



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 16 of 2019

MICHAEL MWANGI WAITHERA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the original conviction and sentence of Hon. M. Wachira – CM dated 2nd April, 2019 at the Chief Magistrate's Court at Murang'a in Sexual Offences Case No. 37 of 2016)

JUDGEMENT

1. Michael Mwangi Waithera (appellant) was charged with **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. That on the 11.10.2016 at Gikandu Primary School, Maragi Sub-location within Murang'a County, intentionally and unlawfully caused his penis to penetrate the vagina of Linet Wachera Mutungi, a child aged 11 years. He faced an alternative count of **indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. That at the said time and place he unlawfully and intentionally caused his penis to penetrate (sic) the vagina of "L.W.M".

2. In a judgement dated 2.4.2019, the appellant was found guilty and convicted on the main count and sentenced to life imprisonment.

3. Aggrieved by conviction and sentence, the appellant has challenged the conviction and sentence basing his appeal on grounds found in his Petition of Appeal namely;

1. **That I pleaded not guilty to the charge.**

2. **That the learned magistrate erred both in law and facts by failing to note that the appellant was not competent and therefore unfit for trial.**

3. **That the magistrate erred in law by failing to ensure that my rights as an accused person were not violated during the trial.**

4. **That the learned magistrate failed to note that the appellant's conviction was based on mere suspicion.**

5. **That the learned magistrate failed to note that burden and standard of proof by the prosecution was not discharged and thus the prosecution case was not to be suspended having regard to the evidence and that on any ground it was a miscarriage of justice.**

4. The appeal was canvassed by way of written submissions by the appellant with an oral response by Mr. Waweru for the DPP.

5. I have considered the Petition of Appeal, the submissions by the appellant and the response by the DPP.

6. An appropriate spring board to start from would be the statement of the legal principle applicable by this court in determining the appeal. This being the first appellate court, I am enjoined in Law to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my conclusions about it bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The Court in **Okeno –vs- Republic (1972) EA 32** stated as follows;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975] E.A 336). 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 courts finding and conclusions; it must make its own findings and draw its own 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, see Peters –vs- Sunday Post (1958) E.A 424.”

7. A summary of the evidence at the trial court comes in handy to enable a re-evaluation of the same by the Court. The complainant testified through an intermediary, Faith Muthoni, the mother (PW 1). The witness was called to the complainant’s school on a report that the complainant was not well. She found the child had been defiled. She took her to hospital. The child was 11 years.

8. The minor testified as PW 2 in an unsworn statement. She said that she was at the school’s playing field when the appellant approached her from a nearby house and took her within the school field and told her to lie on her back. The appellant removed her pant and inserted his penis inside her vagina. He did that repeatedly many times. He finished and went to the road. The complainant used to see the assailant as he lives near their house.

9. PW 3, PW 4 and PW 5 testified that they saw the appellant lead the complainant to a bush. They went to check and found the appellant having sex with the complainant. He left on seeing them.

10. The appellant did not cross examine any of the witnesses and he elected to remain silent when placed on his defence.

11. It is noted that the appellant, despite having the opportunity to do so, did not cross examine any of the witnesses. The right to cross examination is a fundamental one, as was appreciated in the decision of the Court of Appeal for Eastern Africa in **Edward S/o Msenga –Vs- Reginam (1942) EACA 553** where the court held;

“The failure to give the appellant the opportunity to cross examine the 2nd accused was the denial of a fundamental right which was fatal to the conviction on the first count.”

12. An obligation is placed on the court where an accused is unrepresented to ask the accused person whether he wishes to put any questions to the witness and to record his answer. In **S –Vs- Msimango and Another (187/2005) [2009] ZAGPJHC 34; [2009]4 ALL SA 529 (GSJ); 2010 (1) SACR 544 (GSJ) (27 July 2009)** the High Court in South Gauteng, Johannesburg expressed itself thus;

“The right to cross examine is trite in our criminal justice system that curtailing it inappropriately or interfering with it, may render a trial unfair, vitiating the entire proceedings. There is also an obligation on a judicial officer in criminal trials of unrepresented accused persons, not only to explain to such accused persons their procedural rights, but specifically the right to cross examination. For example in S V Mdali 2009 (1) SACR 259 (C) the court held that the failure on the part of the magistrate to adequately explain to an unrepresented accused

the right to cross examination, how it should be conducted; the purpose and scope thereof; and the consequences of a failure to cross examine, breached the accused's fundamental rights to a fair trial. Indeed the importance of the right to cross examine in any disputed hearing, particularly in an adversarial trial system, such as ours, can hardly be over emphasized. (See also H.O.W v Republic 2014 eKLR C.A KSM)."

13. In our instant case, the trial magistrate gave the appellant the chance to cross examine after the testimony of each of the witnesses. Indeed, when the appellant was placed on his defence, the trial court gave the appellant more time to respond to the mode of defence that he wished to adopt and on 26.3.2019, the appellant in his own words stated ***"I will remain silent in my defence."***

14. The appellant has raised a ground that the trial magistrate failed to note that the appellant was not competent and therefore unfit for trial. I have perused the record. I note that in a report by Dr. Syengo Mutisya of Mathari Hospital dated 18.1.2018, it is confirmed that the appellant was fit to stand trial.

15. The appellant's other grounds of appeal are that his conviction was based on mere suspicion and that the prosecution did not discharge its burden of proof.

16. This court has carefully re-evaluated the evidence on record. The complainant's evidence is corroborated by the eye witness accounts of PW 3, PW 4 and PW 5. The evidence of these three witnesses is firm and consistent. They saw the appellant lead the complainant into a bush area. They went to find out what was happening and they saw the appellant having sex with the complainant.

17. That evidence is corroborated by the medical evidence by PW 7 who examined the complainant. The witness has explained that from the history given this was a repeat incident which explains lack of injuries but with evidence of a broken hymen. The evidence of PW 3, PW 4 and PW 5 removes any doubt as to the culpability of the appellant. The complainant is clear that the appellant inserted his penis in her vagina. PW 3, PW 4 and PW 5 found the appellant in the act.

18. My re-evaluation of the evidence leads me to one conclusion. That the conviction by the trial court was based on concrete evidence. The prosecution proved its case beyond reasonable doubt. The conviction was thus safe.

19. The appellant was sentenced to life imprisonment. **Section 8(2) of the Sexual Offences Act** provides;

"S 8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

20. The trial court appears to have imposed the mandatory sentence provided in **S 8(2) of the Sexual Offences Act**. The trial court did not exercise discretion in sentencing. There are no notes indicating why the court found life imprisonment to be the appropriate sentence. Following the Supreme Court decision in **Murutetu Case**, the shackles that tied courts to minimum mandatory sentences were removed. The court is bound to exercise discretion and mete out appropriate sentences on a case-by-case basis.

21. I will, for the above stated reason, set aside the sentence imposed by the trial court and substitute thereof a sentence of 25 years imprisonment to run from the date of conviction by the trial court.

Dated, Signed and delivered at Murang'a this 11th day of November, 2020.

A.K NDUNG'U

JUDGE