REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 91 OF 2018

PATRICK MWENDWA SYENGO.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGEMENT

1. The appellant Patrick Mwendwa Syengo was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars being that on diverse dates 1st January 2017 and 21st September 2017 in Tseikuru Sub-County within Kitui County intentionally caused his penis to penetrate the vagina of PMS a child aged 11 years.

2. In the alternative he was charged with the offence of committing and indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars being that on diverse dates 1st January 2017 and 21st September 2017 in Tseikuru Sub-County within Kitui County intentionally touched the vagina of PMS a child aged 11 years with his penis.

3. The appellant pleaded not guilty and the matter went into full trial and the appellant was found guilty and convicted and thereafter sentenced to serve what court called mandatory life sentence.

4. The appellant was aggrieved thus filed instant appeal in which he set out 7 grounds in his written submissions named supplementary grounds: -

> **(1) That the trial magistrate erred in law and facts by failing to analyze and re-evaluate the entire prosecution's case before holding that the case for the prosecution was proved against the appellant whereas penile penetration was not adequately proved. In other word the element in defilement, i.e. age and penetration were not proved beyond reasonable doubt.**
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> **(2) That the trial magistrate erred in law and fact by failing to realise that the whole of the prosecution's case was riddled with material contradictions, which were enough to displace the prosecution's narrative.**
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> **(3) That the trial magistrate erred in law and facts by putting much weigh to corroboration but failed to test the truthfulness of the complainant, corroboration is not mandatory in sexual offences case and victim sole evidence can base conviction provided the court is satisfied the complainant is truthful.**
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> **(4) That the trial magistrate erred in law and facts by disregarding appellant's defence to the effect that the charge for this offence arose from grudge existing between PW3 and appellant, merely because appellant did not bother to bring it out in cross-examination to witnesses who testified. As a result shifted the burden of prove to the accused and yet burden of proof always lies with prosecution.**
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> **(5) That the trial magistrate erred in law by awarding disproportionate sentence.**
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> **(6) That the trial magistrate erred in law and fact by holding that the case for prosecution was proved against the appellant whereas the conduct of the complainant was consistent with that of an adult. The statutory defence as contained under section 8(1) as read with section (5) and (6) of the Sexual Offences Act was therefore spelt out in evidence but denied by the trial court.**
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> **(7) That the mandatory minimum sentence is unconstitutional as it violates Article 160 and 159 of the Constitution. It disregards the principle of proportionality, mitigation hence denying the court inherent discretion thus against tenet of a fair trial.**

5. The parties were directed to canvass appeal via submissions of which the appellant filed but responded failed to comply with directions.

APPELLANT SUBMISSIONS

6. The appellant submitted that, the trial court was contented to accept that if there was evidence of sexual intercourse involved PMS, then the perpetrator must have been the appellant hence the learned trial magistrate dealing with identification or recognition yet that is not what was in issue. The reason being that there was nobody witnessed the act itself. PW3 only speculated the commission of the offence.

7. He contends that, the trial court erred in upholding that there was penetration yet the doctor did not state the status of PW1 genitalia, but dealt with the fact that PW1 was pregnant thus speculating there was penetration. No loss of virginity was indicated nor was age of pw1 proved.

8. It was argued that trial court erred to uphold conviction and yet medical examination report was clear that no other evidence of bodily harm, demonstrating any form of violence applied.

9. In addition, appellant submitted that, the prosecution did not prove beyond reasonable doubt, that PW1 was actually penetrated, and if so by the appellant. That pregnancy was not a conclusive proof of penetration.

10. The appellant submitted that the trial court erred by holding that the appellant's defence was not brought forward during his cross-examination of the prosecution's witnesses and therefore must have been an afterthought. That he contended was shifting the burden of prove.

11. He relied on the case of ***Woolmington vs DPP [1935] A.C 462 pg 481*** and **Halsbury's Laws of England, 4th Edition, Vol. 17 para 13 and 13**.

12. On burden of prove which he contended always lies on the prosecution to prove its case beyond reasonable doubt.

13. He argued that an abortion that was ostensibly procured on June 2017 seems to be repeated 4 months down the line to suit the fallacy of the suborned prosecution's witnesses contrary to section 124 of the Evidence Act.

14. This is because, he argues, PW1 alleged that she was given the medicine to procure the said abortion in June 2017 and it is about that earlier day when her mother told her she was pregnant although she testified that she did not disclose to her mother of her pregnancy.

15. PW3 the mother to the complainant testified that she took her daughter to hospital on 22/9/2017, where it was established that she was two months pregnant. The P3 form was filled on 28/9/2017 upon realizing her daughter was two months pregnant.

EVIDENCE

16. PW1 a minor aged 11 years and the complainant herein testified that on 1/1/2017, the appellant asked her to remove her pantie and he inserted his penis in her vagina. She stated that the following day he gave her Kshs.200/- and that night he came again and had sex with her. That this continued for a long time until the mother saw the appellant leaving their house one day and reported the matter to the police.

17. The complainant testified that she missed her periods and told her mother about it. That the mother told her that she was pregnant. That in June 2017 the appellant gave her some drugs and that evening she started bleeding. She was taken to Tseikuru District Hospital and was treated. That a P3 form was filled.

18. PW2 the area chief testified that on 9/10/2017 he was called and informed that there was a child who had been defiled by appellant and was escorting the child to Meru Bus Station with the view of helping her escape. He testified that he called the police who went to Meru Bus Station and arrested the complainant who was already in a vehicle.

19. He stated further that the following day he was again called and informed that the appellant was seen trying to escape. That he called the police again who proceeded to the scene where the appellant had been seen and arrested him along Tseikuru – Kyuso road. He testified that appellant was carrying a bag and was accompanied by his wife.

20. PW3 the complainant's mother testified that on 21/9/2017 at 5.00 am she saw the appellant leaving her daughter's house. That she went to the house and asked the complainant who had left the house and the complainant told her it was the appellant. That the complainant told her that appellant gave her Kshs.200/= and had sex with her.

21. She testified that she reported the incident to the police and World Vision. That on 22/9/2017 she took the girl to hospital who was examined and found to be pregnant. She stated further that they were issued with a P3 form. That the complainant did not carry the pregnancy to term because appellant gave her some drugs which induced an abortion.

22. The investigating officer testified as PW4. He testified that the case was reported on 21/9/2017. That she established from the complainant that the appellant had defiled her repeatedly. That on 25/9/2017 the complainant was brought to the police station by her grandmother on allegation that the appellant had given her grandchild tablets swallow with the intention to abort the complainant's pregnancy.

23. He testified that the complainant was taken to hospital. That on 25/9/2017 he was called by the chief (PW2) and informed that appellant had facilitated the complainant to run away. He stated that he went to the bus stage and found the complainant in Meru bound matatu and took her to Tseikuru Police Station. He went to arrest the appellant same day at night but did not find him.

24. That on 10/10/2017 he was called and informed that the appellant was seen heading to Kyuso and was suspected to be running away. PW4 testified that he followed him and found him running away. PW4 testified that he followed him and found him running away. PW4 testified that he followed him and found him along Kyuso-Tseikuru road but managed to arrest him. He testified in cross examination that the appellant could not be arrested earlier because he had disappeared.

25. PW5 the doctor and medical superintendent Tseikuru Sub-County Hospital testified that he filled the P3 form for the complainant who had been treated at Tseikuru Hospital on 21/9/2017 at 4.30pm. He testified that he used the treatment notes earlier. He testified that the child had vaginal bleeding and abdominal pain, secondary to the ingestion of a drug given to her with a view to induce abortion.

26. He testified that there were blood clots and membranes around the cervix. He testified that the blood clots were evacuated. That the membrane was a product of conception. He produced the P3 form which he filled on 28/9/2017 as an exhibit.

27. The court found that a prima facie case had been established against the appellant and he was put on his defence. He testified as the only defence witness. He testified that on 21/9/2017 he delivered some blocks to a client in Tseikuru and also worked all day with his colleagues. That the following day he was accompanied by some of his colleagues to his mother in-law's funeral and came back at 6pm and on 9/10/2017 he was arrested. He testified that he did not commit any offence.

ISSUES, ANALYSIS AND DETERMINATION

28. After going through the evidence and the submissions on record, I find the issues for determination are:

(a) Whether the ingredients of the offence of defilement were proved beyond reasonable doubt?

(b) Whether the appellant defiled the complainant?

(c) Whether the sentence meted out was excessive and unconstitutional?

29. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. See ***Criminal Appeal No. 32 Of 2017 G.O.A. vs R. High Court Migori.***

30. On the age of the complainant, the complainant testified during voire dire examination that she was 11 years old. The mother testified that she was born on 24/6/2006. The prosecution produced a copy of the child's birth certificate which states that she was born on 24/6/2006. She was therefore 11 years at the time of the alleged incident.

31. The medical evidence shows that the child was pregnant and at the time of examination there was incomplete abortion. It was noted that there was no finding by the doctor on the physical state of the complainant's genitalia. However, the pw1 testified that the appellant had been defiling her since January 2017. She was categorical that the appellant inserted his penis in her vagina more than once. She stated in cross examination that she had been having sex with the appellant.

32. In the above case ***Ambrose Mulawindo Ngwatha vs Republic [2016] eKLR*** the Court of Appeal held that, "***in a charge of defilement, what is required is proof of penetration not proof of paternity. ….. proof of paternity maybe proof of penetration. When fertilization and sexual intercourse takes place in accordance with the order of nature. However, paternity is not proof of penetration in introfertilization."*** *(Emphasis mine).*

33. The trial court made a finding that, pw1 in her testimony, was bold, clear and also had a clear understanding on what took place or rather what the appellant did to her between 1/1/2017 to 21/9/2017. Her evidence was not controverted or challenged in cross examination. Thus the trial court was convinced from the evidence of the complainant and other medical evidence on record that there was penetration.

34. On the issue of identification, the complainant knew the appellant well. He was her grandfather. He defiled her severally. He used to talk to her. He once gave her money during the day and also gave her drugs to induce abortion and indeed the foetus aborted.

35. He also tried to assist the minor to run away. Thus there was no doubt that the complainant knew the appellant very well and positively identified him. The appellant was also once seen by the complainant's mother leaving the complainant's house at 5 am.

36. The appellant's defence was considered and found farfetched and consists of mere denials thus rejected. This court has also perused the same. And finds no substance in it. In sum, I find that the prosecution proved its case beyond any reasonable doubt.

37. Thus the court finds no merit in the appeal on conviction and upholds the same. On sentence, the court finds that the trial court awarded what it termed as mandatory life sentence without considering the appellant mitigations. The mandatory aspect of sentence has been held unconstitutional by various superior court authorities including the supreme court case of **Muruatetu.**

38. Thus the court makes the following orders;

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

ii) The appeal succeeds on sentence thus life sentence order is set aside and matter is referred to trial court for sentencing after considering mitigations of the appellant.

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

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C. KARIUKI

JUDGE