



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 5 OF 2020

JACOB MUTUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

An Appeal from original conviction and sentence in criminal case no. 75 of 2018 that was

delivered on 29/01/2020 by the CM's Court Kitui by Hon. M. Kimani-RM

JUDGEMENT

1. **Jacob Mutunga**, the Appellant herein was charged with the offence of defilement Contrary to **Section 8(1) (2) of the Sexual Offence Act Number 3 of 2006**. The particulars were that on 9th October, 2018, at about 3PM at [Particulars withheld] village, Thua Location within Kitui County, intentionally and unlawfully defiled (name withheld) a girl aged 10 years.

2. The Appellant was convicted upon trial and sentenced to serve 45 years in prison. He was dissatisfied with both the conviction and sentence and raised the following grounds namely:-

(i) That the trial Magistrate erred by convicting him on insufficient and uncorroborated evidence.

(ii) That the prosecution's case against him was not proved beyond a reasonable doubt.

(iii) The trial court erred by relying on inconsistent and contradicting evidence.

3. A brief summary of the prosecution reveals that the victim of the offence was 10 years old. The age assessment report was done on the minor on 19.07.2019 almost a year after the incident revealed that the girl was aged 11 years. That report was tendered as P. Ex 3 by P.C Awandhi Mohammed (PW5) the Investigating Officer. The P3 form tendered by Thomas Kituka (PW4) a Clinical Officer based at Kitui County Referral Hospital also indicated that the victim was aged 10 years old.

4. The victim (PW1), testified that the Appellant defiled her at an area near a river as she was herding goats. She maintained that she was defiled in presence of her younger brother (PW2) who tried in vain to rescue her by repeatedly hitting the appellant.

5. MK (PW2), the victim's young brother testified and corroborated the same evidence.

6. The victim's mother also testified and confirmed that she had been left at home by her 2 children as they proceeded to herd goats in the field. The children took rather long and when they returned, she was informed that her daughter had been defiled by the Appellant. She stated that she took the child the following day to the health center where she was informed that her daughter had been defiled. She then went to Nzambani Police Station to report before proceeding to Kitui General Hospital where her daughter was examined and found to have been defiled and infected with a sexually transmitted disease.

7. The medical evidence tendered by Thomas Muasya Kituka (PW4) a Clinical Officer at Kitui General Hospital revealed that the girl had been defiled and infected with Sexually Transmitted Disease.

8. When placed on his defence, the Appellant denied committing the offence stating that he was framed. He claimed that there was no evidence that had implicated him. He testified that he was resting when he heard noise from children and that one poured sand on his eyes before insulting him. He claimed that he did not raise a finger and told them to leave him alone. He further claimed that money had been

poured to frame him by a sister to the victim's mother.

9. The trial court evaluated the evidence and found the prosecution's case had been proved beyond reasonable doubt upon finding that the defence raised was mere denials. He was convicted and sentenced to serve 45 years instead of life imprisonment as prescribed by law. The trial court applied the principle in Francis Mutuatetu in meting out the 45 years' sentence.

This court will come back to that issue later in this judgement.

10. The Appellant raised the following additional grounds in his petition of appeal with leave of this court granted on 7th June 2021. These are the additional grounds: -

(i) That the appellant's constitutional rights were violated.

(ii) That the conviction was not safe.

(iii) That vital witnesses were not called to testify.

(iv) That the learned magistrate erred in law and misdirected herself by convicting the appellant on purported identification evidence altogether without ruling out the possibility of mistaken identity more so in view of the prevailing circumstances at the alleged scene of crime.

(v) That the subordinate court relied the contradictory, inconsistent, inconclusive and insufficient evidence to convict him.

(vi) That Section 210 of the CPC was not adhered.

11. In his written submission's filed on 7th June, 2021, the Appellant contends that his constitutional rights to legal representation under **Article 50 (c) (g) and (b)** were violated. This court however finds that the issue of Constitutional violation is quite detached from the finding of conviction. He did not seek for legal representation. In any event, if the appellant feels that anyone violated his Constitutional right, he has every right to seek redress in a different forum. In this appeal this court only concerns itself with the weight of the evidence presented by the prosecution and the finding made by the trial court.

12. The Appellant also submitted that vital witnesses were not called to testify. He contends that a village elder who purportedly accompanied the victim and her mother to the hospital was not called.

13. He further submits that the prosecution did not prove its case beyond doubt.

14. The Respondent through the Office of the Director of Public Prosecution has opposed this appeal.

On the first ground regarding legal representation, the Respondent contends that the appellant never sought to be represented and that no one denied him the right to legal representation.

15. The State/Respondent contends that the witnesses summoned were sufficient to prove its case beyond doubt and needed no further witnesses for proof.

16. The State has asked this court to enhance the sentence meted out against the appellant to life imprisonment.

17. This court has considered this appeal and the response made by the State/Respondent. The duty of this court is to re-assess or re-evaluate the evidence tendered with a view of reaching own conclusion.

18. The appellant as observed above was charged and convicted of a sexual offence. In such cases, there are 3 critical elements that the prosecution is required to establish and prove. They are:-

(i) Penetration.

(ii) Age of the victim

(iii) Identification of the offender.

19. On the first question of penetration, this court has re-evaluated the evidence of PW1, PW2 and PW4 and find that the evidence is consistent and corroborative. The element of penetration was established through the evidence of PW1 and PW2. PW2 witnessed the act and bravely tried to rescue his sister by hitting the appellant with whatever he could lay his hands off.

Those heroic acts by a young boy of tender years was partly conceded by the appellant when he stated in his defence ***“.....one powered sand in my eyes and Started to hurl insults(Sic)”***

20. The Medical Officer (PW4) who examined the victim in my view put the matter to rest when he gave a vivid account of what he found

out on examination. The victim had been defiled. The element of penetration, therefore, was established and proved beyond any shadow of doubt.

21. I also find that the age of the minor was established and proved beyond doubt. The victim's age was established and proved by PW4. The P3 (PEx1) clearly indicated that the minor was aged 10 years at the material time.

22. The age assessment report tendered by Investigating Officer was not admissible in evidence because the Investigating Officer was not an expert and therefore competent to tender the age assessment. The production of that report infringed the provisions of **Section 48 of the Evidence Act**. The age assessment report therefore, was rendered hearsay due to the omission by the prosecution to call a competent witness to tender it. That notwithstanding, I am persuaded that despite the anomaly the other evidence I have cited above proved beyond doubt that the victim was 10 years old.

In fact, the trial court noted in its proceedings that the victim was a minor of tender years. When asked to state her age, the victim stated that she was 10 years old and in class 4. That evidence was consistent with the medical evidence of PW4 who stated that the minor was aged 10 years.

23. On identification, the appellant was well known to both kids (PW1 and PW2). He was a neighbour and he has not stated that his, was a case of mistaken identity. I also find that in his defence he almost gave himself away when he conceded that he had a confrontation with the children. I am therefore satisfied that the element of identification was not even contested. It was proved.

In the end, this court finds that the prosecution's case against the Appellant was simply overwhelming. The trial evaluated the evidence well and reached the correct conclusion. The Appellant's claim that he was framed was devoid of any shred of evidence. The evidence tendered by prosecution fully supported the charge and the conviction of the Appellant was safe.

On the question of sentence, I agree with the Respondent that the trial court misapplied the Supreme Court decision in the case of Francis Muruatetu in light of the clarification made by that court on 6th July 2021 in that decision. The Section of the law (**Section 8(2) of Sexual Offence Act**) provides for only one sentence. Life imprisonment. The trial court's hands were tied in the face of the said provision and it could not hand in any other lesser sentence.

In the end, this appeal lacks merit. The conviction is upheld. The sentence meted out by the trial court of 45 years' imprisonment is set aside and in its place, the Appellant shall now serve **life imprisonment** as provided under **Section 8 (2) of the Sexual Offence Act**. He deserves that sentence given the trauma he caused to that child and the fact that in the process of defilement, he infected her with a Sexually Transmitted Disease.

DATED, SIGNED AND DELIVERED AT KITUI THIS 8TH DAY OF NOVEMBER 2021.

HON. JUSTICE R. K. LIMO

JUDGE