



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Coram: D. K. Kemei - J**

**CRIMINAL APPEAL NO. 120 'B' OF 2019**

**DANIEL MUTUKU MUIA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal arising from the original conviction and sentence by Hon. CC Oluoch –(SPM) in Mavoko Senior Principal Magistrate's Court in Criminal Case. SO 3 of 2017 vide judgment delivered on 30.11.2018)**

***BETWEEN***

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**DANIEL MUTUKU MUIA.....ACCUSED**

**JUDGEMENT**

1. This is an appeal from the conviction and sentence of Hon. C.C. Oluoch, **Senior Principal Magistrate in Mavoko Criminal Case No. SO 3 of 2017** vide judgement that was delivered on 30.11.2018. The Appellant was on 13.7.2017 charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant on the 9<sup>th</sup> day of July 2017 at [Particulars withheld] area in Athi River Sub County within Machakos County intentionally and unlawfully caused his male organ (Penis) to penetrate the female genital organ (Vagina) of one IM a child aged 6 years. The appellant also faced the alternative count of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. After a full trial, he was sentenced to life imprisonment.

2. The appellant was aggrieved by the conviction and sentence and lodged the present appeal. The appellant's case is two-fold. Firstly, that the prosecution's case was not proved beyond reasonable doubt and Secondly, that the prosecution case was riddled with contradictory and unsupported evidence.

3. The appellant in his submissions submitted that there was no evidence that was adduced in court to support the charge; that the failure of the complainant to explain whether there was penile penetration left loopholes in the prosecution's evidence. According to the appellant, he was not supplied with the evidence that the prosecution intended to rely upon ahead of the trial and hence a breach of his right to a fair trial as enshrined in Article 25(c) and 50(2)(j) of the Constitution. It was further submitted by the appellant that the life imprisonment sentence meted on him was excessive; Reliance was placed on the case of **Francis Karioko Muruatetu & Another v R (2017) eKLR**.

4. The state opposed the appeal; learned counsel submitted that Pw3 caught the appellant in the act and that the medical evidence produced in court proved sexual intercourse. With regard to the age of the victim, counsel submitted that the age assessment report that was produced as Pexh4 proved that the victim was aged 5 years. It was submitted by counsel that the sentence meted on the appellant was proper.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was the complainant (IM). The court after conducting a voir dire on her was not persuaded that she possessed sufficient intelligence to understand the solemnity of an oath and that the prosecution made an application under section 31 of the Sexual Offences Act that she testifies through an intermediary. The intermediary Teresia Waigwa Wandunda was sworn in and she gave evidence that identified a person called Mutuku as the perpetrator.

When recalled because the court noted that Pw1's evidence was missing from the record and after the court invoking section 150 of the Criminal Procedure Code, she testified through an intermediary that she knew the appellant; that he applied oil on her private parts after he removed the trousers she was wearing and he lay on her and used his hand to touch her organ for urinating. It was her testimony that she felt pain and then Mama N found her on the bed whereupon the appellant ran away. She was able to identify the appellant in court and also told the court that she had seen him before.

**6. PW2 was MM**, the victim's mother who testified that the victim was born on 27.4.2012. She testified that on 9.7.2017 she was informed that the victim had been defiled and she took her to Nairobi Women's Hospital Kitengela the same day. She told the court her daughter informed her that Mutuku had applied oil in her private parts and a male organ was inserted in her private parts hence she checked her private parts and noted something like sperms. She told the court that her daughter was admitted for a week and that she was issued with a P3 form, PRC form and Hospital Discharge summary which were marked for identification.

**7. PW3 was EKA** who told the court that on 9.7.2017 she was washing clothes outside M's house and was alerted by a crowd to Pw2's house. She stated that she found the victim in the house; she was naked and oil had been applied on her private parts. She added that a boy whom she identified as the appellant was in the house with the child and who was also naked and had pulled down his trousers and was hiding behind a curtain.

**8. Pw 4 was JWW** who told the court that on 9.7.2017 he saw a child who was outside the house and who had no clothes on and that some oil had been applied on her private parts. He told the court that he saw the appellant running and he managed to apprehend him then escorted him to Sabaki Police Post.

**9. Pw5 was RL** whose evidence was indicated as expunged from the record.

**10. Pw6 was Cpl Florence Ngomoli** from Athi River Police station and the investigating officer. She told the court that on 9.7.2017 she was on duty when she received information that a child had been defiled. She testified that she went to Nairobi Women's Hospital where the child had been admitted and who was in great pain. She confirmed that PRC forms were filled. She stated that the victim was discharged on 12.7.2017 and a discharge summary presented to the hospital whereupon she issued a P3 form. She took a statement from Pw1 that was to the effect that when she was playing the appellant called her to her mother's house and ordered her to keep quiet and then removed her trousers and pulled down his trousers, laid her on a bed and defiled her. It was reported to her that a neighbour found her naked and that the appellant was arrested by members of the public who took him to Sabaki Police Post. She told the court that an age assessment was done on the minor that revealed that she was aged 5 years. The age assessment report was produced as evidence and marked P4.

**11. Pw7 was Peter Ngatia Mawi**, a clinician at Nairobi Women Hospital. He testified of an examination that was carried out on 9.7.2017 on Pw1 who had a history of defilement. The examination was carried out by Dr. Ruth Lenget whose handwriting he was familiar with and that he tendered the P3 form on her behalf under section 33 of the Evidence Act. He testified that Pw1's genitalia had no injuries but her hymen was torn. He testified that the conclusion was that there was penal vaginal penetration. He also sought to produce the discharge summary that was authored by Dr. Kimani whose handwriting he was familiar with; he testified on cross examination that the child's hymen was broken. The prosecution closed its case.

12. The court was satisfied that a prima facie case had been established against the appellant who was placed on his defence. Section 211 Criminal Procedure Code was explained to him and he opted to give sworn evidence. He testified that on the day he was arrested he had come from work and washed Pw1 when a lady arrived and started screaming; that he was arrested and taken to the police station. He denied commission of the offence. The court found that penetration was proven vide medical evidence; that age was proven vide the age assessment and there was an eye witness account of the incident that was corroborated by medical evidence. The appellant was convicted of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. He was subsequently sentenced to life imprisonment on the principal charge. No finding was made on the alternative charge.

13. Having looked at the submissions, grounds of appeal and the evidence on the court record, the following are the issues for determination:-

**a. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

**b. Whether there are contradictions in the evidence of the prosecution that will vitiate the conviction against the appellant.**

**d. What orders may court make?**

14. The Appellant seems to have no qualms about two of the three ingredients of the offence as encapsulated under section 8(1) and (2) of the Sexual Offences Act, to wit that the victim's age was 6 years and that having admitted in his defence evidence that she was found bathing the minor left no doubt about the issue of identification. He challenged the evidence on penetration. The evidence that is on record from the complainant confirms that she had sexual intercourse with the appellant. The appellant was in court and did not counter the said evidence save for stating that he washed Pw1 and then people came screaming and that he was arrested. The sequence of events as recounted by the prosecution evidence point to the fact that the appellant was together with the complainant in the same house and they were found together. PW3 found the two in flagrant delicto in that both were naked. The medical evidence that was adduced by Pw7 confirms that the complainant had a torn hymen. Penetration was proved since under section 2 of the Sexual Offences Act penetration means the complete or partial insertion of a genital organ of another into the genital organ of another. Because there is evidence of a torn hymen, and the only irresistible conclusion is that it had been occasioned by a male organ because according to the complainant as corroborated by the evidence of Pw3, sexual intercourse occurred between the appellant and Pw1. There was evidence that the appellant had applied some oil onto the vagina of the minor and that some of the oil was found on the vagina of the victim by the witnesses. It is obvious that the purpose of the application of the oil on the minor's vagina was to ease the exercise of penile penetration. I must agree with the finding of the trial court that penetration was proven and therefore this ground of appeal raised by the appellant fails.

15. A perusal of the list of exhibits in the trial court showed an age assessment in the names of **Pw1** as the victim born on 27.4.2012 who was assessed at 5 years, a P3 form signed on as evidence of penetration in the names of **Pw1** that reported that the victim had an absent hymen. There is an eye witness account of the incident from Pw1 and Pw3 who saw the conduct of the appellant at the time of the incident as well as the condition of Pw1. In the case of **Mshila Manga v R (2016) eKLR** the court observed that under the proviso to section 124 of the Evidence Act for a conviction to be made the court ought to be satisfied that the witness was truthful and record reasons thereof.

16. From the direct evidence of Pw1 and Pw3 that tells of the event, I see no reason to disbelieve them and I am satisfied that their account of events was free from error. Pw2 and Pw3 confirmed that the appellant lived in their neighbourhood and they had known him before. From the evidence on record and the admission of the appellant it was established that the appellant was at the scene of crime. The appellant himself in his evidence stated that he was bathing the minor when he was apprehended by the villagers.

17. I find that the evidence that was given by Pw4, also gave the chain of events of how he pursued the appellant and handed him over to the police and this evidence in no way disconnects the appellant from the wrongful act; I am satisfied that the appellant was identified as the perpetrator.

18. The Appellant raised the issue of contradictions in evidence as a ground of appeal. However, the evidence of the witnesses was consistent and corroborative. The appellant was caught in flagrant delicto with the victim and was apprehended within the vicinity and hence there is no doubt that he had been placed squarely at the scene of the crime. There were no contradictions at all and if there was then the same is curable under section 382 of the Criminal Procedure Code.

19. I find that the evidence on record is overwhelming enough to sustain a conviction. The finding on conviction by the learned senior principal magistrate was safe and I see no reason to interfere with the same. The appeal against conviction lacks merit and the same is hereby dismissed.

20. As regards the sentence, it is undisputed that the complainant was aged 5 years at the time of commission of the offence and this essentially means that the age falls within the bracket provided for under section 8(2) of the Sexual Offences Act that states that any person convicted under section 8(1) of the said Act shall be liable to be imprisoned to life imprisonment. The appellant was duly sentenced to life imprisonment by the trial court. The appellant has relied on the case of **Francis Karioko Muruatetu & Another V. R (2017) eKLR** and requested to be considered for a reduced sentence. Indeed, following the decision by the Supreme Court in the above case, several cases where minimum sentences had been imposed have had to be reviewed through resentencing. The Court of Appeal in the case of **Jared Koita Injiri V. R (2019) eKLR** and **Jared Ochieng V. R (2018) eKLR** being guided by the above Supreme Court decision interfered with sentences of life imprisonment and reduced the applicants sentences considerably. The appellant's mitigation was considered by the trial court. The victim is noted to have been a 5 year-old girl who is going to be psychologically affected by the incident. I find that a sentence of thirty (30) years imprisonment will be appropriate and which will run from the date of arrest (10.7.2017) as he remained in custody throughout the trial.

21. For the foregoing reasons, the appeal partly succeeds. The conviction by the trial court is upheld. The sentence of life imprisonment is hereby set aside and substituted with a sentence of thirty (30) years commencing from the 10.7.2017.

It is so ordered.

**Dated and delivered at Machakos this 12<sup>th</sup> day of October, 2020.**

**D. K. Kemei**

**Judge**