



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 57 OF 2018

JACKSON MUSYIMI MWENDWA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence of Hon. A. G. Ndungu (RM) in Makindu Senior Principal Magistrate's Court Criminal Case No. 1563 of 2015 delivered on 3rd October, 2018).

JUDGMENT

1. **Jackson Musyimi Mwendwa** the Appellant was charged with the offence of defilement contrary to section 8 (1) (2) Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 23rd October 2015 within Makueni county, intentionally and unlawfully caused his male genital organ namely penis to penetrate into the female genital organ namely vagina of one **TK** a child aged 12 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on 23rd October 2015 within Makueni County, willfully and unlawfully touched the genital organ namely vagina of one **TK** child aged 12 years old using his penis.

3. The Appellant denied the charges and the case proceeded to full hearing with the prosecution calling five witnesses. The Appellant gave an unsworn statement of defence and called no witness. In the final analysis the learned trial Magistrate found him guilty of attempted defilement contrary to section 9 (1) as read with Section 9 (2) of the Sexual Offences Act. He was convicted and sentenced to ten (10) years imprisonment.

4. The Appellant was aggrieved and filed this appeal citing the following are the grounds;

i. *That, he is remorseful, repentant and regrets his action.*

ii. *That, he has learned the value of patience and moral uprightness.*

iii. *That, prior to his arrest and subsequent conviction he was the sole bread winner of his family, married to a house wife bestowed with the heavy responsibility of taking care of his two school going children.*

iv. *That, he is ready to carry on the newly acquired virtues in the society if given a second chance.*

v. *That, he prays the honourable court to treat the entire period that he has been in custody since 24/10/2015 as punishment already and reduce the sentence to the time served.*

vi. *That, he prays for a non-custodial sentence to provide for his young innocent dependants and siblings too.*

vii. *That, the honourable court may issue any other orders it deem fit in his circumstances, of which he promise to abide by.*

5. From the grounds of appeal cited and the Appellant's submissions it is clear that the Appellant is only challenging the sentence of ten (10) years) imprisonment. He has requested this court to consider the period he was in custody before conviction. He says he was in prison custody for two (2) years and eleven (11) months i.e. from 24th November 2015 to 3rd October 2018 prior to being sentenced.

66. Learned counsel for the Respondent Mr. Kihara did not have any objection to this request. He confirmed that the Appellant was arrested on 24th October 2015, took plea on 26th October 2015. He was sentenced on 3rd October 2018. He further confirmed that the Appellant stayed in prison custody throughout that period.

7. This is a first appeal and this court has the duty to re-analyze and re-consider the evidence on record, and arrive at its own conclusion. See **Okeno –Vs- Republic 1972 EA 32**. In the case of **Kiilu & another (2005) I KLR 174** the Court of Appeal stated thus;

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a 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 conclusions.

2. On duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

8. Despite the fact that the Appellant is only appealing against sentence I must satisfy myself that the conviction is safe.

9. The complainant (PW1) in this case was born on 25/04/2002 (EXB1). She was therefore 13 years when this incident occurred on 23/10/2015. She was taken through a *voire dire* examination and the trial court found her fit to give evidence on oath. She explained that she lived with her parents on the same plot with the Appellant and the landlord. On 23rd October 2015 her mother (PW2) was away and she remained with her younger brother Hassan in their rented house at Emali town. The Appellant called to send her and she went to his door, from where he grabbed her and took her inside his house.

10. He threatened her by pointing a knife at her if she screamed. He forced her to lie on his bed after removing all her clothes (skirt, blouse, stockings). He placed his penis in her vagina. The landlord was suspicious as the appellant went out. He asked him where PW1 was. When he did not respond the landlord slapped him and that's how she was rescued and the Appellant was arrested. The landlord called PW1's mother on phone.

11. **PW2 MK** is PW1's mother. She confirmed having been called by the landlord on 23rd October 2015, who informed her about the incident. She returned to the house and found PW1. Accompanied by her husband, PW1 and others they took the Appellant to Emali police station then to the hospital where PW1 was treated.

12. **PW3 DKM** is the father of PW1. He was away with his wife preparing for his mother's burial. He gave similar evidence to that of his wife (PW2).

13. **PW4 P.C. Magdaline Achieng Omondi** was the investigating officer. She confirmed that after the report, PW1 was taken to hospital. The culprit had already been apprehended. She produced PW1's certificate of birth and clinic card (EXB 1 & 2). He confirmed what PW1 had told him.

14. **PW5 Esther Musyoki** is the doctor who examined PW1. The findings were;

- Physical state of genitalia was normal.
- No signs of discharge, pus or blood.
- Pregnancy and H.I.V tests were negative.
- HVS revealed no spermatozoa.
- Conclusion was attempted defilement which is sexual assault.
- P3 produced as EXB 5; PRC form EXB 4.

She confirmed that there was no evidence of defilement.

15. In his unsworn evidence the Appellant explained his movement on 23/10/2015. He said he left home after 7.00 p.m. and left for Emali market and returned at 10.00 p.m. and went to bed. At 11.00 p.m., he heard somebody touching the door. He woke up and went to the door when he heard his landlord talking. He locked the latch of his door with a padlock. He went and sat waiting.

16. He stated that he had a relationship with PW2 who was also admired by the landlord and they had quarreled over the issue. He asked the court not to believe PW1 who lied she was defiled. He wondered why the landlord had not testified.

17. The trial court considered this evidence and concluded that defilement had not been proved but there had been an attempted defilement. This incident took place on the night of 23/10/2015. PW2 and PW3 have confirmed that they were not at home when they received the call from their landlord. On arrival they found the Appellant locked up in his house.

18. PW1 explained what happened to her in a detailed manner. The child was rescued from the Appellant's house. She knew the Appellant well as they lived on the same plot. Her parents were away that material night.

19. In his defence the Appellant said he had an affair with PW2 whom the landlord wanted hence the frame up. The Appellant never put this to either PW2 or PW3 in cross examination for them to confirm or deny. The learned trial Magistrate found no reason for the witnesses to lie against the Appellant.

20. The evidence of PW1, the quick action by the landlord and the quick response by PW2 and PW3 all go to confirm that all was not well with PW1. The child gave sworn evidence and there was no reason for her to lie against the Appellant. The medical evidence did not confirm penetration but according to PW1 the Appellant's penis was placed there in her vagina. The trial court made the correct finding which the Appellant is not challenging. I therefore uphold the conviction.

21. On sentence the Appellant relies on Section 333(2) Criminal Procedure Code to request that his time in prison custody be considered.

Section 333 CPC provides;

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

22. The record shows that the Appellant was arrested on 24/10/2015 and arraigned in court on 26/10/2015. He was granted a bond of Kshs. 200,000/= with a surety but was never released. He was convicted and finally sentenced on 03/10/2018.

23. The court obtained a victim impact statement showing how she has been affected by the incident. The Appellant was said to be a first offender.

24. This offence is prevalent in this jurisdiction. All these have been taken into account including the period he was in custody before conviction and sentence. **I therefore set aside the sentence of ten (10) years imprisonment and substitute it with a sentence of six (6) years imprisonment with effect from 3rd October 2018.**

25. The upshot is that **the appeal against conviction is dismissed. The appeal against sentence succeeds only to the extent stated above at paragraph 24.**

Orders accordingly.

Delivered, signed & dated this 19th day of February, 2020, in open court at Makueni.

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H. I. Ong'udi

Judge