



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 222 OF 2012

DIKO ABDUL.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from judgment of the Senior Resident Magistrate Hon. J. Nthuku

delivered on 22nd of November, 2012 in Nakuru Adult Criminal Case No. 11 of 2012.)

JUDGMENT

1. The Appellant, Abdul Diko, was charged in the Court below with defilement contrary to Section 8(1) as read with Section 8(2) of Sexual Offences Act No. 3 of 2006. The particulars were that on the 6th day of January, 2012 at Lanet Kawangware Estate in Nakuru District within Rift Valley Province unlawfully and intentionally committed an act by inserting a male genital organ namely penis into a female genital organ namely vagina of LWK a girl ages 11 years which caused penetration.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 of Sexual Offences Act No. 3 of 2006 based largely on the same facts.

3. The Appellant pleaded not guilty to the charges and the case proceeded to trial. At the trial, the Prosecution called five witnesses while the Appellant gave an unsworn statement. The Learned Trial Magistrate was persuaded that the main charge had been proved beyond reasonable doubt and convicted the Appellant. She then proceeded to sentence the Appellant to life imprisonment.

4. The Appellant is dissatisfied by both the conviction and sentence and has appealed to this Court. He has listed the following eight grounds of appeal:

- 1. That the Hon. Learned trial magistrate erred in law and fact when she convinced in reliance that did not support the charge.*
- 2. That the Hon. Learned trial magistrate erred in law and fact when she failed to note that the age of injury did not link me to the alleged offence.*
- 3. That the Hon. Learned trial magistrate erred in law and fact when she convicted me in reliance of the prosecution witnesses that was contradicting therefore un corroborating contrary to the provisions of law.*
- 4. That the Hon. Learned trial magistrate erred in law and fact she failed to note that the exhibit of the pant and cloth that was allegedly stained was not produced in court.*
- 5. That the Hon. Learned trial magistrate erred in law and fact when she convicted me in reliance to insufficient evidence.*
- 6. That the Hon. Learned trial magistrate failed to observe that some essential mentioned witnesses were not summoned/compelled to testify to Section 144(1) and 150 of the Penal Code.*
- 7. That the Hon. Learned trial magistrate failed to note that it was burden of proof shifted to me contrary to section 107 and 109 of the Evidence Act.*
- 8. That the Hon. Learned trial magistrate failed in law when she reflected my sincere defence without any cogent reason contrary to*

5. The Appeal was argued by way of Written Submissions followed by oral highlighting.
6. As a first appellate Court, the Court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See **Okeno v R [1972] EA 32** and **Kariuki Karanja v R [1986] KLR 190**.
7. The evidence that emerged from the trial was as follows.
8. The Complainant gave unsworn testimony after the Learned Magistrate made a finding that she was intelligent enough to “understand the importance of telling the truth but not the meaning of oath.” She told the Court that she is a student at [particulars withheld] Primary School and that she was living with her aunt Tabitha in the Kawangware area. She told the Court that she knew the Appellant well since he was a neighbour to her aunt.
9. The Complainant narrated that on 06/01/2012, she was going home from school when the Appellant called her. He apparently proposed to give her the sugarcane she had craved for before. The Complainant agreed to the proposal; went home; changed from her uniform and went back to see the Appellant. The Appellant led her to his father’s house. Instead of getting her the sugarcane, the Complainant says that the Appellant lifted up her skirt and removed her panties. He then proceeded to remove his trousers and laid the Complainant on the couch. In the Complainant’s words, the Appellant then “did bad things” to her; he raped her.
10. The Complainant told the Court that she could not scream because the Appellant covered her mouth with his hand.
11. The Complainant said this all happened in the Appellant’s father’s house and that there was no one else present. After the Appellant finished raping her, the Complainant said he went out of the house and the Complainant ran home.
12. The following morning, a Saturday, the Complainant went to visit a friend of her aunt, MNK (Njeri). Njeri testified as PW4. She is a teacher at [particulars withheld] Primary School. Njeri noted that the Complainant had difficulties walking. Alarmed, she inquired from the Complainant what had happened. The answer she got back was unsatisfactory to her: the Complainant said that she had urinated on herself and that she was therefore itching.
13. Njeri escalated the matter to the Complainant’s aunt. This is TWK. Tabitha testified as PW2. Both Njeri and Tabitha tried to find out what had happened but the Complainant was initially reluctant to reveal what had happened. It was at that point that they called the Complainant’s uncle, JKG (Josiah). He testified as PW3. He confirmed receiving a call from Tabitha (his wife) asking him to urgently go home. He obliged. He found the situation unfolding. It was the threatening presence of Josiah that got the Complainant to speak up. She narrated to them what had happened to her. According to Josiah the word the Complainant used was the Kikuyu word “aranjika” which translates to “he raped me.”
14. Josiah and Tabitha took the Complainant to the Police Station at Lanet from where she was referred to the hospital. At Nakuru PGH Hospital, they found Dr. Sarah Karanja who examined the Complainant and filled out a P3 Form. Dr. Karanja was not available to testify but by stipulation of both parties, was represented by Dr. Justus Nondi in giving evidence and presenting the P3 Form. Dr. Nondi confirmed that he was familiar with the handwriting of Dr. Karanja who had filled the P3 Form. The findings of Dr. Karanja were that the Complainant had a freshly broken hymen and anal discharge. She concluded that she had been defiled. She estimated her age at eleven years old. This was corroborated by the uncle, Josiah.
15. When the matter was first reported to Lanet Police Station, it was PC Lydia Sari who took over the investigations. PC Sari testified as PW6. She confirmed that the Appellant was brought to the station by members of the public and that she re-arrested him. By stipulation, PC Sari also produced the birth certificate of the Complainant which showed that the Complainant was born on 22/07/2000 and was therefore eleven years old at the time of the incident.
16. In his defence, the Appellant said that he was arrested when he went to claim back some Kshs. 50/- which he had loaned to Tabitha (PW2). He claimed that he knew nothing about the case and gave a detailed account about how he was arrested. He protested his innocence.
17. The Court correctly identified the three elements which the Prosecution needed to establish beyond reasonable doubt for the charge of defilement to stick. They are:
 - a. That the victim was below twelve years old;
 - b. That there was penetration; and
 - c. That it was the Appellant who caused the penetration.
18. Mr. Motende argued the appeal for the State. He opposed the appeal and argued that the conviction was merited and the sentence lawful.
19. On age, Mr. Motende argued that it is on record, on the strength of a Birth Certificate, that at the time of the incident, the Complainant was aged 11 years and 6 months. On penetration, Mr. Motende argued that the evidence of the victim was straightforward; and that the evidence was corroborated by the evidence of the medical doctor. The doctor, he argued, concluded that there was evidence of defilement.

20. On identification, Mr. Motende submitted that the minor testified that he knew the Appellant well and that he lived near where she used to live and that the identity of Appellant is not in dispute.
21. On sentence, the Appellant, Mr. Motende argued that the Appellant was sentenced to serve life in prison and that this is the statutory minimum.
22. The first element to prove defilement is penetration. Penetration is defined in Section 2(1) (d) of the Sexual Offences Act as “*The partial or complete insertion of the genital organs of one person into the genital organs of another person.*”
23. The evidence of the Complainant with regard was straightforward and credible. She narrated how the Appellant convinced her to go the Appellant’s house in the guise that he would give her sugarcane and then raped her. The Learned Trial Magistrate believed her narrative and I also find it eminently credible. This is because it is backed up by other elements of the narrative including how Njeri, Tabitha and Josiah first came to learn of the defilement. It is further strengthened by the medical evidence produced in the form of the P3 Form. PW1, in her testimony, stated that the Appellant used to remove her clothes plus her pant and tells her to sleep on a mattress that was on the floor and then inserts his penis into her vagina and after sex she would feel pain. The testimony of PW6, the doctor, also confirmed penetration. She stated that on examination of PW1 on 28/3/13, two days after the defilement, she observed PW1’s genitalia had inflammation of labia majora and the vagina. She also found a broken hymen – a clear indication that the PW1 had been defiled. The doctor produced as evidence the P3 form, PRC form and lab report forms to back up the prosecution testimony as Pexh 2, Pexh 3 and Pexh 4. The production of these documents was not challenged by the Appellant and no reasonable doubts were raised about their veracity or authenticity. Based on this evidence, I have easily reached the conclusion that penetration was positively proved.
24. The second element that the prosecution is required to prove is the age of the complainant. Under Section 2 (1) of the Sexual Offences Act, the definition of a child is the one assigned thereto in the Children Act. This means any human being of less than eighteen (18) years. In this case, PW 4 who is the mother to PW 1 testified that she was born on 10/11/2012 and produced a birth certificate as Prosecution Exhibit 1 which indicates the age of the minor to be 6 years at the time the offence was committed. This evidence was not challenged by the Appellant
25. On the basis of the birth certificate and the testimony of the mother (PW4), I am satisfied that the learned trial magistrate came to the right conclusion on the age of the complainant.
26. The Third element that the prosecution was required to establish is the identity of the perpetrator. The complainant testified that she very well knew the Appellant prior to the sexual assault and between the month of January 2013 to March 2013 the Appellant herein used to call her and PW 2 into his house where he allegedly committed the offence. Indeed, the Appellant is her neighbor and he at one point was employed by one of her uncles. She knew him by the name Sammy and it was not the first time he allegedly committed the act.
27. PW 2 also clearly identified the Appellant by his name as Samuel Baraza. She testified that he used to call her and PW 1 in broad daylight to go to his house. Based on this clear evidence by PW1 and PW2 which was largely unchallenged on cross-examination, I am satisfied that the learned trial magistrate came to the right conclusion of identification of the Appellant as the person who had sexual intercourse with the complainant.
28. From the above analysis I am satisfied that the prosecution proved the three key elements of defilement and from the evidence on record the prosecution proved their case beyond any reasonable doubt and meet the threshold of a defilement case.
29. The Appellant contends he was convicted on inconsistent evidence that lacked probative value. However, the Appellant fails to state the particular inconsistencies as alluded in the prosecution case. Having looked at the entire Trial Court record, I am unable to find any material inconsistencies which would warrant reasonable doubts about the veracity of the Prosecution case.
30. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes that all the elements of the offence of defilement of a child under the age of eleven years have been proved beyond reasonable doubt. The conviction was safe and free from error and it is hereby affirmed.
31. Turning to the sentence imposed, at the time the sentence was passed, our Courts took the minimum sentence provisions in the Sexual Offences Act as immutably mandatory. Our jurisprudence has since moved from that position. In a recent decision, in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

*In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015***], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both

aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

32. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

33. In the present case, the Appellant offered mitigation in the Trial Court. He told the Court that many people at home depended on him. The Court noted that the Appellant was a young man and wished that it had the powers to give a sentence other than the mandatory minimum in view of his age. The charge sheet indicates that the Appellant was twenty-one (21) years old at the time he was charged.

34. Looking at the circumstances of this case, there are two mitigating circumstances that stand out. The first one is the relative youthfulness of the Appellant. He was twenty-one years old. The second one is the absence of use of force or any kind of depraved or cruel treatment of the victim. Granted that the victim was a child of tender years (she was eleven years old) and the sexual assault is likely to traumatize her for a long time or possibly the rest of her life, life imprisonment of the Appellant in the present circumstances may be an overkill. In the circumstances, I consider a prison sentence of thirty years (30) to be sufficient and proportionate. I hereby substitute the life sentence imposed with a sentence of thirty years imprisonment.

35. The orders that the Court shall give, therefore, are as follows:

a. For the reasons stated above, the appeal against conviction is dismissed and the conviction is hereby affirmed.

b. The appeal against sentence succeeds. The sentence imposed by the Trial Court of life imprisonment is hereby set aside. In its place a sentence of thirty (30) years imprisonment is hereby imposed.

36. Orders accordingly

Date at Nakuru this 8th day of November, 2019

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JOEL NGUGI

JUDGE

Delivered at Nakuru this 11th day of November, 2019

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J. N. MULWA

JUDGE