



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 107 OF 2019**

**BETWEEN**

**MARTIN KUNG’U KIBIKU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence dated 17<sup>th</sup> December 2008 in Criminal Case No. 336 of 2007 at Kiambu Magistrates Court before Hon. G. W. Macharia, SRM)***

**JUDGMENT**

1. The appellant, **MARTIN KUNG’U KIBIKU**, was charged, convicted and sentenced to 27 years’ imprisonment after being found guilty of the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** (“the **Act**”) The particulars of the offence were that on 10<sup>th</sup> October 2003 within Kiambu District of Central Province he unlawfully committed an act of defilement of girl aged 8 years namely RMM by penetrating into her genital organs namely the vagina.

2. As this is the first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see **Okeno v Republic [1972] EA 32, Kiilu and Another v Republic [2005] 1 KLR 174**). In order to fulfil this duty, it is necessary to set out the evidence as it emerged before the trial court.

3. The complainant, PW 1, testified on oath after a *voire dire*. She recalled that on 8<sup>th</sup> October 2010 at about 4.00pm, she was going home from school when she met the appellant near the river. He held her hand and took her to a nearby farm. She narrated what transpired as follows:

*As he took me to the farm he was not talking to me. I was not talking to him. He removed my underpant. He also removed my trouser. He also removed his underpant. He then laid on me. He then laid me on the ground on my back. I was facing upwards. He then raped me. After that he told me to go home and if I told my mother he would kill me. I felt pain, I left him at the scene and I went home. I did not tell my mum as I feared I would be killed by the accused.*

4. PW 1 further testified that on 10<sup>th</sup> October 2003 at about noon, her mother sent her to the shops. On the way she met the appellant and she told the court what happened as follows:

*On the way I met the accused on the road near the river. He held my hand and took me to the napier grass. I wanted to scream but he blocked my mouth. At the napier grass, he removed my pants. He also removed his pants and trousers and raped me. After this he bought sweets and warned me not to tell anybody. I left him at the scene. I went home. I felt pain. I did not tell anyone.*

5. On 13<sup>th</sup> October 2013, PW 1 told her mother, PW 2, she was feeling pain in her private parts. Her mother examined her parts and asked her what had happened. PW 1 told her what the appellant had done. She took her to the clinic and then to Kiambu District Hospital. She also reported the matter to the police station where she was issued with a P3 medical form.

6. PW 2 testified that PW 1 was her daughter and that she was aged 8 years. She recalled that on 13<sup>th</sup> October 2013, PW 1 told her she was feeling pain in her private parts. She took her to the bedroom and examined her private parts which she noted were inflamed and the vagina enlarged and some discharge. She suspected that the child had been defiled. When she asked PW 1 what had happened, she disclosed that she had been sexually abused by the appellant on two occasions. She took the child to a local clinic but was advised to take her to hospital. She

also reported the matter to the police station. She told the court that the appellant was arrested on 17<sup>th</sup> October 2003.

7. PW 3 was a neighbour to PW 2 and she recalled that she was at PW 2's home on 13<sup>th</sup> October 2013 to collect milk when she saw PW 1. She noted that PW 1 had difficulties sitting. She was with PW 3 when PW 2 checked PW 1's private parts and noted that there was a discharge. She escorted PW 1 and PW 2 to the clinic where they were referred to the hospital. She also testified that she was present when the appellant was arrested and although she did know him at a personal level, she used to see him on the road.

8. PW 6, a neighbour to PW 2, recalled that on 13<sup>th</sup> October 2003 at about 9.30am, she heard PW 2 screaming. She went to PW 2's house where she met PW 2 and PW 3. PW 2 narrated to her what had taken place. She was present when PW 1 was examined and she noted that PW 1's vagina was inflamed and there was discharge. She escorted PW 1 and PW 2 to the clinic. She told the court that she knew the appellant as he was from the village.

9. The Investigating Officer, PW 4, testified that on 21<sup>st</sup> October 2003, PW 1 and the appellant were brought to the police station at Githunguri from Karia AP Post. He recorded statements and issued the P3 medical form. He also recalled that PW 1 identified the appellant as the person who molested her.

10. The doctor who produced the P3 medical form, PW 5, produced it on behalf of the doctor who examined PW 1 on 15<sup>th</sup> October 2003. After taking her history, the doctor examined her private parts and noted PW 1's vagina was inflamed and the hymen torn. There was no bleeding but there was a mild discharge. A vaginal swab showed pus cells and yeast. He concluded that there had been penetration.

11. The appellant, in his sworn defence, denied the offence. He testified that on 10<sup>th</sup> March 2003, he was at home with his father building a chicken pen. He stated that PW 1 is a relative and their homes are opposite each other and that their families had differences. He told the court when PW 2 screamed on 13<sup>th</sup> October 2003 at about 9.30am, he went to the road and heard that PW 1 had been defiled. He was arrested on 15<sup>th</sup> October 2008. He claimed that when he was arrested, his blood and urine was taken for examination and he was not found with any infection and that the medical results were not brought to court.

12. The appellant's father, DW 2, also testified. He stated that on 10<sup>th</sup> March 2003, he spent the day with the appellant as they were building the chicken pen. He only came to know the case when the appellant was arrested at home. He stated that he asked the Commanding officer to issue his son with P3 medical form for examination of the appellant. The results of the appellant were found negative and the parents were asked to talk about the matter but PW 2 refused. He complained that the case was being agitated by FIDA as he is still good friends with PW 1's father.

13. It is on the basis of the evidence that I have outlined that the appellant was convicted. He now appeals against conviction and sentence based on the grounds set out in the memorandum grounds of appeal and amended grounds of appeal filed on 4<sup>th</sup> November 2019 and 8<sup>th</sup> January 2020 respectively and the written submissions. The thrust of his appeal is that the prosecution failed to prove all the elements of the offence of defilement to the required standard. He pointed out that the trial magistrate relied on the incredible testimony of PW 2 and that the trial magistrate failed to consider the bad blood between the two families. Counsel for the respondent supported the conviction and sentence and submitted that the prosecution proved all the elements of the offence of defilement.

14. The issue in this appeal is whether the prosecution proved all the elements of the offence of defilement. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "*Penetration*" under **section 2** of the *Act* means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

15. PW 1 narrated in very lucid and clear terms how she met the appellant twice and how he sexually molested her. Although the appellant was charged with the latter incident, both incidents took place in broad daylight and the appellant was a person well known to her. Indeed, the appellant admitted that they were neighbours hence the issue of mistaken identity does not arise. Although, the record shows that PW 1 stated that the appellant, "*raped*" her, I have no doubt that the appellant committed an act of penetration taking the totality of circumstances described by the PW 1. How he removed her clothes and his clothes, told her to lie down and how he laid her and how she felt pain all point to the fact that he inserted his penis into her vagina.

16. Under the proviso to **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* her testimony was sufficient to support a conviction, if the trial magistrate believed, for reasons to be recorded, that the child was stating the truth. The trial magistrate considered PW 1's testimony, proceeded to warn herself of the dangers of convicting the appellant on the basis of the uncorroborated testimony of the child and then concluded that she was, "*convinced that PW 1 was honest and truthful in stating that it is the accused who defiled her.*"

17. PW 1's testimony was nevertheless fortified and corroborated by other evidence. Although PW 1 did not immediately tell PW 2 what happened to her because of the threats issued to her by the appellant, when the matter came to light, PW 2 noted that she had pain in her private parts and observed that her vagina was inflamed. This is also confirmed by PW 3 and PW5. Second, the medical evidence produced by PW 5 through the P3 medical report recorded that PW 1's vagina was inflamed and hymen torn. This evidence taken together shows that PW 1 was subjected to an act of penetration.

18. In his defence, the appellant and DW 2 stated and raised the issue that his blood and urine were tested and he was found not to have any infection. It was his contention that since PW 1 had a yeast infection, he could not have caused the act of penetration. It also appears from the record that the P3 medical form to support his contention was misplaced and/or not produced. Even if I accept in the appellant's favour that he was tested as asserted, I doubt that the evidence absolves the appellant. The issue in this case is whether the appellant did or caused an act of penetration and in determining this issue medical evidence is not necessary or indeed medical examination of an accused. The Court of Appeal in *Geoffrey Kioji v Republic*, NYR CR. APP. NO. 270 of 2010 (UR) considered whether it was necessary to examine the accused and whether such evidence was necessary and observed as follows:

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

In this case, the trial magistrate believed PW 1 and the fact of penetration, was duly corroborated.

19. The appellant's defence was twofold; that there was grudge between the appellant's family and the complainant's family and that the matter was being pursued by an NGO and that he was not with the child on the material day. Given that PW 1 gave clear evidence that was duly corroborated, I reject the contention the appellant's defence that he was not with her on the material day. PW 1 told the court that the incident charged was the second one and since the incident took a short time, the fact that the appellant was with his father building the chicken pen does not exclude him committing the felonious act. It for the same reason that I dismiss the defence of a grudge. It appears that it is the appellant and his family that attempted to settle the matter out of court with PW 1's father but this was not successful.

20. The last element of the offence of defilement concerns the proof of age of a child. For purposes of the offence of defilement, it is sufficient that the child is aged 18 years and below. The real age of the child is only relevant for the purpose of determining the sentence. Proof of age is a question of fact. It may be proved by the testimony of the child, if she is sufficiently intelligent to recall her age, the testimony of the parents, documents evidencing the date of birth like the birth certificate, immunization card and the baptism card (see **Richard Wahome v Republic NYR CA Criminal Appeal No. 61 of 2014 [2014] eKLR**). Medical evidence like age assessment report may also prove age of the child.

21. There is no doubt that PW 1 was a child. The prosecution did not produce any documentary evidence to prove PW 1's actual age. PW 1 stated in the *voire dire* examination that she was aged 11 years at the time of the hearing and in her testimony she stated she was 8 years in 2003. Her mother, PW 2, testified that she was 8 years in 2003 and the doctor who examined her recorded that she was 8 years old in the P3 medical form. In light of this evidence, I find that PW 1 was aged 8 years when the offence was committed. I am therefore satisfied that the prosecution proved all the elements of the offence of defilement. I affirm the conviction.

22. As regards the sentence, the appellant ought to have been sentenced to life imprisonment since it was the prescribed mandatory minimum sentence under **section 8(2)** of the **Act** where the child is aged below 11 years and below. The law has now changed due to the decision in **Francis Karioko Muruatetu and Others v Republic [2017] eKLR** where the Supreme Court held that the mandatory death sentence imposed on any person convicted of murder was unconstitutional as it interfered with judicial authority to determine the sentence. In **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** the Court of Appeal extended the same principle to offences under the **Act** as follows:

*In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. .... Needless to say, pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & another – v- Republic (supra)**, we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.*

23. In view of the decisions I have cited, I do not think 27 years' imprisonment is a sentence that is harsh or excessive to warrant interference. I note though that this is the second appeal on this matter as the appeal arising from the original trial was allowed and a re-trial ordered. According to the record the appellant was charged in October 2003 and convicted on 25<sup>th</sup> January 2005. After a successful appeal, he was arraigned before the court on 20<sup>th</sup> February 2007 but was released on bail pending the re-trial. To take into account the period he was in custody, I direct that the sentence shall run from 25<sup>th</sup> January 2005

24. I affirm the conviction and sentence. The sentence of **27 years' imprisonment** to run from **25<sup>th</sup> January 2005**.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 16<sup>th</sup> day of JANUARY 2020.

R. N. SITATI

JUDGE

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.