



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CORAM: E. K. O. OGOLA, J.

CRIMINAL APPEAL NO. 168 OF 2018

KENEDY MUKANGURA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence by M. L. Nabibya, SRM, dated 7th November, 2018 in Hamisi Magistrates Court Criminal Case No. 723 of 2017)

JUDGMENT

1. The appellant was charged with offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. Particulars of the offence are that on diverse dates between 1st April, 2017 and 30th November, 2017 at [particulars withheld] Village, Kigama Sub-location unlawfully caused his penis to penetrate the vagina of R. A. a girl aged 6 years. In the alternative the appellant was accused of committing an offence of indecent act with a child contrary to Section 11 (1) of Sexual Offences Act, that between the alleged dates he caused his penis to be in contact with the girl's vagina.

2. The appellant was convicted and sentenced to serve life imprisonment.

3. Being not satisfied with both the conviction and the sentence the appellant has filed this appeal raising the following grounds of appeal:-

1. THAT the prosecution failed to prove penetration.

2. THAT the prosecution failed to determine the probable type of weapon that caused the injuries.

3. THAT the trial court failed to observe that nothing medically linked me with the alleged offence.

4. THAT I be served with the trial court records to enable me erect more grounds.

4. To prove the offence the prosecution called 4 witnesses. PW1 was the complainant who was six (6) years old at the time of the offence. The court satisfied itself that the witness was intelligent enough to give evidence without any intermediary. PW1 testified that she was in standard one (1) at [particulars withheld] in Kakamega. She testified that she knew the appellant, who defiled her in a bedroom belonging to her father. The appellant went into the bedroom where the complainant was in alone, lifted up her dress and defiled her. The action was painful and she bled from her vagina. After the act the appellant told the complainant not to inform anybody about the act. The complainant did not inform anybody that day, but later informed her father who said nothing about it. Her grandmother later came to know about it and took the complainant to hospital. This was the second time the appellant was defiling the complainant. The appellant was known to the complainant since the appellant used to go to the complainant's house and eat.

5. On cross examination the complainant insisted that the appellant defiled her. Upon being cross-examined by court the complainant said that both the appellant and the complainant's father used to defile her.

6. PW2 was a clinical officer who testified about the medical records of the complainant. The records were made on 2/12/17 when the complainant was accompanied by her aunt and complained of lower stomach pains. She had a discharge from her vagina. Examination revealed a small tear connecting to the urethra. The conclusion was that she had a vaginal infection and her hymen was missing. It was concluded that she had a case of serial defilement over time. Urine passed freely. The minor said she had been defiled by her father and 4

other men who were her father's drinking friends. PW2 filed a P3 form which was submitted in court. This testimony was corroborated by evidence of PW3. PW4 was arresting and investigating officer. PW4 produced birth certificate as prosecution exhibit No. 4.

7. The trial magistrate then put the appellant to his defence. The appellant gave unsworn statement in which he totally denied the offence and stated that he was being framed.

8. This being the first appeal this court has the duty to re-evaluate the evidence and reach its own conclusion on the matter.

9. The appellant states that he was framed and that he did not commit the offence. The appellant also states that the age of the complainant was not ascertained. The appellant also states that there is no corroboration of evidence. The appellant also states that he was not given a fair trial.

10. The prosecution has opposed these allegations stating that there was fair trial, that the appellant was a frequent visitor to the complainant's home and that there was no need for corroboration under S. 124 of the Evidence Act.

11. I have considered the appeal. I will address the issues as stated in the grounds of appeal. The appellant alleges unfair trial which, is not true. The appellant was given time to cross examine the witnesses that testified. He was also given a chance to defend himself. He was also provided with documents which the prosecution relied on. The appellant also states that there was no corroboration. However, under S. 124 of Evidence Act there is no requirement for corroboration. It is the evidence of the complainant in sexual offences. S. 124 of Evidence Act states as follows:-

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person of 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 where in a criminal case involving 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.”

12. On the issue of penetration prosecution exhibit No. 1 and 2 prove that there was penetration. On identification the victim stated that the person who defiled her was a friend to her father. That was not the first time the appellant had gone to the victim's home. He was well known to the victim. The other crucial element which needed to be proved was age, which was proved by prosecution exhibit No. 4 which was certificate of birth showing the victim was six years old.

13. The evidence of the prosecution was watertight and was not displaced by the evidence of the appellant. On the issue of sentence Mr. Ongige for the DPP submitted, correctly in my view, that the court now has discretion on the issue. Counsel urged the court to impose a sentence of 25 years if the appeal fails on conviction.

14. From the foregoing it is the finding of this Court that the conviction of the appellant was safe.

15. On sentence, this court has on the strength of *Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR* the authority to make a fresh sentence since the life sentence in the matter was arrived at as a result of the mandatory sections of the law. This Court therefore sets aside and vacates the life imprisonment given to the appellant and substitutes it with a term of Eighteen (18) years in jail.

That is the Judgment of the court.

Right of appeal in 14 days.

Delivered, dated and signed in open court at Kakamega this 13th day of September, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Ongige – State Counsel

Appellant -

Court Assistant – Mr. Erick