



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 39 OF 2017

STEPHEN MWAURA NGUGI ALIAS MBALUTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Limuru Senior Principal Magistrate's Court Criminal Case No. 886 of 2015** by **Hon. K. M. Njalale (SRM)** on 03/03/17)*

J U D G M E N T

1. Upon arraignment, **Stephen Mwaura Ngugi alias Mbaluto** was charged with the offence of **Attempted Defilement of a Girl** contrary to **Section 9(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on **7th October, 2015** at about **9.00 a.m.** in **Kiambu County** attempted to commit an act which would cause penetration with **MNK** a child aged **13 years old**.

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 **7th October, 2015** at about **9.00 a.m.** in **Kiambu County** committed an indecent act with **MNK** a child aged **13 years old**.

3. After being taken through full trial he was convicted for the offence of committing an Indecent Act with a Child and sentenced to **ten (10) years imprisonment**.

4. Aggrieved, he appeals on grounds that:

- The Honourable Trial Magistrate erred in matters of law and fact by failing to find that the offence of attempted defilement was not established by the evidence tendered.
- The Honourable Trial Magistrate erred in matters of law and fact by failing to find that **Section 77** of the **Evidence Act** was not complied with when the medical evidence was tendered in Court.
- The Honourable Trial Magistrate erred in matters of law and fact by failing to find that the explicit contradictions on record not only impugned on the credibility of the various witnesses to say the truth but on the Prosecution's burden of prove in the whole case.
- The Honourable Trial Magistrate erred in matters of law and fact by failing to find that essential witnesses and exhibits necessary to corroborate the Prosecution's case were not availed hence violating **Article 50(2)(c)** and **(j)** of the **Constitution**.
- The Honourable Trial Magistrate erred in matters of law and fact by rejecting the cogent defence case which reasonably exonerated him from commission of any wrong.
- This Honourable Court in default considers exercising its discretion in light of the jurisprudence under the **Francis Muruatetu and Another Petition No. 15 of 2016** which declared unconstitutional minimum mandatory sentences by affording the Appellant an opportunity to mitigate again.

5. Facts of the case were that on the **7th day of October, 2015**, **PW4 MN**, the Complainant was on her way home when she saw the Appellant their former tenant washing clothes outside his house. She approached him to let her use his cellphone to call her mother. He told her to get the phone from the wife inside the house. He followed her inside and locked the door. He carried her onto the bed, undressed her and removed his trousers. He put his penis into her vagina and stayed for about five (5) minutes prior to removing it. In the meantime, **PW1 Elizabeth Wairimu Chege** the Head Teacher of **[Particulars Withheld] Primary School** while in the office with **PW2 Michael Macharia** the School Chairman got information about a pupil who had been seen entering a house nearby. They notified the area Chief who sent his Administration Police to arrest the culprit. As they waited outside the Appellant opened the door only to be arrested. The child was

examined by PW3 **James Kabue**, a Clinical Officer but no injuries were noted. The hymen was intact. Investigations carried out culminated into the Appellant being charged.

6. Upon being placed on his defence the Appellant stated that on the material date he was at his place of work when two (2) men went and arrested him. They took him to **Kinale Centre** where he met the Head Teacher, girl and Chairman of the school. He denied knowing them but the Head Teacher stated that the girl had reported that he locked her up inside the house. He denied residing at the place but he was arrested. It was alleged that he had defiled the child a charge that he denied.

7. The Appellant canvassed the Appeal through written submissions. He urged that the Prosecution failed to prove the key ingredients of attempted defilement; that the medical examination report was adduced in evidence without adherence to **Section 77** of the **Evidence Act**. That there were inconsistencies in the Prosecution's case that were not minor therefore called into question the credibility of witnesses.

8. Further, he urged that there was non-compliance with **Article 50(2)(c)** and **(j)** of the **Constitution**; the defence that was cogent was rejected and he concluded by mitigating on sentence.

9. The State/Respondent through learned Counsel **Mr. Ongira** opposed the Appeal. He urged that the Appellant committed an indecent act with a child. The conviction was based on the fact that the minor was found inside the house of the Appellant. That the Appellant did not penetrate her as he tried to do it but failed. He called upon the Court to take into consideration the provisions of **Section 124** of the **Evidence Act**.

10. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

11. First and foremost, it is important to note that the conviction herein was on the alternative count.

12. **Section 11(1)** of the **Sexual Offences (Act)** provides thus:

“(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

Section 2 of the ACT defines an indecent act as:

“... an unlawful intentional act which causes:-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that caused penetration.”

13. The victim herein was taken through *voire dire* examination and found to understand the nature of oath. She was a pupil at **[Particulars Withheld] Primary School**, standard 8. At the point of testifying she told the Court that she was fourteen (14) years old. A notification of birth was issued in her regard at birth which had the date **20th June, 2002** as her date of birth. This was proof that at the time of incident she was thirteen (13) years old and therefore, a child (**see Section 2 of the Children Act**).

14. The Complainant testified that the Appellant told her to enter the house where she could get a cellphone that she wanted to use to call her mother to establish her whereabouts at that particular point in time. As soon as she entered the Appellant followed and locked the door. In his defence the Appellant denied the allegation of the Complainant having entered the house but her evidence was corroborated by that of PW1 and PW2 who upon getting the information moved to the scene and found the child inside the house. Ultimately, after the police were called, PW5, **No. 241809 APC Martin Muriuki** found the child at the house and arrested the Appellant.

15. It was the evidence of the Complainant that when the Appellant locked the door he undressed her and having removed his trousers he put his genitalia on her vagina and covered her mouth to deter her from making any sound. After approximately 5 minutes he got off the bed. What she noted was some discharge on the bed. PW5 noted some wetness on the bed.

16. **Section 124** of the **Evidence Act** provides thus:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations 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 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 where 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.”

The Complainant herein was a child of tender years (**see Kipkering Arap Koske (1949) 16 EA CA 135**). The learned trial Magistrate remarked that through *voire dire* examination he found the Complainant to be of good understanding and she understood the duty of telling the truth. He observed her demeanour as she testified and found her consistent in her testimony. Having responded to questions put to her in cross examination without any hesitation he believed her testimony. Her evidence regarding what transpired in the house sufficed.

17. Her evidence established contact of part of the Appellant's body (genitalia) with her genital organs but there was no penetration. The Complainant stated that there was no penetration, a fact that was confirmed by medical evidence. On examination, the genitalia were normal while the hymen was intact.

18. It is urged that **Section 77** of the **Evidence Act** was contravened. The alluded to provision of law provides thus:

“(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”

PW3 **James Kabue** examined the Complainant and authored the medical examination report (P3) that he personally adduced in evidence, the Court did not have to presume the authenticity of the same. And failure to avail a medical practitioner from the institution where the PRC was authored was not fatal.

19. It is alleged that the case was riddled with inconsistencies. In the case of **Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001 (2003) UG CA 6** it was stated 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.”

The alluded to contradiction was that PW1 stated that the officers went into the house and found the child and the owner of the house while PW1 stated that he went outside and locked her inside and that the officers found him outside.

20. It is important to note that PW1 and PW2 stood near the gate and waited for the police to come. After the police went to the scene, per her testimony, PW1 saw the Appellant come out. This is confirmed by PW5 who said they encountered him outside as the child was still inside. These contradictions obviously do not point to deliberate untruthfulness. Therefore, they cannot be considered major. What transpired inside the house could only be proved, by the Complainant.

21. **Article 50(2)(c)** and **(j)** of the **Constitution** that the Prosecution is accused of contravening provides thus:

“(2) Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”

The Appellant failed to elaborate on his complaint regarding that provision of law. However, the alluded to provision of law provides for an accused person's right to have adequate time and facilitates to prepare for his defence and to be informed in advance of the evidence the prosecution intends to rely on. The record shows that on the 1st day of August, 2016 the Appellant notified the Court of the fact of having been furnished with copies of prosecution witness statements and sought time to prepare, an application that was granted, and when the matter came up for hearing on 29/8/2016 they proceeded without any complaint. In the premises his rights to fair trial were not contravened.

22. Regarding failure to call key witnesses **Section 143** of the **Evidence Act** provides thus:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

The Appellant argues that the person who gave information to PW1 and PW2 was not called to testify. The witnesses acted on information given and confirmed its authenticity. Therefore, failure to call the individual cannot make the Court draw an inference that the individual could have given adverse evidence as stated in **Bukenya & Others vs. Uganda (1972) EA 349**.

23. The defence put up by the Appellant was considered by the trial Court and taken into consideration. I have also taken into consideration the emerging jurisprudence as espoused in the case of **Evans Wanjala Wanyonyi vs. Republic (2019) eKLR**. I do consider circumstances in which the offence was committed and the fact that the child having been of tender years, therefore, I am satisfied that the trial Court properly convicted the Appellant on the alternative count, and the sentence imposed was not harsh. In the result the Appeal which is bereft of merit is dismissed in its entirety.

24. It is so ordered.

Dated, Signed and Delivered at Kiambu this 12th day of September, 2019.

L. N. MUTENDE

JUDGE