



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 78 OF 2020

OSCAR JUMA BARASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the original sentence in Criminal Case No.18 of 2019 at the

Principal Magistrate's Court Kimilili by Hon. G. Adhiambo –PM on 9/4/2020)

J U D G M E N T

1. Upon arraignment, **Oscar Juma Barasa**, the Appellant, was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the Sexual Offences Act. Particulars of the offence being that on the 25th day of October 2015 at Kimilili Rural Location, Kimilili Sub-County of Bungoma County, unlawfully and intentionally caused his penis to penetrate the vagina of **ENW** a child aged 13 years.

2. In the alternative, the appellant 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 the 25th day of October 2015 at Kimilili Rural, Kimilili Sub-county of Bungoma County, unlawfully and intentionally caused his penis to touch the vagina of **ENW**.

3. Facts of the case were that on the 25th day of October, 2015, the appellant, a motor cyclist took a certain lady to the complainant's home. He then lured the complainant into going to his place of residence where he had penetrative sex with her. She returned home and informed her parents concerning the ordeal. When the appellant returned to her home, he was arrested and taken to Kimilili Police Station where he was re-arrested. The complainant was subjected to medical examination. Her hymen was broken and a high vaginal swab carried out showed presence of epithelial cells. Investigations were carried out which culminated into the appellant being charged.

4. Upon being put on his defence, the appellant testified that being a "Bodaboda" rider he took a certain lady to the home of the complainant and as he waited for the lady, the complainant left with his motor cycle. He searched for her and when he ultimately found her both of them returned to her home. He asked the complainant's father to give him fuel but he became hostile and accused him of having an affair with the complainant. As a result, he was taken to the police station where he was charged with the offence.

5. The trial court evaluated evidence adduced, and reached a finding that critical ingredients of the offence of defilement, namely, the age of the complainant, the act that caused penetration and positive identification of the perpetrator were proved. It convicted and sentenced the appellant to serve twenty (20) years imprisonment.

6. Aggrieved, at the outset the appellant appealed against the entire judgment and sentence. But by an amended petition filed on 22nd July 2021 the appellant appeals against sentence on grounds that he is a first offender, and he called upon the court to take into consideration time spent in custody pursuant to the provisions of **Section 333(2)** of the Criminal Procedure Code in an endeavor to promote fair trial as enshrined in **Article 25 (c)** of the Constitution. in that regard, he cited the case of **Abolfathi Mohammed & another vs. Republic (2018) eKLR**

7. This being a first appellate court, it is mandated to re-consider and re-evaluate what transpired at trial, the entire record and have in mind the fact that it did not have the opportunity of seeing and hearing witnesses and based on that, reach its own conclusions (also see **Okeno vs. Republic (1972) EA 32**).

8. It is trite that in order for an appellate court to interfere with the sentence of the trial court, the appellant must demonstrate that the court

misdirected itself by acting on wrong principles and if the sentence imposed is harsh and excessive. This principle was well captured in the case of *Ogola s/o Owour vs. Reginum (1954) EACA 29* where the Court of Appeal stated that:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

9. Section 8(3) of the Sexual Offences Act provides that:

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.

10. It was proved by evidence of a birth certificate that the complainant was born on the 5th October 2002, this means that at the time of the act, the minor was thirteen (13) years old. The law provides for a minimum mandatory sentence of twenty (20) years imprisonment. This is a case where the trial court called for a pre-sentence report, took into account the appellant's mitigation and the fact that he was a first offender.

11. Although courts have been of the view that mandatory sentences deprive courts of their legitimate jurisdiction to exercise discretion such that such sentences fail to conform to tenets of fair trial as envisaged in **Article 25** of the Constitution, unless the law is amended courts must comply with what is prescribed by either the Constitution or Statute.

12. The Supreme Court in *Francis Muruatetu and another Vs. Republic, Katiba Institute & 5 others* (Amicus curie) (2021) eKLR gave directions and clarified that the discretion that had been assumed by courts as a result of *Francis Muruatetu & Another vs. R. (2017) eKLR* was erroneous, as the discretion is only applicable to murder cases.

13. This court has been asked to consider time spent in custody.

In the case of *Abolfathi Mohamed (supra)* the court stated that:

"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

14. The appellant was arrested on the 26/10/2015.

15. The appeal therefore succeeds to the extent that time spent in custody shall be taken into account. Therefore, I affirm the sentence term of twenty (20) years imprisonment that will be effective from the date of arrest.

16. 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. Ayekka

Court Assistant - Esther