



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 64 OF 2019

ELISHA OUMA WAMUAKOAPPELLANT

VERSUS

REPUBLICRESPONDENT

[An appeal against the Conviction and Sentencing by the Principal Magistrate's Court

Criminal Case No. 458/2014 delivered on the 16th day of April, 2019]

JUDGMENT

The Appellant, **ELISHA OUMA WAMUAKO**, was convicted for the offence of **Defilement** contrary to **Section 8 (1)** and **8 (2)** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.

1. In his Amended Grounds of Appeal he first asked this Court to review the sentence pursuant to the pronouncement which was made by the Supreme Court, that mandatory sentences were unconstitutional.
2. Secondly, the Appellant requested the Court to direct that the period which he had spent in custody, when he was still on trial, be taken into account when computing the duration he was supposed to spend in imprisonment. That prayer was founded upon **Section 333 (2)** of the **Criminal Procedure Code**.
3. The next issue which the Appellant raised was about the veracity of the case which was presented by the prosecution. His view was that the case against him was never proved to the standard required by law.
4. When canvassing the appeal, the Appellant pointed out that the Complainant had remained silent for a period of 4 days before she disclosed to her parents about what had befallen her.
5. Considering that the child's mother testified that she used to be the person who was bathing the child, the Appellant submitted that it was unbelievable that the mother could have failed to notice the injuries sustained by the girl.
6. The Appellant noted that the child apparently went to school for a couple of days after the incident, and she was able to not only play with other children, but she also performed some chores at home. In the circumstances, the Appellant found it surprising that the child would not have complained of any sort of pain or of any other complications.
7. Furthermore, the Appellant pointed out that the girl was first examined about 15 days after the incident. In his considered view, the evidence tendered by the prosecution had been affected by the delay in ferrying the Complainant to the hospital.
8. It was the Appellant's contention that sperms last 72 hours after an offence such as defilement, had been committed.
9. In this case, the delay was for much longer, and when the girl was first examined, she was diagnosed as suffering from malaria. Accordingly, the Appellant submitted that there was no medical evidence which proved the case.
10. Finally, on the question of the sentence, the Appellant told this Court that during the six years he has been in prison, he had gone through rehabilitation programmes. Therefore, although he had left home without any skills, he had now attained Grades III, II and I in upholstery.
11. The Appellant believes that he was now well-equipped to live a crime-free life, as he will be able to earn a living through legal means.
12. Having undergone rehabilitation, the Appellant urged this Court to find that the time he had already spent in prison was sufficient

punishment.

13. I have re-evaluated all the evidence on record, as is required of a first appellate court.

14. **PW1**, “**QAJ**” testified that she was 6 years old. Her mother “**HJ**” produced the child’s Baptismal Card which cited the date of birth as being 4th December 2007.

15. According to the child’s mother, her daughter was 7 years old.

16. As **PW1** testified on 22nd August 2014, she was still about 4 months shy of her 7th birthday. I therefore appreciate why **PW1** said that she was 6 years old.

17. I also appreciate the fact that although the child had not yet attained the age of 7 years, her mother gave that as her age; I say so because, logically, the child was almost 7 years old.

18. In any event, the age of the child was not an issue for determination in this appeal.

19. Pursuant to the provisions of **Section 8 (2)** of the **Sexual Offences Act**, those who commit the offence of defilement with children who were 11 years or less, would be accorded the same punishment. Each such convict would be liable to imprisonment for Life.

20. Both the Appellant and the child’s mother testified that the two families lived within one housing structure. The building had one external door, and within it the separate rooms were rented by different tenants.

21. The Complainant’s family lived in one unit, whilst the Appellant lived in a separate unit. In a nutshell, the Appellant was a neighbor to the family of the Complainant.

22. **PW1** testified that the Appellant called her into his room. She went there, thinking that the Appellant wanted to send her to the shop.

23. Instead, the Appellant undressed the child and then he also removed his trousers and his underwear.

24. **PW1** gave a vivid testimony about how the Appellant placed her on a mattress which was on the floor; and he then put his penis in her vagina.

25. **PW1** screamed, but the Appellant covered her mouth, using his hand.

26. It was the evidence of the Complainant that the Appellant threatened to kill her if she told her mother about what had happened.

27. In my considered opinion, the threat issued by the Appellant is what caused the Complainant to refrain from disclosing to her parents, what had transpired.

28. However, when the Complainant started “*urinating blood*”, she felt obliged to tell the mother about what the Appellant had done to her.

29. The incident took place on the night of 24th March 2014; and on 26th March 2014 the child informed her mother about it.

30. The mother corroborated the testimony of the Complainant, saying that even when she first found “*a big hole at the vagina*” of the Complainant, the latter refused to disclose what had happened to her.

31. It is only later that the child told her mother that she wanted the family to shift from their house. And when the mother asked for the reason why she wanted the family to relocate, the Complainant explained that the Appellant had threatened to kill her if she revealed what he had done to her.

32. I am therefore fully satisfied that the reason why the child did not immediately reveal to her mother about what had happened is that she was genuinely scared by the threat from the Appellant.

33. **PW4, DR. PATRICIA CHESANG** examined the Complainant on 10th April 2014. She found that the hymen was not intact. However, the doctor visualized injuries on the child’s vagina.

34. And although there was no obvious bleeding from the vagina, there was some greenish discharge therefrom.

35. When the vaginal discharge was examined at the laboratory, it had pus cells and epithelial cells.

36. Having re-evaluated the evidence adduced by the Appellant I note that he attributed his tribulations to an alleged disagreement with the mother of the Complainant. He said that the lady wanted him to befriend her, but he had refused.

37. During the cross-examination of **PW2**, the Appellant had suggested that the mother of the child had asked him for money, and also that she had wanted him to sleep with her.

38. The learned trial magistrate, who had the opportunity to see the demeanour of the witnesses when they were giving evidence, expressly stated that she had no doubt that the Appellant had defiled the Complainant.
39. By so holding, the trial court must be deemed to have rejected the testimony of the Appellant.
40. In my considered opinion, the trial court was correct. I so find because there is clear testimony to show that the Complainant's vagina had been assaulted, resulting in it having "a big hole."
41. The Complainant gave a graphic account of how the said big hole came about; it was because the Appellant had inserted his penis into her vagina.
42. The alleged disagreement between the Appellant and the child's mother cannot have caused either the "big hole" or the pus and the epithelial cells which were found in the child's vagina.
43. Accordingly, the trial court arrived at the correct decision, when it convicted the Appellant for the offence of defilement.
44. On the issue of the pronouncement by the Supreme Court in "the Muruatetu case", the said Court issued Directions on 6th July 2021.
45. The Supreme Court stated categorically that the case of Muruatetu;
- "..... cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution."***
46. The Court went on to make it clear that the decision in the case of Muruatetu was only applicable to sentences for **Murder** under **Sections 203 and 204** of the **Penal Code**.
47. This Court is bound by the decision of the Supreme Court, and therefore I can only reiterate that the Appellant cannot derive any benefit from the Muruatetu case as he was not convicted for the offence of **Murder** under **Sections 203 and 204** of the **Penal Code**.
48. As regards **Section 333 (2)** of the **Criminal Procedure Code**, there is no doubt that if the Appellant was in custody during the period when he was on trial, the said period would be taken into account when computing the duration which he should spend in prison, serving the sentence.
49. Having been sentenced to Life Imprisonment, it follows that the period of the Appellant's incarceration can only be determined by the duration of his life.
50. In Kenya, Life Imprisonment is literally that: the convict shall remain in prison for the rest of his life.
51. Accordingly, this Court cannot play the role of God, by ordering a reduction of the period which the Appellant would serve in prison, as I have no power to determine how long the Appellant will be alive.
52. In the result, the appeal is dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE