REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 135 OF 2018

(From Original Conviction and Sentence in Hamisi Senior Resident Magistrate's Court Criminal Case No. 529 of 2014 (Hon. ML Nabibya, SRM) of 14th February 2018)

JOSEPHAT MULEKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. ML Nabibya, Senior Resident Magistrate, of defilement contrary to section 8(1), as read with section 8(2), of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya, and was accordingly sentenced to life imprisonment. The particulars of the charge against the appellant were that on 31st October 2017 at Sabatia District, Vihiga County, he intentionally caused his penis to penetrate the genital organ, namely vagina, of SM, a child aged eleven years.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally and unlawfully committed an indecent act with the said child.

3. There was a second count, that of attempted defilement contrary to section 9(1), as read with section 9(2), of the Sexual Offences Act. It was alleged that on the same day and at the place he intentionally attempted to cause his penis to penetrate the vagina of JK, a child aged eight years. The alternative charge to that count was that of committing an indecent act with that child by intentionally and unlawfully touching her vagina.

4. The appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called six (6) witnesses.

5. SM was the first to take the witness stand, as PW1. She was the complainant in respect of Count I. she testified to be twelve years old and a Standard Five pupil at [Particulars withheld] Primary School. She gave an unsworn statement and was cross-examined. She stated that she knew the appellant, and that they used to call him Owiso. She described him as a person who used to draw water for people from the river, and that she used to see him going to and from the river. On the material day, she and PW2 went to the river to fetch water. They met the appellant at the river. He asked them to put down their jerricans, and he led them into a tea plantation, told them to remove their panties and lie down. He lay on top of her first. He put his penis into her vagina, and she felt pain. She did not scream because he had threatened her. She said that he partially removed his trousers and underpants before he defiled her. After that he moved to PW2 and also penetrated her vagina. He gave them buns (*mandazi*) and Kshs. 10.00 each. Thereafter, he told them to go home and not disclose to anyone what had just happened. The incident was seen by a person who neighboured the tea farm, known as Gunani, and he reported to the village elder. When they got home, they did not report to the grandmother with whom they stayed, instead it was the village elder who came the next day and told the grandmother. They were taken to Sabatia hospital and a report was made to the police. She said that that was the first time that they were defiled.

6. PW2, JK, was the complainant in respect of Count II. She gave an unsworn statement and was cross-examined by the appellant. She stated that she was eleven years old and was in Standard Five at [Particulars withheld] Primary School. She testified that on 19th May 2014 she was at the river with PW1, when the appellant came over and gave them buns. He thereafter took her to a tea plantation where he ordered her to remove her underpants. When she wanted to scream, he threatened to stab her with a knife. She did not see him with one, though. He ordered her to lie down, and she complied. He then put his penis on her vagina. She bled as a result although she did not scream as he had ordered her not to. She testified that the appellant defiled PW1 in her presence. He removed her panties and inserted his penis into her vagina. He thereafter gave them Kshs. 10.00 each. She informed her grandmother about the incident, and reports were made to the village elder and the police. They were taken to Sabatia hospital and the appellant was arrested. She said that they knew him prior to the incident. He used to work as at Moi's place near Vokoli High School. She did not know his name, but he had introduced himself to them as Josephat.

7. DA (PW3) followed. She was the woman who stayed with PW1 and PW2, and was a tea plucker. A report was made to her on the evening of 20th May 2014 about how her children had been defiled at the river by a neighbour's worker. She interviewed the two girls, who confirmed the incident and mentioned that the appellant had threatened them if they ever told anyone. They reported that Owiso, the common name for the appellant in the area, had defiled them. She thereafter took them to hospital and reported to the police. She said the children were aged eight and eleven at the time. She explained that their mother was sick and had gone back to her parents, leaving them with her. Their father, her son, stayed in Nairobi. She said that she knew the appellant. He was an employee of Moi, and his work was to fetch water. Zedekiah Iratsia Adivaga (PW4) was the village elder to whom a report was made of the incident on 20th May 2014. He was told that two girls in the neighbourhood were not walking properly and he should investigate. He enquired and was informed of what had transpired, and who was responsible. He made a report to the area Assistant Chief and the appellant was arrested. He said that he knew the appellant as he used to stay in the village. He said he did not witness the event but it was the children who narrated it to him. Yabesh Atandi testified as PW5. He was the police officer who received the report of the incident from the teachers of the two victims. He described how the appellant was arrested through the efforts of the area Chief, and he also told of the investigations he conducted. Emanuel Oranga (PW6) examined PW1 on 27th May 2014. She gave a history of having been defiled on 25th May 2014 by a person she knew. He stated that she looked depressed. She had mucus on her labia majora and there was mucus discharge from her vagina. She went to hospital after six days and, therefore, there was no specimen to be collected. .

8. The appellant was put on his defence. He gave a sworn statement and did not call witnesses. He merely denied the offence. He said that he did not know where he was on 19th May 2014, and that he did not know the two girls. He said that his must be a case of mistaken identity. He stated that Moi was his employer.

9. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgement.

10. Being dissatisfied with the sentence the appellant appealed to this court and raised several grounds of appeal. He largely averred that the trial court convicted him on insufficient evidence, the ages of the victims were not sufficiently proved, that he was not subjected to medical examination to connect him to the crime, and that his sworn evidence was not given due regard. He later filed amended grounds, where he added that the conviction was based on contradictory evidence regarding the ages of the complainants, section 169(1) (2) of the Criminal Procedure Code, Cap 75, Laws of Kenya, was not observed, the evidence was uncorroborated discredited contradicted and fabricated, penetration was not sufficiently proved, law and procedure was not followed, and his sworn defence was not considered.

11. I am sitting as a first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant 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. 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 draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

12. The appeal was canvassed on 17th October 2019. The appellant relied on written submissions that he had placed on record, while Ms. Omondi, Prosecution Counsel, asked me to look at the record of the trial court. The appellant's written submissions dwelt on the ages of the complainants, pointing out that the evidence thereon was contradictory.

13. The first general ground is on the ages of the two victims. There are two sets of charge sheets. The initial charges were in 2014, and in them the age of PW1 was put at eleven, while that of PW2 was put at eight. It would appear that the trial was founded on charges that were drawn in 2017, after the High Court had ordered a re-trial, where the age of PW1 was put at eleven, while that of PW2 was said to be eight. When she took the stand, PW1 stated her age to be twelve, while PW2 said her age was eleven in 2017. Their guardian, PW3 put their ages at eight and eleven at the time of the defilement. PW6 was the clinical officer who treated PW1. He put her age at twelve in 2014. The medical records placed on record, such as the general outpatient card from Sabatia Health Centre, dated 27th May 2014, put PW1's age at twelve, while that for PW2 put her age at eleven. The P3 Forms appear to have been based on the treatment notes for they indicate similar ages, the age assessment letters from Vihiga District Hospital, dated 5th June 2014, put the ages eight and eleven respectively.

14. What comes out clearly is that the children in question were between ages eight and twelve. PW2 was very clear that she was eight years old, and at the hearing eleven, which when worked backwards made her eight at the material time. PW1's testimony was a little unclear. She said she was twelve at the time of her testimony, which would have made her nine in 2014. What I note from the P3 Forms and the treatment notes is that the ages differ from those stated in the charges. I am alive, though, to the fact that these were apparent ages. The children were assessed for their ages, and the records return ages eight and eleven, the ages in the charges. The age assessment was more scientific and I shall go by it. These were the children's ages at the material time. They were still children of tender and near tender years. Nothing should really turn on this.

15. The other substantial issue that he raises turns on compliance with section 36 of the Sexual Offences Act. He complains that he was not subjected to medical examination in accordance with that provision. The provision alluded to states as follows:

> *"36. Evidence of medical, forensic and scientific nature*
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> *(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in*

order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.

(4) The dangerous sexual offenders' databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5)—

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and

(b) in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both."

16. Section 36 of the Sexual Offences Act is not in mandatory terms, is worded in very permissive terms. It gives the court discretion to direct the taking of samples for forensics. There is, therefore, no obligation on the part of the trial court to direct that such samples be taken, since such directions could only be made at the discretion of the court in circumstances where it is deemed fit.

17. The court in *George Muchika Lumbasi vs. Republic* [2016] eKLR, stated that section 36 of the Sexual Offences Act does not make medical examination mandatory except where the court thinks it is appropriate, in the circumstances of the case, to subject an accused person to such examination. Adding that such examination is discretionary under section 36. *Evans Wamalwa Simiyu vs. Republic* [2016] eKLR and *Edwin Maiyo Kandie vs. Republic* [2019] eKLR are in similar vein.

18. I believe that the law has been settled, that despite section 36 of the Sexual Offences Act, sexual assault is proved, not by medical examination, but by evidence adduced at the trial. The evidence of the victim and that of corroborative witnesses or circumstantial evidence is usually enough to establish sexual offences such as rape and defilement. That position was stated by the Court of Appeal in *Fappyton Mutuku Ngui vs. Republic* [2014] eKLR, where it was said that medical evidence was usually not necessary. A similar position was taken in *AML vs. Republic* [2012] eKLR, *Kassim Ali vs. Republic* [2006] eKLR, and *George Muchika Lumbasi vs. Republic* (supra), *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, among others.

19. The third issue raised is that penetration was not sufficiently proved. The record is quite clear that the two minors gave detailed accounts of what transpired. The accounts might have not been one hundred percent similar, but what is graphic is that the appellant did penetrate them. They gave very clear accounts on what he did to them. They expressed the pain they felt. The other witnesses told of how the children walked in a strange manner thereafter, raising suspicion that something nasty might have happened to them. The medical evidence was not helpful, largely because the child that was taken for examination for P3 purposes was taken there too late.

20. What constitutes penetration is defined in section 2 of the Sexual Offences Act, as the partial or complete insertion of the genital organs of a person into the genital organ of another person. The Court of Appeal in *Mark Oiruri Mose vs. R* [2013] eKLR, stated that the sexual act need not be fully complete, it would suffice that there is penetration whether only on the surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ. In *Erick Onyango Ondeng vs. Republic* [2014] eKLR, the same court stated that in sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence, and that it was not necessary that the hymen be raptured. See also *GOA vs. Republic* [2018] eKLR. The medical evidence shows that there was mucus on the labia majora of PW2 and mucus discharge, but no specimen was collected as she was being examined quite sometime after the incident.

21. The next issue is that his defence was not considered by the court. I note that he gave a sworn statement. Page 4 of the judgment was devoted to the defence. It was noted in there that the appellant confirmed he worked at the place mentioned by the minors, and that he had also failed to mention where he was on material day when the assault was alleged to have had happened. At page 3 of the judgment the court also noted that he gave a sworn statement in which he said he did not know why he was in court, and said he did not know what happened on 19th May 2014, among other things. That testimony was examined alongside that of the minors who had said that they knew him and knew where he worked. There cannot, therefore, be any basis to conclude that his evidence was not taken into account.

22. The other issue touches on inconsistencies in the evidence of the state witnesses. I have gone through the record and noted the inconsistencies alluded to by the appellant. Some relate to the ages of the minors, but I have dealt with them in paragraphs 13 and 14. The others were minor and did not go to the core of the matter. It was said in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, 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. It was said in *Richard Munene vs. Republic* [2018] eKLR that not every inconsistency or contradiction is material.

23. He raises the issue that section 169 of the Criminal Procedure Code was not complied with. The said provision states as follows:

> *"169. Contents of judgment*
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> *(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*
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> *(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."*

24. The appellant did not, in his written submissions, elaborate on how section 169 was not complied with. I have gone through the judgment of the court, and I have not noted any deficiencies in the same that would suggest that it does not comply with section 169 of the Criminal Procedure Code. It was written by the officer who presided over the case, in the language of the court and it contained the point or points for determination, the decision and the reasons for decision. It was dated and signed by the officer. It recited or narrated the evidence as presented by both sides and analyzed it as against the law creating the offences charged. The appellant faced defilement charges. What was required to be proved was the ages of the minors, whether there was penetration of the minors by the genital organs of another and whether the appellant was the person who penetrated them. The trial court addressed itself to all those points, before it reached the decision that the appellant was guilty as charged. Reasons were also given by the court for arriving at the decision to convict.

25. The last issue he raises is with regard to the evidence of the minors not being corroborated. The starting point should be that with regard to sexual offences the court can convict even without corroboration so long as the testimony by the child victim is believable and credible. Of course, where the statements by the minor victims are unsworn corroboration would be critical as generally unsworn evidence is of little probative value. In this case, the evidence was corroborated. The victims made reports of their ordeal to various persons, which led to action being taken. There is also medical evidence which indicated that there was assault on them. It cannot, therefore, be argued that the evidence that the trial court relied on to convict was not corroborated.

26. The offence of defilement was established to the extent that the state proved the ages of the complainants, the fact of penetration and the appellant was identified as the perpetrator of the crime. What needs to be proved for the purposes of defilement was stated in *Dominic Kibet Mwareng vs. Republic* [2013] eKLR, in the following terms that -

> *"The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant."*

27. With regard to PW2, the offence charged was that of attempted defilement. The evidence that the prosecution led pointed, not to attempted defilement but, to the principal offence of defilement. Yet, the trial court, in its analysis of the evidence, did not advert to attempted defilement at all. Throughout the judgement, the trial court treated the charges relating to the two complainants as if they were complementary, defilement and indecent act with a minor. Even in sentencing, the court did not consider that the appellant faced a charge of attempted defilement, and did not convict him specifically of that offence and impose a sentence tailored for that offence, even if the same was to be held in abeyance. Attempted defilement is a lesser offence to defilement, and it attracts a lesser penalty. The trial court ought to have considered that when it came to sentencing the appellant.

28. On the sentences, the recent developments in jurisprudence on minimum and maximum sentences would require me to give the same a second look. According to the Court of Appeal and the Supreme Court, the trial court should have some discretion to impose such sentences as it considered appropriate in the given circumstances without being constrained by the ceilings imposed by statute, and in particular the lower ceiling. I am conscious of the fact that the Sexual Offences Act was passed to protect underage girls from predators who prey on them, whether the predator used their physical strength to force sexual connection, or took advantage of their immaturity to lure them into consensual sex, bearing in mind that legally, an underage person is deemed to be incapable to consenting to sexual activity, and any purported consent to such activity should be a matter of little consequence.

29. From the material before me, the age of the appellant was not disclosed. The charge documents indicate that he was an adult. The complainants were minors of very young age. PW1 was eleven at the material time, barely out of tender age, while PW2 was of tender age at eight. These were literally babies, and any sort of sexual connection between them and adults was inhuman. It would leave them with lifelong psychological trauma, leave alone physical injury. Any adult who preys on such young children should not be extended any form of mercy. A deterrent sentence is no doubt apt, to make the offender payback and to give him sufficient time in jail to learn a lesson.

30. In view of everything that I have said above, these are the final orders:

(a) That the aspect of the appeal on conviction with respect to Count I is dismissed and the conviction is upheld;

(b) That with respect to Count II, the conviction for defilement is set aside and substituted with a conviction for attempted defilement;

(c) That the sentence in respect of Count I is hereby set aside and substituted with that of thirty years imprisonment effective from the date of conviction on 14th February 2018;

(d) That the sentence under Count II is set aside and substituted with that of fifteen years imprisonment held in abeyance; and

(e) That the appellant has fourteen (14) days to appeal should he be aggrieved by the orders that I have made hereinabove.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE