



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 8 OF 2018

BENARD LITOKHO MAKACHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by F. Makoyo, SRM, in Butere PMC Criminal Case No. 209 of 2014 dated 19/12/2017)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal as per the undated amended petition of appeal are in summary that:

- (1) The trial magistrate erred in law and in fact in proceeding with the case before the appellant was provided with copies of witness statements.
- (2) The trial magistrate erred in law and in fact in failing to consider that the appellant was not examined by a doctor as required by section 36 (1) of the Sexual Offence Act.
- (3) The trial magistrate erred in law and in fact in convicting the appellant without considering the contradictory hearsay evidence on record.
- (4) The trial court erred in law and in fact in convicting the appellant on uncorroborated evidence of a minor.
- (5) The trial magistrate erred in law and in fact in failing to give due regard to the weight of the appellant's defence.

2. The state opposed the appeal.

3. The particulars of the charge against the appellant were that on the 7th day of May, 2014 at [particulars withheld] Village, Sub-location Marama North Location in Butere District within Kakamega County intentionally caused his penis to penetrate the vagina of MN (herein referred to as the complainant), a child aged 14 years.

Case for prosecution -

4. The case for the prosecution was that the complainant was in the year 2014 a class 8 pupil aged 14 years. She was staying with her grandmother PW3 at [particulars withheld]. The appellant was a bicycle repairer outside the home of the complainant's grandmother. He used to keep his tools at the home of the grandmother to the complainant.

5. That on the material night the complainant and her sister PW2 aged 10 years were sleeping in the house of PW3's son. PW3 was sleeping in a separate house. The complainant had fallen asleep at a sofa set in the sitting room where she had been doing studies. She had left the lamp on when she fell asleep. The complainant's sister PW2 was sleeping in the bedroom of the house.

6. That at 2 a.m. PW2 was woken up by a thud on the window of the kitchen area. She went to check and saw a person at the window. The person flashed a torch at her and ordered to go back to bed. She did not recognize who the person was. She went back to her bed.

7. Meanwhile as the complainant slept she heard a thud on the window. She woke up. Someone fell into the room through the window. She recognized the person as the appellant through the aid of the hurricane lamplight. The complainant screamed. The appellant held her at the neck and started to strangle her. He produced a knife from his pocket and warned her that he was going to kill her if she screamed.

8. The complainant's sister PW2 went to the sitting room and found a person lying on the complainant. The person hit her and told her to go back to sleep. She recognized the person as the appellant through the aid of light that was on in the sitting room. She went back to the bedroom. The appellant then pinned the complainant onto the sofa set and forcibly removed her under pant and defiled her. After he was through he got up and put on his underwear. He opened the door and ran out. The complainant's sister went to the sitting room. The two went and woke up their grandmother and informed her of what had happened. On day break at 7 a.m. the complainant's uncle took the complainant to Bukura Health Centre. She was examined. They reported at Butere police station. The complainant was also examined at Butere District Hospital. A P3 form was issued to her. It was completed by a clinical officer at Butere District Hospital who found that the girl's hymen was absent. The appellant was arrested and charged with the offence. During the hearing, the investigating officer PW5 produced the girl's birth certificate as exhibit – P.Ex1. It indicated that she was born on 1/8/2000. The investigating officer also produced as exhibit a pant that the complainant was wearing at the time of the assault, P.Ex 2. The Clinical Officer PW4 produced treatment notes and the P3 form as exhibits, P.Ex 3 and 4 respectively.

Defence Case -

9. When placed to his defence the appellant gave unsworn testimony and stated that he is a motor cycle repairman near the house of the complainant's uncle. That he used to keep his tools at the house of the complainant's uncle at a monthly rent of Kshs.1000/=. That on 6/5/2014 the complainant's uncle demanded for rent. He did not have the money. The complainant's uncle threatened to do something bad to him. On 7/5/2014, he went to pay the money. He found his toolbox having been thrown onto the road. He started to pick the tools. The complainant's grandmother went there and ordered him to leave the area. Later on the same day at 8 p.m. he was arrested. He was charged.

Analysis and Determination -

10. This is a first appeal. The duty of the court is to re-examine afresh the evidence adduced at the lower court, re-evaluate it and draw its own conclusions while bearing in mind that it did not see or hear the witnesses testify – See **Okeno –Vs- Republic (1972) E.A 32.**

11. The advocates for the appellant **Shivachi Mutoka & Company Advocates** submitted that the prosecution witnesses were not credible and that their evidence was highly unreliable. That the complainant stated in her evidence that the appellant entered into the sitting room through the bedroom window. That her sister P.W.2 said that he did so through the kitchen window. That the complainant's pant did not have blood stains when it was produced in court. That the P3 form indicates that the complainant reported to the police on 9/5/14 while the complainant testified that they reported at Butere

on 8/5/14. That the treatment notes indicate the offence to have occurred on 6/5/14 while the P3 form indicates that the offence took place on 7/5/14. The advocates submitted that the contradictory evidence was not sufficient to prove the charge.

12. The prosecution counsel on his part submitted that any contradictions that may be there in the case were not so grave as to cause injustice to the appellant.

13. The way to treat contradictions in a case is as was stated by the Court of Appeal in **Jackson Mwanzia Musembi –Vs- Republic (2017) eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda, Cr. Appeal No. 139 of 2001(2003) UG CA,6** where the court held that:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

14. The complainant did not state in her evidence that the appellant entered into the house through the bedroom window. She only mentioned a window and she was not asked whether it was the bedroom or kitchen window. There is thereby no contradiction in the evidence of the complainant and PW2 on the issue. The complainant said that her panties had blood stains when she was seen by the clinical officer and that she washed them thereafter. Similarly there is no contradiction on the issue.

15. The complainant testified that they went to Butere police station on 7/5/14 but that they arrived there late and they were referred to go back on the following day. That they went back on the following day but they did not find the officer who was dealing with her case. The P3 form indicates that the incident was reported at Butere Police Station on 9/5/14. The fact that the complainant said that they reported on the 8th is not a material contradiction in the case as she said that they also went to the police station on that day. The complainant did not intentionally want to mislead the court when she said that they reported the incident on 8/5/14. The contradiction on the date the case was reported to the police did not go to the root of the case. The fact is that the matter was reported to the police.

16. Section 36 (1) of the Sexual Offences Act gives power to the court to order samples being taken from an accused person for the purposes of conducting forensic or other scientific testing including a DNA test in order to gather evidence and ascertain whether or not an accused person committed an offence. This was not done in the case for the appellant. His advocates submitted that there was insufficient evidence to link the appellant with the offence. The state prosecutor on his part submitted that the medical evidence from the clinical officer PW4 proved that there was penetration.

17. It is clear that Section 36 (1) of the Sexual Offences Act is not couched in mandatory terms. The provisions of the section can only be resorted to when there is reasons to do so. In the case against the appellant there was no spermatozoa found on the complainant or anything else that would have been compared with samples taken from the appellant. It was thereby not necessary to order samples to be taken from the appellant for purpose of ascertaining whether he had committed the offence. The argument is thereby dismissed.

18. The appellant contended that he was not provided with copies of witness statements before the evidence was taken. His advocate submitted that the appellant was in the premises denied his right to fair trial as provided by article 50 (2) (b) and (j) of the Constitution. The article provides that:-

“Every accused person has the right to a fair trial which includes the right –

(b) to be informed of the charge with sufficient detail to answer it.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to

have reasonable access to that evidence.”

19. The right to a fair trial is one of those fundamental rights that may not be limited by virtue of the provisions of Article 25 (c) of the Constitution. The right to be provided with witness statements and documentary exhibits was stressed in the case of **Thomas Patrick Gilbert Cholmondley –Vs- Republic** where the Court of Appeal held that:-

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”

20. In **Simion Githaka Malombe –Vs- Republic Nyeri Criminal Appeal No. 314 of 2010 (2015) eKLR** the Court of Appeal quashed a conviction on the ground that the prosecution had failed to furnish the appellant with witness statements despite the appellant requesting for them and the court making an order for the appellant to be furnished with the same. The court said that the denial of the said documents reduced the trial *“to a farcical sham”*.

21. In **Simon Ndichu Kahoro –Vs- Republic Nairobi Criminal Appeal No. 69 of 2015 (2016) eKLR** where the trial magistrate had ordered that witness statements be furnished to the appellant but the trial proceeded without the appellant being furnished with the same, the Court of Appeal held that the accused’s right to a fair trial were violated on that account. Said the court:-

“All constitutional provisions are important. Article 50 enshrines rights to a fair trial under the Bill of rights. It is our duty as Judges to whom the people of Kenya rely to protect their rights and a fundamental freedoms to live up to their expectations. It is not lost to us that the right to a fair trial is one of the fundamental rights and freedoms which may not be limited by virtue of the provisions of Article 25 (c) of the same constitution. We do not think for a moment that the fact the appellant cross-examined the witnesses cured the breach of his said rights. After all, the right to cross-examine is itself an independent right by virtue of Sub-article 2 (k) of Article 50.”

The court however gave a rider that:-

“We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case.”

22. The trial record in the case for the appellant herein indicates that when the plea was taken on 20/5/14, the trial magistrate made an order for the appellant to be supplied with copies of witness statements and documentary exhibits. When the matter came up for hearing on 1/7/2014 the appellant did not raise any issue of not having been supplied with the said documents. He instead stated that he was ready and the hearing commenced. Later on 8/8/2014 the appellant sought to be furnished with a copy of the P3 form. The trial court made an order to that effect. It appears that the appellant had not been supplied with the same and the court repeated the same orders on 20/8/2014. When the clinical officer appeared in court on 28/1/15 ready to testify, the appellant complained that he had not been supplied with a copy of the P3 form and charge sheet. The court thereupon adjourned the matter again. When the clinical officer eventually appeared in court on 8/5/2015 the appellant did not raise any issue of not having been supplied with copies of the P3 form and charge sheet. He instead said that he was ready to proceed with the matter.

23. It is clear from the above that the court made orders for the appellant to be supplied with copies of witness statements, charge sheet and P3 form. The fact that the appellant was thereafter ready to proceed with the matter after the court made the orders draws a conclusion that he had been supplied with the said

documents. It took some time for the appellant to be supplied with the P3 form. At the time he raised the complaint about the P3 form he did not raise any issue of not having been supplied with witness statements. I find that the appellant was supplied with the above said documents. There was no violation of the appellant's rights of a fair trial under article 50 (2) (b) and (j) of the Constitution.

24. It was submitted that the identification of the appellant was not adequate. That the complainant's sister PW2 said in her evidence that the appellant had a torch that he flashed at her. That the complainant did not mention that the appellant had a torch. That if the person had a torch he most likely shone it on both witnesses which would have prevented eye identification of the appellant. That the witnesses did not indicate that they identified the appellant by voice. Therefore that there was no credible identification of the appellant.

25. The prosecution counsel, **Mr. Ng'etich**, submitted that the evidence was one of recognition as witnesses knew the appellant. That the evidence was corroborative.

26. Evidence of identification under difficult circumstances was dealt with by the Court of Appeal in **Cleophas Otieno Wamunga –Vs- Republic, Kisumu Criminal Appeal No.20 of 1989** where the court stated as follows:-

“We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them..... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said:-

‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’”

In **Lesarau –Vs- Republic (1988) KLR 783**, the said court cautioned that even where identification is based on recognition by reason of long acquaintance the court should be wary of the possibility of mistaken identity.

27. In the instant case, both PW1 and PW2 said that they knew the appellant before. This was confirmed by their grandmother who said that the appellant used to operate a business outside her house. The appellant himself admitted that he used to operate his business at the said place. There is then no doubt that PW1 and PW2 knew the appellant. The evidence was one of recognition rather than identification of a stranger.

28. Both PW1 and PW2 stated that they recognized the appellant because there was a hurricane lamp on in the house. That they reported to their grandmother PW3 that the appellant is the person they had seen in the house. The trial magistrate considered the evidence and believed it. The magistrate stated that the witnesses had plenty of time to see, decipher and discern the appellant as the room was well lit up by hurricane lamplight.

29. The complainant and her sister were minors. They gave their respective evidence on oath. They were cross-examined at length by the appellant. The witnesses stuck to their evidence. They had immediately reported to their grandmother about the incident. They mentioned the name of the appellant to their

grandmother. On my independent re-evaluation of the evidence, I am satisfied that the two witnesses recognized the appellant by aid of the hurricane lamp light. The witnesses PW1 and PW2 immediately after the ordeal mentioned the appellant to their grandmother PW3. There is no substance in the arguments that the evidence on identification was not credible.

30. The ingredients of the offence of defilement are proof of the age of the victim, proof of penetration and the identity of the perpetrator – See **Dominic Kibet Mwareng –Vs- Republic (2013) eKLR**. Proof of the age of the complainant in this case was proved by the birth certificate that indicated that the complainant was born on 1/8/2000. In May 2014 she was thereby aged 13 years and 9 months.

31. The treatment notes and the P3 form produced in court indicated that the complainant had a small tear on the labia. This corroborated the evidence of the complainant that she had been defiled.

32. The appellant was identified by the complainant and her sister PW1 as the person who committed the offence. The appellant's defence did not displace the evidence of the prosecution witnesses. If the appellant had a dispute with the complainant's uncle over rent, this issue did not involve the complainant and her sister PW2. There was no reason for the complainant and her sister to lie against him. The charge against the appellant was proved beyond reasonable doubt. The appeal on conviction is thereby dismissed.

Sentence –

33. The appellant was charged under the provisions of section 8 (1) and as read with section 8 (3) of the Sexual Offences Act that provides that:-

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

34. Sentencing is a discretion of the trial court. In **Francis Muthee Mwangi –Vs- Republic (2016) eKLR**, the court was of the view that:-

“Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.”

35. In **Denis Kinyua Njeru –Vs- Republic (2017) eKLR** the Court of Appeal expressed the view that the sentences provided under section 8 of the Sexual Offences are “*straight jacket*” penalties that left no room for the exercise of discretion by a sentencing court. However, recently in **Evans Wanjala Wanyonyi – Vs- Republic [2019] eKLR**, the court held that:-

“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to

impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:

In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.

25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years.”

36. In view of the above decision of the Court of Appeal the minimum sentence of 20 years imprisonment provided in section 8 (3) of the Sexual Offences Act can only be a maximum sentence. The court has discretion to impose a lesser sentence.

37. I have considered that the appellant defiled a school girl who was barely 14 years of age. He did so by breaking into her house through the window. I am of the view that a sentence of 15 years imprisonment is an appropriate sentence. The sentence of 20 years imprisonment imposed by the trial court is set aside and substituted with one of 15 years imprisonment.

Delivered, dated and signed in open court at Kakamega this 11th day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma for state

No appearance for appellant

Appellant - present

Court Assistant - George

14 days right of appeal.