



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 4 OF 2017

(From the Original Conviction and Sentence in Criminal Case No. 9 OF 2015

of Principal Magistrate's Court at Gichugu A.N. MAKAU –S.R.M)

CYRUS MURIMI MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted of the offence of defilement, contrary to **Section 8 (1)** as read with **Section 8 (2) of the Sexual Offences Act No.3 of 2006**, and sentenced to life imprisonment.

2. He was dissatisfied with both conviction and sentence, and filed this appeal, which initially raised 8 grounds. However, in his written submission he filed amended ground and listed six (6) grounds of appeal.

This are;

(i) That the learned trial Magistrate erred in both law and fact by admitting a doubt ridden evidence adduced by prosecution witnesses.

(ii) That the learned trial Magistrate erred in both law and fact by failing to consider that penetration was not proved to threshold.

(iii) That the learned trial Magistrate erred in both law and facts by failing to consider the exiting grudge between me and the mother of the minor.

(iv) That the learned trial Magistrate erred in both law and fact by admitting shoddy and unfounded investigations evidence by the Investigating Officer.

(v) That the learned trial Magistrate erred in both law and fact by failing to consider that I was charged with the wrong section of the law.

(vi) That the learned trial Magistrate erred in both law and fact by failing to consider my plausible defense.

3. He prays that, his appeal be allowed, conviction be quashed, the sentence imposed be set aside, and he be set at liberty. When the matter came up for directions, the appellant opted to canvas the appeal by way of written submissions,

The respondent opposed the appeal, and filed written submissions.

4. The brief background of the case are that; the complainant EWM is a child aged seven (7) years. On 24th May, 2015, the complainant's mother BW was informed by another child by name PN that the appellant had caused her to suckle his urine. When she asked the complainant, she told her that, the appellant who he referred to as MURIMI had called her to his house on Friday and caused her to do the same thing, she did with the child PN

5. BW decided to check the complainant, and realized that her private parts were not normal as they looked stretched and big. She waited for her husband, who came at around 9p.m, and she informed him what she had observed in the child. They took action and reported at Kiyanaga Police station, the children were referred to hospital where they were examined and treated. P3 forms were filled. The appellant was arrested by the father BW and the father of PN and they handed him over to the Police. The appellant was then charged.

6. The complainant EWM gave evidence in court after a Voire Dire examination, and she told the court that, he knows the appellant as Cyrus Murimi who is his neighbor. That on 22nd May, 2015, after she came from school, she went to play at the appellant's place, where she was with two other children, by name IK and S. The two then left her at the home of the appellant and went home. The appellant called her and he told her to go to bed. The appellant was standing outside his house, and he went inside and closed the door, and he removed her clothes. She was only wearing a trouser, the appellant slept on her, and the appellant then removed his 'thing' and he put it into her 'thing' for urinating, she said she felt pain. The appellant then told her to put on her clothes and go away and that if she tells anyone what happened he will kill her. EW told the court that the appellant had bought her a sweet. She did not tell anyone. PN is the one who told her mother and her mother in turn asked her. She told her the truth and she was then taken to hospital.

7. According to the Clinical Officer Stephen Maina Kiama (PW-4-), who works at Kiyanaga Sub County Hospital, upon examining EWM who was aged 7 years, on allegation that she had been defiled by a person known to her, he found that;

- ***The labia majora and minora, plus the vagina were in place.***
- ***Hymen was broken, but not freshly, laboratory examination found that she had urinary tract infection.***
- ***She was given anti-biotic, and anti – protozoa for the infection.***

8. He filled the P3 form and stated that there was no evidence of defilement at that time. He produced the P3 form as Exhibit. 2. He further testified that a post – rape care form was filled on 28th May, 2015 and the examination showed that there was no defilement. He testified that the form was filled by his colleague Beatrice Wangui Kubai who he had worked with for three (3) years. The appellant was then charged with this offence.

9. Pw-5- Penina Mogesa Police Constable testified that she investigated the case. She produced a birth certificate for the complainant, showing that she was born on the 26th December, 2007, birth P. Exhibit. 1. The appellant was arrested by members of the public and taken to the police station where he was charged with this offence.

10. I have considered the appeal, this being the first appellate court, I have a duty to evaluate the evidence, ANALSE it, THEN come up with my own independent finding, but bearing in mind, that I had no opportunity to see the witnesses, when they testified and assess their demeanour, THEN LEAVE room for that. This was held in the case of; **OKENO -VERSUS – REPUBLIC (1972) EA 32.** I have considered the proceedings before the trial court, the grounds of appeal, and the submissions. I will proceed to consider the grounds of appeal The appellant has submitted that the trial magistrate erred in both law and fact by admitting doubt ridden evidence adduced by prosecution witness.

11. He submits that, the evidence adduced is doubtful. That according to the Clinical Officer, he clearly stated that the examination showed there was no defilement. That it is therefore, my broad contention that the evidence of the witnesses, must be corroborated. That the trial magistrate erred by proceeding to convict him with the offence of defilement, that was ruled out by the expert. And he urges the court to find that there was no defilement.

12. For the respondent it was submitted that, the prosecution proofed penetration. That the complainant gave a very lengthy testimony on how the appellant penetrated her on several occasions. He referred this court to page 24 of the proceedings where the complainant stated as follows;

“I was then called by Murimi and he told me to go to bed, he was outside his house, I went to him and he told me to close the door, and I closed it. He removed my clothes, I was wearing a trouser. He then slept over me. I did not have anything beneath my trouser. He put into my thing of urinating. I felt a lot of pain, when he inserted it.”

13. He submits that from the above testimony, the appellant penetrated the complainant. The evidence was corroborated by the PW4 the Clinical Officer when she observed the complainant and noted the following.

- *Hymen was broken.*
- *Urinary track infection*
- *Complainant was defiled.*

14. That the evidence by the Clinical Officer demonstrated that PW-3- the complainant was defiled. The trial magistrate found that, penetration can only be proved by medical evidence. The medical evidence produced confirms that the child genitalia had been penetrated and her hymen perforated. The trial Magistrate further found that, according to the medical officer, there was a possibility that the child was defiled. Upon cross examination by the court, the medic stated that the interference of the labia majora and minora and indicates penetration. No injuries had been seen on the date she was taken to hospital and this was due to the fact that, she was defiled on 22nd May, and was examined on 25th May, three days after the alleged defilement. That there was

evidence that the child (victim) was defiled.

15. I have considered the submissions, and I find that medical evidence proved that there was penetration. PW-4- who was the Clinical Officer confirmed that hymen was broken, and on being cross-examined by the court he stated that;

“ the interference of the labia majora and minora, and the hymen having been broken indicate that there was defilement owing to the age of the girl.”

Section 2 of The Sexual Offences Act, defines penetration and it state:

“penetration means the partial or complete insertion, of the genital organ of a person into the genital organ of another person,

Section 8 (1) (2) provides;

“a person who commits an act which causes penetration, with a child is guilty of an offence termed defilement.”

A person who commits the offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life”.

Penetration is a key ingredient of the charge of defilement which must be proved for the offence of defilement to be completed. The Court of Appeal in the case of Mark Oiruri –v- Mose –v- R(2013) eKLR stated:-

“Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require the evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girls organ.”

The emphasis is that what needs to be proved is penetration which can be partial or complete.

The Court of Appeal in Erick Onyango Ondeng –v- Republic (2014) eKLR stated as follows on the aspect of penetration –

“In sexual offences the slightest penetration of a female sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

16. The complainant was a child aged 7 years. The broken hymen is evidence of penetration. And the child was able to tell the court that it is the appellant who penetrated her genital organ, using his genital organ. Of course I have noted the proceedings which the appellant has pointed out where PW4 stated that there was no defilement. He however clarified when he was cross examined by the court and stated that the hymen was not freshly broken and he continued to inform the court that he examined the complainant three days after the alleged incident and therefore if she had sustained injuries, they may have healed.

17. The conclusion by PW-4- was not based on the ground that there was no penetration but on the fact that there were no injuries on the genitalia. The evidence pointed to the fact that there was penetration as the hymen was perforated. It was proved beyond any reasonable doubts that there was penetration and therefore defilement.

I find that the allegation by the appellant, that there was no defilement has no merit.

18. On the second ground, the appellant submits that the trial magistrate erred in law and in fact, by failing to consider that penetration was not proofed to the required threshold.

19. I believe that I have dealt with this issue of penetration on the first ground above and I need not address it. What I would wish to add is that; the evidence that the hymen was not freshly broken, does not exonerate the appellant because the allegation was not that the offence was committed on the date the complainant, was taken to hospital. The charge sheet shows that, the offence was committed on 22nd May, 2015 while the P3 form shows that she was examined on 25th May, 2015. There was therefore a time lapse, and hence the observation by the Doctor, that the hymen was not freshly broken. The P3 form further stated that the complainant had reported that he was defiled severally by a person well known to her. The broken hymen corroborated the fact of defilement.

20. On the third ground, he submitted that the trial Magistrate erred by failing to consider the existing grudge between him and the complainant’s mother. From the record, the trial Magistrate did consider the allegation that the complainant’s mother and the appellant’s mother had a grudge. She stated, at page 44 of the record;

“evidence on record about his relationship with the child ‘s mother and himself, was that of a worker and a boss, and if any dues were owed to him, were long time ago settled. It is not possible that, he was implicated, because the child’s evidence alone is so clear that he called her to his house this child was not a stranger to him. She was found to be truthful, and hence believable.”

21. The trial Magistrate made a finding based on facts, and concluded that the complainant, was a credible witness, and having

made that finding, the court could rely on her evidence to convict the appellant. This court cannot interfere with the finding of fact by the trial Magistrate, as she had the chance to see the witness when she testified and assessed her demeanour.

22. I therefore, find that the allegation that his defence was not considered, is not supported by the record.

23. I also note that the appellant, has not denied that he was well known to the complainant. The evidence before the trial Magistrate, was that; the complainant and the appellant were neighbours. The complainant testified that, she had gone to the home of the appellant to play with other children, as such, the complainant, could not mistake the appellant for another person.

24. The prosecution had the burden to prove that the appellant, was the one who defiled the complainant. I find that this burden was discharged to the required standard. The appellant was the perpetrator, no other person was implicated.

The evidence tendered by the complainant demonstrated that the appellant, who he identified during trial was the person who defiled her. The identity of the perpetrator was proved beyond any reasonable doubt.

25. Finally on ground four and five which were merged, the appellant submits that the trial magistrate erred in both law and fact by admitting shoddy and unfounded investigations. That the Investigating Officer failed to note the defect on the charge sheet.

26. That the charge sheet, had stated that Cyrus Muchira but not Cyrus Murimi Mureithi had committed the offence. But Muchira is reported to have committed the offence on 25th May, which is inconsistent with the evidence on the charge sheet. That Cyrus Murimi committed the offence on 22nd May, 2015 and taken to the Police on 27th May, 2015. When drafting the charges, he was charged with defilement contrary to **Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.**

27. I do not know where the appellant got these dates and the name, because the charge sheet clearly shows the person charged is Cyrus Murimi Mureithi and the witnesses testified that the appellant is called 'Murimi'. The appellant gave his names as Cyrus Murimi Mureithi when he gave his defence. As for the date on the charge sheet, the offence is alleged to have been committed on 22nd of May, and this was testified by the witnesses. It is the medical examination that was performed on 25th of May, 2015.

28. On the issue of: the Section under which the appellant was charged, he was charged with the offence, under **Section 8 (1)** as read with **Section 8 (3) Sexual Offences Act.** That the particulars stated that; he caused his penis to penetrate into the vagina of 'EWM' a child aged 7 years.

29. The prosecution proved that, the complainant was aged 7 years with the production of a birth certificate, Exhibit. 1. Which shows that, she was born on 26th December, 2007.

30. Now the question is whether the appellant has suffered any prejudice. **Section 382 of the Criminal Procedure Code** provides:

“Subject to the provision herein before contained, no finding sentence, or order passed by a court of competent jurisdiction, shall be reversed or altered, on appeal or revision on account of an error, omission or irregularity, in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry, or other proceeding, under this code, unless the error, omission or irregularity has occasioned a failure of justice.”

Provided that in determining whether an error, or omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could or should have been raised at an earlier stage in the proceedings.”

31. The appellant did not raise any objection to the charge, and he proceeded with the case, and was convicted. I find that no prejudice was occasioned, and therefore this is not a ground to warrant setting aside the conviction. Failure to quote the correct Sub-section could have been cured by an amendment, and the omission was never noted by the Prosecution as they proceeded to prove the particulars of the charge, that the minor was aged 7 years. Where the appellant has not suffered any prejudice, in line with the above provision, the court cannot interfere with the finding of the trial magistrate. As a matter of fact, the trial Magistrate, convicted the appellant on the offence of defilement contrary to **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act.** This is at page 44 of the record.

The ground is without merit.

32. Finally on ground number 6, the appellant submits that the trial magistrate, erred in both law and fact, by failing to give his defence consideration.

33. I find that this is far from the truth, the defence was considered as I have pointed out above, and I need not repeat here. The trial Magistrate rejected his defence. This court will not interfere with finding of facts by the trial Magistrate as she had the opportunity to see the witnesses, as well as the appellant, and assess their demeanor.

34. On the sentence, the court stated:

“Section 8 (2) of the Sexual Offences Act, provides for, a mandatory sentence of life imprisonment where defilement is proved and accused convicted. My hands are tied to the law and I cannot pass a lesser sentence other than which the law provides. The accused is sentenced to life imprisonment.”

The Supreme Court of Kenya has since held that, mandatory sentence which deprives, the judicial officer, the exercise of discretion in sentencing is unconstitutional, refer to case of; **Francis Karioko Muruatetu & Another -versus - Republic & Others. Petition No. 15 & 16 of 2015.**

35. The trial Magistrate passed the mandatory and lamented that her hands were tied. I will therefore interfere with the sentence passed by the Trial Magistrate.

36. In conclusion, having considered all the evidence which was tendered before the trial magistrate and the submissions, I find that the prosecution discharged the burden to prove the ingredients of the charge, that is; identity of the perpetrator, penetration and age of the complainant beyond any reasonable doubt. I find that the appeal is without merit and is dismissed.

37. On the sentence, I set aside the sentence of Life imprisonment and sentence the appellant to 25 years imprisonment, computed from the date of the Judgment of the trial Magistrate.

Dated at Kerugoya this 8th day of May 2020.

L.W. GITARI

JUDGE