



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC.APPL NO.73 OF 2016

SAMUEL MWITA MAROA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **Samuel Mwita Maroa** was charged with the offence of **defilement contrary to section 8(4) as read with section 8(4) of the sexual offences Act No.3 of 2006**. Particulars are that on diverse dates between 27th day of February 2014 and 2nd day of March 2014 at [particulars withheld] area in Rongai District of Nakuru County, appellant unlawfully and intentionally committed an act which caused his genital organ namely penis to penetrate into the genital organ namely vagina of **SJ** a child aged 16 years which caused penetration.

2. The appellant was also charged with an alternative count of **indecent act with a child contrary to section 11(1) of the sexual offences Act No.3 of 2006**. Particulars are that on diverse dates between 27th day of February 2014 and 2nd day of March 2014 at [particulars withheld] area in Rongai District of Nakuru County, appellant unlawfully and intentionally committed an indecent act by touching genital organs namely vagina of **SJ** a girl aged 16 years with male genital organ namely penis without her consent.

3. The appellant denied both the main and alternative charge and the case proceeded for hearing with prosecution calling 6 witnesses and the appellant adduced sworn evidence and never availed any witness. The trial magistrate found the appellant guilty of the main charge, convicted and sentenced him to 15 years' imprisonment. Being dissatisfied by the said determination, the appellant filed this appeal on the following grounds: -

i. The learned magistrate erred in law and fact by basing conviction on flimsy evidence.

ii. The learned trial magistrate erred in law and fact in failing to appreciate that the offence was not proved beyond reasonable doubt.

iii. The learned trial magistrate erred in law and fact by failing to appreciate plausible defence

iv. The learned trial magistrate erred in law and fact by failing to appreciate that the age of the complainant was not ascertained

v. The learned trial magistrate erred in law and fact by appreciating contradicting evidence from crucial witnesses

4. The appellant filed supplementary grounds of appeal as set out hereunder: -

i. The learned magistrate erred in law and fact by failing to note the contradictory nature of the prosecution evidence

ii. The learned magistrate erred in law and fact to consider that investigations were shallowly contradictory

iii. The learned magistrate erred in law and fact by convicting on evidence of sole witness which was not corroborated by other material evidence.

iv. The learned magistrate erred in law and fact by convicting against the weight of adduced evidence.

APPELLANTS CASE

5. The appellant adopted his grounds of appeal during the hearing and indicated that he had nothing to add.

6. The appellant submitted that the Court failed to ensure that he was granted fair trial and he was not supplied witness statements free of charge thus breaching the constitutional requirement.

7. The appellant further submitted that he was convicted on the basis of sole evidence of PW1 which was uncorroborated and the Court failed to record why it believed the sole witness.

8. Further that the said sole witness contradicted herself in her evidence casting doubt on her integrity and her evidence should not have been relied on.

9. The appellant further challenged the Court's decision to order him to pay prosecution witnesses.

10. The appellant submitted that the investigating officer failed to establish that the complainant was staying in accused's house during the night while staying at a neighbor's house during the day; further PW3 confirmed that he did not take statements from neighbor's and due to shallow investigations, the Court could not establish the truth; further that there was no sufficient prove that the accused was with another person in the house and whether he was a tenant in the house.

RESPONDENTS CASE

11. The state counsel submitted that in respect to age, the complainant stated that she was 16 years old and her evidence was corroborated by her mother who proved by birth certificate, birth notification and immunization card that she was 16 years old.

12. On identification, she submitted that the appellant was known to the complainant as PW1 said he was known as **Samuel** and he was a neighbor. She submitted that the complainant said the appellant testified that the accused took her to his house and stayed with her for two nights. Further that PW3 the investigating officer identified the appellant as the person who was found in custody of the complainant and that he attempted to board a matatu with the complainant and PW4 the mother of the complainant was present with PW3 at the time of the appellant's arrest. She stated that PW5 also said the appellant was their neighbor.

13. On penetration the state counsel submitted that PW6 examined the complainant and found that her hymen was broken and was bleeding with whitish discharge. Examination as per the doctor's evidence was after 5 days as evidenced by old wound which was in the process of healing.

14. In a rejoinder the appellant urged the Court to look at his case as he never committed the offence. He urged the Court to even find that the complainant could have forced the appellant to be close to her; and asked how they could be together if he had ill motive.

ANALYSIS AND DETERMINATION

15. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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; 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 v. Sunday Post, [1958] EA 424.)”

16. In view of the above, I have perused the trial court proceedings; have also perused and considered the appellant's submissions together with state counsel's submissions. I consider the following as issues for determination: -

- i. Whether the offence of defilement was proved beyond reasonable doubt
- ii. Whether sentence imposed was harsh and excessive

(i) Whether the offence of defilement was proved beyond reasonable doubt

17. It is stated that for a case of defilement three ingredients have to be proved being age, penetration and identification. In respect to age, documents which are birth certificate, notification of birth, and immunization card were produced in Court to confirm age of the complainant as 16 years; the 3 documents were not challenged. Age was therefore proved beyond reasonable doubt.

18. In respect to penetration, besides the broken hymen, there were injuries in the complainant's vagina which were healing with bleeding and whitish discharge; this no doubt confirm penetration into the complainant's vagina.

19. There was no issue in respect to identification as there was confirmation that the appellant was the child's neighbor. This was a child aged 16 years and there could have been difficulty in her knowing her neighbor. Further the appellant was found together with the complainant and evidence adduced is that the appellant tried to run away with the complainant. Evidence also show that the appellant and complainant had been together for 2 days. There is therefore no doubt in identification.

20. From the foregoing, I find that all the three ingredients for offence of defilement were proved beyond reasonable doubt. Appeal on conviction cannot therefore stand.

(ii)Whether sentence imposed was harsh and excessive

21. The appellant was convicted of **Section 8(1) as read with Section 8 (4) of the Sexual Offences Act** which provide for a minimum sentence of fifteen (15) years. The appellant was sentenced to minimum sentence provided by statute. The Supreme Court however declared mandatory nature of sentences unconstitutional in the case of **Muruatetu**. Mandatory nature of sentences takes away the discretion of judicial officers rendering mitigating factors superfluous. It denies the judicial officer the opportunity to consider circumstances of each case and impose an appropriate sentence.

22. In view of the above, I have considered the circumstances of this case; I also note that in mitigation, the appellant indicated that he had a child and a wife who relied on him. I have also considered the fact that the complainant was aged 16 years old at the time of the offence and find it appropriate to reduce his sentence to 7 years' imprisonment.

23. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is allowed and sentence is reduced to 7 years' imprisonment.
3. Sentence to run from the date of sentence by the trial court.

Judgment dated, signed and delivered via zoom at Nakuru this 5th day of November, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Appellant present in person.

Rita Rotich for the state