



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 94 OF 2017**

**ALEX JAMES NYAMAI ....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

(An appeal from the Judgment of Hon. E. Mutunga, Resident Magistrate, in Mombasa Chief Magistrate's Court Criminal Case No. 3053 of 2012).

**JUDGMENT**

1. The appellant was convicted for the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between 9th September, 2012 and 18<sup>th</sup> October, 2012 in Mombasa District within Coast Province, unlawfully and intentionally caused his penis to penetrate the vagina of JEO [name withheld] a girl aged 15 years. The appellant was sentenced to serve 20 years imprisonment.
2. He was dissatisfied with the conviction and sentence and filed a petition of appeal on 15<sup>th</sup> June, 2017 through the law firm of Kakai Mugalo & Co. Advocates. He raised the following grounds of appeal:-
  - i. The Learned Hon. Magistrate erred in both law and fact by convicting the appellant after the prosecution failed to prove its case beyond reasonable doubt, while failing to appreciate that the appellant was a victim of entrapment;
  - ii. The Learned Hon. Magistrate erred in both law and fact by not confirming disclosure of evidence by the prosecution and failure to inform the appellant of his right to legal representation considering the seriousness of the charges, hence arriving at a wrong decision in law; and
  - iii. The Learned Hon. Magistrate erred in both law and fact by failing to establish the preferred language of the appellant and neither was the language consistently reflected in the proceedings hence amounting to a miscarriage of justice.
3. The appellant filed another petition of appeal on 22nd November, 2017 in Mombasa High Court Criminal Appeal No. 125 of 2017 raising the following grounds of appeal:-
  - i. That the Trial Magistrate erred in law and fact by failing to note that this case was not proved beyond reasonable doubt;
  - ii. That the Learned Magistrate erred in law and fact in convicting the appellant by believing the prosecution witnesses without putting sufficient scrutiny on the contradictions and inconsistencies in their evidence;
  - iii. That the Learned Trial Magistrate erred in both law and fact by failing to appreciate that there was not a medical examination report on the basis of DNA test on the appellant;
  - iv. That the Learned Trial Magistrate erred in law and fact by sentencing the appellant before inquiring into his age and any other mitigating circumstance;
  - v. That the Trial Magistrate erred in law and fact in failing to recognize the appellant's constitutional right to be represented by an advocate and also failing to arraign the appellant in court within the stipulated time as he was detained for a period of three days from the time of his arrest; and

vi. The Learned Magistrate erred in law and fact by passing a sentence which was manifestly excessive in the circumstances.

4. The grounds raised in the two petitions of appeal were consolidated on 29th November, 2018 on application of the appellant's Counsel. This appeal file became the lead file.

5. In written submissions filed by Marende Necheza & Company Advocates on 28<sup>th</sup> January, 2018, it was stated that the complainant (PW1) left her home and went to live with the appellant in Mikindani. It was submitted that she told him that she had gone to live with him as his wife. It was further submitted that PW1 behaved like an adult due to the aforesaid conduct. Counsel for the appellant cited the decision in Malindi High Court Criminal Appeal No. 32 of 2015, **Martin Charo vs Republic** [2016] eKLR, where the court in allowing the appeal held that the complainant therein who was a minor, had behaved like an adult.

6. This court was invited to take note of PW1's conduct and draw the conclusion that she acted like an adult and carried herself as one. It was submitted that it was harsh to punish the appellant with 20 years imprisonment, yet it was PW1 who followed him to his house and offered to be his wife. It was stated that PW1 willingly accompanied him to his ancestral home in Kibwezi to start a life with him. It was also submitted that she did not file any charges against the appellant but was forced by her father to do so.

7. On the issue of the harshness of the sentence of 20 years imposed against the appellant, his Counsel relied on Malindi High Court Criminal Appeal No. 32 of 2016, **Omus Kiringi Chivatsi vs Republic** [2017] eKLR where the court stated that conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled and it was unfair to sentence someone to 20 years imprisonment yet the complainant was enjoying the relationship.

8. Counsel for the appellant also cited Malindi High Court Criminal Appeal No. 27 of 2017, **KKM vs Republic** [2017] eKLR where the court was of the view that Judicial Officers should be able to distinguish between "real" defilement and cases where the victim was trying to fulfil her sexual feelings and that such a differentiation should take into account the age of the complainant.

9. The decision in Malindi High Court Criminal Appeal No. 43 of 2013, **Ali Kazungu Zeth vs Republic** [2015] eKLR, was also cited to show that people who lure innocent children into sex or who forcefully defile children should be punished but when female children become hunters and look for boys, it becomes unjust to punish the boys.

10. Counsel for the appellant submitted that the sentence of 20 years imprisonment was excessive and punitive considering the circumstances of the case. He prayed for the appeal to be allowed.

11. The Director of Public Prosecutions (DPP) through Ms Marindah, Prosecution Counsel, opposed the appeal through written submissions filed on 8th February, 2019. It was submitted for the DPP that it is not a defence for the appellant to say that PW1 acted as an adult and carried herself as one, while he was clearly aware of the fact that she was a minor. It was stated that the complainant was employed by PW1's father as a Watchman to guard his home and he therefore knew that PW1 was still a student in Primary School.

12. It was also submitted that the appellant had not demonstrated that PW1 had deceived him into believing that she was above the age of eighteen years at the time the alleged offence occurred. He also did not demonstrate that he believed PW1 to be over 18 years of age. As such, the defence provided under the provisions of Section 8(5) of the Sexual Offences Act, 2006 could not benefit the appellant.

13. It was further submitted that the prosecution proved its case beyond reasonable doubt, in that PW1 was 15 years old in the year 2012 when she was defiled by the appellant. It was stated that he did not dispute having lived with PW1 and that he used to engage in sex with her.

14. On the issue of the sentence, the respondent's Counsel submitted that the minimum sentence for an offence under Section 8(1) as read with 8(3) of the Sexual Offences Act is 20 years imprisonment. She relied on the case of **Samuel Muchiri vs Republic** [2016] eKLR where the Court of Appeal declined to reduce the sentence imposed therein as there was no evidence of an error in principle by the Trial Court in arriving at the sentence imposed against the appellant. It was submitted that in the present case, there was no error in principle that was made. Counsel for the respondent prayed for the appeal to be dismissed.

#### **The evidence adduced before the court below**

15. The complainant was PW1, JEO [name withheld]. She was a child aged 15 years. As at the time she testified on 3<sup>rd</sup> January, 2012 she was in standard seven. She gave evidence that on 9th September, 2012 she went to the appellant's house in Mikindani and found him there. She testified that the appellant was her boyfriend. She indicated that when she visited the appellant, she told him she had gone to live with him because her brother was abusing her for having him as her boyfriend. She further indicated that the appellant said it was okay and they stayed in his house for 3 days.

16. It was her evidence that they would sleep on the same bed and she had sex with the appellant using a condom. She stated that after 3 days, they went to the appellant's home in Kibwezi where they found the appellant's two sisters. PW1 testified that she slept with the appellant in his house but did not have sex on that day. While at Kibwezi, she called her sister and told her that she was in Nairobi. PW1's sister told her that she would send her money to enable her to go back home.

17. PW1 recounted that on 17<sup>th</sup> October, 2012 they had sex without a condom. On 18<sup>th</sup> October, 2012 her father went to the appellant's home with 3 Police Officers and the area Chief. They were taken to Makupa Police Station where the appellant was locked in.

18. PW1 testified that she was taken for medical treatment and given medicine to prevent pregnancy. A P3 form dated 21<sup>st</sup> October, 2012 and a PRC form were filled. She went for a laboratory test also. PW1 stated that the appellant had asked her to be his wife but she did not respond.

19. PW2, DMO [name withheld] was PW1's father. He testified that a neighbour told him that there was something going on between PW1 and the appellant. When his son informed him that PW1 was not at home, he went to Makupa Police Station. The appellant's sister's cell phone was tracked to Kinyambu, Kibwezi. PW2 stated that he knew that PW1 was with the appellant. He was later told that the two were at a place known as Machinery. He went to the said place where he got 2 Police Officers from the DO's office. They were accompanied by the Chief of Dam Village. It was his evidence that they found PW1 and the appellant, who were arrested and taken to Makupa Police Station. He said that due to anger, he did not talk to PW2. He indicated that he had employed the appellant as a Watchman. PW2 took PW1 to Coast Province General Hospital (CPGH) where a P3 form was filled.

20. PW3, BDO [name withheld], PW2's brother supported the evidence of PW2 to the effect that PW1 ran away from home. He indicated that he received the said information from his nephew who was PW1's brother. He testified that he went to PW2's house where he confirmed that PW1 was not there. He added that she had carried her items as they did not see them in their house. PW3 stated that he asked his nephew where PW1 was and he said that he suspected that she had eloped with the appellant. They went to the appellant's house at Makande and found all his household items had been taken away. It was his evidence that with the assistance of Police Officers from Makupa Police Station, PW1 and the appellant were tracked to Kibwezi. PW3 further stated that the appellant was a Guard and tenant of PW2.

21. PW4 was No. 20008075017 APC Sammy Mwangangi Kabende of Kibwezi AP's office. He previously worked at Machinery. It was his evidence that he accompanied PW2 to Dam Machinery to trace PW1 and the appellant. They found the 2 in the appellant's home and took them to Machinery Division cells. They then escorted them to Makupa Police Station. PW4 stated that PW1 was alleging that she was married to the appellant.

22. Dr. Lawrence Ngone of CPGH testified as PW5. He had with him PW1's P3 form which showed that she went to CPGH on 2nd October, 2012. It was found that her hymen was not intact and it was not freshly ruptured. She had a whitish vaginal discharge in her private parts. The degree of injury was classified as maim. He signed the P3 form on 23rd November, 2012. PW5 produced the P3 form as p. exhibit 1, laboratory report as p. exhibit 2 and PRC form as p. exhibit 3.

23. The Investigating Officer testified as PW6. She was No. 86080 Corporal Keziah Aleyo Lenkuri from Makupa Police Station. She took PW1 to hospital after she was brought to Mombasa from Kibwezi where she had been taken for marriage. PW6 produced a letter from Makupa Police Station as p. exhibit 4 and PW1's birth certificate as p. exhibit 5. She stated that PW1 was 14 years old as per the birth certificate. PW6 testified that PW1 and the appellant were tracked to Kinyambu area in Kibwezi. She further testified that PW1 got pregnant and gave birth. PW6 confirmed that the plot that the appellant used to live in, belonged to PW1's father.

24. In his defence, the appellant admitted that he is from Kibwezi and explained that PW1 followed him to his house. He also stated that she followed him to their home (Kibwezi) and that she called her parents and told them that she was in Nairobi. He claimed that there was a grudge.

#### **ANALYSIS AND DETERMINATION**

25. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent conclusion, while bearing mind that it has neither seen nor heard the witnesses testify. In **Okeno vs Republic** (1972) EA 32, the Court of Appeal held 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 and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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.”**

26. The issues of determination are:-

- i. If the appellant understood the language of the court;**
- ii. Other issues raised;**
- iii. If the prosecution proved its case beyond reasonable doubt; and**
- iv. If the sentence was harsh or excessive.**

#### **If the appellant understood the language of the court**

27. The appellant was arraigned in court on 23<sup>rd</sup> October, 2012. The record of the said date indicates that there was interpretation of the proceedings that took place in the lower court from English to Kiswahili language. The charge was read out to the appellant in Kiswahili language which he understood. He responded by saying that the charge was not true. 6 prosecution witnesses testified and nowhere is it reflected on the record that the appellant informed the Trial Court that he could not follow the proceedings due to language barrier or that he did not understand the evidence of the witnesses due to the language that was being used in his case.

28. With regard to the appellant's suggestion that the language of the court should have been recorded throughout the proceedings, this court holds that the same was not necessary. Once the language that the appellant understood best was established and recorded in the court file, the court was bound to conduct the trial of the case in the said language. It was therefore not necessary to record the language of the

court on each day that the case was mentioned or heard.

#### **Other issues raised**

29. Although the appellant claimed in his grounds of appeal that there were contradictions in the prosecution's case, no submission was made to substantiate the same. The said claim was therefore made without a solid basis. Another issue that was brought forth was that the appellant had been kept in custody for the 3 days before he was taken to court, thereby violating the provisions of the constitution. Once again, Counsel for the appellant failed to elaborate on the said allegation. If indeed he was held for more than 24 hours before being charged, nothing stops him from moving the court through an appropriate petition. On the issue of a DNA, examination not having been done, it would have been superfluous to carry out a DNA analysis of the appellant to establish if he had defiled PW1, due to the fact that the appellant did not deny having had sex with PW1.

#### **If the prosecution proved its case beyond reasonable doubt**

30. PW1's age is not in issue as a birth certificate was produced which established that she was born on 2<sup>nd</sup> September, 1997. The offence herein occurred on diverse dates between 9th September, 2012 and 18<sup>th</sup> October, 2012. PW1 was therefore 15 years old as at the time of the alleged offence. She was therefore a minor who was not capable of giving consent for sexual intercourse to take place.

31. As for whether she was defiled, PW1 gave a graphic account of how she went to the appellant's house after her brother abused her for having a relationship with the appellant. She stayed with him for 3 days and they had sex several times. Thereafter they went to the appellant's home in the village at Kibwezi and carried on with their sexual liaison. On being re-examined by the prosecutor, she said that they had sex about 10 times.

32. It was submitted by the respondent's Counsel that PW1 due to her conduct behaved like an adult and he urged this court to be persuaded by 4 decisions of the High Court at Malindi. I have gone through the said decisions. Firstly, they were rendered by a court of concurrent jurisdiction to this one and are therefore not binding on this court. Secondly, the position of the law is that a minor is incapable of giving consent for sexual intercourse to take place. It therefore follows that even if a minor persistently pursues a man with avowed love or affection and offers herself to him for sex, the man must exercise a lot of restraint, as minors are protected by the law from engaging in sexual intercourse.

33. The present case is not one where the appellant can even pretend not to have known that PW1 was below 18 years of age. He was employed by her father as a Watchman. He must have known that PW1 was a pupil in Primary School. When PW1 went to his house to stay with him, he should have taken her right back to her father's house. He however took no action and even shipped her off to his home village in Machinery, Kibwezi where he continued living and having sex with her. PW2 and PW4 found them at the said place.

34. Medical evidence tendered through P3 and PRC forms proved that PW1's hymen was not intact and that it had not been freshly perforated. The foregoing proves that there was penetration of PW1's vagina. There is no doubt whatsoever that the prosecution proved its case beyond reasonable doubt. The defence put forth by the appellant cannot come to his aid. He admitted that he had been with PW1 after she followed him to his home. He did not deny having had sex with her.

#### **If the sentence was harsh or excessive**

35. In determining whether or not this court should interfere with the discretion of the Trial Court in sentencing, I make reference to the decision of the Court of Appeal in **Bernard Kimani Gacheru vs Republic**, Criminal Appeal No. 188 of 2000 where the said court stated as follows:-

**“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 the 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 discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”**

36. The appellant was sentenced to 20 years imprisonment. That is the minimum sentence provided by the provisions of Section 8(3) of the Sexual Offences Act, No. 3 of 2006. Sentencing is at the discretion of the Trial Court. There is nothing on record to show that the Hon. Magistrate did not exercise his discretion judiciously. I therefore uphold the sentence of 20 years imprisonment. The appeal is dismissed in its entirety. The appellant has 14 days right of appeal.

**DELIVERED, DATED and SIGNED at MOMBASA on this 19<sup>th</sup> day of July, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of: -**

Appellant present in person

Ms Ogwen, Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant