



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 94 OF 2020

JAMES MECHUMO WANYONYI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 60 of 2019 at the Senior

Principal Magistrates Court Kimilili by Hon. G. Adhiambo – PM on 18/8/2020)

J U D G M E N T

1. **James Mechumo Wanyonyi**, the Appellant, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the Sexual Offences Act. The particulars being that on an unknown day of September 2018 in Bungoma North District within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of **SN** a child aged 15 years.

2. In the alternative, he faced a charge of committing an Indecent Act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. Particulars being that on an unknown day of September 2018 in Bungoma North District within Bungoma County, he intentionally and unlawfully touched the breasts of **SN** a girl aged 15 years with his hands.

3. Having been taken through full trial, the appellant was convicted and sentenced to serve ten (10) years imprisonment.

4. Aggrieved, the appellant appeals on grounds that: Section 36 of the Sexual Offences Act was not complied with; Clinical evidence could not sustain a conviction; the sentence of ten (10) years imprisonment imposed is harsh and excessive; and, that, the appellant is repentant and remorseful therefore prays for a non-custodial sentence.

5. Briefly, evidence adduced was that the complainant herein had consensual sex with the appellant, an act that she kept secret.

Thereafter she realized she had conceived. She ran away from home but returned thereafter. She was taken to hospital for examination and it was discovered that she was pregnant. The matter was reported to the police who commenced investigations. Subsequently DNA profiles were generated from both the appellant and complainant to determine whether they were biological parents of baby H who was born. It was established that there were 99.99 % chances that the appellant was the biological father of the child hence these case.

6. Upon being put on his defence, the appellant stated that he was summoned to Wabukhonyi Police Patrol Base. He went there only to be arrested. He was asked to reconcile with Patrick who had injured his eyes. When Patrick showed up he asked him to compensate him by refunding expenses that his parents incurred in taking him to hospital. This did not come to pass. Instead, he was arraigned in court but could not tell if Patrick was related to the complainant.

7. The appeal was canvassed by way of written submissions. It was urged by the appellant that it was not possible to tell who drafted the charge sheet as it had neither a stamp nor signature which rendered it defective. That the defilement was as a result of juvenile affair; and there being no evidence that the child born was a product of the appellant and complainant, the case was not properly investigated; And that since the appellant was a juvenile, the sentence of ten (10) years imprisonment calls for review.

8. The State/Respondent submitted that all ingredients of the offence were adequately proved and taking into account the age of the victim, the sentence meted out was commensurate to the offence committed.

9. This being a first appeal, this court must reconsider and analyze evidence in totality that was adduced at trial to arrive at its own conclusions bearing in mind that it had no opportunity of seeing or hearing witnesses who testified. In the case of **Ajode Vs. Republic (2004) KLR 81** the Court of Appeal stated that:

“In law it is the duty of the first appellate court to weight the same conflicting evidence and make its own inference and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that”

10. The offence of defilement is defined by **Section 8(1)** of the Sexual Offences Act that provides thus:

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

11. Ingredients of the offence that were to be proved beyond reasonable doubt were the age of the victim, the act of penetration and positive identification of the assailant/perpetrator.

12. The prosecution adduced in evidence a birth Certificate Serial number (withheld) issued to the victim S.N indicating that she was born on 1/12/2004. In the case of **Francis Omuroni vs. Uganda, Appeal No. 2 of 2000**, the Court of Appeal stated that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense”

13. Therefore at the time of the act of coitus the victim was of an apparent age of 15 years.

14. As a result of what transpired the complainant conceived.

This was proof of penetrative sex having occurred.

Section 2 of the Sexual Offences Act defines penetration as

...Partial or complete insertion of the genital organs of a person into the genital organs of another person;

15. A reading of the submissions of the appellant demonstrates confusion. At one point he argued that the offence was not committed but also admitted that it did happen and sought forgiveness.

16. The alleged defect on the charge is imaginary since the charge sheet is signed and duly stamped.

17. The appellant also complains that what happened was as a result of juvenile love affair. This was an admission of the fact of having had penetrative sex with the complainant, a fact proved further by evidence of the child that was sired.

18. In the premises, I affirm the conviction.

19. On sentence, the appellant contends that it is harsh and excessive. **Section 8(3)** of the Sexual Offences Act provides thus:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

20. Principles of interfering with sentence were well captured in the case of **Bernard Kimani Gacheru Vs. Republic (2002) eKLR** where the Court of Appeal stated as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

21. Following the conviction that resulted, the appellant was given the opportunity to mitigate and he stated as follows;

“I have a wife and 2 children I only have a mother without a father. I pray for a minimum sentence that I will complete faster. I am willing and ready to engage in community service.”

22. This means that at the time of the offence the appellant was a young adult.

23. The minimum prescribed sentence for the offence is twenty (20) years imprisonment. The sentence of ten (10) years was however meted out at a time when courts were deemed to have discretion following the decision of **Francis Karioko Muruatetu & another vs. Republic (2017) eKLR**. In the case of **Christopher Ochieng vs. Republic (2005)** the Court of Appeal stated that the mandatory nature of sentences deprived courts to exercise their discretion and therefore fails to contour to fair trial. This position has now been clarified by the Supreme Court in **Francis Karioko Muruatetu & another vs. Republic and others (2021) eKLR** to the effect that the principle only applies

to murder cases.

24. Punishing the offender would depend on the circumstances in which the offence was committed. Although the appellant was a first offender, he lacked integrity for defiling a child who was incapable of consenting to the act as she was a minor, yet, he was already married and a father of two (2).

25. In the circumstances, the trial court did not fall into error in meting out the sentence which was too lenient.

26. From the foregoing the appeal is bereft of merit. Accordingly it is dismissed.

27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY,

THIS 5TH DAY OF NOVEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

ODPP – Mr. Ayekha

Court Assistant – Esther