



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: R. Wendoh, J.]

CRIMINAL APPEAL NO. E035 OF 2021

JOSEPH MURIMI NCHAMA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. A.N. KARIMI, RM, in the

Senior Principal Magistrate's Court at Kehancha Sexual Offence

Case No. 37 of 2020 delivered on 29th July 2021)

JUGDMENT

The appellant, **Joseph Murimi Nchama** was charged with the offence of defilement contrary to **Sections 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006**. An alternative charge was also preferred being committing an indecent act with a child contrary to **Section 11 (A) of the Sexual Offences Act No. 3 of 2006**.

The particulars of the charge are that on 23rd May 2020 at around 1800hrs in Kuria West sub - county, the appellant intentionally caused his penis to penetrate the vagina of EWM a child aged 17 years.

After a full trial, the appellant was convicted of the main charge of defilement and sentenced to fifteen (15) years in jail.

Being dissatisfied with the said judgement, the appellant preferred the instant appeal vide a Petition of Appeal and further Supplementary Grounds of Appeal both undated. The grounds of appeal are as follows: -

a) That the trial court erred in both law and fact by failing to consider the requirement in Article 50 (2) (g) (h) of the Constitution.

b) That the trial court erred in law and fact by not observing that the ingredients of the offence were not proved as required by law.

c) That the trial court erred in law and fact by failing to specify the language used during the plea taking.

The appellant therefore prays that the conviction be quashed and sentence set aside.

The court gave directions that the appeal be canvassed by way of written submissions. The appellant filed his undated submissions on 18/10/2021. **Mr. Kimanthi** learned Counsel for the State opposed the appeal and filed his submissions on 22/10/2021.

The appellant submitted that at the time when he took plea, it was done in a language which he did not understand which confused him to plead guilty; that he was denied the services of a lawyer as stipulated under Article 50 (2) (g), which is a gross violation of his rights to a fair hearing; that when he was taken to the hospital for age assessment it was against his constitutional rights since his parents nor the government's advocate were present thus the results were fixed to score goals.

The appellant further submitted that the P3 form indicated that the complainant has been sexually active and she is in a mission to score

goals. It was further submitted by the appellant that the circumstances of his arrest were not clear as the alleged people who arrested him did not record statements; that even the issue of UTI was not subjected to further tests to link it with him. Finally, the appellant urged this court to observe that he did not ask PW1, PW2 and PW3 questions due to the fact that he was shocked.

On behalf of the State, Mr. Kimanathi submitted that on the age assessment, the appellant was 20 years and the complainant was 17; that the prosecution proved the charge of defilement through PW1 and PW3 respectively. The complainant, PW1, testified that she had been in a long-term relation with the appellant and they first engaged in sex on 23/5/2020 at the age of 17 years. Learned Counsel submitted that the element of age, identification and penetration was therefore proved. The evidence of the victim alone is admissible under Section 124 of the Evidence Act.

On the right to be informed of his choice of Advocate, Learned Counsel submitted that the appellant was informed of the same on 19/3/2021 when he was also supplied with witness statement; that the first prosecution witness testified on 26/3/2021 and the appellant had already been informed of his rights under Article 50 (2) (g) of the Constitution and therefore cannot benefit from that argument. Further, it was submitted that the offence was under Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act and the sentence is stipulated to be not less than 15 years. The appellant was sentenced to 15 years and therefore he cannot argue that the same is excessive.

Learned Counsel submitted that from the evidence, the victim testified that she left her home to visit the appellant who as per his evidence is also a student; that this can be described as a mutual relationship, a Romeo and Juliet type. Although the conviction is founded on sound evidence, this court can exercise its power under **Section 354** of the **Criminal Procedure Code** to vary the sentence meted upon the appellant but dismiss the appeal on conviction.

This being a first appeal, this court has a duty to re-examine all the evidence adduced before the trial court afresh, analyse it and arrive at its own conclusions but always bear in mind that this court did not see or hear the witnesses testifying and therefore make allowance for it. The court is guided by the decision of the court of Appeal in **Kiilu & Another vs= Republic [2005]1KLR 174**, where the court said:-

“An Appellant on first appeal is entitled to expect the evidence as a whole submitted to fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of the first appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; Only then can it decide whether the

Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses.

See also **Okeno v Republic (1972) E.A. 32**

The Prosecution called a total of four witnesses in support of its case. PW1 EWM a girl aged 17 years, who told the court that she had been in a romantic relationship with the appellant since 2019 when she was in standard 8; that on 23/5/2020, while at home, the appellant called to tell her to meet him somewhere which she did. They proceeded to the accused’s cousins house where they spent the night together and they had sex “*tulishiriki ngono*” since she believed she would not get pregnant because she had just completed her periods. **PW2 FR**, the complainant’s mother recalled that on 23/5/2020 about 4:00p.m, PW1 went missing from home and they started to search for her; that the next morning, one John Kitugu and the complainant’s father went to accused’s aunt’s home where the accused and complainant were found, arrested and taken to the Police station. The complainant was on 24/5/2020, examined by **PW3 Risper Atieno** a Clinical Officer at Kuria West Sub County Hospital. No bruises were seen in the complainant’s genitalia PW3 found that PW1 was in her menstrual periods; no hymen was found but the vaginal swabs revealed presence of red blood cells and pus cells and that she had contracted UTI. **PW4 Gloria Mengitch** was the investigating officer in the case.

When placed on his defence, the appellant denied knowing the complainant and that he was arrested when with her.

I have reviewed the evidence, tendered in the trial court, and the oral submissions.

Whether the charge of defilement was proved:

To prove a charge of defilement, the prosecution has to prove beyond reasonable doubt that the following elements exist.

- i) **Proof of the age of the complainant;**
- ii) **Proof of penetration;**
- iii) **Proof of identity of the perpetrator.**

In the instant case, age of the complainant was not in dispute. A birth certificate was produced in evidence which corroborated PW1 and PW2’s evidence that she was born on 7/7/2003 and was therefore 17 years on 23/5/2020 when the offence was allegedly committed.

Whether penetration was proved:

Penetration is defined in **Section 2** of the Sexual Offences Act as:-

“the partial or complete insertion of the genital organs of a person into the genital organ of another person.

PW1 is a girl aged 17 years. Though she should not explain exactly what happened between her and the appellant, in detail, she told the court that she spent the night with the appellant and they engaged in sex. She went further to disclose the act in Kiswahili ‘tulishiriki ngono’ meaning they had sexual intercourse. PW3 also confirmed that from the examination, though the complainant was in her periods, there was no hymen, her vaginal swab had pus and she had contracted UTI. This court is satisfied that penetration was proved.

Proof of identity of the perpetrator:

PW1 told the court that she was actually found in company of the appellant in a house on the morning of 24/5/2020 by her father and police officers and both her and the appellant were arrested. The appellant never challenged her evidence in any way. The appellant’s defence was hollow. He belatedly claimed that his father had a grudge with PW4, the investigating officer who eloped with his sister. Even if that were true, how would PW1 and PW2 be involved. The defence was not believable. Under Section 124 of the Evidence Act, the court can base a conviction on the testimony of a single witness in a sexual offence. In this case, the testimony of PW1 was unchallenged. The appellant was her boyfriend and they were found together. I have no doubt that the appellant was the perpetrator.

Whether the charge was read to the appellant in a language he understood, the standard for all criminal proceedings hearings is laid down under **Article 50 (2) (b) and (m)** of the Constitution which provides: -

(2) Every person has a right to a fair trial which includes the right

(a)...

(b) to be informed of the charge, with sufficient detail to answer it,

(c) (c) – (l)

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

Similarly, Section 198 of the Criminal Procedure Code provides for interpretation of evidence to the accused or his advocate and in particular, the language of the subordinate court shall be English or Kiswahili.

The appellant was first arraigned in court on 26/5/2020. The court record indicates that the charges and the elements thereof were read to the accused in the Kiswahili language a language that he understood and a plea of guilty was entered upon his own admission in Kiswahili. The next day when the matter came up for further directions, the appellant asked the court to read the charges afresh to him. The court indicated:

“Charges can be read afresh to the accused. Charge read over and explained to the accused in Kiswahili, a language he understands and replies in Kiswahili.”

The appellant changed his plea from guilty to not guilty. It was quite clear that the charges were read to him in a language he understood and his response was in Kiswahili. The appellant cannot therefore turn around now and claim that the charges were read to him in English, a language which he did not understand. Besides, the appellant cannot claim not to understand Kiswahili. He was a form one student.

As regards the issue of taking the age assessment in the absence of a third party, the age assessment report that was filed in court, shows that the appellant was between 18 and 19 years. On 27/5/2020, the appellant told the court that he will be 18 years on 5/6/2020. There is no legal requirement that a third party should be present during the age assessment exercise. Hence, there is no violation of his rights. The appellant was an adult.

Of the right under Article 50 (2)(g):

On the right to counsel, Article 50 (2) (g) provides that an accused person has the right to choose, and be represented by, an advocate, and to be informed of this right promptly. In *Joseph Kiema Philip vs Republic* (2019) e KLR Nyakundi J held:-

“It is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state. It (the court record) must show that the court did take the profile of the accused person before the trial commenced...”

On the point when the accused should be told of this right, *Nyakundi J* in *Joseph Kiema Philip (supra)* stated:

“...the earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearing.” (emphasis added).

The right to be informed of the right to counsel is mandatory and the court has **to comply with it, and it has to be done promptly.**

I have perused the trial court record. On 19/3/2021, the accused was informed of the right to Counsel at his own expense. At this point, the

hearing had not commenced. The submissions of the accused person that he was not informed of his right of legal representation under Article 50 (2) (g) is not sustainable.

After careful consideration of all the above grounds, I find that the conviction is sound and there is no reason to fault it.

Whether the sentence is excessive:

Under Section 8(4) of the Sexual Offences Act, upon conviction one is liable to imprisonment of not less than 15 years imprisonment. The sentences was therefore legal but the question is whether it is excessive in the circumstances.

The Prosecution has conceded that the conviction on sentence can be varied by this court pursuant to the revisionary powers bestowed upon it by **Section 364** of the Criminal Procedure Code. **Section 354 (3) (a) (i) and (ii)** of the Criminal Procedure Code, provides that on an appeal on conviction, this court has the power to alter the nature of the sentence to either quash, enhance, reduce or order a re-trial. In deciding whether or not to interfere with the sentence of the trial court, the court is guided by the principles in the case of **Ogolla s/o Owuor, (1954) EACA 270** wherein it was stated:

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

The Appellate court in Joseph Muerithi Kanyita v Republic [2017] eKLR held as much when it stated:-

"In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low..."

It is undeniable that the trial court did not overlook any material factor or took into account immaterial factor when meting out the sentence under Section 8(4), the sentence is lawful. However, looking at the special circumstances of this case, the appellant and the victim are both youngsters, the complainant 17 years and the appellant about 19 years old, who engaged in unlawful sexual relations. But this does not absolve the appellant from the offence of defilement as he had sex with a minor who could not legally consent. Both were students in secondary school and in light of the above, I am of the view that the sentence of 15 years was harsh and excessive in the circumstances and in the exercise of this court's discretion under Section 354 (3) (a) (i) and (ii) of the Criminal Procedure Code. I hereby set it aside. Before I pronounce my sentence, I hereby seek a pre-sentence report to be prepared by the probation officer within two weeks of today's date.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 2ND DAY OF DECEMBER, 2021.

R. WENDOH

JUDGE

Judgment delivered in the presence of

In person for the Appellant.

Mr. Kimanthi for the State.

Nyauke Court Assistant.