



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 124 OF 2018

(CORAM: F. GIKONYO J.)

CHARLES KIMATHIAPPELLANT

-versus-

REPUBLIC..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that the appellant on the 22nd day of June 2013 in Tigania West District within Meru County intentionally caused his penis to penetrate the vagina of BG a child aged 12 years.

2. He was also charged with alternative charge of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that the appellant on the 22nd day of June 2013 in Tigania West District within Meru County intentionally touched the vagina of B G a child aged 12 years with his penis.

3. The trial court convicted the accused of the main count of defilement and sentenced him to twenty (20) years imprisonment. The accused was aggrieved by his conviction and sentence which led to this appeal. The appellant appealed based on eight (8) grounds which may be collapsed into three (3): **that the learned magistrate erred in law and fact; (1) in his assessment and analysis of the evidence; (2) for rejecting his defence; and (3) in concluding that the prosecution had proved their case beyond reasonable doubt.**

4. This appeal was canvassed by way of written submissions. The appellant submitted that the prosecution failed to prove their case beyond reasonable doubt. The evidence adduced was full of inconsistencies and contradictions. Moreover, he argued that these charges were framed by the complainant's mother who owed him money which she refused to pay. Besides the prosecution ought to have taken the semen sample to the government chemist for DNA analysis. He argued further that the mandatory sentence of twenty (20) years imprisonment fails to conform to **Article 25 (c) of the Constitution**. Thus, the conviction and sentence is not merited and should be set aside. He relied on the cases of **Denis Kinyua v Republic [2017] eKLR**, **Evans Wanjala Wanyonyi v Republic [2019]eKLR** , **Philip Muiruri Ndaruga v Republic [2016] eKLR** among others.

5. The respondent submitted that they proved all the elements of the offence being age, penetration and the identification of the appellant as the assailant. Hence, they proved their case beyond reasonable doubt. They relied on the case of **Paul Otieno Okello v Republic [2019] eKLR** to support their position.

ANALYSIS AND DETERMINATION

6. As first appellate court, I am obligated to revisit and re-evaluate the evidence before the trial court a fresh, and make its own conclusions, except, bearing in mind that I did not have the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. Republic [1972] E.A 32**.

Issues

7. The court should determine whether the prosecution proved beyond reasonable doubt the guilt of the appellant for defilement. The specific elements of the offence arise from **Section 8 (1) of the Sexual Offences Act** which provides as follows:

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

These elements are:

1. Age of the complainant

2. Proof of penetration

3. Positive identification of the assailant.

Age

8. On age of the complainant, **PW1** stated that she was 12 years old when the incident occurred. This was corroborated by her parents **PW2** and **PW3** as well as the investigating officer **PW5**. The P3 form and the treatment card both indicate that the child was aged 12 years. A birth certificate would be the best evidence to ascertain the child's age however age may be proved through other evidence. On this see the case of **Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** - it was held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

9. The evidence adduced is sufficient proof of age of the complainant. Accordingly, I find that the complainant was 12 years old when the incident took place and therefore a child. Therefore, I am of the view that the trial magistrate did not error when he found that the complainant is a child aged twelve years.

Penetration

10. Section 2(1) of the Sexual Offences Act defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

11. For better understanding of the scope of this statutory term see in the case of **Mark Oiruri Mose v R [2013] eKLR** where the Court of Appeal stated that:

“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 that 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 girl's organ.” (Emphasis added).

12. **PW1** told the court that the appellant removed her underpants, his trouser and boxer, and inserted his penis into her vagina. The P3 form and treatment card produced by **PW4** show that on vaginal examination of the child there was tenderness, small lacerations, hymen was not intact, there was a lot of semen deposited in her vagina and she had pain in her private parts. Moreover, her underpants were soiled with red discharge that had a foul smell. These pieces of evidence prove beyond reasonable doubt that there was penetration of the child. I so find.

Was Appellant the assailant?

13. Positive identification that the appellant was the assailant is crucial element of the offence. For that reason, I will state her evidence in *extenso*.

14. **PW1 B. G** testified that on 22/6/2013 she was going to collect firewood at their farm when she met the accused who asked her where she was going. He then asked her whether she could sleep with her of which she said no. He then jumped on her and lay her down. He proceeded to remove her pant. He then removed his trouser and boxer and inserted his penis in her vagina. When he finished, he warned her that if she screamed he would kill her. She could not even scream as he was pressing her neck. She went home and found her father. She was afraid to tell him what had happened so she went to look for her mother who had taken long. She found her on the way and told her what had happened. She took her to Kiburine dispensary. She stated that she is now 16 years old but at the time of the incident she was 12 years old.

15. **PW2 J K**, mother of **PW1**, corroborated the evidence of **PW1**. She told the court that on 22/06/2013 she had sent **PW1** to go collect firewood. Since she took too long she went to the road to find out why she had delayed. That is when she met her crying and upon asking her what the problem was she told her that the accused had raped her. She stated that **PW1** could not scream since the accused held her by the throat and there was a panga beside him. They went to the police station then the hospital. At the time of the incident **PW1** was aged 12 years.

16. **PW3 J T**, step father of **PW1**, also offered further reinforcement to the evidence of **PW1** and **PW2**. He stated that on 22/06/2013 **PW1** went to fetch firewood. He was then informed by **PW2** that the child had been raped by the accused on their farm. As he walked he met the accused whom he took to Kiburine Police Station. The child was then taken to the hospital.

17. **PW5 No. 96639 P C Victor Omola** of Nchiru Police Station and the investigating officer stated that he took over the file from the original investigating officer on 6/8/2018. He perused the file and noted that all the witnesses had testified. From the investigation the complainant was 12 years old when she was defiled by the accused on 22/6/2013.

18. From the foregoing, there was sufficient evidence that the appellant defiled **PW1**. **PW1** was the complainant and identified the appellant as the assailant. She knew him prior to the incident since he was their neighbour. This was identification by recognition. Her evidence on

identification alone may even found a conviction as long as the court records reasons for believing the truth of the evidence in accordance with **Section 124 of the Evidence Act** which provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

19. The trial court conducted *voir dire* examination of PW1 and concluded that the minor was aware of the importance of saying the truth. She then narrated to the court the events and how they occurred and she was categorical that the appellant removed his trouser and boxer and inserted his penis in her vagina. I do not find anything to show that she was under any delusion or of mistaken identity, for she knew the appellant well. Her evidence was cogent, gave a picturesque of the incident with such succinct details of the manner it happened and the identity of the assailant. The evidence leaves no doubt that the appellant caused penetration of her.

20. When put on his defence the appellant stated that the allegations were false and that **PW2** was indebted to him in the sum of Kshs. 10,000/- which she had agreed to pay but has not until today.

21. I have seen many cases within this jurisdiction where these kind of allegations have been made in defence. I consider such to be a serious matter as it hinges on perversion of justice. Thus, it is expected that the defence should be seriously prosecuted. But, the appellant has merely made the allegations without providing any supporting evidence. Other than claiming that PW2 owed him money and so she fabricated these charges, the appellant herein provided nothing in support thereof. The defence is a mere afterthought and I dismiss it.

22. The appellant also argued that the evidence by Prosecution was riddled with inconsistencies as PW1 confused the date of the incident during examination; that **PW1** stated that he did not have a panga while **PW2** stated that he had one and that the name appearing on the charge sheet as one of the witness is J K and not K. The Court of Appeal in the case of **Richard Munene v Republic [2018] eKLR** stated as follows:

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

23. Meticulous perusal of the evidence adduced as a whole, show that the inconsistencies mentioned by the appellant; (1) are not substantial; (2) do not create any doubt or rout the core of the prosecution’s case; and (3) are easily reconcilable through the substratum of the evidence by the witnesses. Consequently, the inconsistencies are not fatal.

24. In the upshot, I find that the appellant was positively identified as the assailant herein. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

Of sentence

25. The appellant submitted that he was sentenced in accordance with **Section 8(3) of the Sexual Offences Act** which states:

“(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

26. If I understood the appellant’s submissions, he seems to argue that his sentence was not in conformity to **Article 25 (c) of the Constitution** because it was based on a law that leaves no room for any discretion. The Court of Appeal in the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** where the appellant was charged with defilement contrary to **Section 8 (1) and (4) of the Sexual Offences Act No. 3 of 2006** held as follows:

“24. On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforesaid Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:

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.

25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand.”

27. Accordingly, the minimum sentence set by law fetters court's discretion in sentencing and causes prejudice to the accused. The twenty (20) year term of imprisonment meted upon the appellant was based on the said law which sets minimum sentence of twenty years. In the upshot, I set aside the sentence of 20 years and after looking at the all relevant factors in this case, I sentence him to fifteen (15) years imprisonment from the date of his initial sentence. Orders accordingly.

Dated, signed and delivered at Milimani this 7th day of May 2020

F. GIKONYO

JUDGE

Representation: -

Appellant in person

DPP, Meru for state