



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 77 OF 2016

JEREMIAH MUTIWA MUSEE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kitui Chief Magistrate's Court Criminal Case (S.O.) No. 110 of 2014 by Hon. E. Boke (PM) on 10/11/16)

J U D G M E N T

1. **Jeremiah Mutua Musee**, the Appellant was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Sub-Section (3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **25th** day of **December, 2014** at around **4.00 p.m.** in **Kitui County**, unlawfully and intentionally did an act of penetration to **NJN** a child aged **14 years** by inserting his genital organ namely penis into her genital organs namely vagina.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on **25th** day of **December, 2014** at around **4.00 p.m.** in **Kitui County**, committed an act of indecency with **NJN** a child aged **14 years** by touching her private parts namely vagina, breast and buttocks using his hands.
3. Having been taken through full trial, he was found guilty, convicted on the main Count of Defilement and sentenced to **twenty-five (25) years imprisonment**.
4. Aggrieved, he appeals on grounds, as amended, that; the trial Magistrate relied upon penetration without considering that there was a contradiction on the information on the PRC form and the P3 form; no documents were produced to prove the age of the Complainant, the enmity between the Appellant and PW1, the father of the Complainant was not considered and the strong defence put up was rejected.
5. Facts of the case were that on the **25th December, 2014**, the Complainant was on her way home from church at about **4.00 p.m.** when she encountered the Appellant who told her that her mother was calling her. He proceeded to hold her hand, pulled her into the bush, removed her pant and violated her sexually. She went home and informed her mother who told her father. The following day she went to **Muthale Hospital** where she was given some medication. Later, they went to **Kauwi Sub-District Hospital** where she was examined. The case was reported to the police who arrested the Appellant, investigated and caused him to be charged.
6. Upon being put on his defence, the Appellant denied having committed the offence. He denied having been home on the material date as he had gone to see a patient at Kitui General Hospital where he stayed until **5.00 p.m.** and returned home but arrived between **7.30 p.m. – 8.00 p.m.** The following day he went to his place of work where he stayed until **5.00 p.m.** On **27th** he was arrested. Further, he stated that since PW1 and PW2 told the Court that he used to work with the Complainant's father, seemingly what transpired was as a result of work related differences. That the Complainant's father had threatened to ensure something carries him like a motor-vehicle. And the allegations came up before two (2) weeks lapsed.
7. The Appeal was canvassed by way of written submissions. It was urged that the two (2) medical practitioners who examined the Complainant (PW4 and PW6) gave contradictory evidence and it was questionable for the Court to believe PW4 and disregard the evidence of PW6. This in his opinion was in violation of his rights. That a Birth Certificate was the only document that could conclusively prove the age of the Complainant. In this regard, he relied on the case of **Hillary Nyongesa vs. Republic (Eldoret) Criminal Appeal No. 123 of 2009** where **Mwilu, J.** stated thus:

“Age is such a critical aspect in Sexual Offences that it has to be proved conclusively. Anything else is not good at all. It will not suffice. And it becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

8. And, that the trial Court failed to consider that because of the enmity that existed PW1 and PW2 were not credible witnesses and the defence put up that was strong was disregarded.

9. The Respondent (State) opposed the Appeal. It was urged that the age of the minor was proved by evidence of the Immunization Card, she positively identified the Appellant as the person who defiled her, an act that was proved by evidence of PW4 and PW6.

10. This being a first Appellate Court, I am under a duty to subject evidence adduced before the trial Court to a fresh evaluation and analysis and draw my own conclusions. In doing so I must bear in mind the fact that I neither saw nor heard any of the witnesses therefore unable to comment on their demeanor (**See Kiilu & Another vs. Republic (2005) 1 KLR 174**).

11. The Court was obligated to satisfy itself of the existence of the key elements of defilement which were proof of the age of the victim, penetration of her genitalia by a male genitalia and that the Appellant was the perpetrator of the act.

12. One of the Complaints of the Appellant was that the age of the Complainant was not proved. In the case of **Mwalengo Chichoro Mwajembe vs. Republic Criminal Appeal No. 24 of 2015 (UR)** the Court of Appeal stated thus:

“... the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable ...”

PW1, NJ, a standard 7 pupil stated that she was 15 years old. PW2 FMM, her mother told the Court that the Complainant was born in the year 2000. She adduced in evidence an Immunization Card in the name of EN. Names of the parents are indicated as J and M. In her evidence PW1 stated that her father is known as J while her mother is known as FJ. According to the document the Complainant was born on 8th April, 2000. This was sufficient proof that the Complainant was a child aged fourteen (14) years and at the point of testifying she was fifteen (15) years old.

13. On the issue of penetration, it is questioned if indeed there was any penetration as required by the law. Penetration is defined by Section 2 of the **Sexual Offences Act** thus:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

14. It was the evidence of the Complainant that the Appellant inserted his male sex organ into her vagina. To achieve his sexual pleasure, he committed the episodes of sex but she could not scream as he covered her mouth with his hand.

15. On the 26th December, 2014, the Complainant was seen at **Kauwi Sub-District Hospital**. PW4 **Kennedy Kioko**, a Clinical Officer who examined her and filled a P3 form (Medical Examination Report) found her with a freshly broken hymen. The vaginal canal was inflamed and reddish. PW6 **Esau Mukeu of Muthale Mission Hospital** where the Complainant was taken at the outset filled the Post Rape Care Form (PRC) in her regard. He found the Complainant’s outer vagina normal but there was discharge and the hymen was broken.

Both clinicians were in agreement as to the presence of some discharge and the broken hymen. PW6 did not comment on the vaginal canal that PW4 found inflamed and reddish. Therefore, the alleged contradiction was immaterial.

16. In the case of **Erick Onyango Ondeng vs. Republic (2014) eKLR** it was held that:

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence ...”

The fact of a freshly broken hymen was proof of complete penetration.

17. The Complainant identified the Appellant as the perpetrator of the act. The Appellant came up with an alibi defence. He urged that on the material date he spent the day at Kitui District Hospital where he had a patient. Where an Accused person argues that he could not have committed the offence because he was not where the act was committed, the Prosecution is duty bound to disprove the allegation. However, in the case of **Republic vs. Sukha Singh & Others (1939) 6 EA CA 145** the Court of Appeal held that:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

18. This is a case where the Complainant testified but on being cross examined the Appellant did not suggest that he was not in the vicinity on the fateful date. All other witnesses testified but no allegation of that nature was raised. In his defence, he talked of ‘a sick person’ ... a ‘patient’ at Kitui Hospital without any specificity. This was a mere allegation.

19. He also contends that he had work related disagreement with the Complainant's father. The father of the Complainant did not testify. PW2 admitted on cross examination that the Appellant once worked with her husband, the father of the Complainant but she could not tell why he (Appellant) stopped working. It was not suggested to her that at the time of the offence he was working with the Complainant's father and they had a disagreement. From the foregoing it is apparent that the Prosecution adduced sufficient evidence that comprehensively demolished the Appellant's alibi defence and allegation of some alleged enmity between him and the Complainant's father.

20. This is a case where the Prosecution proved all ingredients of offence. Therefore, the Court did not misdirect itself either on fact or law in reaching the decision to convict the Appellant. In the premises, I uphold the conviction.

21. On sentence, in the case of **Evans Wangila Wanyonyi vs. Republic (2019) Eklr** the Appellant was charged in the primary case before the lower court with the offence of defiling a 14 year old minor. The trial court sentenced him to fifteen (15) years imprisonment being the minimum prescribed sentence for an offence of defilement of a child of her age. On appeal, the High Court enhanced the sentence to twenty (20) years imprisonment. On appeal to the Court of Appeal, it rendered itself thus:

“On enhanced 20 years 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 V Republic (2018) e KLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri V. Republic 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 and 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.

“In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & Another -vs- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng -vs- Republic (supra) and Jared Koita Injiri -vs- Republic, Kisumu Criminal Appeal No.93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 years 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 term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015”.

17. Guided by the reasoning above, I do take into consideration the mitigating factors, the fact of the Appellant having been a first offender and there being room to reform. In the premises, I set aside the sentence meted out, and substitute it with **twenty (20) years imprisonment, to be effective from the date of conviction and sentence in the trial court.**

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of September, 2019.

L. N. MUTENDE

JUDGE