



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E013 OF 2020

WILSON MITWE MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged with four counts of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act in Criminal Case No. 34 of 2019 at the Principal Magistrate's court at Siakago. Of the four counts, he was charged with an alternative count to the main count, of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 (as per the charge sheet).

2. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal as per the petition of appeal filed on the 4th day of August, 2020 are that; -

- 1) *The honourable court erred in law and fact by failing to ascertain whether the constitutional rights of the appellant who is visually impaired were upheld throughout the proceedings.*
- 2) *The learned magistrate erred in law and fact by failing to ascertain whether the appellant who is visually impaired could read and write in braille before commencing proceedings.*
- 3) *The learned magistrate erred in law and fact by allowing the appellant to take plea before ascertaining which language he could understand, read and write.*
- 4) *The learned magistrate erred in law and fact by failing to ascertain the period between which the alleged offence occurred and the time it took for the complainants to be medically examined.*
- 5) *The learned magistrate erred in law and fact by convicting the appellant while there was no evidence at all on how a person with visual disability could carry out the alleged offences.*
- 6) *The learned magistrate erred in law and fact by failing to ascertain whether the complainants were known by the appellant since he could not visually see them during the proceedings.*
- 7) *The learned magistrate erred in law by convicting and sentencing the appellant against the weight of evidence.*

3. When the appeal came up for hearing on the 8th day of June, 2021, the court gave directions on filing of submissions which directions were complied with by the parties.

4. In his submissions, the appellant submitted that the trial magistrate erred in both law and facts by failing to realize that the constitutional rights of the appellant who is blind were greatly infringed on, in that, he requested to be provided with the statement of the case in braille and an assistant but the trial court declined and went ahead to assume that he was pretending to be blind.

5. Further that under Article 54(1)(a)(b)(e) as a person under disability, he ought to have been treated with the dignity and respect as prescribed in the Constitution.

6. It was also his case that the prosecution did not give the period the alleged acts took place, and that the evidence by the prosecution witnesses was contradictory. That the manner the investigations were carried out by PW2 was a violation of his rights as he was not involved

and he did not record a statement, more so being a blind man. That he is totally blind and he could not see the alleged victims of defilement. He contended that it was PW2 who orchestrated all the allegations for reasons unknown to him since it was her, who informed the other teachers about the allegations.

7. It was also his submission that from the onset, no one alleged that he had sex with him until the case was brought up by PW2. Further that whenever he was on duty he had a teacher assistant/reader as required by the Teacher's Service Commission and in the circumstances, it was not possible for such ordeals to have happened in the eyes of the reader or assistant as there is no time that a blind teacher can be on duty or go to class without a teacher assistant or reader.

8. On the part of the respondent, it was submitted that the ingredients of the offence of defilement were proved and the sentenced to serve a cumulative term of 15 years was too lenient. That is the appellant was served with all the documents which the prosecution relied on, and he acknowledged receipt after which the trial commenced. That he was given an opportunity to cross-examine all the witnesses and at no time did he raise the issue of his blindness as an impediment to a fair trial.

9. The respondent further submitted that in the course of the trial the learned magistrate noted that the appellant was partially blind and was therefore familiar with the environment which meant that the trial magistrate was well aware of the state of the appellant's blindness and the said issue was probed exhaustively during the trial. That the identity of the appellant is not in dispute as he was previously known to PW1, PW5, PW6 and PW7 as their CRE teacher. That there are no contradictions in the testimony of PW1 and PW2 as alleged or at all.

10. Reliance was made on the case of **Jackson Mwanzia Musembi Vs Republic [2017] eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda Criminal Appeal No. 139 of 2001 (UGCA) 6** and that of **Richard Munene Vs Republic [2018] eKLR**.

11. The respondent further relied on Section 124 of the Evidence Act which allows the court to convict based on the evidence of a single witness if it is satisfied that the said witness is telling the truth. Further that the medical report of PW8 confirmed that the offences did take place and where the same was not sufficiently proved for PW1, the appellant was convicted in the alternative count.

12. On sentence, it was submitted that the same is not harsh as the appellant has not demonstrated how the trial magistrate abused her discretion in sentencing. Reliance was made on the case of **Bernard Kimani Gacheru Vs Republic [2002] eKLR** and the **Sentencing Policy Guidelines, 2016** published by the Kenya Judiciary. The respondent urged the court to dismiss the appeal.

13. In determining this appeal, this court being a first appellate court, is alive to and takes into account the principles laid down in the case of **Okeno Vs Republic [1972] EA 32** where the court stated that: -

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya Vs Republic 1975) EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions."

14. The appellant herein was charged with the offence of defilement. The same is provided for under Section 8(1) of the Sexual Offences Act.

(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 20 years.

15. In the case of **George Opondo Olunga Vs Republic [2016] eKLR**, it was stated that the ingredients of an offence of defilement are: -

1) *Identification or recognition of the offender*

2) *Penetration*

3) *Age of victim*

16. For the offence of defilement to be proved, the prosecution must prove each of the above ingredients beyond reasonable doubt. (see the case of **John Mutua Munyoki Vs Republic [2017] eKLR**).

17. In the first and second grounds of appeal, the appellant contends that his constitutional rights were not upheld throughout the proceedings.

18. **Article 54 of the Constitution** deals with persons with disabilities and it provides: -

A person with any disability is entitled -

a) To be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;

b) To use sign language, brail or other appropriate means of communication; and

c) To access materials and devices to overcome constraints arising from the person's disability.

19. The appellant herein is partially blind. When the plea was taken on the 29th July, 2019, he was released on bond. On the said date, he informed the court that he is hypertensive and that his drugs had run out. The court ordered that he be taken for medical examination. On that date, the record shows that the proceedings were taken in English language. It is on record that the appellant is a teacher by profession and it was not difficult for him to understand English language.

20. On the 6th August 2019, when the matter came up for pre-trial, he informed the court that he is virtually impaired and he prayed that the statements be in braille. The court ordered that the same be supplied and noted that owing to the challenge of the accused person and considering that dates available in Court 2 are in the following year, the case was transferred to Court 1 for an earlier date and so that it could be heard expeditiously. Eventually, the appellant was supplied with the statements in Braille on the 14th October, 2019 and he confirmed having been so supplied.

21. In view of the foregoing, the appellant cannot claim that his constitutional rights were not safeguarded. He was supplied with all the materials he required to prepare his defence and he confirmed as much. There is nothing on record to show that his rights were not upheld as alleged.

22. On the second ground of appeal, it was the appellant himself who made an application to be supplied with the witness statements in Braille and the court ensured that he was provided with the same even before the trial commenced. When the same were supplied to him, he did not raise any other complaint and the trial went on till the end, with his full participation.

23. As for the language the court used in taking the plea, the court has already considered the same and found that the appellant being a teacher had no difficulties understanding English language, and if for whatever reason he had difficulties, he could have brought that to the attention of the trial court which he did not.

24. On grounds 4, 5, 6 and 7 the key evidence is that of PW1, PW5, PW6 and PW7 who were the complainants in the case. At the material time they were all pupils at Ranjeru primary school. The appellant was their CRE teacher and thus a person well known to them. PW5, PW6 and PW7 gave evidence on how the appellant defiled them on different dates.

25. According to PW5, it was on the 2nd of June, 2019 when she decided to go and enquire from the appellant a difficult CRE question. She found him seated in the staff room alone. She asked him the question and instead of answering, he held her hand pulled her towards the staffroom wall, removed something from the pocket after which he removed his penis and raised her dress, removed her panty and inserted his penis into her vagina.

26. On the part of PW6, she testified that, on the 2nd of June, 2019 she went to the staff room to look for past papers when she found the appellant who pushed her and told her to sit where he was seated. He placed his hand around her shoulders and touched her breasts. He started caressing her breasts and tried to lift her dress but she managed to run away.

27. On the 9th of June, 2019 at 10.00 am PW6 went to class and she was told that the appellant was looking for her and she went to check why he was calling her. She found him in the staffroom alone. She stood by the door and the appellant pushed her to the corner, he removed his penis and inserted it into her vagina but he used a condom. He warned her not to tell anyone or else he would kill her.

28. PW7's evidence was that on the 2nd of June, 2019 she was called by the appellant to the staffroom after she rang the evening bell. The lights in the staffroom were on. The appellant pushed her against the wall and put his hands into her mouth. He lifted her dress and removed her panty and biker. He then removed his penis wore a condom on his penis and inserted his penis into her vagina. He warned her not to tell anyone.

29. PW1 testified on how she went to the staffroom to consult the appellant on a difficult CRE question. It was on the 28th of May 2019 at 6.45 pm. The appellant demanded that she put some tea from a thermos. He touched her hands and pushed her to a corner, raised her dress and stepped on her pant and it got torn. He touched her breasts and buttocks and threatened her not to tell anyone. Further that on the 2nd of June 2019, the appellant touched her vagina with his penis but did not insert it in the vagina.

30. PW2, PW3 and PW4 are teachers at [Particulars Withheld] primary school where PW5, PW6, PW1 and PW7 were schooling. PW2 was sent a message by one of the pupils to the effect that she would not come back to the school as teachers and pupils were against her. She informed the head teacher who called her and other teachers and they were told to investigate what was happening.

31. The pupil who sent the message was a friend of PW1. Upon carrying out investigations, they found that PW1 had a key to the appellant's office and PW1 was the one who used to clean the appellant's office. The teachers learnt that the appellant and PW1 were friends. PW2 called PW1 and she confirmed that PW1 was to meet the appellant on a date that was not indicated but at 6.30 pm. PW1 went to the staff room where the appellant was and PW2 went behind the staffroom; she peeped through the window and saw the appellant holding PW1's sleeves while caressing her breast and lowered her biker. He hit her buttocks and told her to rush to the classroom as he sensed as though there was someone.

32. The evidence of PW2 was corroborated by that of PW4 in all material aspects.

33. PW8, Dr. Jacinta Karimi Nyaga produced P3 forms for PW5, PW6, PW1 and PW7. She formed an opinion that PW5, PW6 and PW7 had

been sexually assaulted.

34. The ages of the complainants were proven by way of birth certificates that were produced as exhibits.

35. The identification of the appellant by the complainants was above board. He was their CRE teacher whom they knew quite well. Penetration of PW5, PW6 and PW7 was proved. They gave graphic details of how the appellant defiled them on different dates in the staffroom by inserting his penis into their vaginas save for PW1 whom he indecently assaulted.

36. In view of the foregoing, I find the appeal both on conviction and sentence devoid of merit. I dismiss it and uphold the conviction and sentence meted out on the appellant by the trial court.

37. Orders accordingly.

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

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent