



IN THE HIGH COURT OF KENYA

AT MOMBASA

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 103 OF 2017

BETWEEN

SUDI MWEKE MUNYALO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. L. K. Gatheru, RM

dated 28th June 2017 at the Senior Principal Magistrate's Court

at Mariakani in Criminal Case No. 668 of 2014)

JUDGMENT

1. The appellant, **SUDI MWEKE MUNYALO**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** ("the Act"). The particulars were that on 27th October 2014 at about 12.15am at [particulars withheld] Village of Kaloleni District of Kilifi County, he intentionally caused his penis to penetrate the vagina of WM aged 10 years old. He was sentenced to life imprisonment and now appeals against the conviction and sentence.
2. At the hearing of the appeal, counsel for the appellant contended that the appellant's fundamental rights to a fair trial under **Article 50** of the Constitution were violated in several respects. First, he was denied the opportunity to engage counsel when his counsel's application to re-open the case was denied by the trial magistrate. Second, the right to remain silent was violated when the trial magistrate informed the appellant to reflect on his choice and third, that the appellant was denied the right to make final submissions in his case. Counsel pointed out that the right to a fair hearing is one of the rights that cannot be limited under **Article 25 (c)** of the Constitution hence the entire trial was vitiated and thus the conviction and sentence must be set aside.
3. The respondent denied that the appellant's rights were violated as alleged. Counsel for the respondent urged that the court exercised its discretion properly when it declined to re-open the prosecution case when the appellant subsequently employed an advocate. He denied that the appellant's right to silence was denied as the appellant subsequently decided to give sworn testimony in his defence. Lastly, counsel submitted that the appellant was given an opportunity to present his submissions several times but he failed to do so forcing the trial magistrate to reserve judgment.
4. Whether the appellant's fair trial rights were limited as urged by counsel for the appellant must be examined in the context of proceedings. I do not read the provisions of **Article 25(c)** of the Constitution to mean that the court hearing a criminal case is left at the mercy of an accused or that it had no discretion in dealing with the matters before it within the confines of the law that provides for a fair hearing. What the appellant was afforded in the case was an opportunity to be heard and the case was heard and determined.
5. On the first issue regarding the argument that the right to legal representation guaranteed under **Article 50(2)(g)** of the Constitution was violated when the appellant's advocate's application to re-open the case was rejected by the trial magistrate, the trial magistrate gave a considered ruling in which he held that he could not re-open the case as it was not in the interests of justice taking into account the fact that the case commenced in December 2014. By the time the application to re-open the case was made in January 2016, the prosecution had closed its case and the appellant put on his defence. The trial magistrate also noted that the complainant who was a child aged 10 years ought not to be subjected to a further hearing one and a half years after she had testified.
6. In my view, whether or not to re-open the prosecution's case is a matter of the court's discretion. The fact that the trial court rejected the application does not, of itself, amount to a violation of the right to counsel. I hold that the trial court took into account the circumstances of

the case including the fact that the appellant had participated in the proceedings prior to that date.

7. An accused's right to remain silent in his defence is a right guaranteed under **Article 50** of the Constitution. As I understand, the appellant's complaint is that when the prosecution closed his case, the appellant was informed of the options available to defend himself under **section 211** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* which include the right to remain silent. Counsel for the appellant complained that after the appellant had informed the court that he wished to remain silent, the trial magistrate recorded that, "*accused person given to days to think if he wants to remain silent.*" After two days, the appellant informed the court that he was to give sworn testimony in his defence without calling any witness.

8. Having considered the proceedings, I do not think the right of the appellant to remain silent was violated for the reason that the appellant subsequently elected to give sworn testimony. Moreover, the appellant did so with the benefit of legal advice and was represented by an advocate at the time he made his defence. I therefore do not find any prejudice by the trial magistrate's direction.

9. Lastly, the record shows that on 20th January 2017, counsel for the appellant requested to file written submissions at the end of the defence hearing. He was given until 20th February 2017 but he failed to attend court on account of illness. The matter was adjourned to 9th March 2017 but on that day again, the counsel requested for more time on account of illness. He was given a further 21 days. When the matter came up on 3rd April 2017, the appellant told the court that his advocate was not coming to court as he had not been paid. The trial magistrate nevertheless granted the appellant another opportunity to file submissions. By 18th May 2017, no submissions had been filed causing the trial magistrate to reserve the matter for judgment. Despite the date for judgment being given, the appellant's counsel did not file any submissions. In light of these circumstances, I hold that the appellant was given sufficient opportunity to make submissions but did not take advantage of the same hence I do not find any violation.

10. For the reasons I have set out above, I do not find any violation of the appellant's fundamental rights and freedoms. I now turn to consider the substantive case against the appellant. I am aware that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] EA 32*).

11. The evidence before the trial court was as follows. After a *voire dire*, the complainant (PW 1) gave unsworn testimony. She told the court that on the morning of 27th October 2014 she had been sent by her mother to buy paper to pack groundnuts. She narrated what happened as follows:

As I left his house, I lifted the curtain then he grabbed me and threw me on the bed. I had a biker, pant and my uniform. He pulled off my clothes and he removed his clothes too. He did bad things to me. We live about 70 metres apart. He covered my mouth and told me not to tell anyone what happened. He separated my legs. I felt pain. I told him that I was feeling pain but he penetrated me using his private part and put it into my (private) part. He continued bouncing on top of me for a while and he also sucked my tongue. He kept on asking if it was sweet and I told him it was painful.

12. PW 1 stated after the ordeal, she left his home. She further testified that the appellant defiled her for three days. The complainant's mother, PW 3, recalled that on the material day, the appellant came to her home and asked for PW 1 so that he could send her to the market. PW 1 later came and told her that she had been sexually assaulted by the appellant and that when she checked PW 1's private parts, they had a watery substance and blood was coming out. She went and reported the matter to the police station and then proceeded to hospital with the child.

16. PW 5, the investigating officer, received PW 1 and PW 3 at the police station on 27th October 2014 after they went to complain about the incident. He issued a P3 form and accompanied both of them to hospital where PW 1 was examined and treated. PW 2, the clinical officer who examined PW 1 on the same day recalled that she had a torn skirt which was wet with blood. Her private parts had a cut on the labia minor and bruises on the labia and the hymen was broke. A high vaginal swab confirmed that there were red blood cells and pus cells and that she was suffering from a sexually transmitted disease. PW 5, a doctor at Mariakani Sub-county hospital conducted the age assessment based on the eruption of teeth and concluded that PW 1 was aged 10 years old.

14. The appellant elected to give sworn testimony in his defence. He denied that he committed the offence. A substantial part of his defence comprised submissions but on the issues of facts, he told the court that he was arrested four days after the incident while he was at home. He denied that at the time he is alleged to have committed the offence he was at home as he used to work overnight and sleep during the day. When cross-examined he stated that he would send children, including PW 1, to buy paper for packing groundnuts.

15. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the *Sexual Offences Act*, the prosecution must show that the appellant did an act that amounted to penetration of a child. "*Penetration*" under **section 2** of the *Act* means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

16. As regards the issue of penetration, the child clearly testified how the appellant sexually assaulted her in graphic terms I have set out elsewhere in this judgment. She was resolute in cross-examination, that the appellant had in fact sexually assaulted her for three days. He was a person known to her and she explained that she also knew his children. Her testimony was corroborated by the testimony of her mother, PW 3, who confirmed that the appellant came to his house and requested to send the child to the market. Further she saw the child in a state of distress after the incident on 27th October 2014 with her wet clothes and when she examined her private parts she saw. She also reported the incident on the same day.

17. PW 1's testimony is further corroborated by the medical evidence of PW 2. Although the P3 form produced showed that she was examined on 29th May 2014, PW 1 was examined on 27th October 2014 which is the date of the incident. The cut on the labia minora and the bruises on the labia were consistent with the fact of penetration.

18. To my mind the appellant's defence was really a denial of the offence. He however confirmed that he was at his home on the material day and that he knew the appellant whom he would send to buy packaging paper from time to time. He contended that PW 1's testimony referring to other incidents of defilement implied that the allegation was inconsistent with her statement. I agree with the trial magistrate on this issue that the date on the incident charged was what took place on 27th October 2014 and the evidence on that is consistent in that after PW 1 was sexually assaulted, she reported to her mother and on the same day she reported to the police and was examined and treated at the hospital by PW 2 on the same day she was defiled.

19. The import of age as an ingredient in the offence of defilement was discussed by the Court of Appeal in *Moses Nato Raphael v Republic NRB CA Civil Appeal No. 169 of 2014 [2015]eKLR* as follows;

On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in *Tumaini Maasai Mwanja v. R, Mombasa CR.A. No. 364 of 2010*, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.

20. There is no doubt that PW 1 was a child and the appellant did not suggest otherwise. Her apparent age for sentencing is a question of fact hence I reject the submission by counsel for the appellant that the child's age was not proved as the birth certificate was not produced. PW 3 testified that PW 1 was born in July 2004. In addition, PW 5 who produced an age assessment report, testified that based on the teeth eruption, PW 1 was aged 10 years although the margin of error was one year. I therefore find that the child was aged 10 years. In the circumstances, the mandatory sentence of life imprisonment provided under **section 8(2)** of the *Act* is sound.

21. For the reasons I have set out, I affirm the conviction and sentence. I dismiss the appeal.

DATED and DELIVERED at MOMBASA this 3rd day of September 2018.

D.S. MAJANJA

JUDGE

Mr Odera, Advocate for the Appellant.

Mr Masila, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.