



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.153 OF 2019

DENNIS NJUKI MURUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Mutuku SRM delivered on 12th July 2019 in Kibera CM CR. Case No.5022 of 2011)

JUDGMENT

The Appellant, Dennis Njuki Murunga, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on 1st October 2011, at Ongata Rongai within Kajiado County, the Appellant intentionally caused his penis to penetrate the vagina of GW, a child aged 16 years old. In the alternative charge, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 1st October 2011, at Ongata Rongai within Kajiado County, the Appellant intentionally and unlawfully committed an indecent act by touching the vagina of GW, a child aged 16 years, with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main count of **defilement** and sentenced to serve fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging the conviction and sentence.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. He averred that his right to a fair trial was violated by the trial court since he was not accorded legal representation. He faulted the trial court for relying on evidence that was legally inadmissible as well as extraneous matters in arriving at its decision. He took issue with the fact that the trial court failed to acknowledge that material witnesses necessary to prove the prosecution's case were not availed to adduce evidence in contravention of **Section 150** of the **Criminal Procedure Code**. The Appellant was of the view that the complainant's age was not established by the prosecution to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court failed to properly evaluate his defence in arriving at its decision. He opined that the circumstantial evidence adduced was insufficient to sustain a conviction. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. This court also heard oral submission made by Mr. Swaka for the Appellant and Ms. Nyauncho for the State. Counsel for the Appellant submitted that the complainant's age was not established by the prosecution to the required standard of proof beyond any reasonable doubt. He stated that the evidence of P3 Form was not sufficient to establish the complainant's age. He stated that the Appellant's defence was cogent and ought to have been considered by the trial court in arriving at its decision. Counsel for the Appellant further asserted that the complainant's friends who were with her at the Appellant's house, ought to have been availed before the trial court as witnesses. He stated that the Appellant was convicted based on the uncorroborated evidence of the complainant. He submitted that suspicion however strong cannot form basis for a conviction. He was of the view that the sentence meted by the trial court was harsh and excessive in the circumstances. In the premises, he urged the court to allow the Appellant's appeal.

Ms. Nyauncho for the State opposed the Appeal. She made oral submission to the effect that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. She averred that though the complainant's birth certificate was not produced into evidence, the P3 Form as well as a letter from the complainant's school indicated that she was 16 years old at the time. With regard to the element of penetration, the Learned State Counsel asserted that the medical evidence established that the complainant was penetrated. Her vaginal wall had reddened and swollen which was indicative of penetration. Ms. Nyancho further averred that the Appellant was known to the complainant. She stated that the complainant spent the entire night at the Appellant's house. His identification was therefore without doubt. She submitted that **Section 124** of the **Evidence Act** was applied in this case and that the testimony of the complainant was sufficient and cogent to sustain a conviction. She was of the view that the custodial sentence of 15 years meted on the

Appellant was merited in the present case. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, GW, is the complainant. She gave sworn evidence. She stated that she was born on 6th December 1995 and was 16 years old at the time she testified in court. She was enrolled in Form Three at [Particulars Withheld] Secondary School. It was her testimony that on the material day of 1st October 2011 at about 5.30 p.m. she was walking along Adventist Church Road in Rongai. She met two of her friends J and D. After exchanging pleasantries, she told them that she was going to visit her friend M. They however convinced her to go watch a football match with them on TV. The Appellant was not at his house when they got there. He arrived a few minutes later. They watched the football match which ended at about 7.30 pm. The Appellant then sent J and D to a shop to buy *chapati*. He followed them outside when they left the house. The complainant was left alone in the house.

The Appellant came back to the house after about 15 minutes. He locked the door. The complainant asked to leave but he told her to wait. He offered her some food but she did not want any. The complainant asked him to open the door. The Appellant refused. She started insulting him. The Appellant went to his bedroom. He came back to the living room smoking bhang. He attacked the complainant and started strangling her neck. He then pushed her to his bedroom. She fell on his bed. He removed his clothes and brandished a somali sword which was under his carpet. The complainant screamed. He slapped her on her right cheek. He then undressed her and proceeded to insert his penis in her vagina. The complainant stated that the sexual assault lasted for about 30 minutes.

After the Appellant was done, he locked the complainant in the bedroom and went to the sitting room. The complainant stated that she could hear him talking to J and D. After some time, he brought J and D to the bedroom and locked them all inside. The Appellant left the house and came back at midnight. J and D slept in the sitting room, while the Appellant spent the night in the bedroom with the complainant. He sexually assaulted her again that night. At about 7.00 a.m., the Appellant opened the door and asked J to take the complainant home. When the complainant got home, she did not find her mother. She asked a lady by the name Mama Muthoni to take her to the police station. She was taken to Ongata Rongai Police Station where she reported the matter. She was referred to Nairobi Women's Hospital where she underwent medical examination. The Appellant was thereafter arrested.

PW2, Dr. Zephania Kamau, was based at the Police Surgery at Nairobi. He stated that he examined the complainant on 13th October 2011. She was alleged to have been sexually assaulted. Upon examination, PW2 stated that the complainant had no visible physical injuries. Her external genitalia, vulva and vagina were normal. Her hymen was broken with old tears. He produced the complainant's P3 Form into evidence. PW3, Dr. Kinuthia, was a clinical officer based at Nairobi Women's Hospital. He adduced evidence on behalf of Dr. Charles Mwai who examined the complainant. He stated that the said Dr. Mwai was no longer working at the said hospital and could therefore not be availed to give evidence before the trial court. He told the court that the complainant was examined at Nairobi Women's Hospital on 2nd October 2011. Upon examination, the complainant's vaginal wall was reddened and swollen. No tears or lacerations were noted. Dr. Mwai concluded that from his examination, the complainant had been sexually assaulted. PW3 produced the complainant's medical report into evidence.

PW4, Cpl. Janet Sitienei, from Ongata Rongai Police Station, investigated this case. She stated that she took over the case on 6th February 2015 from Cpl. Gichuki Ndambuki who is deceased. Cpl. Gichuki was assigned the case on 2nd October 2011. He had interrogated the witnesses and recorded their statements. PW4 stated that she did not conduct any further investigations.

The Appellant was put on his defence. He gave a sworn statement. He testified that on the material day of 1st October 2011, he was at work at Gamwanza Children's Home in Ongata Rongai. He was a football coach. He reported to work at 7.30 am and left at 4.00 pm. He then went to his shop where he operated play station games for hire. He closed his shop at about 8.00 pm and left for his house. A friend of his, known as Francis Muriuki, came to his house, accompanied by the complainant. They had supper. The said Francis and the complainant left his house at about 9.00 pm. The Appellant left his house at 9.30 pm to go watch a football match on TV. He denied sexually assaulting the complainant.

DW2, Jane Wanjiku, is the Appellant's mother. She stated that the Appellant called her and informed her that he had been arrested. She had previously met the investigating officer, Cpl. Gichuki, who briefed her on the case. DW2 testified that the complainant's mother contacted her in attempt to extort money from her. She however did not give her any money. DW3, Francis Muriuki, was a friend to the Appellant. He stated that they worked together at Gamwanza Children's Home. He told the court that on 1st October 2011, he went to visit the Appellant at his house at about 8.30 pm. He was accompanied by the complainant. They had dinner at the Appellant's house. They afterwards left the house. He escorted the complainant to her house. DW3 stated that he did not talk to the police when he discovered that the Appellant had been arrested.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comment regarding the demeanour of the witnesses (See **David Agwata Achira vs Republic [2003] eKLR**). In the present appeal, the issue for determination by this court is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act** brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. **Section 8(1)** of the **Sexual Offences Act** provides that:-

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

The prosecution is required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator. With regard to the age of the complainant, the Appellant contended that her age was not proved by the prosecution, since her birth certificate was not produced into evidence. The complainant told the court that she was sixteen (16) years old at the time she testified before court. She was in Form Three at [Particulars Withheld] Secondary School. She stated that she was born on 6th December 1995. She availed her birth certificate before the trial court and the same was marked for identification as MFI-3. The birth certificate was however never formally

produced as an exhibit by the prosecution.

This court notes that the medical report from Nairobi Women's Hospital as well as the complainant's P3 Form indicated that she was 16 years of age. **The trial magistrate, who had the benefit of seeing the complainant testify,** assessed the complainant's age to be that of a minor. This is evident since the trial magistrate deemed it necessary to conduct a *voire dire* examination on the complainant before proceeding to take her evidence. **This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.** Her age was established to the required standard of proof beyond any reasonable doubt.

With regards to penetration, Section 2(1) of the Sexual Offences Act defines the same as:

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

The complainant narrated to the court how she went to the Appellant's house accompanied by her two friends by the names J and D. The Appellant was not at the house when they got there. The Appellant came to the house a few minutes later. They watched a football match on TV. At about 7.30 p.m., the Appellant sent J and D to a shop to buy *chapati*. The Appellant left the house with the two boys. The complainant was left alone in the Appellant's house. The Appellant came back to the house after about 15 minutes. He locked the door. The complainant asked him to open the door so that she could leave. He however asked her to wait. He made dinner and offered the same to the complainant. She declined to eat the same.

When the Appellant refused to open the door, the complainant insulted him. The Appellant went to his bedroom and came back while smoking bhang. He strangled the complainant's neck and pushed her to his bedroom. He pushed her on his bed. He asked her to undress but she declined. He removed his clothes. He then took a sword from under his carpet. The complainant screamed. The Appellant slapped her on her right cheek. He then undressed her and sexually assaulted her. She stated that she bled.

After the Appellant was done, he locked the complainant in the bedroom and went to the sitting room. The complainant stated that she could hear him talking to J and D. After some time, he brought J and D to the bedroom and locked them all inside. The Appellant left the house and came back at midnight. J and D slept in the sitting room, while the Appellant spent the night in the bedroom with the complainant. He sexually assaulted her again. At about 7.00 a.m., the Appellant opened the door and asked J to take the complainant home. When the complainant got home, she did not find her mother. She asked a lady by the name Mama Muthoni to take her to the police station. She was taken to Ongata Rongai Police Station where she reported the matter. She was referred to Nairobi Women's Hospital where she underwent medical examination.

The medical evidence adduced by the prosecution established that indeed the complainant was vaginally penetrated. The complainant was examined at Nairobi Women's Hospital the next day after the incident occurred. The medical report adduced into evidence indicated that the complainant's vaginal walls had reddened and was swollen. The doctor came to the conclusion that the complainant had been sexually assaulted. PW2, Dr. Zephania Kamau, examined the complainant on 13th October 2011. This was about two weeks after the incident occurred. PW2 stated that the complainant's external genital was normal. Her hymen was broken with old tears.

The evidence of PW2 and PW3 corroborated the complainant's assertion that she had indeed been sexually assaulted. She was examined at Nairobi Women's Hospital the following day after the incident was alleged to have occurred. The evidence of the broken hymen as well as reddened and swollen vaginal walls was indicative of the fact that the complainant was indeed penetrated. **Taking into consideration the P3 Form and the medical report produced in court, as well as the complainant's testimony, this court formed the opinion that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.**

The third issue is whether penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. She referred to him by name. She stated that she had known him for about two years prior to the material date when the incident is alleged to have occurred. He was therefore not a stranger. The Appellant's identification was by recognition. The complainant stated that she reported the incident the following morning after the Appellant let her go. When she did not find her mother at home, she asked Mama Muthoni to take her to the police station. The complainant reported the sexual assault incident immediately and the Appellant was arrested at his home.

The Appellant in his defence denied that he sexually assaulted the complainant. He asserted that on the material day, at about 8.00 pm, a friend of his known as Francis Muriuki came to his house. He was accompanied by the complainant. They had supper. The said Francis and the complainant left his house at about 9.00 pm. The Appellant then left his house at 9.30 p.m. to go and watch a football match on TV. He denied sexually assaulting the complainant. He availed the said Francis Muriuki, DW3, to testify before the trial court. DW3 corroborated the Appellant's testimony. This court however notes that the Appellant's assertion that the complainant and DW3 came to visit him and left together was not put to the complainant during cross-examination. In addition, DW3 stated that he did not talk to the police when he found out that the Appellant was arrested. This court is of the view that the Appellant's defence was an afterthought which was aimed at exonerating himself from the present charges.

This court believes that the complainant was telling the truth. She reported the sexual assault incident immediately after she left the Appellant's house. The medical evidence corroborated her assertion of the sexual assault. No evidence of existence of any previous grudges between the Appellant and complainant was presented before the trial court. There was therefore no reason for the complainant to implicate the Appellant if he indeed did not sexually assault her. **Section 124 of the Evidence Act** is applicable in this case.

This court is of the view that the evidence of the prosecution witnesses taken into totality was corroborative and the Appellant was positively identified as the perpetrator of the sexual assault. The Appellant's defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. It was properly dismissed as being of no probative evidential value. This court, having re-evaluated the evidence adduced before the trial court, and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. **The Appellant's guilt was established to the required standard of proof beyond any**

reasonable doubt. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

As regards the sentence, Section 8(4) of the Sexual Offences Act provides for a mandatory sentence of fifteen (15) imprisonment for any person convicted of defiling a child aged between sixteen (16) and eighteen (18) years old. However, the recent decision of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic [2017] eKLR* held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional and that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case.

The reasoning in the *Muruatetu case* was also extended to mandatory sentences imposed by the Sexual Offences Act in recent decisions by the Court of Appeal in *Christopher Ochieng vs R [2018] eKLR* and *Jared Koita Injiri vs R [2019] eKLR*. The Court of Appeal in *Jared Koita Injiri* (supra) held thus;

“...In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) 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. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

Guided by the aforesaid decisions of the Supreme Court and Court of Appeal, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the mandatory 15 years imprisonment sentence that was meted on him was deserved or another sentence ought to be imposed. This court has considered the Appellant's mitigation in the present appeal, as well as the report by the probation officer dated 12th July 2019. The Appellant is a first offender. He stated that he has a family and was the sole bread winner. He was remorseful and prayed for leniency. The probation report indicated that the victim's family and the Appellant's family had reconciled. The victim stated that she was being pressured by her family to forgive the Appellant since the incident happened when they were young. She stated that the ordeal traumatized her and prayed for justice.

In the premises, this court sets aside the fifteen (15) year imprisonment sentence given by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from the date he was sentenced by the trial court i.e. on 12th July 2019. This court has taken into consideration the period that the Appellant was in lawful custody both before and after his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JULY 2020

L. KIMARU

JUDGE