REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 52 OF 2016

(From original conviction and sentence in Criminal Case

No. 1435 of 2015 of the Principal Magistrate's Court at Baricho).

DANIEL WACHIRA MATHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant Daniel Wachira Mathu was convicted of defilement of a girl aged 13 years and sentenced to 20 years imprisonment contrary to **Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. He lodged an appeal on 07/11/2016 raising the following grounds;

a) That, the learned Trial Magistrate erred in law and facts in relying on insufficient and incredible evidence given by the prosecution.

b) That, the learned trial Magistrate erred in law and facts in failing to appreciate that the conviction was against the weight of evidence adduced.

c) That, the learned trial Magistrate erred in law and facts by relying on a shoddy investigation.

d) That, my constitution rights were violated as per Chapter 4 Article 49(1), (f), (i) of the Kenyan Constitution.

e) That, the learned trial Magistrate erred in law and facts by not considering that the whole case was full of contradictions and inconsistence.

f) That, the learned trial Magistrate erred in law and facts by putting some extraneous matters which had no basis on evidence tendered before him to make a wrong conviction.

g) That, the learned trial Magistrate erred in law and facts by rejecting my mitigation factors and my defence contrary to Section 169(1) of C.P.C

2. The appellant prays that the appeal be allowed, conviction be quashed, sentence be set aside and he be set at liberty.

3. The brief facts of the case are that the complainant MWW is a child aged Thirteen (13) years, having been born on 5/5/02 as per a copy of the Birth certificate which was produced in court as **exhibit -1-** she was a pupil in class -4- at [Particulars withheld] Primary School and was living with her parents and her brothers.

4. On 21/8/15 the complainant went to the quarry where her parents were working she assisted her parents to carry hardcore upto 10.00 am when she returned home at 10.00 am. Upon arrival the appellant who was employed by her father came home. She met the appellant who held her hand and told her that she was required to the quarry. The appellant insisted on carrying her on the Ox-cart which he had. The complainant refused but the appellant put her in the Ox-cart and ordered her to lie down inside the cart. The Ox-cart moved fast and reached a maize plantation. The appellant tied one of the Ox to a tree. He then pulled out the complainant to show her breasts. The appellant then led her to the maize plantation where he removed her biker, skintight and pant. The appellant then defiled the complainant by having sex with her by force. The appellant experienced a lot of pain during the ordeal. The appellant gave Kshs 80/= and told her not to tell anybody and threatened to kill her if she did. The appellant told her to tell her mother she was injured by a stick while harvesting maize if she asked her what happened. The appellant further told her to give her mother Kshs 80/= and tell her it was her earning from the maize job.

5. The appellant also told her that young girls must undergo ***"tabia mbaya"*** as they grow up and he promised to be giving her money in the future. The appellant left her. As she walked home after dressing up she realized she was bleeding she went home and informed her Aunt FW who in turn informed her mother. The complainant was escorted to hospital at *'Gwa Kamande'*. The complainant was treated and was stitched. The appellant came to the hospital with complainant's father. The appellant congratulated the complainant for not disclosing what had happened.

6. The following day the complainant disclosed to her mother what had actually happened. Before they could report the matter to the police the appellant went to the complainant's home with a group of people and wanted her to explain what happened. The complainant explained what happened. The appellant confessed that she had defiled the complainant. He asked to be forgiven. The group had wanted the matter to be resolved at home. They left.

7. The matter was then reported to the police. The complainant was issued with a P3 form which was filled at Sagana Sub-County Hospital. The appellant was then arrested and charged.

8. The complainant was examined by Peter Kamande Muiruri (PW-5-) a Clinical Officer on 21/8/2015 at Penkam Medical Clinic Kagio. According to PW-5- the complainant gave a history of having been pierced by a stick while preparing dry maize. On examination her clothes were soaked with blood. She was still bleeding when she went to the clinic. She wore a bloody pairs of bikers. On examination of her genitalia she had a tear, measuring 1 ½ Cm on her lower segment of vulva which was oozing blood. She was bleeding heavily. He gave her fast aid by stitching the wound, treated her with antibiotics and pain killers.

9. The Clinical Officer testified that in his professional opinion the injuries were inconsistent with the history given. Later on 6/9/15 after being counselled, the complainant confessed to have been defiled by a person known to her. He advised her to report the matter to the police and referred her to Sagana Sub-county hospital for further treatment. The Clinical Officer found that the injury was consistent with defilement. The hymen was missing. He produced treatment notes as **exhibit 2A & b.** The P3 form was filled by PW-6- and was produced in court as **Exhibit -3-.**

10. This is a first appeal. This court has a duty to consider the evidence, evaluate it and come up with its own finding but bearing in mind that the Judge did not have an opportunity to see the witnesses when they testified and leave room for that. This is what was stated in ***Okeno –v- Republic 1972*** where the Court Stated:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwal –v- R (1957) E. A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –v- Sunday Post (1958) E. A 424".***

11. This court must therefore evaluate the evidence and reach a conclusion. I will first consider the grounds of appeal raised by the appellant.

12. In his submissions the appellant has collapsed the grounds as follows:-

> **a) Identity of the perpetrator.**
>
> **b) Penetration**.

1. **Identity of Perpetrator:-**

Appellant claims that identification was not proved beyond the required standard. He submits that the identity of the perpetrator was a fabrication intended to settle old scores.

13. PWI in her evidence stated that they had gone to the quarry and upon finishing they went home. The appellant who had been employed by her father to ferry bricks using an ox drawn cart from the quarry to their compound came. She took her 2 younger siblings to her grandmother's house and went to look for her friends but did not find them.

14. As she was returning home, she met the appellant who informed her mother had sent for her. She refused but he put her in the cart and told her to lie inside in the cart. They arrived near the quarry when the appellant began whipping the ox and it ran while pulling the cart. They stopped near a maize farm and the appellant proceeded to defile her. Then he gave her Kshs 80/= to give to her mother and tell her she was injured as she was harvesting maize.

15. PWI recognized the appellant since it was day time and he was employed by her father therefore his identity was proved. Furthermore, the appellant on a later day went to the home of PW1 where PW2 and PW 4 were present and confessed to defiling PWI and sought for forgiveness.

The trial Magistrate stated as follows:-

> ***"From the evidence before court, the complainant was not bleeding when she parted ways with her parents and her siblings. She started bleeding after her sexual encounter with the accused. The facts point to culpability on the part of the accused. Further,***

his conduct from the time the incident occurred, to the hospital and later to the complainant's home is very telling. He took it upon himself to ferry the complainant and her mother home and spent his money to buy her Ribena. I had an opportunity of observing the demeanor of the complainant and I noted that her recollection of the events on the material date was vivid and her evidence remained solid even after being subjected to cross examination. The fact that the complainant disclosed about the incident a day after it occurred and action was taken two weeks later does not negate the fact that she was defiled. I have no doubt about the credibility of her evidence. In any event, the accused had threatened to kill her and she disclosed that she had been defiled when her mother insisted on seeing the wound. The entire evidence on the part of the accused has been outweighed by the cogent evidence on the part of the prosecution, it is incredible and I dismiss it as such. I have no doubt that the accused was the perpetrator of the despicable crime and it is not even remotely possible that he was framed.

16. In this case the evidence on the identification of the perpetrator is direct evidence by the complainant who knew the appellant very well before the incident. The trial Magistrate in the above passage considered the issue of the perpetrator and in my view arrived at the inevitable conclusion that the appellant was the perpetrator. The question of proper identification does not arise as the offence was committed in broad daylight which circumstances favour positive identification of a person who was well known. The ground is without merits.

2. **Evidence of Penetration**

The appellant claims that the prosecution witnesses did not tender evidence to prove penetration.

17. PW-5- testified that PW-1- was bleeding from her private parts and her clothes were soaked in blood. She had a tear on lower segment of her vulva which was oozing blood. And her hymen was not present. He formed the opinion that the injury was consistent with defilement.

18. PW-6- testified that PW-1- had a healing wound on her vulva, her hymen was broken but not fresh and had whitish discharge from her vagina. There was evidence of defilement from examination.

19. Penetration is defined as ***"means the partial or complete insertion of the genital organs of a person into the genital organs of another person"***

At page 4 of the proceedings the complainant stated as follows:-

"----- the accused pushed me to the ground on a maize farm. He removed my pair of bikers, skin tight and pant. He forbid me from crying. He lay on me and did tabia mbaya. He had sex with me by force, when he was done, he handed me Kshs 80/= and forbid me from telling anyone".

20. For a child aged 13 years this testimony clearly illustrates what happened and there is no magic needed to understand what she was telling the court. She gave details which demonstrated to the court that she was defiled. There was penetration when the appellant did ***"tabia mbaya"*** and sexual intercourse after removing her clothes. The evidence is captured at page 4 of the record. It is not extraneous. The fact of penetration was well corroborated by the medical evidence tendered by PW-5- who examined the complainant when the wound was fresh and saw injuries which were consistent with defilement and the hymen was missing.

21. PW5 observed as follows:-

- Bleeding from private parts.

- Clothes soaked in blood.

- Tear of lower segment of vulva of about 1 ½ centimeter.

- Hymen was missing.

22. PW6 who filled the P3 form observed the following:

- Had a healing wound in her genitals.

- Whitish discharge.

- Conclusion – complainant was defiled.

23. Penetration is one of the ingredients of defilement and there must be evidence which forms the factual basis of the offence.

24. This must be the evidence tendered by the victim of a sexual offence. It then must be confirmed by expert evidence which assists the court to form an opinion as to whether the issue has been proved. In this case the evidence of the complainant proved beyond any reasonable doubts that there was penetration. This was corroborated by the expert witnesses who are PW5 & 6 who were in agreement that there was penetration which resulted in injuries and broken hymen. I find that penetration was proved to the required standards with the evidence of the complainant and the medical evidence.

3. Whether the Prosecution proved its case beyond reasonable doubt.

Looking at the entire evidence adduced, the prosecution proved its case beyond all reasonable doubts. PW1 was able to narrate the occurrence of the incident and what the appellant did to her which was corroborated by the medical evidence. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW-1- in the manner described. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion, which is that of guilt of the appellant.

25. The evidence adduced was cogent and devoid of inconsistences and contradictions.

26. The appellant alleged violation of his rights under **Article 49(i) (f) (i) of the Constitution.** This was not expounded in his submissions it was upon the appellant to state the rights and the manner in which the rights were violated. In the absence of such explanation the court is handicapped and cannot competently declare whether or not the rights were violated. In any case pre-trial violations cannot bar the court from determining the criminal case before it on merits. The concern of this court would be those violations which affect his rights to fair trial. I cannot speculate on the alleged violations which have not been explained and I will therefore not make a finding on that ground, other than say that it has no merits.

27. The appellant raised the ground that the trial Magistrate erred in law and facts by rejecting his mitigation. I have considered the ground. The record shows that the appellant was allowed to make his mitigation. The trial Magistrate stated that; ***"the Section under which the accused is charged provides for a minimum sentence. My hands are tied. The accused is sentenced to 20 years' imprisonment."***

Section 8(1)(2) of the Sexual Offences Act provides:-

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life"***

The Supreme Court is ***Petition No. 15/2015. Francis Kariako Muruatetu & Another –v- R*** and others held; that mandatory sentence which does not give the court room to exercise discretion when sentencing is unconstitutional. Though the Supreme Court was dealing with the mandatory death sentence under **Section 204 of the Penal Code** the finding applies to other mandatory sentences which do not give room to the trial Magistrate to exercise his or her discretion. In this case the trial Magistrate received the mitigation and properly complied with **Section 216 and 329 of the Criminal Procedure Code.** I find that having considered the circumstances of this case, the minimum sentence imposed by the trial Magistrate was appropriate. I find no reason to interfere with the sentence.

In Conclusion:-

Having considered the evidence tendered and having evaluated it, I find that the conviction of the appellant was based on the cogent evidence tendered before the trial Magistrate. The conviction was proper in the circumstances. I find that the appeal is without merits and is dismissed.

Dated at Kerugoya this 11th day of October, 2019.

L. W. GITARI

JUDGE