REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 41 OF 2018

ISAAC MUTYAVAI MULWA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGEMENT

1. The appellant Isaac Mutyavai Mulwa was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars being that on 22nd day of June 2016 at Kandae Sub-Location, Mutomo Location in Mutomo Sub-County within Kitui County intentionally and unlawfully caused his penis to penetrate the vagina of MM a girl aged 13 years.

2. The appellant was also charged in the alternative with committing indecent act with the said child on the same date and place contrary to section 11(1) of the Act, particulars of the indecent act being that the appellant touched the child's vagina with his penis.

3. Six witnesses testified for the prosecution and on being put on his defence the appellant in a sworn defence denied the charges herein.

4. He was found guilty after hearing and was convicted and sentenced to serve 20 years' imprisonment. Thus he filed instant appeal in which the principal grounds were that:

i. Whether charge was defective?

ii. Whether prosecution proved its case beyond reasonable doubt?

5. Parties were directed to canvas appeal via submissions. The prosecution relied on the evidence on record to oppose appeal.

6. The appellant's submissions:

-There was no voire dire to test ability of the victim before testifying.

- Further there was no corroboration of victim's testimony.

- The sentence imposed was mandatory minimum sentence which is unconstitutional.

EVIDENCE ADDUCED

7. The complainant's testimony is to the effect that on 22/6/2016 at about 4pm she left home for their farm which is about 35-40m from the home of Mutyavai to look for baobao fruits commonly known as "mabuyu". While at the farm Mutyavai spotted and called her to his home with a view to enquiring something from her. She obliged and on reaching Mutyavai's home, Mutyavai asked her if she had seen one P M a child. She replied in the negative upon which Mutyavai got hold of and pulled her into his house by the hand and closed the door. She started crying but Mutyavai warned her not to cry or else he would take a knife and cut her with it.

8. While still in Mutyavai's house she heard her sister call out her name after which Mutyavai went out holding a stick and locked her inside the house. When Mutyavai went back to the house, he got hold of and threw her onto his bed. Mutyavai then tore her cloth and slept with her.

9. Asked to explain what she meant by Mutyavai sleeping with her, she become shy and the court directed her to give a description in writing in response to which she wrote on a paper to the effect that Mutyavai defiled her.

10. When she left Mutyavai's house she reported the incident to her sister and later to her mother. Her mother examined her private part and

took her to her grandmother. The matter was subsequently reported to police after which the complainant was according to her evidence, taken to hospital.

11. In conclusion of her testimony in chief the complainant emphasized that the person who sexually assaulted her is Isaac Mutyavai Mulwa, who is their neighbour; known to her, and the appellant in this case.

12. In cross examination, the complainant maintained her testimony in chief and reiterated that the testimony she had given in court was truthful.

13. PW2 GM who is sister to the complainant, told the court that on the material date at about 4pm, the complainant left home to look for baobao fruits from their farm. The complainant overstayed and she decided to go to the farm and check on her.

14. She did not find her in the farm. She traced her footprints to the home of Mutyavai and while outside Mutyavai's house she heard the complainant crying. She called out her (complainant's) name but she did not respond.

15. Soon thereafter, Mutyavai came out with a stick and chased her away. According to her evidence she ran away and took cover in their farm in a manner that she could see what was happening on the home compound of Mutyavai. Mutyavai went back into the house but after a short while he and the complainant came out of the same house.

16. When she enquired from the complainant what had happened, the complainant told her that Mutyavai had called her to his home from their farm and asked her about the whereabouts of one Pauline Mumo after which he got hold of and pulled her into his house. She also told her that while in the house, Mutyavai had sexual intercourse with her by force.

17. In Court PW2 identified a torn biker which the complainant was wearing on the material date. She concluded her testimony by describing Mutyavai as their neighbour since her childhood and whom he knew very well. She identified the appelant in this case as the said Mutyavai.

18. In cross examination PW2 added that when she arrived at the home of the appelant she did not find any other person and that she stood close to the door to his house from where she heard the complainant crying.

19. The evidence of PW3 KM mother to the complainant, and PW4 KK, grandmother to the complainant is based on the reports made to them by PW1 and PW2 regarding the subject incident.

20. On receiving information in that behalf, they reported the matter to the police at Mutomo Police Station the following day in the morning for appropriate legal action which included taking the complainant to Mutomo Health Centre for medical examination. It was also their evidence that they had examined the complainant's genitalia and observed some discharge therefrom.

21. PW6 Daniel Mulwa, a clinical officer from Mutomo Health Centre testified to the effect that on 23/6/2016 she examined the complainant and filled a P3 form for her on the same date. The examination revealed the following missing vaginal hymen and tears on labia minora.

22. Further laboratory tests established presence of human spermatozoa within her genitalia and an infection known as trichomonas vaginitis. He produced in evidence treatment notes (Pexh.2) and a P3 form (Pexh.3) in that behalf all dated 23/6/2016.

23. The foregoing findings were in his view consistent with defilement. A similar examination on the appellant did not reveal anything unusual and the witness was of the view that the appelant had nothing to do with the infection noted on the complainant.

24. In response to the charges and the foregoing evidence against him, the appellant in a sworn defence told the court in essence that on 23/6/2016 he was arrested from his place of work; Mutomo Mission Secondary School, but the police and subsequently charged with the offences herein which he had not committed.

25. He further told the court that there exist personal differences between himself and the complainant's mother reports him to the chief whenever his chicken and livestock trespass into her farm. In his view this case is meant to settle personal scores.

26. He also lamented that the complainant had been beaten by her mother in order to record a false statement. I also note his statement to the effect that on the material date he was not at the scene but at Mutomo KMTC where he had spent night as a caretaker.

ISSUES, ANALYSIS AND DETERMINATION:

27. After going through evidence on record, I find the issues raised are; whether the charge was defective? Whether failure to conduct voire dire nullifies proceedings of the trial court? Whether the prosecution proved its case beyond reasonable doubt? Whether the sentence was unconstitutional?

28. On whether the charge was defective, section 137 of the Criminal Procedure Code provides as follows:

> ***"The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in this accordance with this Code-***

(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;

(ii) the statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of the offence shall set out in ordinary language, in which the use of technical terms shall not be necessary; provided that where any rule of law or any act limits the particulars of an offence which are required to be given in a charge of information, nothing shall require more particulars to be given than those so required."

29. The court has perused the charge and finds that all the essential elements were well captured in the charge sheet read to the appellant on the 27th June 2016.

30. In any event, **Section 134 of the Criminal Procedure Code** provides that:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the appellant person is charged, together with particulars as may be necessary for giving reasonable information to be offence charged."

31. In **BND vs Republic [2017] eKLR** the trial court laid out the test to be followed in determining whether a charge sheet is defective as follows:

"....the principle of the law governing charge sheet is that an appellant should be charged with an offence known in law.

The offence charged should be disclosed and stated in a clear and unambiguous manner so that the appellant may be able to plead to a specific charge that he can understand. It will also enable an appellant person to prepare his defence."

32. The appellant does not demonstrate how the charge was defective thus the ground fails.

33. The appellant though not in the grounds of appeal raises in submissions the issue of absence of voire dire prior to swearing of the pw1minor aged 13 years of age.

34. In the case of ***Maripett Loonkomok vs Republic [2016] eKLR*** the Court of Appeal sitting in Mombasa found and held that children under the age of fourteen (14) ought to be taken through a voire dire examination. It rendered itself as follows:-

"…that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voire dire examination. It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an appellant person. But it is equally true, as this Court recently found that;

> ***'In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction.'"***

35. Notably, the age at which a voire dire examination should be conducted depends on the circumstances of a particular case and is not cast in stone. Indeed, a child could be aged seventeen (17) years yet be of such mental incapacity that would require that a trial court to conduct a voire dire examination to determine if he or she should adduce sworn or unsworn evidence.

36. The ascertainment of whether such a witness understands the meaning of taking an oath cannot be taken lightly as an appellant person can be convicted on the basis of sworn evidence of such a witness.

37. In the circumstances of this case I go by ***Maripett Loonkomok supra*** where it indicated that, ***"in appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."*** As demonstrated by evidence hereafter.

38. On prove of prosecution case beyond reasonable doubt, the elements of the defilement offence under charged provision are age of the child, penetration and identity of the perpetrator. **Was the complainant a child aged 13 years as at 22/6/2016?** In determining this point court drew guidance from case of ***Alfayo Gombe vs Republic [2010] eKLR*** in which the Court of Appeal emphasized that the age of a victim of defilement is a crucial ingredient of the offence which must be proved beyond reasonable doubt.

39. In the presence case PW1, MM who was the complainant told the court that /she is 13 years old. PW2 GM, her sister said that the complainant was 13 years old. PW3 KM who is mother to the complainant testified that the complainant was born in February 2003. She gave her age as 13 years and informed the court that she lost the child's health card for the complaint.

40. On the same issue, she told the court that the complainant was after lodging a complaint taken to Kitui for age assessment. In his evidence PW5 PC Edwin Shikhami being the investigating officer confirmed taking the complainant for age assessment and produced a report thereof dated 24/6/2016 (Pexh 4) in which the age of the complainant has been given as 13 years.

41. The alleged offence in this case according to the charge sheet and the evidence on record occurred on 22/6/2016. The evidence by the complainant that she was then 13 years is corroborated by her sister, mother and the age assessment report. This evidence which has not been controverted in any way, established beyond reasonable doubt that the complainant was 13 years as at 22/6/2016.

42. **Did the appellant penetrate the vagina of the complainant with his penis on 22/6/2016 as alleged?** With regard to the identity of the person who confronted the complainant on the material date, the complainant, PW2, PW3 and PW4 testified to the effect that the appellant was their neighbour.

43. The indecent in this case took place during day time at about 4pm according to the evidence on record. The complainant was categorical that it was the appellant who spoke to her when he enquired about the whereabouts of one Pauline Mumo, and when he warned her not to cry when he locked her in the house.

44. PW2 at one point in time saw the appellant emerge from his house holding a stick soon after she had heard the complainant crying therein. She saw him again came out of the house with the complainant. PW3 said she had at about 1pm seen the appellant at his home before she left for a funeral.

45. Taking into account the totality of the foregoing, there is no doubt that the appellant was at the scene on the material date and time. His veiled defence of alibi cannot succeed in the present case. The alibi is not worth a belief and it was in my view an afterthought gauging by the demeanor portrayed by the appellant as he went about his defence.

46. And even if one were to give his alibi a second thought, he would find it inapplicable to the time the alleged offence in this case was said to have been committed.

47. This was so because the alibi would only apply to the time between the night of 21st and 22nd June 2016 if his evidence to the effect that he had spent the night preceding the time of the alleged offence at Mutomo KMTC.

48. The alibi would thus not account for his whereabouts on 22nd June 2016 in particular from the afternoon hours.

49. Thus the trial court was justified in dismissing the alibi and confirming the finding that the appellant was at the scene on 22/6/2016 at about 4pm when the offences charged were allegedly committed.

Did the appellant actually engage himself in an act of coitus (penetration) with the complainant?

50. The narration given by the complainant over subject incident in this case was laden with details, and consistent on all the material aspects of the offence of defilement to be doubted.

51. The events preceding the meeting between the appellant and the complainant, and the complainant's presence in the appellant's house are corroborated by PW2. She heard the complainant cry inside the house of the appellant; soon thereafter the appellant came out and chased her away. Appellant then returned to the house and after a while, from her hideout she saw the appellant and the complainant leave the house.

52. It was the complainant's evidence that when the appellant threw her onto his bed, he tore her cloth. The biker produced in evidence had a tear at the middle on the lower part. The investigating officer established that it was through this tear that the appellant assessed the complainant's genitalia.

53. The witnesses who examined the complainant soon after the incident observed some discharge from her genitalia. Upon medical examination tears on the labia minora were detected and so were spermatozoa upon further lab tests. These findings corroborated the complainant's testimony and were a confirmation beyond reasonable doubt that she had been defiled.

54. The appellant denied involvement in the commission of the offence and cited personal differences between himself and the complainant's mother. He further claims the complainant was coerced by her mother to record a false statement. Of note was that the appellant did not cross examine any of the prosecution witnesses in a manner suggesting existence of such differences or that the complainant had been coerced to implicate him.

55. Like the defence of alibi which trial court rejected, I similarly find the alleged personal differences to have no basis to warrant an adverse finding on the prosecution's case.

56. For these reasons the defence was for dismissal as offered by the appellant and this court finds no error in finding that the prosecution proved beyond reasonable doubt that the appellant penetrated the vagina of the complainant MM on 22/6/2016.Thus the appeal fails on challenge of conviction.

57. On sentence, the trial court disregarded the mitigation stating that the sentence of 20 years was mandatory and thus its hands were tied. This was contrary to the Supreme Court of Kenya holding in ***Muruatetu case*** and subsequent other superior court holdings that mandatory aspects of the sentences are unconstitutional.

58. Thus the appeal succeeds on sentence and court makes the following orders;

i. The appeal is dismissed on conviction and same is upheld.

ii. The sentence of 20 years' imprisonment is set aside and matter is referred back to the trial court for sentencing after considering appellant's mitigations.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE