



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 59 OF 2018

BEN RODGERS MUTHUI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the conviction and sentence in Shanzu SPM SO. Case No. 75 of 2017 (Hon. B. Koech SRM) delivered on 9/3/2018)

J U D G M E N T

1. **Ben Rodgers Muthui (“the Appellant”)** was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (2) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 3rd July, 2017 at Maweni area Kisauni sub-county in Mombasa County, the appellant unlawfully caused his penis to penetrate the vagina of RD a child aged 10 years.
2. There was an alternative charge of committing an indecent act with a child contrary to **section 11 (1) of the Sexual Offences Act No.3 of 2006 (SOA)**. It was alleged that on 3rd July, 2017 at Maweni area Kisauni sub-county in Mombasa County, the appellant unlawfully touched the vagina of RD a child aged 10 years with his penis.
3. The appellant denied the charge and after trial, he was found guilty of the alternative charge, was convicted and sentenced to 15 years imprisonment. He has now appealed to this court against both conviction and sentence.
4. This being a first appellate court, the court is enjoined to re-appraise the evidence afresh and come to its own independent findings and make its own conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA)**.
5. The brief facts of the case were that on 3/7/2017, the complainant (**PW2**) was playing with her younger sister **PW5** when the appellant called them into his house. He gave **PW5** money to go and buy a cake and remained behind with the complainant. The appellant then closed the door and defiled the complainant. She felt pain.
6. **PW5** told the court that she left the complainant with the appellant in his house and went to play outside. When she returned, she found the appellant defiling the complainant. She later reported the incident to her mother.
7. **PW1 NMM**, the mother to the complainant testified that the appellant was her neighbor and a loader at Kongowea market. She also used to do business at the same market. On the material day, the appellant did not go to Kongowea. She recalled that when she came home that day in the evening, **PW2** was complaining of stomach-ache.
8. The following day in the evening, her younger daughter **PW5**, reported to her that the previous day the appellant had defiled the complainant. She inquired from the complainant who confirmed the fact. She reported the incident to the police and took the complainant to Coast General Hospital.
9. **PW4 Dr. Salim** produced the P3 and PRC forms which showed that the complainant’s vagina was hypererethic and the hymen broken. The doctor who had examined the complainant had opined that she had been defiled.
10. The case was investigated by **PW3 PC (w) Rose Wanjala Webi**. She told the court that a report was made at the station on 5/7/2017. She interviewed the complainant who confirmed to her that the appellant had defiled her. She accompanied the child to hospital where she was examined She produced the Clinic Card which showed that the complainant was born on 17/7/2007.
11. In his defence, the appellant denied having defiled the complainant and told the court that he was arrested on 14/7/2017 and taken to Nyalı Police Station. That he was being framed up by **PW1** because she wanted to mend up with her husband.

12. In his petition, the appellant set out four grounds of appeal, namely; **that the trial court relied on insufficient evidence of a minor that was not corroborated; the court failed to consider the contradictions between the evidence of the complainant and the doctor; that the trial court failed to consider his mitigation and that the sentence was excessive in the circumstances; and that his defence was not considered.**

13. In his submissions, the appellant argued all the grounds together. That the evidence produced was insufficient. That the trial court put unnecessary reliance on **section 124 of the Evidence Act** without considering that such evidence still required corroboration. That there was contradiction in the prosecution evidence as the injuries to the complainant were one month old according to **PW3** while **PW4** stated that the complainant went to hospital after 2 days of the incident. That the evidence of the complainant was contradictory as to the time when the incident occurred. That the sentence of 15 years was harsh and should be reduced to 5 years on the authority of **Samuel Achieng Alego v. Republic [2018] eKLR**.

14. The appeal was opposed by the prosecution. **Mr. Fedha**, Learned Prosecutor submitted that the appellant was properly convicted with the alternative charge of committing an indecent act with a child. That the age of the minor had been proved; that the contradictions alluded to by the appellant were not material; that the sentence was not excessive and should be upheld. The case of **Dominic Mwilaria v. Republic [2018] eKLR** was relied on in support of maintaining the sentence.

15. The first ground was that the trial court erred in relying on insufficient evidence of a minor and put unnecessary reliance on **section 124 of the Evidence Act** to convict the appellant. The evidence on record was that the two sisters, **PW2** and **PW5** were playing outside their house when the appellant called **PW2** who obliged. **PW5** followed her. The appellant then gave **PW5** money to go and buy a cake and remained behind with **PW2**.

16. The appellant then removed **PW1**'s panty and did bad manners to her. She is recorded as telling the court. **"He took his 'dudu' and put it here (showing area of vagina)"**.

17. **Section 124 of the Evidence Act, Cap 80 Laws of Kenya** provides: -

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15), when the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him

Provided that when in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth"

18. It is clear from the foregoing that, in sexual offences such as the present one, corroboration is not mandatory. There is nowhere in the judgment of the trial court that it over emphasized **section 124** aforesaid. There was enough evidence that corroborated the testimony of **PW2**. **PW5** told the court how she returned to the house and found the complainant doing **'tabia mbaya'** with the appellant.

19. The **P3** form showed that the complainant had hyperemic hymen. That meant that the hymen was injured. The doctor did not conclude that there had been any penetration and therefore there was no defilement. On the other hand, the **PRC** showed that the complainant's vagina was hyperemic. The medical reports were corroborative of the story given by both **PW2** and **PW5** that the appellant had attempted to defile the complainant.

20. In this regard, this court is satisfied that contrary to the appellant's contention, there was enough evidence on which the trial court was entitled to return a conviction as it did. That ground fails.

21. The appellant complained that the trial court failed to consider the contradictions in the testimony of **PW2** and the doctor. That **PW2** testified that she was defiled on 3/7/2017 yet the doctor found that her injuries were a month old.

22. While the **PRC** was filled on 5/7/2017, the **P3** form was filled on 3/8/2017. The **P3** is usually filled using the **PRC** as stated by **PW4**. The period between 3/7/2017 when **PW2** stated she was defiled and 3/8/2017 when the **P3** form was filled was clearly one month. The injuries were therefore a month old. There was no contradiction as contended by the appellant.

23. The appellant also complained that the trial court failed to consider the contradictions in the testimony of **PW2**. That she told the court that the incident happened in the morning and at lunch hour. That it was not clear when the incident occurred.

24. The meaning and tenor of the testimony of **PW2** is that, she went to the appellant's house twice, in the morning and at lunch hour. However, the defilement took place in the afternoon during lunch. There was no contradiction whatsoever.

25. However, if that was a contradiction, the same was too minor to weaken the prosecution case. In **Erick Onyango Ondeng v. Republic [2014] eKLR**, the Court of Appeal quoted with approval the holding in the Ugandan Court of Appeal in **Twehangane Alfred v Uganda Cr. A. No.139 of 2001, [2003] UGCA**. That Court held:-

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless 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"

26. That ground fails.

27. The other complaint was that the appellant's defence was not considered. In the judgment, the trial court noted that the appellant did not put to the prosecution witnesses the allegations he made in his defence. The appellant had stated that the complainant's mother had framed him because she wanted to reconcile with the father of the complainant. The trial court found this to have no basis.

28. Further, the court found that the appellant lied when he stated in cross-examination that he did not have the witness statements yet he had told the court on 26/7/2017, that he had those statements.

29. From the foregoing, it is clear that the trial court did consider and analyze the appellant's defence and found it to be an afterthought. This court agrees with the conclusions of the trial court. That ground has no basis and it fails.

30. The final ground was that the court did not consider the appellant's mitigation and that the sentence was excessive. The record shows that when called upon to mitigate, the appellant asked for leniency and stated that he was framed up. He never showed any remorse. He never told the court any mitigating circumstances that the court could take into consideration when meting out the sentence.

31. The court recorded that it had considered the appellant's mitigation. That he was a first offender and the circumstances of the offence. It also considered that the victim was 10 years old and that the complainant had put trust on the appellant which he betrayed. That it is for that reason that the trial court enhanced the sentence from the minimum 10 years to 15 years.

32. In **Benard Kimani Gacheru v. Republic [2002] eKLR**, the Court of Appeal held:-

“It is now settled law, ..., that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must rest on the facts of each case. On appeal, the appellate court will not easily interfere with 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 the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”.

33. The appellant contends that the sentence was excessive. That the trial court did not take into consideration the period he had spent in custody since he was charged as provided for under **section 333 (2) of the Criminal Procedure Code**.

34. The appellant was admitted to bond on 5/12/2017 having spent 5 months in custody. The trial court does not seem to have taken into consideration that fact when passing the sentence and in enhancing the same from the minimum 10 years to the high of 15 years.

35. I have considered the authority relied on by the appellant. I agree with the reasoning therein that it is no longer necessary to be tied to the mandatory minimum sentences set out in the SOA by dint of the holding in the case of **Francis Karioko Muruatetu & Another v. Republic [2017]eKLR**.

36. For the foregoing reasons, I dismiss the appel on conviction. I will interfere with the discretion of the trial court. Considering the circumstances of this case, I will set aside the sentence of 15 years imposed by the trial court and substitute therefor with a sentence of 7 years. The sentence is to run from 9/3/2018.

DATED and **DELIVERED** at Mombasa this 11th day of September, 2019.

A. MABEYA

JUDGE