



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 45 OF 2015**

**SALIM MWACHONDO MWERO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal from the original conviction and sentence by I. Ruguru, Senior Resident Magistrate, delivered on 6<sup>th</sup> February, 2015 in Mombasa Chief Magistrate's Court Criminal Case No. 3039 of 2010).***

**JUDGMENT**

1. On 4<sup>th</sup> October, 2010 the appellant was arraigned before the lower court and charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 24<sup>th</sup> day of September, 2010 in Kisauni District, he unlawfully and intentionally caused his penis to penetrate the vagina of MV [name withheld] a girl aged 5.

2. The appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 24<sup>th</sup> day of September, 2010 in Kisauni District of Mombasa County, he unlawfully and intentionally caused his penis to touch the vagina of MV [name withheld] a girl aged 5. He was found guilty of the main charge and sentenced to life imprisonment.

3. On 18<sup>th</sup> February, 2015, he filed a petition and grounds of appeal. On 12<sup>th</sup> July, 2018, the law firm of Oduor Siminyu & Company Advocates filed Criminal Appeal No. 53 of 2018, when the present appeal was subsisting. On 3<sup>rd</sup> September, 2018, Judge Majanja struck out Criminal Appeal No. 53 of 2018 but retained the grounds of appeal therein which were deemed to be additional grounds to the present appeal. This court notes that some of the grounds of appeal overlap. The consolidated grounds of appeal are:-

- (i) That the Learned Trial Magistrate erred in law and fact when she relied on the prosecution evidence which was not watertight to warrant a conviction;
- (ii) The Learned Trial Magistrate did not take into account that the evidence of the complainant and PW2 was inconsistent and contradictory;
- (iii) That the Learned Trial Magistrate failed to take into account the evidence of the appellant and totally disregarded the same;
- (iv) That the Learned Trial Magistrate did not hear any evidence from the members of the public, neighbours or anyone who participated in the appellant's arrest to corroborate the evidence of the complainant and PW2;
- (v) That the Learned Trial Magistrate solely relied on the evidence of the complainant who was at the time 5 years old and her mother, PW2, only;
- (vi) That the Learned Trial Magistrate erred in law and fact by not relying on any DNA evidence or blood test to confirm with certainty that the appellant indeed carried out the act;
- (vii) That the Learned Trial Magistrate erred in law and fact by believing the evidence of the witnesses without giving justified reasons;
- (viii) That the Learned Trial Magistrate relied on disjointed and inconsistent evidence given by the prosecution witnesses;

- (ix) That the Learned Trial Magistrate erred in law and fact by relying on medical evidence that did not link the appellant to the offence;
- (x) That the Learned Trial Magistrate failed to consider that the appellant was unrepresented and that being a layman he could not cross-examine the witnesses effectively to absolve himself from the charges against him;
- (xi) That the sentence was excessive and the appellant's mitigation was not considered;
- (xii) That the Learned Trial Magistrate erred in law and fact by relying on wrong evidence, explanation, findings and authorities in convicting the appellant;
- (xiii) That the Learned Trial Magistrate erred in law and fact by not considering that the medical report produced in court was contrary to the evidence of the medical officer hence the same was unreliable;
- (xiv) That the Learned Trial Magistrate erred in law and fact in failing to consider that the age of the victim was not proved beyond reasonable doubt; and
- (xv) That the Learned Trial Magistrate erred in law and fact in failing to consider that the matter in question was made up, thus it was unreliable to sustain the appellant's conviction and sentence.

4. The appellant's Counsel filed written submissions on 5<sup>th</sup> November, 2019. They are to the effect that the complainant, PW1, was not properly examined to test if she understood the meaning of an oath. That she did not appear to know the nature of an oath, but the Trial Court allowed her to give evidence. It was submitted that there was lack of clarity in PW1's evidence as to whether the appellant inserted his finger in her private parts or if he sexually defiled her. It was further submitted that PW2 did not complete her testimony as she was stood down but was not recalled. It was submitted that PW2's evidence was not tested in cross-examination.

5. It was also contended that there was no evidence that the act was carried out in the house of the complainant due to lack of corroboration. It was stated that there was no evidence adduced to prove the claim that the appellant was caught red-handed in the act. It was stated that neither the stained bed sheets nor were pictures of the scene produced in court. Counsel for the appellant submitted that the Trial Court should have been cautious about accepting the evidence of a minor.

6. It was argued that contradictions by the prosecution witnesses spilled over to the medical expert who only referred to the complainant's hymen as having been perforated but no other injuries were noted.

7. In the appellant's Counsel's view, for a 5 year old who was sexually assaulted, more injuries would have been expected on her private parts. In his view, the charge of defilement was not proved. The decision in **Twehangane Alfred v Uganda** [2003] UGCA, was cited to demonstrate that if grave contradictions exist in the evidence of the prosecution witnesses, the same should go to the benefit of the appellant.

8. With regard to the sentence of life imprisonment, Counsel for the appellant urged this court to apply the reasoning in the decision in **Francis Karioko Muruatetu v Republic** [2018] eKLR, in favour of the appellant. The case of **Gradph Mwangi Mugo v Republic** [2019] eKLR, was also cited to show that in the said case, the appellant's life sentence was substituted with 10 years imprisonment. The appellant's Counsel prayed for the appeal to be allowed.

9. Ms Mwangeka, Prosecution Counsel, filed written submissions on behalf of the respondent on 2<sup>nd</sup> December, 2019. She submitted that the evidence of penetration of PW1's vagina was corroborated by medical evidence, as well as the evidence of PW2. With regard to the identity of the perpetrator of the offence, the Prosecution Counsel stated that PW1's evidence was clear that she was defiled by the appellant and the incident occurred at 4:00p.m., after she went home from school. It was stated that PW1 knew the appellant as "*Mwanyumwanyu*" who was her father's friend. Ms Mwangeka drew the court's attention to the appellant's unsworn defence in which he confirmed that he knew PW1 and her family very well and that on the day in issue, he was at PW1's house with her. That he also stated there was no grudge between him, PW1 and her family.

10. It was pointed out by the prosecution that the Trial Court found PW1 to have been consistent and credible in her evidence.

11. On the issue of failure by the prosecution to have the appellant undertake a DNA test to connect or absolve him from the commission of the offence, the Prosecution Counsel submitted that such an examination was not mandatory. She cited the case of **Evans Wamalwa Siminyu v Republic** [2016] eKLR, to support her submission.

12. In response to the appellant's contention that being a layman he was unable to cross-examine the witnesses effectively, Ms Mwangeka's view was that the appellant did not seek time to get legal representation. He also failed to inform the court that he was unable to properly defend himself.

13. In regard to the sentence meted out to the appellant, Ms Mwangeka submitted that PW1 was 5 years old when she was defiled. She however prayed for review of the appellant's sentence from life imprisonment to a determinate sentence of 30 years or any other that this court may deem fit and just to mete. She prayed for the conviction to be upheld.

## ANALYSIS AND DETERMINATION

14. The duty of the 1<sup>st</sup> appellate court is to analyze and re-evaluate the evidence adduced before the Trial Court and come to its own

independent decision, while bearing in mind that it neither saw nor heard the witnesses testify and make an allowance for the said fact. In **Kiilu v Republic** [2005]1 KLR 174, the Court of Appeal said thus regarding the said duty-

**“1. An appellant on 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. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”**

15. The issues for determination in this appeal are:-

- (i) If PW1 was defiled;**
- (ii) If failure to conduct a DNA examination on the appellant weakened the prosecution case;**
- (iii) Whether PW1’s age was proved;**
- (iv) If the appellant was accorded a fair hearing;**
- (v) If the prosecution proved its case beyond reasonable doubt;**
- (vi) Whether the appellant’s defence was considered; and**
- (vii) If the sentence was harsh or excessive.**

**If PW1 was defiled.**

16. The complainant was MV [name withheld]. She testified as PW1 after being taken through *voir dire* examination. The Trial Court found that she did not understand the nature and meaning of an oath but was knowledgeable enough to give evidence on affirmation. It was PW1’s evidence that on a date she could not recall, as she was playing with her siblings, the appellant whom she knew called and gave her money to go buy cigarettes for him. She bought and took to him the cigarettes, as he sat on a log behind their house. PW1 recounted that the appellant inserted his fingers inside her front private parts. He then took her inside their house and pushed her on the bed, as she resisted. He made her lie down and in her own words she said “*akatoa mnyama wake akaningiza*”. She indicated that he had removed her clothes and he did “*tabia mbaya*” to her twice.

17. PW1 testified that her mother (PW2) arrived as he was doing so and that she held the appellant by the collar and many people assaulted him. PW1’s father went to the scene and she was taken to hospital, where she was admitted for 4 days. The appellant was taken to the police station.

18. PW1 identified the person who did “*tabia mbaya*” to her as the appellant. She indicated that the appellant was her father’s friend and he used to call him “*Mwanyumwanyu*”. In cross-examination, she indicated that she screamed but the appellant held her mouth and nose. That she bled after the incident and the blood stained the bed sheet and her clothes. She stated that she washed them because they were smelly.

19. In cross-examination, she said that PW2 screamed saying “*Mwanangu umemfanyaje*” and that is when people went to the scene and assaulted the appellant. She further said she could not walk because she felt she had been cut in her front private parts and her father carried her to the police station and to hospital where she was admitted. In cross-examination, she indicated that PW2 and the appellant had not disagreed and that he used to go to their home to eat ugali.

20. It is this court’s finding that from PW1’s evidence, it is apparent that she had a very good recollection of what transpired on the day the appellant took her to her parent’s bed and put his “*mnyama*” (penis) in her front private parts (vagina) and did “*tabia mbaya*” (defiled) her twice. The evidence adduced by PW1 leaves no doubt that she was defiled.

21. Dr. Ngone testified as PW3. He stated that PW1 was taken to Coast Province General Hospital (CPGH) on 24<sup>th</sup> September, 2010, when her PRC form was filled. It was produced by PW3, as P. exhibit 2. It shows that when she was examined on the said date, she was complaining of pain in the genital area. Upon examination, her hymen was found not to be intact. The comments made by the examining officer were that there was evidence of genital penetration.

22. Dr. Ngone’s evidence was that he examined PW1 on 1<sup>st</sup> October, 2010, for purpose of filling of the P3 form. He found that her hymen was perforated and she had a torn vaginal opening. The Doctor also found that she had physical injury on her trunk. He established that PW1 had been defiled on 24<sup>th</sup> September, 2010. He assessed the degree of injury as maim and produced the P3 form as P. exhibit 1.

23. The appellant’s Counsel rightly submitted that the evidence of PW2 could not form the basis of corroboration of PW1’s evidence. The lower court record reveals that on 5<sup>th</sup> June, 2013, PW1’s mother FV [name withheld] gave some evidence but the prosecutor applied for her to be stood down for further examination-in-chief as the witness had not carried any documents for PW1, to establish when she was born.

24. The Prosecutor then was Chief Inspector Muniko. On 30<sup>th</sup> September, 2013, the prosecutor was Chief Inspector Eunice. She informed the court that she was not ready to proceed as the Investigating Officer was not able to trace the witnesses.

25. On 9<sup>th</sup> May, 2014, Chief Inspector Eunice was the prosecutor. After PW4 testified, she closed the prosecution case. It appears that Chief Inspector Eunice was not aware that PW2 had been stood down and there was need for her to be recalled to complete testifying. In the said circumstances, this court concurs with Counsel for the appellant that the Trial Court should not have considered the evidence of PW2 as she did not complete giving her evidence and she was not subjected to cross-examination. This court therefore disregards the evidence of PW2 as its veracity was not tested in cross-examination.

26. It is however this court's finding that even in the absence of PW2's evidence there was overwhelming evidence that PW1 was defiled as medical evidence adduced by PW3 corroborated the said fact.

**If failure to undertake a DNA examination of the appellant weakened the prosecution case.**

27. The appellant's Counsel was of the view that a DNA examination should have been done to establish if the appellant was the one who defiled PW1. The circumstances of this case did not call for the appellant to be subjected to a DNA analysis.

28. PW1's evidence was that he was caught red handed committing the offence. Members of the public beat him up before he was taken to the police station. The evidence of No. 85409 Corporal Bernard Megut who was based at Nyali Police Station was that on 24<sup>th</sup> September, 2010 at 5:00p.m., the appellant was taken there by members of the public who reported that he had defiled PW1 on the same day at 4:00p.m.

29. PW4 indicated that PW1 was crying and she was accompanied by her parents. He further stated that PW1's mother carried PW1 as she could not walk due to the injuries she had sustained. He further testified that the appellant was also taken to hospital for treatment as he had been badly beaten by members of the public.

30. The evidence by PW4 as stated above supports the fact that there was no need for the appellant to undergo a DNA test as he was caught in the act of defiling PW1. There was evidence that PW1 could not walk and had to be carried to the police station by her father and to hospital by her mother after the appellant was found defiling her. There was also evidence to support the fact that he was beaten for having defiled PW1. As per PW1's evidence, he was arrested by members of the public when her mother screamed saying "Mwanangu umemfanyaje".

31. Section 36(1) of the Sexual Offences Act which has provisions for DNA examination of accused persons, states as follows-

***Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence.*** (emphasis added).

32. In the case of **Kassim Ali v Republic** Criminal Appeal No. 84 of 2005, the Court of Appeal stated thus:-

***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence. Moreover, Section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case".***

33. It is this court's finding that the submission by the appellant that he should have undergone DNA examination is without merit, as Section 36(1) of the Sexual Offences Act uses the permissive word "may", which removes the mandatory element.

**Whether PW1's age was proved.**

34. In his grounds of appeal the appellant claimed that PW1's age was not proved. The evidence adduced by PW4, the Investigating Officer, was that he did not get PW1's birth certificate. PW1 was taken to CPGH for age assessment following a court order. Her age was assessed on 5<sup>th</sup> May, 2014 and she was found to be 9 years old. The said age assessment report is admissible evidence and establishes that as at 24<sup>th</sup> September, 2010 when PW1 was defiled, she was 5 years old. That is the age which is reflected on the charge sheet. It is this court's finding that PW1's age was proved.

**Whether the appellant's defence was considered**

35. The appellant gave unsworn evidence. He admitted that he knew PW1 and her witnesses very well. He indicated that PW1's mother was his wife's relative. He admitted being in PW1's house on the material day and he was served with lunch by her mother. He stated that she went out to do some work and left him with PW1 and another child. He indicated that he requested PW1 to get some water for him and he entered their house to put the water, as PW1 could not fetch water from a jerrycan. He further indicated that after taking the water, he met PW1's mother at the door and she alleged that he had defiled PW1. Another man came and he told him what had happened. The appellant asked PW1's mother to call her husband.

36. The appellant indicated that PW1's mother started screaming and he suggested that he be examined. That many people went to the scene and arrested him. They beat him up and wanted to lynch him. He and PW1 were taken the police station, where he was put in the cells. He said there was no grudge between them but the case was fabricated. He then said that there was a land dispute between him and PW1's

father.

37. The appellant called Juma Ndegwa Kidudu as his witness. His evidence was that on the material day he heard screams and found the appellant being beaten by members of the public on an allegation of raping (sic) a child. That they suggested that the child be taken to Makadara (CPGH) and the appellant to Nyali Police Station. In cross-examination, he said that he did not witness the incident and that he rescued PW1 from the wrath of the members of the public.

38. From the Judgment delivered in the lower court, it is clear that the Trial Magistrate considered the appellant's defence at length. He did not find any evidence of malice or grudge between PW1 and the appellant or other witnesses to confirm that the appellant was framed up for this case.

39. The Trial Court found it hard to believe the appellant's defence. This court similarly finds that what the appellant said in his defence placed him at the scene of crime. The fact that he had been served food by PW1's mother was evidence of the existence of a good relationship between him and PW1's family. In her evidence, PW1 indicated that the appellant was her father's friend. It is the finding of this court that the appellant's defence was far-fetched and was displaced by the evidence adduced by prosecution witnesses. It was rightfully rejected. The witness called by the appellant added no value to the appellant's defence. All that he said was that he found the appellant being beaten on the allegation of having defiled a child.

#### **If the appellant was accorded a fair hearing.**

40. The appellant's Counsel contended that since the appellant was unrepresented and was a layman, he could not cross-examine witnesses effectively to absolve himself from the charges leveled against him. Indeed the appellant did not have the benefit of Legal Counsel during a part of his trial in the lower court. The lower court proceedings show that on 30th March, 2011 when the case commenced hearing, the appellant was represented by Mtana who said he was ready to proceed. After PW1 testified, Mtana cross-examined her at length.

41. The proceedings reflect that on 26th March, 2014 when PW3 testified, the appellant informed the Trial Court that he was ready. On the day when PW3 testified, he was cross-examined by the appellant. Subsequently, on 9<sup>th</sup> April, 2014 the appellant said he was ready for the case to proceed and PW4, the Investigating Officer, testified. The appellant cross-examined him. The record reveals that the appellant cross-examined witnesses effectively.

42. As Ms Mwangeka so well put it, the appellant never applied to be given time by the Trial Court to engage another Advocate to represent him. Having had the benefit of being represented by Mtana at the first instance, the appellant was not ignorant of his right to legal representation. This court's finding is that he was accorded a fair hearing as no one stopped him from cross-examining witnesses or being represented by an Advocate of his choice.

#### **If the prosecution proved its case beyond reasonable doubt.**

43. From the analysis of the evidence adduced in the lower court, it is not in doubt that the appellant is the one who defiled PW1. Although she was the sole witness to the offence, as this court found that PW2's evidence was not complete and was never put through the rigours of cross-examination, the fact of defilement was corroborated by medical evidence adduced by PW3.

44. The Trial Court found PW1's evidence consistent and credible. She noted that it was tested in cross-examination by the defence but remained unshaken. Having given the reasons for believing the evidence of PW1, even in the absence of an eyewitness account, such evidence was sufficient to form the basis of a conviction in accordance with the provisions of Section 124 of the Evidence Act.

45. The consistency of PW1's testimony also stood out when PW4 recounted to the Trial Court, the information he was given by PW1 when he was investigating the case. What she informed him was in tandem with her evidence that she was defiled by the appellant on her parent's bed, when her mother went to fetch water and that the appellant was found by her mother in the act. As per her evidence, the appellant was assaulted by members of the public for having defiled her. The said fact was confirmed by PW4 as the appellant was taken to hospital after being beaten by members of the public. The appellant's witness also confirmed that he found the appellant being beaten.

46. Failure by the prosecution to call other witnesses to testify did not weaken the prosecution case, as according to the provisions of Section 143 of the Evidence Act, unless it has been specifically provided by law, no particular number of witnesses shall be required to prove a fact. This court's finding is that failure to call additional witnesses did not prejudice the appellant because the only role they played was to apprehend and escort him to the police station.

47. This court finds no contradiction or inconsistencies in the evidence of the prosecution witnesses. Failure by the prosecution to produce the blood stained bed sheet or photos of the scene of crime was not fatal to its case.

48. It is the finding of this court that the appellant exploited an opportunity which arose when PW1's mother went to fetch water thereby leaving PW1 with him. He defiled PW1 on her parent's bed and breached the trust that PW1's family had in him as a friend to PW1's father. The evidence adduced against the appellant was overwhelming. This court is of the finding that the prosecution proved its case beyond reasonable doubt. I uphold the appellant's conviction for the charge of defilement as per the provisions of Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

#### **Whether the sentence was harsh or excessive**

49. The appellant was sentenced to life imprisonment. The Supreme Court decision in **Francis Karioko Muruatetu and Another v Republic** [2018] eKLR held that courts have discretionary powers in sentencing in murder cases. It was followed by the Court of Appeal

decision in **Jared Koita Injiri v Republic** [2019] eKLR. In the latter case, the Court of Appeal reviewed the sentence of life imprisonment to 30 years imprisonment for the appellant therein, who had defiled a 9 year old girl.

50. Guided by the **Koita Injiri** case (supra), I set aside the sentence of life imprisonment imposed on the appellant and substitute it with a sentence of 36 years imprisonment.

51. The appellant was out on bond during the hearing of his case in the lower court. His sentence shall therefore run from 6<sup>th</sup> of February, 2015, being the date he was sentenced by the Trial Court. The appeal succeeds only to the extent stated in this judgment. The appellant has 14 days right of appeal.

**DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of May, 2020. Judgment delivered through microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present

Mr. Jumbale holding brief for Mr. Oduor for the appellant

Ms Valerie Ongeti, Prosecution Counsel, for the DPP

Mr. Mohamed Mohamud - Court Assistant