



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 18 OF 2020

PATRICK MUTEMBEI NYAGA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006; the particulars were that on the 6th day of August 2019 at [Particulars Withheld] village in Mbeere North sub-county within Embu County intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of AK a girl child aged 10 years.
2. He also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006; the particulars being that on the 6th day of August 2019 at [Particulars Withheld] village in Mbeere North Sub-County within Embu county wilfully and unlawfully touched the vagina of AK a girl child aged 10 years with his penis.
3. The prosecution called four (4) witnesses in support of the charge and at the close of prosecution's case, the appellant was put on his defence wherein he testified as DW1 and called one witness.
4. The complainant AK gave evidence as PW1 and told the court how on the material day; she was asleep on the same bed with her sister when the appellant went and picked her from the bed and carried her with his hands to his bed. That he told her that he wanted to sleep with her. He removed her panty and inserted his thing for urinating. She felt pain and started crying.
5. In the morning she woke up and told her grandmother. In the evening she and the sister were taken to a neighbour's house by the grandmother where they spent the night. Later their father took them home. The chief went for them from their home and took them to Kanyambora AP Post and later Ishiara. She told the police what had happened and she was taken to Ishiara Hospital.
6. PW2 was the Chief of Kanyambora Location. On the 7th of August 2010 he received some information that the Assistant Chief, Ngura Sub-Location, had been informed that the appellant herein had defiled her daughter the previous day. He arrested the appellant at Kanyambora market and escorted him to Kanyambora Police post for interrogation. He requested police officers from Ishiara to take PW1 and the sister to the hospital for verification.
7. Dr. Wincate Wambui Njeri testified as PW4. She examined PW1 and filed a P3 form for her. On examination, she found that PW1's genitalia had some redness, whitish discharge and a lacerated hymen. The hymen was broken and she had a foul smell. She remarked that it was a case of defilement. She produced the P3 form as an exhibit. According to her, the hymen was broken two days before.
8. When put on his defence, the appellant denied having committed the offence. He however admitted that he took PW1 to his room but stated that he was not sure that the incident took place. He stated that all what was said in court was hearsay evidence.
9. In her judgment delivered on the 1st day of August, 2020 the learned magistrate convicted the appellant, and on the 22nd of September, 2020, the trial court sentenced him to serve 30 years imprisonment.
10. Being dissatisfied with the conviction and the sentence, the appellant has approached this court vide a petition of appeal which he filed on the 15th of October, 2020 wherein he has listed the following grounds of appeal;

1) The learned trial magistrate erred in both matters of law and facts by convicting the appellant without considering that the prosecution evidence was inadequate to support a conviction.

2) The learned trial magistrate erred in both matters of law and facts by failing to consider that the prosecution evidence was full of contradiction and uncorroborated.

3) The learned trial magistrate erred in both matters of law and facts by failing to consider that the the adduced prosecution evidence was tinted with a thick layer of doubts and unreliable for conviction.

4) The learned trial magistrate erred in both matters of law and facts by disregarding my defence without cogent reasons.

5) The learned trial magistrate erred in both matters of law and facts by imposing a harsh and excessive sentence while with inadequate prosecution evidence.

11. This being the first appellate court, it is guided by the principles enunciated in the case of **Okeno Vs Republic** where the Court of Appeal set out the duty of the first appellate court in the following terms: -

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya R [1957] EA 3365) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and drawn its own conclusions (Shantilal Ruwala Vs R [1957] EA 570).

12. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions and only then can it decide whether the magistrate's findings should be supported and in doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

13. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006 and an alternative count of committing an indecent act with a child. The ingredients of the offence of defilement are; -

1) Age of the complainant

2) Proof of penetration

3) Positive identification of the assailant

14. On the age of the complainant, the evidence available to the court is that she was 10 years when the offence was committed. A birth certificate was produced as an exhibit by PW3.

15. On proof of penetration, PW1 gave a comprehensive account of what happened on the night of the 6th of August 2019. She stated that the appellant went and picked her from the bed where she was sleeping with her sister and took her to his room and inserted his thing for urinating into her thing for urinating and she felt pain and started crying. Her evidence was corroborated by PW4, the doctor who examined her. She was complaining of pain in the perineum after having been defiled.

16. According to PW4, PW1 had genitalia redness, whitish discharge and a lacerated hymen. The hymen was broken, it was tender on touch and she had foul smell. The age of the injury was two days.

17. PW1's evidence was consistent and cogent. She was categorical that it is the appellant who defiled her. The appellant is her father though not her biological father. The following morning she told her grandmother what had happened. She stated that she was not cowered by anyone on what to say. I find that, sufficient evidence was adduced to prove penetration.

18. On identification, the court notes that the appellant is the foster father to the complainant. He is a person she knew well and she had no doubt in her mind that it is the appellant who defiled her. It was at night and they were asleep when the appellant picked the complainant from the bed where she was sleeping with her sister and took her to his bed. I find that the complainant knew her assailant very well.

19. The appellant's other ground of appeal is that the prosecution's evidence is contradictory. The court has carefully gone through the evidence on record but I cannot find any material contradictions. Even assuming that there are contradictions, the manner of treating contradictions in a case were stated by the Court of Appeal in the case of **Jackson Mwanzia Vs Republic [2017] eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda (Criminal "Appeal No. 139 of 2000 (UGCA) 6** thus;

"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. This court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

20. Similarly, the Court of Appeal in the case of **Richard Munene Vs Republic [2018] eKLR** stated;

"It is a well settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to the case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial that an accused person will be entitled to benefit from it."

21. On the sentence being harsh and excessive, it has not been demonstrated by the appellant how the trial court abused its discretion while sentencing. In the case of **Bernard Kimani Gacheru Vs Republic [2002] eKLR** the Court of Appeal stated;

“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 wrong material, or acted on the 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 stated is shown to exist.”

22. The sentence imposed must also meet the objectives of sentencing as per the Sentencing Policy Guidelines (2016) which are Retribution, Deterrence, Rehabilitation, Restorative justice, Community protection and Denunciation.

23. The appellant herein was charged under Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The sentence provided for under that sub-section is life sentence. The appellant herein was sentenced to serve 30 years imprisonment.

24. The trial court on sentencing noted that the complainant was badly affected by the actions of the appellant who is her father. Despite him expected to be a protector he turned into a predator.

25. He was lucky to get away with a sentence of 30 years.

26. In view of the foregoing, I find that the appeal is devoid of merits and I hereby dismiss the same and uphold the conviction and the sentence imposed by the trial court.

27. It is so ordered.

Delivered, dated and signed at Embu this 2nd day of November, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant/Appellant

.....for the Respondent