at Faza Sub-District Hospital recollected that on 7.5.2015 he examined (**PW1**) who came to the hospital with a history of being defiled. On examination (**PW3**) confirmed that (**PW1's**) private parts had lacerations on the vaginal floor estimated to be 24-28 hours old. He opined that the victim and suffered maim and the P3 Form was produced as **Exhibit 1**.

(PW4) – MS aged seventeen years old gave evidence that was married to her mother. She also gave a chronology of events on the moral character of the appellant. This was indicative and in support of the criminal transactions in which she was defiled by the appellant. She

describes the incidents to have occurred in the forest nearby and the second time when she had gone to fetch water. On being examined by the medical doctor, it was proven that she lost her virginity as a result of the sexual intercourse she had with the appellant.

(PW5) – Munira Athman – testified with regard to the information received and produced in respect of the defilement of the victim **(PW1)** by the appellant. **(PW6) No. xxxxx Sgt. Wanderi**, Police detective attached to Faza Police Post testified and alluded to the level of investigations carried out on this matter which subsequently culminated in the arrest of the appellant. In that regard he produced the age – assessment of **(PW1)** as **Exhibit 3**.

In answer to the charge, the appellant denied the offence of defiling the victim **(PW1)**. According to the appellant all these allegations by **(PW1)** were all a fabrication arising out of a conflict with his fourth wife **M**.

Determination

The Court of Appeals of Eastern Africa laid down the principles that ought to be followed when hearing appeals by the 1st appeals Court in **Pandya v R {1957} EA 336** and **Ruwalla v R {1957} EA 570**:

“It is the duty of the first appellate Court to remember that the parties to the Court are entitled, as well on the questions of fact as on questions of Law, to demand a decision of the Court of first appeal and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing it down inferences and conclusions though it should always bear in mind that it has neither seen or heard witnesses and to make accounts in their respect.”

Therefore, after perusing the record of the Lower Court, the question to be considered is whether, there was sufficient evidence to justify the findings of fact and Law by the Lower Court. In any criminal matter, the state has a duty to prove the case beyond reasonable doubt. (See **Woolmington v DPP {1935} AC 462**) In the case of defilement, the state has to prove the following elements:

- (a). The act of defilement that is penetration of the female genitals by the male organ of the accused.*
- (b). The element of age of the victim being below eighteen (18) years.*
- (c). The element on identification of the perpetration.*

The basic elements for the offence of defilement revolve around penetration and the fact of the victim who was intentionally and unlawfully defiled. It has to be remembered that under Section 2 of the Sexual Offences Act, one thing in common for the offence to be sustained is for the prosecution to prove that the victim was partially or completely penetrated by the male organs. On many occasions penetration may be proved by the testimony of the victim as a single identifying witness of the crime or other independent evidence. That is commonly referred to as corroborative evidence of penetration into the genitals.

In the instant case, the evidence before the Lower Court showed that there was penetration which was established by **(PW1)** testimony. That act of penetration was also corroborated by the medical evidence of **(PW3)**. In the clinical officers analysis and examination **(PW1)** suffered serious vaginal lacerations and due to its traumatic effect he opined the injury to be maim.

The appellant argued that all that specifics stated by the victim were as a result of the differences he had with his wife and the mother to **(PW1)**. I have looked at the record of the Lower Court and I find that **(PW1)** was indeed defiled. The conviction was well founded in the evidence of **(PW1)** as corroborated by the medical evidence of **(PW3)**. The arguments by the appellant on the existence of their personal differences with his wife have no bearing to the crime he committed against the victim **(PW1)**.

Secondly, the evidence of **(PW1)**, **(PW3)** and **(PW5)** also proves that the victim was indeed fifteen (15) years old when the offence happened. The only other element to be considered is that of identification of the appellant. The cases of **Cleophas Otieno Wamuga v R CR Appeal No. 20 of 1989 UR** the principles upon which visual identification by recognition were emphasized. The Court held inter alia:

“That way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J. in the known case of R v Turnbull {1976} 3 ALL ER 549 where he said “Recognition may be more reliable than identification of a stranger, but, even when the witness is purporting, to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In **Abdallah Bin Wendo v R 20 EACA** – the Court held thus:

“Subject to certain well known exceptions, it is trite Law that a fact may be proved by the testimony of a single identifying witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respective identification especially when it is known that the conditions favoring correct identification were difficult

From the evidence the identification of the appellant in this case lay not only on the visual features observed by **(PW1)** but also on her recognition by that witness. The appellant before Court as confirmed by **(PW1)** was well known prior to the occurrence of the defilement. It is indeed acknowledged by the appellant that **(PW1)** is a daughter to his wife. So there can be no iota of evidence to doubt or disbelief the testimony of **(PW1)** on recognition of the appellant. It must be remembered that the credibility of **(PW1)** was never impeached by the trial Court. The finding made by the Lower Court on identification cannot be faulted.

Having so found on the issue of identification, it follows that the appellant was squarely placed at the scene as the principal offender to the

unlawful act of defilement. In the result, this appeal has no merit on conviction, and the Judgment of the Court is hereby affirmed.

Finally, the appellant has also appealed against the sentence stating that it is unconstitutional, punitive and excessive in the circumstances. A reading of Section 8 (4) of the Sexual Offences Act provides for a penalty not less fifteen (15) years. The reasons for enhancement of the sentence is well articulated in the Judgment of the trial Court. There are crimes in our society that a plea of being a first offender is of little relevance. That the offenders who participate in the commission of heinous crimes of carnal knowledge with young girls, brutalizing their being and occasioning a permanent psychotraumatic effect, should know that if found culpable they will be subjected to long custodial sentences. I draw the appellant to the provisions of Section 382 of the Criminal Procedure Code. Giving effect to these provisions there is no error, omissions or irregularity that has been pointed out by the appellant which has occasioned a failure of justice. This is one case I find no misdirection or wrong exercise of discretion to call upon this appeals Court to vary or substitute the sentence. This appeal is dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for DPP
2. The Appellant