



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 10 OF 2020

FRED MUSA KORIRA....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case No. S.O 6 of 2019 at the Senior Resident Magistrate's Court – Sirisia Law Courts by Hon. L.N Kiniale - PM)

JUDGEMENT

1. The Appellant, FRED MUSA KORIRA, was charged with the offence of Defilement contrary to **Section 8(1)** as read together with **Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars being that, on the 25th day of March 2019 at about 1.00pm at [Particulars Withheld] Village Malakisi location with Bungoma Country, he unlawfully and intentionally caused his penis male organ to penetrate the vagina of a female organ of MNK (name redacted on account of age) aged 9 years.
2. The Appellant faced an alternative charge of Indecent Act contrary to **Section 11(3) of the Sexual Offences Act**; that on the 25th day of March 2019 at about 1.00pm at [Particulars Withheld] Village Malakisi location within Bungoma County, he unlawfully and intentionally caused his penis male organ to touch the vagina female organ of MNK a child aged 9 years.
3. A summary of the Prosecution evidence is that PW3 sent MNK to her house to let out her chicken. The Appellant, who was well known to the minor, waylaid her and pulled her into his house. He placed her on his bed and undressed her then proceeded to defile her. That the Appellant only stopped when his sister came to the room. The minor reported the matter to PW3 who informed the headmaster and a clan elder. The Appellant was subsequently arrested and charged.
4. The Appellant in his defense denied all the charges brought against him and stated that he was being framed due to bad blood that existed between him and PW3.
5. The matter was subjected to a full trial at the end of which the Appellant was convicted on the main charge and sentenced to life imprisonment. He filed an appeal on grounds that the trial court had not given due regard to his evidence and also that sufficient proof was not given to implicate him. Lastly he was of the view that the sentence meted was excessive and harsh in the circumstance.
6. The Appellant submitted that the prosecution case was marred by inconsistencies including where the minor was heading and what she was going to do. Further that the alleged defilement is reported to have occurred on 25/3/2021 but that the Investigations Officer testified that he received a report that the minor had been defiled on 21/3/2019. He also submitted that defilement had not been conclusively proven as the puss and epithelial cells could be caused by other factors other than penetration especially because there were no other injuries to the vagina. He further submitted that the trial court failed to consider a possibility of mistaken identity thus occasioning him prejudice. Lastly, he submitted that the sentence to life imprisonment was unconstitutional.
7. The Prosecution counsel, M/S Ahinduka, opposed the appeal. In rebuttal Counsel submitted that the minor was defiled during the day and positively identified the Appellant in court. Counsel also submitted that the Appellant was arrested and both he and the minor were taken to the hospital where it was determined that the minor had been defiled and had an infection similar to what the Appellant had. Further it was submitted that the minor was 9 years old at the time of incident and that the trial Magistrate considered this fact alongside witness statements and determined that life imprisonment was the most appropriate sentence.
8. The grounds raised by the Appellant bring out two main issues for determination being; whether the prosecution had proved beyond reasonable doubt that the Appellant had defiled MNK and whether the sentence meted against the Appellant was harsh and excessive.

9. This being a first appeal, this court is guided by the principles enunciated in *Joseph Ndungu Kagiri -Vs- Republic (2016) eKLR*:-

- a) There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
- b) The first appellate court can also review the trial court's conclusion with respect to both facts and law.
- c) It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
- d) When the trial court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

10. This court must also make allowance for the fact that it neither saw nor heard the witnesses testify, whereas the trial court had the opportunity to do so, and to assess the witnesses' demeanor.

11. The Appellant was charged and convicted for the offence of Defilement contrary to **Section 8(1)** as read together with **Section 8(2) of the Sexual Offences Act No. 3 of 2006**. This section provides;

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

12. In order to discharge its onus, the prosecution was to prove beyond reasonable doubt the ingredients of defilement being that the victim was a minor, there was penetration and the perpetrator of the alleged crime was identified..

13. On the question of the age of the victim, the minor herself said she was 9 years old and the prosecution provided an age assessment report, which confirmed the age of the minor to be 9 years. The Appellant submitted that he had not been furnished with a copy of the Complainant's birth certificate and stated that the age assessment report was fabricated. I find no reason to disbelieve the age assessment report prepared by a qualified doctor who testified in court as PW2 and was subjected to cross-examination. More so the victim was a child in lower primary, and the trial court conducted a *voire dire*, which indicates that the trial court observed the victim and concluded that she was a child of tender years. I am therefore satisfied that the prosecution evidence was proved beyond reasonable doubt that the minor was 9 years old.

14. The other ingredient of defilement is penetration, which is defined by Section 2 of the SOA as the **"partial or complete insertion of the genital organs of a person into the genital organs of another person."** MNK stated of the Appellant "He then took his thing for urinating and inserted it in my thing for urinating". That is that he inserted his penis into her vagina causing her to feel pain and when she tried to scream he covered her mouth. PW3's evidence was that the minor told her that the Appellant did bad manners to her and she was in pain.

15. The evidence adduced clearly shows that the child ended up in hospital and upon examination it was established that she was sexually abused. The evidence of the complainant and the medical officer all point to a ruptured hymen. The child complained of pain right after the incident and reported the same to PW3. What is also clear is that a penis was at one stage used to penetrate the minor's vagina, as is evinced by the sexually transmitted disease detected in the minor. This sexually transmitted disease was detected in both the minor and the Appellant.

16. The medical evidence referred to missing hymen, whitish discharge and presence of pus and epithelial cells. PW2 testified that presence of epithelial cells confirmed trauma or injury in the vagina and puss cells, which led to the conclusion of a sexually transmitted disease, specifically Gonorrhoea. It can therefore be safely concluded that the missing hymen is likely to have been caused by penetration. The P3 form indicated that there was no presence of blood on the minor's clothing but I note that the minor does not appear to have been taken to the hospital immediately. However, PW2 corroborated the minor's testimony that she had been defiled.

17. From the foregoing, it is my view that the trial Magistrate was correct in reaching the conclusion that there was penetration of the minor, and that she had been defiled.

18. On the question of the identification of the Appellant, the minor testified that she knew the Appellant by face and that his house was near the road that goes to her school. He was therefore familiar to the minor. Further, the minor testified that the offence was committed at around 1.00pm and that the Appellant was well visible at that time. The question of familiarity of a witness and accused persons was addressed in the case of *Republic -Vs- Naru ole Saguda [2017] eKLR*. The court, in the foregoing case, was satisfied with the witness' familiarity with the accused person and that the time of the offence being around 1.00pm – 2.00pm in the afternoon, conditions were favorable for a positive identification.

19. In the instant case, the account of the minor was corroborated by **PW3** who testified that the Appellant lived about 100 meters from the school. Further that it was she who sent the minor to her house during the lunch break.

20. The Appellant also took issue with what he considered to be failure on the part of the magistrate to consider the evidence of the eyewitness at the scene. He did not submit on this ground and it was not clear which witness the Appellant was referring to. Be that as it may, the minor testified that the Appellant's sister found the minor in the Appellant's house and that the house was locked from the inside. This witness was however not called to verify this account.

21. The Appellant's sister may have been a crucial witness and it is not clear why she was not called to testify. The trial magistrate in the

judgement attributed the absence of the witness to the fact that she was Appellant’s sister. Nothing however stopped the Appellant himself from having the said witness summoned by the Court to testify on his behalf. Raising the issue after the determination of the matter is in my view an afterthought.

22. In any event, the absence of the said witness was not fatal to the prosecution case as the trial Magistrate rightfully observed. The trial Magistrate was satisfied with the identification of the Appellant and his placement at the scene of the crime. Further, corroboration in offences of this nature is not mandatory. **Section 124 of the Evidence Act** requires courts to ensure that evidence produced substantiates the claim against the accused. The court can proceed and convict if the evidence is sufficient as was held in **Geoffrey Amkwach -Vs- Republic [2018] eKLR**. It is my view that the evidence provided herein was sufficient and it was proper for the trial magistrate to rely on it to convict the Appellant.

23 With respect to the other inconsistencies outlined in paragraph 18 above, I observe that the trial court considered them and found, as stated in paragraph 4 at page 5 of the judgement that those contradictions, if any, were not fundamental to the case. It is not every discrepancy or inconsistency in the evidence of the prosecution that can debunk the prosecution case. In the case of **John Nyaga Njuki & 4 Others -Vs- Republic, Cr. App. No. 160 of 2000**, the Court of Appeal held the following;

“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.”

24. I have reevaluated the evidence and find that there were no discrepancies of the nature that would have created doubt and vitiated the prosecution case. In my considered view, the contradictions highlighted by the Appellant do not affect the otherwise proved case against him.

25. On the ground that there existed bad blood over a land dispute and a debt between the Appellant and **PW3**, the Appellant did not give any particulars about the parcel of land that allegedly compounded the irreconcilable differences between the two. Under **Section 107 of the Evidence Act** whoever alleges must prove. There is no doubt that the burden of proof in criminal matters lies with the prosecution. I observe that the Appellant put these allegations to PW3 in cross-examination and they were satisfactorily rebutted.

26. There is no evidence that the institution of the criminal case was actuated by malice on the part of PW3 stemming from a land dispute between the two or a debt owed between the two or at all. This also applies to his allegation that PW2 was bribed to falsify the contents of the medical report to his detriment. There is therefore no reasonable doubt arising from these allegations from which the Appellant could have reaped the benefit.

27. The Appellant has taken issue with the sentence meted by the trial magistrate. In his view, the sentence of life imprisonment was harsh and excessive in the circumstances of this case. The Appellant was convicted for the offence of Defilement under the provision of **Section 8(1)** as read together with **Section 8(2)** of the **Sexual Offences Act**. The minor in this case was 9 years old at the material time. The sentence provided by the Act in the circumstances is life imprisonment.

28. This court notes that the Appellant pleaded for leniency during his mitigation. He pleaded that he has a school going boy who depends on him; that he lost his wife and that his mother is a widow who is dependent on him. He also stated that he is disabled. I equally note from the grounds of appeal that the Appellant is contrite.

29. Since the enactment of the **Sexual Offences Act**, sentences provided under the provision of **Section 8** are *straight jacket* penalties as was determined the by Court of Appeal in **Denis Kinyua Njeru –Vs- Republic (2017) eKLR**. This means that the sentencing court has no room to exercise its discretion.

30. For the foregoing reasons, it is the finding of this court that the appeal lacks merit and is consequently dismissed.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF OCTOBER, 2021

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in Person.

In the presence of.....State Counsel.