



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 84 OF 2019

JAMES MUSYOKA MUKUSYO..... APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(Being an appeal from the judgment of Hon. R. Koech (SRM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 479 of 2014)

JUDGMENT

1. **James Musyoka Mukusyo** the Appellant was initially charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The victim was said to have been 14 years of age. He also faced an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. After a full trial, he was found guilty and convicted of the offence of attempted defilement contrary to section 9(1) of the Sexual Offences Act and sentenced to ten (10) years imprisonment.

2. He was aggrieved by the judgment and filed this appeal against the whole of it. He however later withdrew his appeal against conviction and proceeded to mitigate for a sentence reduction on the following grounds: -

(i) **That**, he prays that the honourable court to invoke section 333(2) of the Criminal Procedure code.

(ii) **That**, he prays to this honourable court to give orders for the five years sentence to commence from the date of arrest.

(iii) **That** he prays to this honourable court to reduce his sentence to time served.

3. He has relied on section 38 of the Penal Code and section 333(2) of the Criminal Procedure Code to argue that the time he spent in prison custody must be considered in his sentence. His prayer is therefore that the court makes an order that his sentence runs from 13th June 2014 when he was arrested. To buttress his argument, he relied on the cases of **Ahamad Abolfathi Mohammed and Anor –vs- R (2018) eKLR and Musyeki Lemoya –vs- R (2014) eKLR**.

4. He submits that he has been in custody for over four (4) years and has acquired a number of skills and has also been transformed. He produced certificates in painting, decoration grade I and II and The Prisoner's Journey.

5. Mr. Kihara learned counsel for the State was not opposed to the period spent in prison custody (*1 year, 2 months*) being considered while sentencing. He however, opposed the request of the sentence being reduced by five years.

6. A summary of the prosecution case is that Pw2(HNW) the complainant herein then aged 14 years left for school (*[particulars withheld] primary school*) on 12th June, 2014 6:00 am. Upon arrival she was called by her class teacher who sent her home to bring money for fees and office maintenance. She did not find anybody at home as her mum (Pw1) had gone to do work at the chief's home in Kwa Kavisi location. While there, she was called at the gate by the Appellant who was a neighbor's workman. He tried to trick her into going to the home where he worked but she refused. She later went to Kativo's farm where the Appellant held her hands, removed her biker and panty and removed his penis which he smeared with saliva.

7. Thereafter he inserted the penis into her vagina after tangling both her legs and lying on her. She bled after the ordeal. She reported to a neighbor (Pw3) who called her mother (Pw1) after it had been confirmed that she had been defiled. A report was made to the police and she was taken to hospital, within one hour.

8. **Pw5 Doctor Nahashon Kagwe Mugiri** produced the P3 form report on behalf of Dr. Mbindyo. Findings were as follows:

- *Clothes appeared dirty with no blood stains*

- No bruises on her
- Head/neck were normal
- Chest/abdomen were normal
- Both limbs were normal
- Outer vagina was normal
- Both labias were normal
- There were a few pus cells which were normal
- 2-6 pus cells were seen suggestive of a mild vaginal infection.

9. **Pw4 No. 200806/864 APC John Nga'nga** and **Pw6 PC Joshua Wambua** confirmed receipt of the reports by one Florence who was the Appellant's employer. Investigations were conducted by Pw6.

10. In his sworn defence he denied the charge. He explained how he had been arrested and denied committing the offence. Pw2 had mentioned how the Appellant's employer **Mr. Muchina** had used AP officers from Kathonzwani to interfere with the case by offering Kshs.2,000/= to the doctor, who was examining her. The trial court found the charge of defilement not proved and reduced it to attempted defilement.

Analysis and determination

11. This is a first appellate court with a duty to reconsider and re-examine the evidence and arrive at its own conclusion. I also bear in mind that I did not see nor hear the witnesses and give an allowance for that. See **Okeno –vs- R (1972) E.A 32; Kiilu and Anor –vs- R (2005) IKLR 174 and David Njuguna Wairimu –vs- R (2010) eKLR.**

12. In spite of the fact that the Appellant abandoned his appeal against conviction, it's important that this court satisfies itself of the safety of the conviction. I have considered the evidence of Pw1 who clearly explained what was done to her. Pw2 was examined at the hospital within an hour and the findings were that there was no penetration. This could be attributed to many factors including interference as alluded to by the complainant (Pw2).

13. In the circumstances, the learned trial magistrate being satisfied with the evidence of Pw1 – Pw3 and the action taken by them reduced the charge to attempted defilement contrary to Section 9(1) as read with Section (2) Sexual Offences Act. I am satisfied that the conviction is safe.

14. **Section 333(1) and (2) Criminal Procedure Code** provides the following: -

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of Section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

It is the Appellant's prayer that this court reduces his sentence and releases him after deducting the 1 year 3 months he was in custody prior to the conviction and sentence. The State has submitted that indeed the said period spent in custody was not considered.

15. The issue is whether the said period was considered by the trial court. The Appellant was given the minimum sentence of ten (10) years for the offence of attempted defilement under the Sexual Offences Act. The Appellant when asked to mitigate stated this

“I did not meet the complainant, let the court decide what it want to do with me. The witnesses lied against me.

16. He asked the court to do what it deemed fit and that's exactly what it did. After his stay in prison he now realizes he should have done better. I have taken note of the fact that this case was heard and determined on 13th August, 2015 which was before the determination of **Francis Karioko Muruatetu and Anor –vs- R (2017) eKLR** followed by several others from the Court of Appeal like: **Jared Koita Injiri –vs- R KSM Cr. Appeal No. 93 of 2014, Christopher Ochieng –vs- R (2018) eKLR** on the legality of the minimum mandatory sentence.

17. In view of section 333 (2) Criminal Procedure Code, I have considered the period that the Appellant was in remand custody (1 year 3

months), his mitigation and all the circumstances of the case. I hereby set aside the sentence of ten (10) years and substitute it with sentence of seven (7) years imprisonment from the date of conviction and sentence.

18. The result is that the appeal partially succeeds. I make the following orders: -

i. Conviction is upheld.

ii. Appellant to serve seven (7) years imprisonment from 13th August 2015.

Orders accordingly.

Delivered, signed & dated this 19th day of November 2019, in open Court at Makueni.

.....

Hon. H. I. Ong'udi

Judge