



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 118 OF 2019

RAPHAEL MUSYOKA MWALIMU.....APPELLANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. T. A. Sitati (Mr.) Principal Magistrate on

30th August 2019 in Criminal Case No. 541 of 2016, *Republic v Raphael Musyoka Mwamilu*).

JUDGMENT

Background

1. Raphael Musyoka Mwamilu was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars are that Raphael Musyoka Mwamilu on 19th day of May, 2016 in Kwale County within Coast Region intentionally caused his penis to penetrate the vagina of SD a child aged 12 years.
2. In the alternative count, the appellant was also charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that Raphael Musyoka Mwamilu on the 19th day of May, 2016 in Kwale County within Coast Region County intentionally touched the vagina of SD a child aged 12 years with his penis.
3. The trial magistrate considered the evidence of the four prosecution witnesses and the sworn statement of the appellant and convicted the appellant who was sentenced to serve 20 years imprisonment.
4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds:-
 - I. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years imprisonment without considering that the offence of defilement was not proved beyond any reasonable doubt.
 - II. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years imprisonment without considering that the case at hand was due to fabrication and made up case.
 - III. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant to serve 20 years imprisonment without considering that the source of his arrest was not established.
 - IV. That the learned trial magistrate erred in law and fact by in admitting a confession statement.
 - V. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant to serve 20 years imprisonment without considering that the sentence was harsh, disproportional and unconstitutional.
5. The Appellant prayed that the appeal be allowed, conviction quashed and the sentence set aside.
6. PW1, AW the mother to the complainant stated that the complainant was born on 5.8.2004. That on 19.5.2016, she left the house after her children had come back from school and she instructed them to lock themselves in because she got an urgent task of replenishing beer stock at Kilulu Bar where she worked. In the morning when the children were off to school, PW1 went to the shop to buy breakfast when she was told by Milka Tito, the owner of the kiosk that she suspected the Appellant had been trailing the complainant the previous day. PW1 knew

the Appellant as a fruit broker and she had known him for a few years. She had previously chased the Appellant away from her home thrice after he swore that he would have sex with the complainant. PW1 states that the Appellant had a number of rape cases at the Chief's camp. After PW1 got information from Milka on the need to look out for the complainant, PW1 asked some young men to look for the Appellant who was found at the market and arrested. PW1 said she took this action because the complainant had confirmed that the Appellant lured her with Kshs. 500. The complainant was picked from school by a bodaboda and taken to the chief's camp. On the way, the complainant revealed that the Appellant had gone to her at night with a knife and forced her to have sex with him or else she would be killed. The complainant disclosed this to KM, her uncle, because she feared her mother. The Appellant tried to give out a bribe of Kshs. 2000 to be released but he was handed over to Shimba Hills Police Station. The police gave instructions for the complainant to be taken to Shimba Hills Dispensary where they were referred to Msambweni County Hospital. Examinations and tests were conducted and the P3 form issued by the police was filled. The same was produced in court together with the PRC form.

7. PW2, Clinical Officer Phillip Kibet Chebii based at Msambweni County Referral Hospital confirmed that he examined and treated the complainant then filled the P3 form. PW2 stated that the complainant was 12 years old and in a fair general condition when she was referred to the hospital by Kubo Police Station on allegations of defilement. PW2 said that the hymen was absent, there was a whitish discharge but no venereal disease, she was HIV negative, syphilis negative, pregnancy negative, and urinalysis negative. PW2 concluded that absence of the hymen showed that penetration had taken place. PW2 produced the P3 and the PRC forms with his signatures as well as the lab form and report. PW2 said the vaginal canal had pus cells, indicative of either sexual infection or poor hygienic conditions.

8. PW3- the complainant said PW1 is her mother and she knew the Appellant when they moved to Shimba Hills from Likoni. The Appellant had rented a house next to theirs. PW3 said that on 19.5.2016, she was opening the chicken house within the compound at 6.00pm when the Appellant went over to her, pulled her hand and took her to the firewood storeroom and removed her dress before having sex with her. PW3 said she tried to reject his advance but the Appellant held her tightly and had a knife which scared her. PW3 said she had a 'dera' and panty which were forcibly removed by the Appellant who inserted his male organ in her vagina and defiled her. The Appellant then went away once he was done. Thereafter, PW3 took a shower and changed her clothes. That evening, her mother came back home late so she did not get the chance to report what had happened. Early in the morning, she went to school as usual. PW3 said that while at school, her mother sent for her to be fetched by a bodaboda who took her to Shimba Police where her mother had made a report. PW3 narrated to the police what the Appellant had done to her before she was taken to a local medical facility and later to Msambweni County Hospital. PW3 said she was taken to the lab for tests and later for examination and for treatment. PW3 also identified the Appellant in court by pointing at him in the dock.

9. PW4, No. 54122 Corporal Nduva Mutiso based at Msambweni Police Station said that the initial investigating officer was Sergeant Aden Shakir who was moved to Murang'a Police Station. PW4 said that on 22.5.2016 at 10.00am, PC Kipruto from Kubo Police Post arrived at Msambweni Police Station and found Sergeant Aden. PC Kipruto took the Appellant, the complainant and her mother to Msambweni Police Station. PW4 said that the complainant and her mother recorded their report. PC Fridah then issued a P3 form for examination at Msambweni Police Station. According to the investigation diary, the doctor confirmed that the defilement had taken place.

10. DW1, Raphael Musyoka Mwilu the Appellant herein said that he is a foodstuff distributor in the region and denies the charges. DW1 said that around 20.5.2016, he was in Esho village doing his daily arithmetic to pay off workers which he did and they went away. Suddenly he saw a group of young men come back. They had basins to sell and asked him to buy. A woman then emerged from behind them. The Appellant was then arrested and asked to go with them to Shimba Hills Police. None of them told the Appellant the reasons for arrest. The Appellant said he was taken to Kubo Police Station where the police informed him of defilement allegations. The Appellant said that he was asked for Kshs. 30,000 in exchange for his liberty but he rejected this offer and protested his innocence.

11. The appeal was canvassed by way of Written Submissions. The Appellant's submission was that the evidence of PW 1 on the two occasions that she attended court differed to the extent that when she was in court on 16th of January, 2018, she said that she stays with her daughter SD and her grandchild and that on 27th August, 2019 she said that she has two children-M who was 30 years and the complainants who was 15 years old.

12. The Appellant also submitted that if he had truly defiled the complainant, that her older sister-M, ought to have raised an alarm. In this regard, the Appellant attributed the discrepancies to PW 1's lack of credibility. To him, failure to disclose the age of PW 1's grandchild was a deliberate scheme to conceal vital information so as to fix him.

13. The Appellant further submitted that during the first attendance in court, PW1 stated that she went to Milka's shop where she learnt that Milka had seen her daughter and the Appellant. That during the second time in court, PW1 stated that Milka Tito asked her to check her daughter as Milka suspected that the Appellant had been trailing her daughter the previous day. The Appellant submits that there is a difference between seeing and suspecting. When a witness states that she saw an event, it means she relies on confirmed information. This is contrary to someone who merely suspects. It becomes difficult to form an opinion over what is suspected.

14. The submission by the Appellant on confession was that the same was not in accordance with section 25A (1) of the Evidence Act. What the Appellant referred to as a confession was PW 1's testimony that she had previously chased off the Appellant from her house three times after he swore that he would have sex with her daughter. He said that PW 1 was not qualified to take his confession and that the same was inadmissible and that it cannot form a basis for his conviction.

15. The Appellant also raised the defense of alibi in his submissions but claimed that it was PW 1 who created an alibi on the 19th of May, 2016 in the evening in order to create a conducive environment to implicate him on a defilement act.

16. The Appellant submits that in a criminal case, the scene of crime is crucial in gathering evidence to establish the facts surrounding the crime, whether the act happened in PW1's compound or in the abandoned home next to PW1's home. This raises the question as to which was the scene of crime and at what time the crime exactly took place.

17. The Appellant submits in defilement cases, the prosecution has to prove beyond any reasonable doubt the element of penetration, age

and identification. The Appellant submits that the age of the complainant is not disputed but penetration and identification. The Appellant submits on penetration that he does not dispute that the minor was not defiled. What the prosecution ought to have proved is that the complainant was not defiled by any other person but by the Appellant. Lack of hymen does not necessarily point at the Appellant as the person who defiled the complainant. On identification, the Appellant submits that he lives in the neighbourhood with the complainant and PW1, therefore, they are familiar to him. However, the broken hymen does not necessarily point to him as the person who defiled the complainant.

18. The Appellant submits on the issue of unconstitutional sentence that he was over punished and the same could be cured through Petition No. 15 of 2015 of *Francis Karioko Muruatetu & Another v Republic*.

Respondent's Submissions

19. The Respondent submitted that the prosecution had proved the three elements of the offence of defilement namely: age of the victim, penetration and identity of the perpetrator. That on the issues of age, the birth notification showed that PW 3 was born on 5th August, 2004 and that she was 12 years old at the time of the offence and that the prosecution discharged the burden to prove age beyond reasonable doubt.

20. On the issue of the identity of the perpetrator, it was submitted that he was a neighbor to the complainant and her mother for four and the offence occurred at around 6:00 pm and that there was daylight.

21. The fact of penetration was proved by the testimony of the complainant PW3 who gave a sworn statement. PW2-the clinical officer, produced the P3 and the PRC forms as exhibits where the finding was that the hymen was missing with the conclusion that there was penetrative sexual act. The evidence of the complainant and the doctor established that there was penetration.

22. The Respondent submits that the trial court properly evaluated the evidence and found that the prosecution established a case against the Appellant beyond reasonable doubt.

23. The Respondent submits on the issue of confession that no confession was admitted by the court. Page 59 line 21 to 22 does not constitute a confession. That was the reason the court gave for passing the sentence and the same was not considered for purposes of conviction.

24. On the issue of contradictions of the prosecution case, the Respondent cited the case of *Dickson Elia Nsamba Shapwata & Another v The Republic*, Cr. App. No. 92 of 2007 where the Court of Appeal of Tanzania as adopted in *James Ochieng Ogogo v Republic* [2018] eKLR which addressed the issue of discrepancies in evidence concluded; *'In evaluating discrepancies, contradictions and omissions, it is undesirable for the court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.'* The Respondent further submits on the issue that the alleged contradictions do not go to the heart of this matter. PW1 is the victim's mother and does not allege to be an eye witness. All she states is that she had cautioned the Appellant from pursuing her daughter after finding him in her company a while back. Further proceedings prior to a matter starting de novo cannot be referred to by this trial court unless special reasons are advanced. Those do not apply to this case. The Respondent submits that the P3 form establishes there was penetration. PW3 says she was injured in her vagina by the Appellant's penis and indeed her hymen was broken. There were no inconsistencies, the Prosecution's case was cogent, consistent and uncontroverted.

25. The Respondent submitted that the Appellant was arrested by members of the public and taken to the police station as explained by PW 4.

26. The Respondent submitted that Section 8(3) of the Sexual Offences Act provides for the minimum sentence of 20 years was lawful and appropriate in the circumstances and the holding in the **Francis Muruatetu Case** was not applicable in sexual offences cases or any other capital offence except murder cases. The trial court took into account the fact that the Appellant was not remorseful. In addition, the Appellant threatened the minor using a knife and repeatedly had sex with her. The Respondent submits that the Appellant took advantage of a 12 year old child and destroyed her inherent dignity. He violated her body as sexual offences traumatize victims for a long period of time.

27. The Respondent urged the Court to uphold both the conviction and sentence and dismiss the appeal for lack of merit.

Analysis and Determination

28. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic** [2010] eKLR where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

29. After considering the grounds of appeal Records of trial court, submissions and circumstances of the case, issues for determination are as follows:-

- i. Whether the offence of defilement was proved beyond reasonable doubt.

- ii. Whether the charge against the Appellant was a fabrication.
- iii. Whether the Appellant's arrest was in connection to the offence of defilement or any other offence.
- iv. Whether the Appellant's defense was considered.
- v. Whether due procedure was followed in admitting a confession

Whether the offence of defilement was proved beyond reasonable doubt

30. The **Sexual Offences Act No. 3 of 2006, Section 8(1) and (3)** under which the Appellant was charged states:-

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

(3)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.

31. In *George Opondo Olunga v Republic [2016] eKLR*, it was stated that the ingredients of an offence of defilement are;

'...identification or recognition of the offender, penetration and the age of the victim.'

32. The age of the victim was not in dispute as PW1 produced the complainant's birth notification which showed her date of birth as 5.8.2004. She was therefore 12 years old at the time the offence was committed. The ingredient of the age of the complainant is therefore not in dispute.

33. On penetration, **section 2 of the Sexual Offences Act** defines penetration as-

"The partial or complete insertion of the genital organs of a person into the genital organs of another person"

34. PW 3 said that the Appellant pulled her by the hand, pulled her into the store room and had sex with her while holding her tightly with one hand and holding a knife with the other. That he forcibly removed her 'dera' and the pant she was wearing. The PRC and the P3 forms showed that the complainant was defiled and her hymen was broken. The Appellant did not dispute that the minor was defiled however, he stated that the broken hymen does not necessarily point to him as the person who defiled the complainant. There was therefore sufficient evidence to prove penetration.

35. The third ingredient in the offence of defilement is the identity of the perpetrator. The prosecution ought to have proved that the complainant was not defiled by any other person other than the Appellant. The Respondent's witnesses testified that the Appellant was a person well known to the complainant and PW1 as he was their neighbour. The Appellant in his submissions, confirms that PW1 and PW 3 were familiar with him but he argues that the evidence of PW 3 as to the scene of the offence is different from the evidence by PW 1 who said that her tenant reported having seen the complainant and the Appellant the previous night at around 8:00 pm in an abandoned home next to her house. The complainant was categorical that she was defiled in a firewood storeroom next to the chicken house at 6:00 pm. What was reported to PW1 cannot override the direct evidence of the complainant as to where the offence took place. The issue of whether there was light in the alleged abandoned house does not therefore arise.

36. The trial Magistrate rightly believed the credibility of PW 3 as provided for under **section 124 of the Evidence Act**. That she recognized her perpetrator. **Section 124 of the Evidence Act** states that:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

37. Further to this, the case of *Julius Kiunga M'birithia v Republic [2013] eKLR*, held that:-

"...the law requires that the court should take extreme care to analyse every evidence on identification before it convicts on such evidence of a single witness. It should be understood that there is absolutely no contradiction between the statutory provision in section 124 of the Evidence Act with regard to sexual offences and case law on the subject of identification by a single witness in general. Indeed, case law has always insisted that there is no legal prohibition on convicting on the evidence of identification by a single witness, except that the court should take extreme care to eliminate any possibility of mistaken identity."

Whether contradictions stated by the Appellant affected the case in any way

38. The Appellant in submitting stated that there were contradictions in PW1's evidence on the two occasions when she appeared in court. The nature of this contradiction being that PW 1 said that her daughter was seduced using Ksh. 500/= but on the other hand, the complainant testified that the Appellant forcefully had sex with her. The Appellant also pointed out the terminology used in the P3 form as contradicting the terminology used by PW 1. He further went on to say that although the complainant claimed that she was injured, the degree of injury was not indicated in the P3 form and that left doubt as to whether the offence of defilement was committed and that the complainant was of

doubtable credibility.

39. The discrepancies referred to by the Appellant relate to proceedings that took place before directions were taken for the matter to start afresh and they do not go to the root of the charge. This was the position in the case of **Joseph Maina Mwangi v Republic, Criminal Appeal No. 73 of 1993** where the Court of Appeal held that:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the CPC viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”

40. In light of the foregoing, the contradictions stated by the Appellant are non-issues and do not cause any prejudice to the prosecution's case that the Appellant defiled the complainant. It is therefore not true that the charge against the Appellant was a fabrication.

Whether the Appellant's arrest was in connection to the offence of defilement or any other offence

41. The Appellant was arrested by members of the public who handed him over to police officers at Shimba Hills Police Station. The Appellant submitted that the reason for his arrest was not proved before the court and the complainant was used to fabricate him.

42. **Sections 34 and 35 of the Criminal Procedure Code** allows arrests by private persons without a warrant and upon arrest, the suspect should be handed over to a police officer. It is clear that the Appellant was arrested for defiling the complainant herein and the manner of arrest was in order.

Whether due procedure was followed in admitting a confession

43. The Appellant submitted that PW1 in her testimony stated that she had previously chased off the Appellant from her home 3 times after he swore that he would have sex with PW1's daughter. The Appellant further submitted that the said allegation was a confession which ought to have been rendered inadmissible according to the law on confession. I find that PW1's statement in court does not amount to confession as confessions ought to be made by an accused person and not a witness as provided under **Section 25 and 25 A (1)** of the **Evidence Act**.

Section 25 provides-

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

Section 25 A (1) provides

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.”

44. In conclusion, I find no merit in the appeal lodged by the Appellant and the same is dismissed. The conviction of the Appellant and sentence of the trial court is upheld. The Appellant may appeal against this decision within 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 5TH DAY OF NOVEMBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE