



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 60 OF 2017

MICHEAL MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence in Mavoko Principal Magistrate's Court (Hon. P.O. Ooko, PM), in Criminal Case SOA No. 14 of 2015 vide judgement delivered on 4.8.2016)

BETWEEN

REPUBLICPROSECUTOR

VERSUS

MICHEAL MUTUKU.....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence by Hon. P.O. Ooko, Principal Magistrate in **Mavoko Criminal Case SOA No. 14 of 2015** vide judgement delivered on 4.8.2016. 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 charge were that the appellant "On the 17.7.2015 at Stony Athi area in Athi River sub-county within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **MNa** child aged 13 years. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. Upon the appellant denying the charges, the prosecution presented 6 witnesses in support of their case. Pw1 was MN. After conducting a voir dire on her, the court was satisfied that she had enough intelligence to understand the questions put to her and she gave sworn testimony. It was her evidence that she was born in 2002 and that on 17.7.2015 she went to her mother's place of business that was near the appellant's house. She testified that the appellant sought and gained entry into the place she was and pounced on her covering her mouth then threw her on his bed, removed her clothes as well as his and inserted his penis into her vagina. She testified that on the same day she was taken for treatment at Kitengela. It was her testimony that the appellant used to take tea at her mother's kiosk and make advances at her.

3. **Pw2** was **JKK** who testified that she had the age assessment of the complainant who was her sixth born child. She told the court that on 17.7.2015 she was in the company of Pw1 who disappeared mysteriously. She stated that she went to an adjacent plot and saw shoes outside and when she pushed the door she saw the appellant in flagrant delicto with Pw1. She testified that she reported the matter to Athi River police station and that Pw1 was taken to Kitengela. She tendered in court the P3 form and the PRC form in respect of Pw1.

4. On 12.1.2016, an application was made to amend the charge sheet to cite the correct age of Pw1 and the same was allowed by the trial court. The appellant pleaded not guilty to the amended charges.

5. **Pw3** was **Dr. Stephen Karanja**, who testified of an examination that he carried out on the victim on 17.7.2015 and it was found that her hymen was missing, it had a fresh scar and was bloody. He opined that the injuries were 11 hours old and had been caused by penetration. He concluded that the victim had been defiled. He testified that he examined Pw1 and filled a PRC form on 17.7.2015 and that the form had the same conclusion as the P3 form. The P3 form and PRC form were produced in evidence without any objection by the appellant.

6. **Pw4** was **Cpl Stephen Cheburet** who testified that on 17.7.2015 Pw2 came to her work place in the company of Pw1 and reported a defilement case. He testified that he utilized the patrol vehicle and on the way before reaching Konza area, Pw2 spotted the appellant who was arrested.

7. **Pw5** was **PC Antony Mathenge** who testified that on 17.7.2015, the appellant was brought to the police station at Athi River, Crime Department by Pw4. He told the court that he accompanied the appellant and Pw1 to Kitengela Nairobi Women Hospital where they were examined and P3 and PRC forms were issued and in addition an age assessment was conducted on Pw1.

8. **Pw6** was **Dr Maureen Maitha**, a clinical officer who conducted the age assessment on Pw1 and she assessed her age as 13 years as at 15.10.2015. She produced the age assessment report in court. The court found that the appellant had a case to answer and put on his defence.

9. The appellant opted to give an unsworn statement and call no witness. The appellant told the court that he was arrested on allegations that he had committed defilement but the charges were false. He told the court that he was framed.

10. The trial court found that the prosecution had proved its case beyond reasonable doubt. The appellant was convicted of the main charge and after considering mitigations he was sentenced to 20 years imprisonment.

11. It was this decision that prompted the instant appeal. The grounds raised by the appellant and amended is that he was of the view that the charge was neither proven nor supported by the evidence on record and that he was not identified as the perpetrator.

12. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt and that the prosecution case was riddled with inconsistencies. The appellant challenged the evidence on his identification as the perpetrator and reliance was placed on the case of **Joo v R (2015) eKLR**. His prayer is that the appeal be allowed, the conviction quashed and the sentence set aside.

13. The state submitted that penile penetration was proven; that the age of the victim was proven and so was the appellant identified. Learned counsel in placing reliance on the case of **Bukenya & Others v Uganda (1972) EA 549** submitted that the prosecution was not obligated to call a multitude of witnesses. On the issue of contradictions, counsel submitted that the court be guided by Section 382 of the Criminal Procedure Code and the case of **Philip Nzaka Watu v R (2016) eKLR** and submitted that the inconsistencies if any did not prejudice the appellant. Counsel invited the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

14. This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

15. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into one grounds:

1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;

16. In cases of defilement the following are to be proven:

1. The age of the child.
2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and
3. That the perpetrator is the Appellant.

17. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years, she was aged 13 years as per the age assessment report that was tendered by Pw6 without any objection by the appellant. It is also undisputed that there was penetration because the evidence on record points towards penetration and this was indicated via primary evidence of Pw1 and evidence of Pw2 as corroborated by the P3 form, the PRC form also on record that was uncontroverted by the appellant. There is however contention by the appellant on the issue of his identification as the perpetrator. Pw1 told the court that knew the appellant and so did Pw2 who not only used to sell tea to the appellant but caught the appellant in flagrant delicto making out with the complainant in his room. Again the complainant clearly narrated to the court of how the appellant enticed her into his room and then pounced on her and defiled her. The evidence of the appellant did not set up any defence and or his evidence did not succeed in casting doubt on the occurrence of the event and or the participation of the appellant. From the evidence on record, the court is able to say with certainty that the appellant was properly identified as the perpetrator.

18. I did not have the benefit of seeing the witnesses testify but from the proceedings and the court record, the trial court seemed satisfied of the evidence against the appellant. From the record and having considered the surrounding circumstances and the fact that the appellant was got red handed in the act and who was well known to the complainant and her mother. I am satisfied that the prosecution's evidence is clear, consistent and cogent, I am satisfied that the prosecution met its standard of proof and hence the conviction arrived at by the trial court was safe.

19. The appellant's case was that he was framed and this does not weaken any inference of guilt on his part. I disagree that there was inconsistency in the prosecution evidence that went to the root of the case. As analyzed earlier, the pieces of evidence prove beyond reasonable doubt that an act of sexual intercourse took place and that the trial court did not err in its findings.

20. On sentence it is noted that the appellant was sentenced to serve 20 years' imprisonment. The appellant had been charged under section 8(1) as read with section 8(3) of the Sexual Offences Act. The age of the complainant was established to be 13 years old and hence the sentence fell within the age bracket of 12-15 years as contemplated by section 8(3) of the Sexual Offences Act which imposes a sentence of

twenty years upon conviction. The sentence meted on the appellant was the possible minimum in law and I do not see any reason to interfere with it.

21. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal lacks merit and is dismissed. The conviction and sentence is hereby upheld.

It is so ordered.

Dated and delivered at **Machakos** this **11th** day of **May, 2020**.

D. K. Kemei

Judge