



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 2 OF 2017**

**JIMMY MWAZO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the original conviction and sentence by Hon.**

**M.O. Rabera, Senior Resident Magistrate, delivered on 3<sup>rd</sup>**

**January, 2017 in Mombasa Chief Magistrate's Court Sexual Offence No. 53 of 2016).**

**JUDGMENT**

1. The appellant, Jimmy Mwazo, was on the 3<sup>rd</sup> January, 2017 sentenced to life imprisonment for the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the charge were that on the 30<sup>th</sup> day of May, 2016 at [particulars withheld] in Changamwe Sub-County, within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of HS [name withheld] a girl aged 8 years.
3. The appellant was aggrieved by the conviction and sentence. He filed a petition and grounds of appeal on 12<sup>th</sup> January, 2017. On 17<sup>th</sup> December, 2018, he filed amended grounds of appeal, with leave of the court, raising the following issues:-
  - (i) That the Trial Magistrate failed to see that the element of penetration was not proved;
  - (ii) Crucial evidence was not tabled by the prosecution;
  - (iii) That the whole matter was a fabrication intended to unfairly incarcerate him;
  - (iv) That the investigations pertaining to his case were very shoddy and unreliable; and
  - (v) That his defence testimony was dismissed without any justification.
4. In the appellant's submissions filed together with his amended grounds of appeal, he stated that the medical evidence adduced was insufficient to support the allegations of defilement against him. He submitted that the medical evidence disclosed that at the time PW1 was examined, she was found to have an old scar on her broken hymen. He further stated that following the allegation of defilement, the approximate age of the injury was one month. Further, no spermatozoa was found in her vagina.
5. The appellant contended that there were allegations that PW1 had been defiled on two occasions as she had a fresh injury. The appellant therefore doubted if the medical examination report was for PW1 or another person. The appellant regarded the medical findings of an old scar on PW1's vagina and fresh abrasions as contradictory and unreliable.
6. He challenged the fact that the person who allegedly arrested him by the name Kombo was not called to give evidence. He relied on the case of **Bukenya vs Uganda** [1972] EA 549 on the failure by the prosecution to call some witnesses. He also cited the provisions of Sections 144 and 150 of the Criminal Procedure Code.

7. The appellant contended that the case brought against him was a fabrication. He elaborated his claim by saying that PW1 and PW2 in their evidence never mentioned that PW1 had been previously defiled. He further stated that according to the lower court proceedings, it was PW3 who talked about the previous defilement on PW1. The appellant therefore submitted that the said mismatch in evidence should have been resolved in his favour. He relied on the case of **Teper vs Republic** [1952] AC, on circumstantial evidence.
8. The appellant pointed out that although PW1 and PW2 testified that the appellant was admitted to Hospital for 2 days after the incident on 30th May, 2016, the P3 form shows that she was sent to Hospital on 4<sup>th</sup> July, 2016. He regarded the above line of evidence as inconsistent. He stated that he was being framed up by the two witnesses as PW3 had indicated that PW1 was not admitted to Hospital.
9. The appellant submitted that the case against him was poorly investigated. He also stated that his defence testimony was dismissed outrightly despite the fact that it displaced the prosecution's case. He argued that the Hon. Magistrate failed to appreciate it and instead relied on assumptions. He prayed for his appeal to be allowed.
10. The respondent through submissions filed by Ms Marindah, Prosecution Counsel, on 5<sup>th</sup> February, 2019 opposed the appeal. She submitted that the appellant was well known to PW1 and the offence took place during day time, thus the circumstances were ideal for positive identification.
11. It was also submitted that there was no evidence of bad blood between PW1, and the appellant and PW1's mother and the appellant.
12. The Prosecution Counsel stated that the appellant conceded that PW1 was in his house on 30th of May, 2016. She further stated that the Post Rape Care form (PRC form) and P3 form were both filled on the date when the offence was alleged to have been committed.
13. Ms Marindah submitted that the Trial Magistrate believed the evidence of PW1 and convicted the appellant after satisfying himself of the requirement under the provisions of Section 124 of the Evidence Act, in that he believed that PW1 was a truthful witness and that her evidence was untainted and uncontradicted even after cross-examination by the appellant.
14. The Prosecution Counsel urged the court to find that the appellant's unsworn evidence had no probative value and was worthless and his defence, was a mere denial. She prayed for the appeal to be dismissed.

#### **ANALYSIS AND DETERMINATION**

15. The duty of the first appellate court is to analyze and re-evaluate the evidence tendered before the Trial Court and arrive at its own independent decision while bearing in mind that it has neither seen nor heard the witnesses testify. In the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** the Court of Appeal reiterated this duty as follows:-

***“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”***

16. PW1, HS [name withheld] was taken through voire examination and the Trial Magistrate made an order for her to give sworn evidence as he found her to be intelligent enough to do so. It was her evidence that on 30<sup>th</sup> May, 2016 at about 8:00 a.m., the appellant gave her Kshs. 100/= and sent her to a shop to buy for him milk and mandazi. After she took to him the said items, he held her hand and pulled her to his bed and did “tabia mbaya” (bad manners) on her. She explained that the appellant took out his “dudu” (penis) and put it in her vagina.
17. It was PW1's evidence that her mother who had left home remembered she had forgotten some money and went back for it. She did not find PW1 in the house and she called out her name loudly. PW1 ran out of the appellant's house crying. She testified that as she was getting out of the said house, she met her mother. She stated that the appellant was a neighbour who occupied the house next to theirs.
18. She further testified that upon hearing her mother's voice, the appellant ran out of his house. She told her mother what had happened and she was taken to Changamwe Police Station and then to Makadara Hospital (Coast Province General Hospital) where she was admitted to 2 days and treated. She identified the appellant in court, as the person who defiled her.
19. PW2, DC [name withheld] who is PW1's mother testified that on 30th May, 2016 she left her home at 8:00 a.m., to look for casual work. She left PW1 and her other children at home. After about 10 minutes, she remembered she had not left money for their lunch and went back. On returning home she found a padlock on her door. She called out PW1's name and she emerged from the appellant's house while holding her pant, as she cried. She asked her why she had come out of the appellant's house and she reported that the appellant had defiled her. PW2 testified that the appellant ran out of his house.
20. She further gave evidence that the appellant had been their neighbour for 10 years. She also stated that he had chased away his wife and children in the month of February that year and he was staying alone. She reported the incident to the Village Elder who advised them to go to the Police Station. It was PW2's evidence that she reported the incident to Changamwe Police Station on the same day and then went to Makadara Hospital where some tests were done on PW1. She identified the treatment notes for PW1 in court. As for PW1's age, PW2 stated that she was born on 23rd March, 2006 and identified her immunization card and P3 form in court. She testified that PW1 was admitted to Hospital for 2 days. She stated that she had no grudge against the appellant.
21. Dr. Mohammed Abdul Azizi a Doctor working at Coast Province General Hospital (CPGH) testified as PW3. He stated that he was familiar with the handwriting and signature of Dr. Raita who filled PW1's P3 form. PW3 indicated that the said form showed that there was

oedema on PW1's labia majora and a fresh erythematous abrasion at 6 O'clock. Her hymen was broken with an old scar. The approximate age of the injury was 1 month. The degree of injury was categorized as maim. The P3 form was signed on 4<sup>th</sup> July, 2016. PW3 produced the P3 form as P. exhibit 3. He also produced a PRC form for PW1 as P. exhibit 4, which indicated that PW1 was examined on 30<sup>th</sup> May, 2016 at noon in CPGH. Following the examination done on the said date, the observations made on PW1's private parts are similar to those captured on her P3 form.

22. No. 77368, Sergeant Josephine Mwangeno attached to Changamwe Police Station gave evidence as PW4. She recounted to the Trial Court that PW1 lodged a complaint at the said Police Station about having been defiled by the appellant. PW4 received the said report on 31st May, 2016. She stated that the appellant was arrested by members of the public who were beating him as they took him to Changamwe Police Station. She indicated that she saved him from the angry mob. A piece of cloth (dress) was handed over to her by PW1. It was produced as P. exhibit 5. PW4 testified that she used the PRC as the basis for charging the appellant. She produced PW1's Health Immunization card as P. exhibit 2.

23. In his defence, the appellant denied having committed the offence. He stated that on 30th May, 2016 he woke up and prepared to do some jua kali (casual) work. He further stated that he met PW1's mother at his doorstep and asked her if he could send one of her children to the shops. She called PW1 who came out of a neighbour's house and he gave her Kshs. 100/= to buy for him milk and mandazi. She bought and took the items to him. He indicated that he heard one of their neighbours and PW1's mother interrogating PW1 on what she was doing in his house. He stated that the defilement case was a frame up by PW2's friend who was one of their neighbours.

24. The issues for determination are:-

- (i) If PW1 was defiled by the appellant;**
- (ii) If failure to call the person who arrested the appellant was fatal to the prosecution's case;**
- (iii) If the appellant's defence was considered;**
- (iv) If there were inconsistencies in the prosecution's case; and**
- (v) If the sentence was harsh and excessive.**

**If PW1 was defiled by the appellant.**

25. The evidence of PW1 was short and to the point. On 30th May, 2016 at 8:00 a.m, while at home, she was called by the appellant who sent her to the shops to buy for him milk and mandazi. He gave her Kshs. 100/=. On taking the items to him, he held her hand and pulled her to his bed and defiled her. When in the said house, she heard her mother call out her name loudly. She ran out of the appellant's house crying. She explained to her mother (PW2) what had happened. She stated that the appellant on hearing PW2's voice ran out of his house.

26. PW1's evidence was corroborated to some material aspect by the evidence of PW2, who confirmed that on the day in issue she left her children including PW1 at home as she went to look for casual work. PW2 however remembered that she had not left money for her children's lunch and returned to her house, which she found locked with a padlock. On calling out PW1's name, she ran out of the appellant's house while holding her panty and upon asking her why she had come out of the appellant's house, she told her that the appellant had defiled her. She saw the appellant run out of his house and escape through the back door. In my considered view, PW1 and PW2's narrative as to how the incident unfolded flowed seamlessly up to that point.

27. On PW1 being examined at CPGH on 30th May, 2016 at noon, it was established that she had oedema of the labia majora and fresh erythematous abrasion at 6 O'clock. She had a broken hymen with an old scar. The same findings were captured on her P3 form that was filled on 4<sup>th</sup> July, 2016.

28. The appellant challenged the said evidence by stating that due to PW1's perforated hymen with an old scar, the allegation of defilement against him was not proved beyond reasonable doubt.

29. The court's concern in this case is whether the appellant defiled PW1 on 30th May, 2016 and not if PW1 had on a previous occasion been defiled which resulted in torn hymen and an old scar. Even if she had been defiled before the material day, which led to perforation of her hymen, that should not be a justification for subsequent defilement by the appellant.

30. The court finds that the direct evidence adduced by PW1 that she was defiled by the appellant was corroborated by the evidence of PW2 who saw her emerge from the appellant's house on 30th May, 2016. That piece of evidence therefore demonstrates that the appellant had the opportunity to defile PW1. The fact that PW1 was defiled was supported by the medical examination which revealed fresh abrasions on her vagina and oedema of the labia majora. That was conclusive evidence of penetration. The foregoing evidence unerringly points to the appellant as the perpetrator of the offence. The act of the appellant of running away from his house upon hearing PW1 being called by PW2 was the conduct of a guilty mind and goes further to corroborate the evidence of PW1 that she was defiled by him.

31. In his Judgment, the Hon. Magistrate found the evidence of PW1 to be truthful, untainted and uncontradicted even on cross-examination. Under the proviso to Section 124 of the Evidence Act, *Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief. In this case, the only eyewitness to the offence was PW1. Her mother, PW2, adduced both direct and circumstantial evidence which after analysis, I am satisfied corroborates the direct evidence of PW1 that the appellant is the one who defiled her.*

### **If failure to call the person who arrested the appellant was fatal to the prosecution's case.**

32. On cross-examination, PW2 stated that the appellant was arrested by one Kombo, a member of the vigilante group. The appellant therefore submitted that the said Kombo should have been called as a witness for the prosecution and the failure to call him weakened the prosecution's case. Under the provisions of Section 143 of the Evidence Act, the prosecution is not under obligation to call a particular number of witnesses, in the absence of any evidence to the contrary to prove any fact. In **Keter vs Republic** [2007] eKLR, the court held as follows with regard to failure by the prosecution to call some witnesses:-

*"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."*

33. In this court's view, failure to call Kombo as a witness did not prejudice the appellant in any way. The said person was not an eyewitness to the commission of the offence and there was no value addition he would have made in this case.

### **If the appellant's defence was considered.**

34. In the Judgment delivered on 31<sup>st</sup> January, 2017 the Hon. Magistrate indicated that he had considered the evidence on record and the unsworn evidence tendered by the defence. He found that the prosecution had proved its case beyond reasonable doubt. Having gone through the defence raised by the appellant, is my finding that it did not weaken the prosecution's case but instead bolstered the evidence of PW1 that the appellant on the morning of 30th May, 2016 sent PW1 to buy for him milk and mandazi. PW2 stated that on that date, the appellant asked her for permission to send her daughter to the shops which he had never done previously, although he used to send her. The allegation by the appellant that PW2's friend is the one who framed him up for this offence is farfetched and cannot hold in light of the overwhelming evidence against the appellant as the perpetrator of the offence

### **If there were inconsistencies in the prosecution's case**

35. The appellant raised the issue of inconsistencies in the evidence of PW1 and PW2 that the former was admitted to Hospital for 2 days and the evidence of PW3 who said that PW1 was not admitted to Hospital. It has been held time without number that inconsistencies are bound to occur in the evidence of witnesses. On the issue of inconsistencies and discrepancies, the Court of Appeal in the case of **Philip Nzaku Watu vs Republic** [2017] eKLR, had the following to say:-

*"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signify fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."*

36. PW1 and PW2 were categorical that PW1 was admitted to Hospital for 2 days. The P3 form is silent on whether she was admitted to Hospital. It is the finding of this court that since PW3 is not the one who examined PW1 when she went to CPGH for filling of her P3 form, he was unlikely to know if PW1 was admitted to Hospital or not, if that information was not captured on the P3 form. I have no reason to doubt PW1 and PW2 in their evidence that the former was admitted to Hospital for two days. What is of critical importance is if she was defiled or not and whether the perpetrator of the offence was the appellant. The evidence on record overwhelmingly demonstrates that the appellant who was a neighbour to PW2 for about 10 years is the one who defiled her daughter, PW1. In this case, I hold that the appellant was convicted on sound evidence. The appeal against conviction is hereby dismissed.

### **If the Sentence was harsh and excessive**

37. On the issue of the sentence imposed against the appellant, PW1's Child Health Card (Immunization card) was produced in evidence. It shows that she was born on 23rd March, 2006. As at 30 May, 2016, when the offence was committed she was 9 years old and 2 months shy of reaching the age of 10 years. The sentence provided under the provisions of Section 8(2) of the Sexual Offences Act for an offender who defiles a child who is 11 years or less in age, is life imprisonment.

38. In **Francis Karioko Muruatetu & Another vs Republic, Supreme Court Petition No. 16 of 2015 (Muruatetu case)**, the Supreme Court held that the mandatory death sentence is unconstitutional for depriving the courts the discretion to impose an appropriate sentence depending on the circumstances of each case. Emerging jurisprudence led to the Court of Appeal in Kisumu in **Jared Koita Injiri vs Republic** [2019] eKLR (**Koita case**) to exercise its discretion in a sexual offence case in which the appellant had been convicted under the provisions of Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The said court observed that the appellant therein was sentenced to life imprisonment on the basis of the mandatory nature of the sentence stipulated by the provisions of Section 8(1) (sic) of the Sexual Offences Act.

39. The said court held that if the reasoning of the Supreme Court in the **Muruatetu case** (supra) was to be applied to the said provision, life imprisonment should be considered unconstitutional on the basis of the said case. A recap of the holding in the **Muruatetu case** is as follows:-

*"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances, but has, nevertheless, to impose mandatory sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under Article 25 of the Constitution; an absolute right."*

40. The Court of Appeal in the **Koita case** (supra) went on to consider that the appellant was a first offender and that he had pleaded for leniency. The court took into account that the appellant committed a heinous crime that occasioned severe trauma and suffering to a young girl and that his actions had demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. The said court after considering the facts surrounding the case and the appellant's mitigation substituted the sentence of life imprisonment with 30 years imprisonment.

41. In the present case, when called to offer mitigation before the Trial Court, the appellant herein said nothing. The Prosecution Counsel informed the said court that the appellant was a first offender. Bearing in mind the severity of a mandatory death sentence *vis a vis* life imprisonment where a convict is bound to be deprived of his liberty for life and after applying the reasoning behind the decision in the **Muruatetu case**, it is the finding of this court that the appellant herein is entitled to benefit from a less severe sentence other than life imprisonment. I do take cognizance of the fact that the appellant in the instant appeal was convicted and sentenced for having defiled a girl of almost the same age as the victim in the **Koita case** (supra). As such, the sentence imposed against the appellant should be commensurate with the gravity of the offence that was committed on a child of that age, the trauma that the victim must have suffered and the effects that the act of defilement might have in her future life.

42. Part 1 of Chapter 4 of the Constitution of Kenya makes general provisions with regard to the Bill of rights. Article 20(1), (2) and (3) thereof give effect to the application of the said Bill of rights by stating as follows:-

***“(1) The bill of Rights applies to all law and binds all State organs and all persons.***

***(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.***

***(3) In applying a provision of the Bill of Rights, a court shall –***

***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and***

***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”*** (emphasis added).

43. This court's view is that the *ratio decidendi* in the **Muruatetu and Koita cases** has led to development of the law under the provisions of Article 20(3)(a) of the Constitution of Kenya by application of constitutional provisions on the right of accused persons to fair trial and the discretion of the courts in sentencing under statutory provisions that provide for mandatory sentences. The Supreme Court and Court of Appeal in the above cited cases in considering the right to fair trial, in my view, apart from developing the law adopted the interpretation that most favoured the aggrieved persons who were before them.

44. One of the rights of an accused person is the right to a fair trial which subsists throughout the hearing of a case. Sentencing is a critical component of the right to fair trial as a Trial Court should not impose a harsh or excessive sentence where the circumstances of the case militate against it. The sentence meted out should be commensurate with the offence that a person has been convicted of. The more aggravating the circumstances of an offence are, the harsher the sentence should be. Sentence is not only aimed at punishing a convict but also in rehabilitating him by making him a better person who can be re-integrated into society.

45. While bearing the above Supreme Court and Court of Appeal decisions in mind, as well as the evidence that was adduced before the Trial Court in this case, I set aside the sentence of life imprisonment imposed against the appellant and substitute it with a sentence of 35 years imprisonment with effect from 3rd January, 2017, being the date he was sentenced by the Trial Court. The said sentence takes into account the period of time the appellant stayed in remand pending the hearing of his case before the Trial Court. His appeal succeeds only to the said extent. The appellant has 14 days right of appeal.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF JUNE, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present in person

Ms Ogwenyo, Principal Prosecution Counsel, for the DPP

Mr. Oliver Musundi – Court Assistant