



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL NO. 21 OF 2019

BM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence

in Cr. Case No. 49 of 2014 in the PMC's Court at Kibera, Boko –

SPM; and Judgment delivered on 30th October, 2018.)

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 which were that on diverse dates between January, 2011 and November, 2013 at Ngong within Nairobi County unlawfully and intentionally caused his penis to penetrate the vagina of RA a girl aged 13 years. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. He pleaded not guilty to the charges, was tried, convicted and sentenced to serve twenty (20) years imprisonment on the main charge. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal: -

- a) The trial court did not consider that Section 26 and 36 of the Sexual Offences Act were not complied with.
- b) The prosecution case was based on mere suspicion.
- c) The trial court acted upon the evidence of incompetent witnesses.
- d) The prosecution case was not proved beyond reasonable doubt.
- e) His defence was not considered.

3. When this appeal came up for hearing before me, the appellant who was not represented, filed supplementary grounds of appeal and written submission which he relied upon, while Miss Nyauncho for the prosecution opposed the appeals by way of oral submissions.

4. In the supplementary grounds of appeal, the appellant raised the following grounds.

- a) Essential witnesses were not called by the prosecution to testify.
- b) Section 200(3) of the CPC was not complied with.
- c) The prosecution case was based on hearsay, contradictory, inconsistency and incoherent evidence.
- d) His defence was not considered and the burden of proof was shifted to him.

SUBMISSIONS

5. In his written submissions, it was contended that the prosecution case was solely based on suspicion which could not be a ground for conviction as was stated in the case of **MARY WANJIKU GICHIRA v REPUBLIC CR. APP. No. 17 of 1998**. It was contended that the evidence of PW1 – the complainant was contradictory, untruthful and did not support the charge. It was stated that the prosecution did not call as a witness one M an aunt of the complainant who lived with her and who was the originator of the case thereby raising doubt on the prosecution case.

6. It was submitted further that PW1's mother's boss, the principal of [Particulars Withheld], J and the people at Shofco were also not called to testify despite being mentioned several times. It was submitted that an adverse inference should have been made against the prosecution case as was stated in the case of **DONALD MAJIWA ACHILWA & 2 OTHERS v REPUBLIC [2009] eKLR**

7. It was submitted further that Section 200(3) of the Criminal Procedure Code was not complied with and that plea taking was manipulated so as to sustain a conviction. It was submitted that when the trial magistrate went on transfer, Section 200 (3) was explained to the appellant who at the time of this defence opted that the case starts de novo which the trial court did not grant. He relied upon the case of **REBECCA MWIKALI NABUTOLA v REPUBLIC [2012] eKLR**

8. It was contended that the trial court admitted evidence in contravention of Article 50(4) of the Constitution, in addition to hearsay evidence contrary to the Court of Appeal holding in **KINYATTI v REPUBLIC Cr. App. No. 60 of 1983**. It was contended that the right of the appellant to cross examine the medical evidence was violated, as Dr. Ngetich who allegedly attended to the minor was not called to testify.

9. It was submitted that penetration which is a key element of offence was not proved as the evidence of Dr. Maundu who examined the complainant was that there were no physical injuries, genitals were normal though the hymen was broken. It was submitted that there was no way the appellant would have had sexual relationship with the complainant yet failed to transmit HIV/AIDS for a period of three years, since the appellant was HIV positive yet the complainant was negative. It was submitted that penetration was not proved for which the causes of **PKW v REPUBLIC [2012]eKLR and LDD v Republic [2017] eKLR** were tendered in support.

10. It was contended that the prosecution case was full of contradictions and discrepancies which were neither minor nor trifling, in support of this submissions, reference was made to the Court of Appeal of Nigeria case of **DAVID OJEA & ANOR v FEDERAL REPUBLIC OF NIGERIA [2014] LP ELR 2255(CA)**. It was stated that placing the appellant at the scene of crime was not sufficient evidence to warrant a conviction, since it was based on circumstantial evidence for which the case of **MWANGI v REPUBLIC [1983] KLR 75** was submitted in support. It was contended that the fact that the appellant and PW1 were known to each other was not proof of the commissions of the offence.

11. It was stated that his alibi defence was not considered by the trial court, who shifted the burden of proof upon him in support of this submission, reliance was placed upon the cases of **PETER KIOKO KISILI v REPUBLIC [1984] KLR 739 and LONGINUS KOMBA v REPUBLIC [1973] LRT 127**.

12. It was finally contended that the sentence was not legal as it conflicted with Article 27 of the Constitution as the same was sentenced to the minimum sentence provided for, which did not meet the constitutional dictates. In support of the submission reference was made to the cases of **YAWANYALE v REPUBLIC [2018] eKLR and HAMISI BAKARI & ANOTHER v REPUBLIC [1987] eKLR**.

13. On behalf of the prosecution Mr. Onyancha submitted that the age of the complainant was proved to be 13 years and that she was staying with the appellant who was her step father who defiled her on several occasions when the mother was not in the house and would threaten to kill her if she told her mother.

14. It was stated that age was proved through the birth certificate and penetration through the evidence of PW2 and PW3 the two doctors. Identification of the appellant was through recognition and free of error. It was submitted further that the defence of being framed by a relative was an afterthought as it was not in his defence.

15. The sentence, was submitted to be adequate since the appellant was the complainant's father who took advantage of her when the mother was away and defiled her severally. It was contended that failure to charge the appellant with incest was not fatal to the prosecution case.

16. This being a first appeal the court on the basis of the authority of **OKENO v REPUBLIC [1972] EA 32** is under a legal duty to re-evaluate the evidence tendered before the trial court to come to its own conclusion though giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses.

PROCEEDINGS

17. As it usually occurs in cases of this nature, the complainant was at the time of trial aged 14 years old, she was a step daughter of the complainant whose mother used to work away from home at [Particulars Withheld] KAREN AREA and would only come back home on Saturdays or Sundays. Before she moved in with the accused and her mother, she had been living with the grandmother. In the year 2010, when the complainant was in class six, the appellant defiled her and told her not to tell anybody otherwise he would kill her mother and himself. Her mother returned home after four days but she did not report to her out of fear instilled upon her by the appellant.

18. He thereafter attacked her, the second time while she was asleep on the floor, when she realized that his penis was inside her vagina. This time around she reported to her mother who beat her up, on the grounds that she was lying, she reported to a neighbour called LEAH, who went and asked her mother, who stated that it was a false allegation. From that time, it became a usual occurrence up to 2013, during which period of time the complainant also stopped reporting her ordeal to her mother. She then became the Appellant's sex toy as he took to

defiling her every other time.

19. In the year, 2013, the complainant was taken to live with her aunt called ML at Kibera, leaving the appellant and the mother behind, when she decided to tell her what used to happen to her while she was living with her mother and step-father and that is when she found help leading to the subsequent arrest of the appellant after her Aunt reported the case to SHOFCO an NGO based at Kibera.

20. **PW5 KENNEDY OTIENO OMWANDA** stated that on 26/4/2014, he was conducting door to door campaigns as part of his duties with SHOFCO (Shining Hope for Communities) to create awareness to people regarding sexual issues (having sexual relationship with children) when they reached the house of the aunt of the complainant, who reported to them what the complainant had told her that the appellant used to defile her. They interrogated her and she told them that the last time the appellant had sex with her was when she was home for half term and that wherever she was on holiday he would defile her. They took her to Nairobi Women hospital for post rape care and medical report, before proceeding to Riruta police station for a report. It was his evidence that they were just walking around during campaign, when the report was made to them.

21. **PW4 Cpl. ELIZABETH WAMBOI** recorded statements from the witnesses and confirmed that the complainant was at that time schooling as [Particulars Withheld] secondary school, having been born on 7/12/1999. she then proceeded to arrest the appellant and stated that he was not taken for DNA test as no swaps had been taken.

22. **PW2 DR. MAUNDU** Examined the complainant on 9/3/2014 and confirmed her age then as 13 years. Her private Parts were normal with no injuries but noted that her hymen had been broken but not recently. **PW3 DR. KINUTHIA EDWARD MBUGUA** a Clinical Officer in charge at Nairobi Women Hospital testified and produced post rape care report reports on behalf of Dr. Ngelechei who had left service at the hospital and stated that the complainant reported that she was in pain while urinating and was bleeding from her vagina oftenly. She reported that the appellant used to forcefully have sex with her whenever her mother was away at work. It was his evidence that her hymen was broken. She had an infection and her history confirmed that she had been defiled.

23. When put on his defence the appellant denied the charges and stated that he was arrested from his house in the presence of the complainant's mother and her two sisters.

ANALYSIS AND DETERMINATION

24. From the proceedings, the Memorandum of Appeal and the submissions thereon, I have identified the following issues for determination:

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- a) Whether Section 200 (3) of the Criminal Procedure Code was complied with.
- b) Whether the prosecution case was proved beyond reasonable doubt.
- c) Whether failure to call some prosecution witnesses was fatal to the prosecution case.
- d) Whether the appellant's defence was considered.
- e) Whether the sentence was lawful.

25. On the issue of Section 200 the law provides as follows: -

“200(1) Subject to sub-section (3) where a magistrate, after having heard and recorded the whole or part of the evidence, in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding Magistrates may: -

- (a)
- (b)
- (2)

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding Magistrates shall inform the accused of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

26. In this case, the appellant's case commenced for hearing before Hon. J. Wanjala CM on 29/8/2014 when the complainant testified as PW1 and was adequately cross examined by Mrs. Chesang the Advocate then on record for the Appellant. On 29/6/2015 the matter was placed before Hon. Ochoi PM, who explained to the Appellant his rights under Section 200 of CPC after the transfer of the then trial court. The Appellant opted for the case to start afresh which was objected to by the prosecutor on the ground that the complainant was a minor who had testified and it will be traumatizing for her to testify again.

27. By a ruling thereon the court declined to grant the request and stated that the complainant had been extensively cross examined by the Advocate then on record for the Appellant and that whereas the appellant had the right to recall any witness who had testified, the same had a duty to give reasons why he wanted the case to start afresh. He noted that the complainant was a minor who would feel intimidated if asked to testify over again.

28. The Court of Appeal in **NYABUTO & ANOTHER v REPUBLIC [2009] KLR 409** Cited with approval the holding in **JOSEPH KAMAU GICHUKI v REPUBLIC CR. APPEAL NO. 523/2010** and stressed that: -

“By dint of Section 200(1)(b) of the Criminal Procedure Code a succeeding Judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and why in cases where her exigencies of the circumstances not only are likely but will defeat the ends of justice if a succeeding Judge does not or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the letter becoming unavailable to complete the trial. See NDEGWA v REPUBLIC [1985] KLR 535

“.....The passage of time militates against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellant. Musinga, J in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded.”

29. Justice A. C. MRIMA in the case of **MERCY MUGUR v REPUBLIC [2018] eKLR** stated that: -

“13. I must however clarify that the duty on the part of the succeeding magistrate is our limited to informing the accused person of that right. The succeeding magistrate is however not bound to oblige the request which may thereupon be made by the accused person. The magistrate must consider the request, if any, in light of the circumstances of the case and upon hearing all the parties. The court may not accede to the request made by the accused person.”

30. Having looked at the reasons given by the trial court in declining to allow the recall of PW1, which I find to had been based on sound legal principles, I am not persuaded that the appellants right to fair hearing was violated and therefore dismiss this ground of appeal as lacking merit.

31. On the issue of proof of the prosecution and the allegation by the appellant that the prosecution case was full of contradictions: - It must be noted from the record, that the complainant was aged about 11 years when the appellant as per her evidence started to defile her, she reported to her mother who was not helpful until she moved in with her aunt in the year 2013 when she disclosed to her what she had gone through in the hands of the appellant, her mother having declined to believe her. It was only on 26/4/2014 when help came through to her from PW5. Having taken into account that period of time, it was not possible for the complainant to remember each and every act of defilement and therefore find no fault with the charge sheet as drafted as the same covered all that period of time. The charge sheet as drafted was not defective as the Appellant had notice of what he was charged with.

32. The age of the complainant which is one of the elements of the offence of defilement was proved through the evidence of the complainant and the two doctors, penetration was proved by the evidence, of the complainant and the two doctors who confirmed that her hymen was broken, though not fresh as at the time of examination, thereby corroborating her evidence.

33. On the identification of the appellant as the perpetrator of the offence, the prosecution case was based on the evidence of the complainant and the circumstantial evidence thereon, which includes how the matter was reported as confirmed through the evidence of PW5 and the fact that the Complainant's mother did not testify thereby corroborating the complainant's evidence that she had taken sides with the Appellant against the complainant, who she considered a child of lesser god having been sired by a relative. There was no evidence tendered to show that there was any grudge between the complainant, her Aunt and the Appellant, which would have led to them framing the same having taken into account the evidence of PW5 on how the report was made. The evidence on record shows that neither the complainant nor her aunt knew PW5, who was on a mission of educating residents of Kibera on the issues of defilement when the report was made.

34. I am therefore satisfied that the Appellant was positively identified through the direct evidence of the complainant and the circumstantial evidence as stated herein and therefore his conviction was safe.

35. This being a sexual offence Act where Section 124 of the Evidence Act does not require, corroboration, I find and hold that failure to call the Aunt of the complainant one ML who was living with the complainant at the time when the report was made, and one LEAH their neighbour whom she first reported to, when her mother declined to come to her aid was not fatal to the prosecution case, since their evidence was adequately covered by that of PW5. As regards Dr. Ngelechi, his evidence was tendered by **PW3 DR. KINUTHIA** in compliance with the law foundations having been made why he could not be called and therefore find no prejudice suffered by the appellant.

36. On the appellant's defence, whereas the same had submitted that he had an alibi defence, the record of proceedings indicates that the same only made a general denial and did not raise any defence. His evidence was only based on how he was arrested and not what happened between her and the complainant during the period in question. I therefore find his defence mere denial. His submissions before the court that he was HIV positive and therefore should have infected the complainant was not supported by the medical evidence tendered by Dr. Maundu who examined both the Appellant and the complainant and therefore find this ground an afterthought and lacking merit.

37. Sentencing is at the discretion of the trial court and the appellate court would only interfere with the same where there is material misdirection by the trial court as was well stated by Odunga J in the case of **SIMON KIPKURUI KAMORI V REPUBLIC [2019] eKLR** thus: -

“Since the appellant is only appealing against sentence, it is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

6. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

7. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

8. To this, I would add a third criterion namely, *“that the sentence is manifestly excessive in view of the circumstances of the case”*. (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)”

9. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

38. The Appellant herein was sentenced to an imprisonment period of twenty years whereas the sentence provided for under Section 8(3) of the Sexual Offences Act is for a period not less than 20 years whereas the Appellant was given the minimum period provided for in law and being alive to the discretion now given to the courts on the misapplication of the Supreme Court’s decision in the **FRANCIS MURUATETU case**, the trial court in sentencing the appellant considered his mitigation, the fact that he was a first offender and the period which he was in custody and the fact that he had absconded for some time and therefore find no fault with the trial court sentence therein.

39. I have taken note of the fact that the Appellant was loco parentis to the complainant having moved in with her mother and should have taken her as his daughter and not a mini-wife to satisfy his sexual urge in the absence of her mother who was busy working at the upmarket Hardy estate of Karen where she was a live-in house help. The Act of the appellant betrayed the trust placed upon him and he said sentence was justified and lawful.

40. The upshot of this is that I find the appeal herein lacking merit and is therefore dismissed both on conviction and sentence and the trial court’s finding thereon affirmed.

41. The appellant has right of appeal.

Dated, Signed and Delivered at Nairobi This 14th Day of October, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE

In the presence of: -

Ms Chege for the Respondent

Appellant present in person

Court clerk Karwitha