



IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 79 OF 2019

BETWEEN

PETER ONGORO NYAMESA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 12th March 2019

in Criminal Case (SO) No. 5 of 2018 at Gatundu Magistrates Court before Hon. L. M. Wachira, SPM)

JUDGMENT

1. The appellant, **PETER ONGORO NYAMESA**, was charged with three counts of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** (“the Act”) The particulars of the offence were that on diverse dates between 29th October 2017 and 28th January 2018 at Gatundu South Sub-County within Kiambu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina’s of MWK, a child aged 9 years, GWN, a child aged 10 years and CWK, a child aged 14 years.

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 **Njoroge v Republic [1987] KLR 19**). In order to fulfil this duty, it is necessary to set out the evidence as it emerged before the trial court.

3. The prosecution’s case was that the appellant lured the complainants to his house and sexually molested them. MWK (PW 1), was affirmed after a *voire dire*. She stated that she was 10 years and in Standard 3. She recalled that she went to the appellant’s house where the appellant did “*bad manners*” to her. She explained that she met GWN (PW 3) and CWK (PW 1) at the appellant’s house where he gave them tea, mandazi and cake. She recalled that he gave GWN Kshs. 50/- to buy a gift. GWN gave her Kshs. 30/- and they all left.

4. MWK further testified that on one Sunday, she went to the appellant’s house with GWN and CWK. The appellant gave GWN Kshs. 100/- for the girls to share. On that day the appellant sexually assaulted each of them and told them he would give them more money. Thereafter, they left and went to Church. MWK also recalled that on one occasion, the appellant invited them to his home gave each of them Kshs. 10/- and told them to leave. She stated that the appellant had sexually assaulted her four times. He asked them not to tell anyone about it so she did not tell anyone. She only revealed what happened when CWK’s mother told her mother what had happened. She told the court that it is GWN who introduced her to the appellant as she would get money.

5. CWK testified on oath after a *voire dire*. She stated she was aged 13 years and in Standard 8. She told the court that the appellant had been sexually harassing her and her friends, MWK and GWN. He would call them on Sundays, offer them tea, cake and mandazi and proceed to sexually molest them. She stated that he did so five times. She also testified that he told them not to reveal what was happening and would give them money to share. She told the court that the incidences came to an end when GWN disclosed the matter.

6. GWN was affirmed after a *voire dire* and stated she was aged 10 years and was in Standard 1. She recalled that the appellant lured her and MWK and CWK to his house where he made tea and bought cakes and proceeded to sexually molest them. He would then give them money. On one Sunday, he invited them, penetrated each of them and let them go to Church. She did this again on the following Sunday. She recalled that the appellant had penetrated her at approximately 6 times and he told them not to tell anyone. GWN recalled that one teacher realized what was happening. She told the teacher that they had been going to the appellant’s house and he was sexually harassing them. The matter was then reported to the police station after their parents were informed.

7. GWN’s aunt, PW 4, testified that on 7th February 2018, when the Deputy Head Teacher at GWN’s school called her to the school and told her that she was concerned that GWN usually has a lot of money. She asked GWN about the money and GWN revealed to her how the appellant had been luring her and her friends to his house and sexually molesting them. PW 4 was advised to report the matter to the police. They also took the children to the hospital where they were examined and treated.

8. MWK's mother, PW 5, received information about the appellant and the children after GWN was interrogated. She picked MWK from school and escorted her to the police station to report the incident and then took her to hospital. She told the court that she had not realized anything before that date.

9. The teacher where GWN went to school, PW 6, testified that she taught GWN and noticed that she would come late to school or would be absent and that she came to school with money in various denomination from Kshs. 20/-, Kshs. 50/- or even Kshs. 100/-. Another teacher also noted the same and informed her. She called GWN and PW 4 to her office and when she interrogated GWN, she revealed what had taken place with the appellant. After this information was revealed, the matter was reported to the police.

10. A member of the Community Policing, PW 7, told the court that on 8th February 2018, he was asked by the Assistant Chief to search for the appellant. The appellant was not in his house but when information was circulated, he was arrested on the following day. PW 8, an administration police officer, recalled that on 12th February 2018, he was informed that the appellant had been arrested by the members of the public. He proceeded to re-arrest him and hand him over to the police.

11. The doctor (PW 9) produced the respective treatments notes and P3 medical records on behalf of the doctor who examined the children and who, according to the trial magistrate, was now deceased. As regards GWN, she noted that examination of the private parts revealed laceration of the labia minora and the hymen was absent. There was slight bleeding but no discharge. MWK had lacerations on the labia minora, the external genitalia were swollen and the hymen was absent. The high vaginal swab showed pus cells and red blood cells. CWK did not have any bruises on the labia but the hymen was absent and she had a whitish discharge. She concluded that all the children had been defiled.

12. The Investigating officer, PW 10, recalled that the case against the appellant was initially reported on 7th February 2018 by GWN, PW 4 and PW 6. She interrogated GWN who told her what transpired. On the next day MWK came with PW 5 and they recorded their statements. PW 10 was later informed that the appellant had been arrested and was brought to the police station. She later located CWK whom she also interrogated and who confirmed what the appellant had done to each of the girls.

13. In his unsworn statement, the appellant denied the offences, stated that he was framed and that he did not know the children. He stated that he had been living in the locality for 35 years without any incident. He called the area Assistant Chief, DW 2, who stated that he knew the appellant and he did not have any issue with him apart from the incident that was reported to him.

14. The appellant 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 3rd October 2019 and 8th January 2020 respectively and the written submissions. The appellant complained that the prosecution failed to prove all the elements of the offence of defilement to the required standard. He stated that the charges against him were defective as they did not conform to the evidence. That the medical evidence was adduced in contravention of **section 77 of the Evidence Act (Chapter 77 of the Laws of Kenya)**. He complained that the evidence was contradictory and inconsistent and could not sustain a conviction and that his cogent defence was improperly rejected.

15. 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.*"

16. The complainants gave detailed evidence on how they were molested over a period of time by the appellant. He would lure them to his house, give them tea and cake, proceed to sexually assault them and then given them money. These incidents took place over a period of time estimated to be between 29th October 2017 and 28th January 2018. The nature and character of events that took place over a period of time, displaces any notion of mistaken identity.

17. The question is whether the prosecution proved penetration as defined by **section 2 of the Act**. The children described what the appellant did variously. MWK stated that the appellant did "*bad manners*" and that "*he removed his penis and shown (sic) it to me and lay on me.*" She also stated that, "*He would remove my clothes and remove his trouser and then have sex with me.*" CWK told the court that the appellant, "*would have sexual intercourse.*" She testified that the appellant would have sex with them. GWN described what happened as follows, "*He removed his organ for urinating and he put it in our private parts*" and that "*Ongoro would have sexual intercourse with me many times.*"

18. I have no doubt that the complainants were subjected to acts of penetration as each of the children gave or used words that were descriptive of words that in common parlance describe the act of penetration. Perhaps it would have been appropriate for the learned magistrate to record the precise words the children used to describe the act which the appellant did so that the court may determine whether the act amounts to penetration within the meaning of the **Act** (see **Samson Aginga Ayieyo v Republic KSM CA Crim. App. No. 165 of 2006 [2006] eKLR**).

19. Despite the proviso to **section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya)** which provides that the testimony of the victim is sufficient to support a conviction, if the trial magistrate believes, for reasons to be recorded, that victims were stating the truth, the trial magistrate found sufficient corroborative evidence in the form of the medical evidence produced by PW 9. The appellant contended that the evidence was not properly admitted but I noted that PW 9 is the one who testified that she is the one who filled the P3 medical forms after examining each of the complainants and was thus the competent person to produce the medical records.

20. The appellant's defence was a mere denial and that he was framed. There was no suggestion from his cross-examination of the witnesses that there was a grudge of any sort. Further the appellant's conduct came to light independent of each child. It is only when GWN revealed the matter to her teachers who had become suspicious of her conduct and that she had money that the issue came to light. When the other children, MWK and CWK, were confronted with the information thereafter, they all gave the same version of events. Their testimony was consistent and demonstrated the appellant's *modus operandi*.

21. The prosecution proved the age of each child by producing their birth certificates. MWK was born on 6th September 2009 and was 9 years at the time of the incident. CWK was born on 18th February 2004 hence she was aged 13 years at the time of the incident and GWN was born on 15th April 2008 and aged 10 years at the time of the incident. They were all below the age of 18 and were children. From the totality of the evidence, I find that all the elements of the offence of defilement was proved.

22. Before I conclude the judgment, I note that the appellant complained that his right to a fair trial was violated because the proceedings were conducted in a language he did not understand. I have reviewed the entire proceedings and they show that the proceedings were conducted in Swahili. The appellant pleaded and was cross-examined in Swahili. He made his defence and even called a witness. He did not raise any issue about the language of the court throughout hence I am unable to conclude that his right to a fair trial was violated.

23. The trial magistrate imposed the mandatory minimum sentences under the **Act** based on the age of each child. Since GWN, the appellant was sentenced to life imprisonment under **section 8(2)** of the **Act**. In respect of MWK and CWK, the court imposed 20 years' imprisonment under **section 8(3)** of the **Act**. 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.*

24. Despite the change in the law permitting discretion in sentencing under the **Act**, I am not inclined to review the sentence. Despite the age of the appellant, he was a child predator who preyed on innocent children for his own gratification without regard to their health and safety. Save for the life sentence which I quash and substitute with a sentence of 30 years, I affirm the sentence.

25. The appeal is dismissed, save that the life sentence imposed on Count 2 is quashed and substituted with a sentence of 30 years' imprisonment. All the sentences shall run concurrently.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 16th 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.