REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 114 OF 2019

(From Original Conviction and Sentence in Butali PMCCRC No. 9 of 2019 by Hon. CN Njalale, Senior Resident Magistrate, of 16th October 2019)

AMOS LUMITI...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon. CN Njalale, Senior Resident Magistrate, of defilement contrary to Section 8(1), as read with section 8(2), of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to thirty (30) years imprisonment. The particulars of the charge were that on 5th April 2019 at [particulars withheld] area, Manda Location, in Kakamega North Sub-County, within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of PAS, a child aged 8 years. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place, as stated in the main count, he had intentionally touched the private parts of the subject child, being her vagina, with his penis.

2. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called six (6) witnesses.

3. PS, the complainant, testified as PW1. She stated that the appellant had hit her with a stone on 5th April 2019, on her way to school. She fell, whereupon the appellant picked her up, carried her to a sugarcane plantation, removed her clothes and raped her. After the ordeal, he gave her Kshs. 5.00, telling her to buy sweets. She reported the mater to her mother after getting home from school, who took her to hospital, and later to the police station. On the way from the police station, she saw the accused at the shops and pointed him out as her assailant.

4. RKL (PW2), the mother of PW1, testified that when PW1 came home from school on 5th April 2019, after schools closed, she was being led by her hand by her school mates. When she enquired, they told her that PW1 was feeling pain and bleeding from her lower part. PW1 told her she was bleeding. She removed her clothes and saw blood oozing, with some having dried on her thighs and legs. She then took PW1 to the health centre, and later to the police station. On the way from the police station, PW1 saw the accused at the shops and pointed him out as the perpetrator, and he was arrested. PW2 said that she knew the appellant, as he lived not so far away from her home, and that she knew the mother of the appellant.

5. No. 99019806 Corporal Julius Chebii Kipmock (PW3) was the police officer who received the report

of the sexual assault. She described how PW1 identified the appellant at the shops and came back to the station with her mother to report, and how she thereafter arrested the appellant. she said that PW1 was walking slowly, with difficulty. No. 200711654 APC Jonathan Partoip testified as PW4. He was a colleague of PW4, and he gave testimony which corroborated that of PW4.

6. Pauline Maranga testified as PW5. She was the clinical officer who filled the P3 Form, and who produced a PRC form for PW1. She explained that she had been sexually assaulted. PW5, No. 56659 Sergeant Consolata Lugonzo, was the police officer who investigated the matter. She stated that she started investigations into the matter as soon as the same was reported on 5th April 2019. She said that she did not examine the complainant.

7. The appellant was put on his defence. He gave a sworn statement and called witnesses. He said he spent the greater part of 5th April 2019 in the farm, with his mother. He remained in the farm until 2.00 PM when he went home to graze cattle. It was while grazing his cattle that he was arrested and taken to Manda Police Station. Later he was transferred to Matete Police Station, and later to Kabras Police Station, and later to Malava Police Station. He said that he was assaulted at the police stations. DW2 was his mother, DT. She said that she was with the appellant at the farm the whole day on 5th April 2019, until he was arrested at about 5.00PM. She said that he did not leave the homestead. She confirmed that [particulars withheld] Primary School was nearby, and that there were sugarcane farms around there. DW3, Emily Kaneya, was a sister of the appellant. She testified that he was arrested at 5.00 PM at their farm when they were ploughing. She asserted that the appellant was with them at 11.00 AM when it was alleged that he had defiled the child. She also confirmed that [particulars withheld] Primary School was nearby, and that people cultivated sugarcane.

8. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgment.

9. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds of appeal, which include: that crucial witnesses were not called, report of probation officer was not considered, evidence was doubtful farfetched inconsistent and uncorroborated, case was founded on malice and fabrications, identification of the appellant was not positive, the medical evidence was poor, the pre-sentence report was not obtained in a manner consistent with the law, and his *alibi* defence was not given due consideration.

10. The appeal was canvassed by way of written submissions. Only the appellant filed written submissions which I have read through and noted the arguments made. He has raised issues around identification and sentence.

11. I will first deal with the grounds that appellant has addressed in his written submissions. He has cited *Cleophas Otieno Wamunga vs. Republic* [1989] eKLR (**Masime JA, Gicheru & Kwach AG JJA**), *Francis Karioki Muruatetu & another v Republic & 5 others* [2016] eKLR (*Rawal DCJ&VP, Ibrahim, Ojwang, Wanjala & Njoki SCJJ*), *Charles Njoroge Ndura vs. Republic* [2008] eKLR (Ojwang & Dulu JJ) and the *Blackstone's Criminal Practice* 2001 (12th edition) OUP, 2002, on the principles governing identification. The appellant was arrested on the same day when the incident happened. The testimonies of PW1, PW2, PW3 and PW4 narrated the circumstances of his arrest after identification by PW1. He was not arrested, according to them, at the farm, as he and his witnesses alleged, but just outside the police station or police post, and that was shortly after PW1 and PW2 reported the matter at the police station/post/camp. He was allegedly found just metres outside the station. They returned to the station and indicated that PW1 had just seen and identified her assailant, and the PW3 and PW4 arrested him. She described how he was dressed, and he was still in that attire at the time of his arrest. After reviewing those testimonies, as against his and that of his witnesses, and his submissions, I am not persuaded that there was any error in the identification.

12. On the sentence, he was given thirty years' imprisonment. The child victim, PW1, was eight years old at the time of the offence. The provision which prescribes sentence, where the victims are of her age, is section 8(2) of the Sexual Offences Act, and it is mandatory life imprisonment. The trial court was

lenient, ostensibly relying on the interpretation that the Court of Appeal and the High Court had given to *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), with respect to mandatory sentences, and which apparently gave discretion to trial courts. The appellant, therefore, got away rather lightly. He pleads for leniency.

13. The penalty is mandatory. The court has no discretion in the matter, as was clarified recently in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others* (*Amicus Curiae* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), that the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases, and not in other cases, such as defilement. The discretion that the trial court exercised in that case was not available to it, and it should have imposed the mandatory sentence prescribed in the Sexual Offences Act.

14. For avoidance of doubt, section 8(1)(2) of the Sexual Offences Act provides as follows:

> ***"8. Defilement***
>
> *(1) A person who commits an act which causes penetration with a child is guiltyof an offence termed defilement.*
>
> *(2) A person who commits an offence of defilement with a child aged elevenyears or less shall upon conviction be sentenced to imprisonment for life."*

15. Let me now advert to the grounds in the petition of appeal, the first on is on non-production of key witnesses. On witnesses, the appellant argues that the prosecution failed to summon and produce key witnesses to stabilize their case. The appellant has not addressed this ground in his written submissions, and I wonder whether he has abandoned it. He has not articulated in which witnesses were not called, and why and how their evidence would have provided stability to the prosecution case. There is no specific number of witnesses that the prosecution is required to call to prove its case. It suffices that the State calls such number of witnesses as it believes would be sufficient to establish the charge that they have brought against the accused person. The principal actors in the matter were PW1, PW2, the medical personnel and police officers who handled the matter. These were the most critical witnesses. The State had no obligation to call every individual who might have, in any remote manner, have come into contact with PW1.

16. The second ground is that the trial court did not consider the pre-sentence report by the probation office, ostensibly at the time of sentencing. I note from the record, that it was the trial court that, on its own motion, had ordered for a pre-sentence report, after hearing the appellant and the State on mitigation. After the report was presented, the court records that it did consider it before imposing sentence. I do not, therefore, see the merit in the ground that that report was not taken into account. The court did not have to analyse the report, or state how the report influenced it in sentencing. It suffices that the report was availed, and, in sentencing, the court indicates that it was among the various things that it considered. The order on sentencing reads:

> *"I have considered the pre-sentencing report availed to me by the probation officer, and upon considering the same as well as the mitigation, the fact that the accused is a first offender, the nature of the offence and the sentencing policy, I sentence the accused person to serve (30) thirty years' imprisonment given then mature of the offence.*
>
> *The accused has a right of appeal within 14 days."*

17. The third ground is that the evidence upon which he was convicted was farfetched, inconsistent doubtful and uncorroborated. Again, he did not submit on this in his written submissions, and, therefore, it is not clear to me whether he has abandoned this ground. The testimony of PW1 that she was molested

sexually, was well corroborated. Firstly, by PW2, the mother. She noticed that, when the child got home, she was being supported by other children, because she was feeling pain between her legs, she examined her and established that blood was oozing out of her private parts, and some of it had dried on her thighs and legs, and she narrated to her what had befallen her. Secondly, the medical evidence, also established that she had been defiled, consistently with what she had told the court, and PW1. The same was reported to the police officers who were involved in the matter. All these events and reports happened within one day. It cannot be then that there was no corroboration.

18. Secondly, on inconsistency, the testimonies of all the witnesses were flowing. Of course, there were inconsistencies, such as to whether PW1 had been hit with a stone and fell and then was carried to the sugarcane farm. One merely said the appellant grabbed her and took her to a sugarcane plantation and defiled her. Another said that the appellant had slapped her and pushed her to a sugar plantation where he defiled her. There could be others but these are minor. The bottom-line is that PW1 met, the appellant and he took her to a sugarcane plantation were he defiled her. Whether he hit her with a stone first, or slapped her or simply grabbed her, do not change the principal fact of defilement.

19. Whether the evidence was farfetched and doubtful, the appellant has not pointed to any aspects of the evidence, which in his view made it so. I find the testimony of PW1 fairly straightforward and flowing, in fact too much so for an eight-year old. Little wonder the court took a sworn statement from her. The testimonies of the other witnesses are equally flowing and believable.

20. The fourth ground is that the trial court did not appreciate that the case was malicious and fabricated. I have not seen evidence of that from the trial record. In his defence, he did not seek to bring out that element of the defence. He did not say whether he knew the family of PW1, or had interacted with it in the past, or whether there was any animosity between the two families, to warrant a case being fabricated against him. His two witnesses, DW2 and DW3 did not also advert to anything of that nature. There is no basis, therefore, upon which I can conclude that there was malice or fabrication behind the prosecution.

21. The third ground is about identification. He says his identification was not positive. The appellant was arrested on the same day. PW1 saw him in a crowd of men, and picked him out of that crowd, based on how he was dressed. He was wearing the same clothes that he was wearing in the morning when the child alleges he assaulted her. at the trial she was very clear that the man in the dock was her assailant. I am not persuaded that the trial went wrong on identification.

22. The sixth ground is on medical evidence, that he was convicted in the absence of medical evidence to link him to the offence. It is now well settled that a person charged with a sexual offence need not be tested medically or forensically to ascertain any sexual connection between him and the complainant. The correct legal position is that the court convicts an accused person on basis of other evidence, where forensic evidence is not available. It was held in *Robert Mutungi Muumbi vs. Republic* (2015) eKLR (**Makhandia, Ouko & M'Inoti JJA**) and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR (**Makhandia, Ouko & M'Inoti JJA**), , that whereas section 36 of the Sexual Offences Act allows the court to order samples to be taken from an accused person for forensic examination or deoxyribonucleic acid (DNA) testing, that provision was not mandatory, and that penetration or sexual intercourse could be proved by alternative evidence. It was emphasized that medical or DNA evidence was not the only evidence by which commission of a sexual offence could be proved. In any case, medical evidence was presented by a clinical officer. It demonstrated that the child had been defiled, the appellant was also tested, and the results presented in court by the clinical officer.

23. The other ground is that his *alibi* defence was not given due consideration. His defence was that he did not leave his home that material day, as he spent the whole of it at the farm with DW2 and DW3, and he was arrested at the farm. I have perused the trial record and noted that the court did consider that evidence before dismissing it. This is what the court says in the judgment:

> *"In his defence, the accused narrated that he was in the farm weeding with his sibling and his mother and that he did not leave the homestead on the said date. The evidence of DW2 and DW3 was also in effect that they were in the farm ploughing with the accused person. however, it is clear*

from the court record that the accused person was arrested near Manda AP camp and that the complainant identified him thereof. Both PW3 and PW4 were categorical that the accused person was arrested near Manda AP camp and not in the farm as the said accused and his witnesses want this court to believe. I therefore find that the alibi pleaded by the accused person does not discharge or rather rebut the prosecution evidence which is both cogent and consistent."

24. Overall, I am not persuaded that the appeal herein has any merits and I hereby dismiss the same. I affirm the conviction and confirm the sentence. I must state that the sentence imposed was lenient, for the reasons I have indicated above. The proper sentence should have been life imprisonment, given that the penalty under section 8(2) is mandatory. The Supreme Court clarified in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others* (*Amicus Curiae* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ) that there is no discretion. The proper thing should be to set aside the sentence imposed by the trial court, and to substitute it with the proper sentence of life imprisonment, but I shall refrain from doing so. The appeal is disposed of in the terms set out above.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE