



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL NO. 4 OF 2017

MUNIRI NDIRANGU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

[From the original the Senior Resident Magistrate's court at Narok, in Criminal Case No.1139 of 2013, R v. Muniri Ndirangu]

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of defilement of a girl aged 3 years old contrary to section 8 (1) (2) of the Sexual Offences Act no. 3 of 2006 which is the authorized minimum sentence.
2. The appellant was convicted on the sole evidence of the complainant (PW1). The complainant after being subjected to a *voire dire* examination was allowed to make an unsworn statement. She testified that she used to stay at the appellant's house. She further testified that the appellant has young boys. She also testified that the appellant "***did bad things to me***". She went on to testify that the appellant pulled off her panty half way to her thighs and then lifted her and placed her on his laps.
3. Furthermore, she testified that the appellant "*put his male thing into my private part here (she points to her genital area) this was in sitting room as he sat on the sofa. PW1 screamed. I also cried out (witness covers her face with both hands. He then stopped)*". Thereafter, she went and told her father regarding what the appellant had done to her. As a result she was taken to hospital and she was examined by the Benjamin Tum (PW3), who was a Clinical Officer.
4. PW3 noted a lacerated labia majora with bleeding. He also found that her hymen was broken and there was bleeding from her vaginal wall. It was also his evidence that laboratory tests for high vaginal swabs were carried out and he found that there were moderate blood cells in her urine. HIV tests proved negative. PW3 concluded that there was penetration and thereafter he put the complainant on HIV treatment, antibiotics and other treatments. It is PW3 who put in evidence of the P3 form as prosecution exhibit 1. While under cross examination, PW3 testified that he carried out syphilis and a HIV test, both of which proved negative.
5. The appellant testified on oath in his defence. He testified that his correct name is Munyiri and is a driver as well as a farmer. It was his evidence that on 28th August 2013, at about 4:30 p.m. he was alone in his home at Melili trading centre after returning from his farm. While in the house, he was called by a friend by the name Kaseiye, who testified as (DW1) in defence of the appellant. The two of them went into a place where a person had committed suicide. Later in the same day in the evening, the appellant went into a place where they watched evening news. He also testified that while there, the

complainant's father arrived at the scene and sat next to one Fundi, who was also watching news.

6. The complainant's father then called him. He then asked the complainant's father if there was any problem. In response, the complainant's father told him that his toddler daughter had told him that the appellant had done bad things to her. He immediately denied those allegations and went further to state that he had not met the toddler daughter. He then proceeded to tell the complainant's father to have her examined medically to verify her allegations. Thereafter, he went to his house and prepared his food. In the process of preparing his food three young men arrived at the scene. One of whom told him that a taxi had been brought and that he should accompany him. This young man told him to stop cooking because he had promised to buy him food in a hotel along the way, which he did before proceeding to Narok District Hospital.

7. As they were in that hospital, the father of the complainant took him to Narok Police Station where he was detained over night and in the end he was charged with this offence. While under cross examination, he admitted that PW1 called "*mama*" which in Kikuyu means uncle. The appellant called Simon Olekaseiye (DW1) and Hillary Kiptoo (DW2) who supported his evidence, after which he closed his defence.

8. The appellant has raised eight grounds of appeal in petition to this court. I will start with ground two, in which the appellant has faulted the trial court both in law and fact by relying on the conflicting and uncorroborated evidence of the prosecution witnesses.. In this regard, I find that the evidence of the complainant was detailed and was correctly found to be credible by the trial court.

9. Furthermore, the trial court was alive to the fact that he was convicting the appellant on the uncorroborated evidence of a child of tender years. In terms of section 124 of the Evidence Act (Cap 80 of Laws of Kenya), it is not mandatory that the evidence of a child of tender years must be corroborated before a conviction is entered. The trial court found PW1 to be a credible witness and that was the basis of the conviction. In the circumstances, I find no merit in this ground of appeal and I hereby dismiss it.

10. In ground three, the appellant has faulted the trial court for relying on suspect and what he calls doctored medical evidence. I find from the evidence of Benjamin Tum (PW3), who had examined the complainant that the complainant had a lacerated labia majora with bleeding and also found a broken hymen and mild bleeding from her vaginal wall. He concluded that there was penetration. In view of this evidence which was believed by the trial court, I find that this was not doctored evidence. The issue of it having been doctored was not put to this PW3. I therefore find that this ground of appeal is without merit and I hereby dismiss it.

11. In ground four, the appellant has faulted the trial court for importing evidence into the judgment that was not produced in the trial court and as a result arrived at an erroneous decision. I find from the judgment of the trial court and the evidence at the trial that the judgment is based on the evidence that was produced during trial. In circumstances, I find no merit in this ground of appeal and therefore dismiss it.

12. In grounds five and six, the appellant has faulted the trial court in failing to find that the offence was not proved as required and that the court failed to consider the evidence of the appellant. I find from the judgment that the evidence of the appellant was considered together with that of his defence witnesses namely, Simon Olekaseiye (DW1) and Hillary Kiptoo (DW2). After considering that evidence and that of the prosecution, the trial court rightly disbelieved the defence evidence. In circumstances, I find no merit in these grounds of appeal and I hereby similarly dismiss them.

13. In grounds seven and eight, the appellant has faulted the trial court for failing to accord him the opportunity to mitigate before being sentenced to what he calls a manifestly excessive sentence that has no basis in law. In sentencing the appellant, the trial court gave the appellant the opportunity to mitigate. In response thereto, the appellant stated that he was framed due to political differences and concluded that he could not have done such a thing. Thereafter, the trial court proceeded to sentence the appellant to life imprisonment, which he found was the only authorized sentence by law in terms of section 8 (1) (2) of

the Sexual Offence Act no. 3 of 2006.

14. In the circumstances, I find that the appellant was given an opportunity to mitigate and he did so. I also find that the sentence is one that is prescribed by law. In the circumstances, I find no merit in these two grounds of appeal which I hereby dismiss.

15. I have considered the submissions of both the counsel. This is a first appeal. As a first appeal court I am required according to *Okeno V. R. (1972) EA 32* to reassess the evidence produced before the trial court and make my own independent findings while deferring to findings of fact based on the demeanour of witnesses. I have done so and I find that the conviction of the appellant is based on sound evidence. I therefore confirm the conviction.

16. There are two matters that are of concern that were not raised by both the appellant and respondent. The first one is that the identity of the child of tender years should not have been disclosed during the time she gave evidence. She should have been assigned a pseudonym name thereafter the particulars of her name and identity should have been taken separately and kept in a secret registry. The pseudonym name assigned to the child of tender years should also have been used in the judgement rather than being referred by her initials.

17. Furthermore, in order to keep confidential the identity of the mother a similar approach should have been adopted, so that her pseudonym name should have been used during her evidence in court and in the judgment. The usage of her initials in the judgment does not guarantee that confidentiality. In the same manner, her name and other particulars of her identity should have been taken in camera and kept in the secret registry. I find that the disclosure of both the identity of the child of tender years and her mother have not occasioned any miscarriage of justice in terms of Section 382 Criminal Procedure Code [Cap 75] Laws of Kenya.

18. The sentencing imposed is one that is authorized by law namely life imprisonment, because the complainant was a child of tender years aged 3. I hereby similarly dismiss the appeal against sentence.

19. The upshot of the foregoing is that the appeal is dismissed in its entirety.

Judgment delivered in open court this 7th day of February, 2017.

In the presence of Mr. Kilel for the Appellant and Mr. Mukofu for the Respondent.

J. M. Bwonwonga

Judge

7/2/2017