REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL 40 OF 2013

Francis Muthee Mwangi.....……....…..…….……..…..…….Appellant

Versus

Republic…….....……..…….…….……Respondent

(Appeal against Judgement conviction and sentence imposed in Criminal Case Number 550 of 2012, R vs Francis Muthee Mwangi at Karatina, delivered by H. M. Okwam, Ag. S. R.M. on 28.3.2013).

JUDGEMENT

Francis Muthee Mwangi (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the Ag. Senior Resident Magistrate in criminal case number **550** of **2013,** Karatina**,** delivered on 28.3.2013. In the said case the appellant was charged with the offence of defilement of a child of 11 years contrary to Section **8 (1) (2)** of the Sexual Offences Act.[1]

The particulars of the offence were that on the **13th** day of May 2012 at [particulars withheld] Estate in Mathira East District within Nyeri County, intentionally caused his penis to penetrate the vagina of **M W N**, a child under the age of **11** years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act.[2] It was alleged that on 13th May 2012 at [particulars withheld] estate in Mathira East District within Nyeri County, intentionally touched the vagina of **M W N** , a child aged **11** years.

The prosecution called a total of five **(5)** witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty as set out in the case of **Okeno v. R**[3] which is to:-

".....to a fresh and exhaustive examination[4] *and to the appellate court's own decision on the evidence.....it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.*[5]*"*

PW1, M W N , the complainant gave her age as 10 years. **A**s the law demands the learned magistrate conducted a *Voire Dire* and allowed her to give sworn evidence after satisfying himself that the child appreciated the nature of an oath. She testified that on the material day she was asleep, that she forgot to close the door and *"Muthee"* came and removed her clothes, he held her mouth with one hand, *and inserted his thing into her.* She felt pain and cried, he ran away. She knew the appellant. He was staying in the same plot. The next day a one **M M** noticed her walking in a funny way and asked her what the problem was. She told her what the appellant did whereupon she went to the appellant and the public beat him up and took him to the police.

PW2 M M noticed the child walking in an usual way, took interest and inquired from her, then the child opened up and explained that the appellant had raped her. He was arrested.

PW3 Dr. Martha Mwangi, examined the child, aged 11 years, her genitals were swollen, hymen was not intact, no spermatozoa was detected, she concluded that the child was raped and produced he **P3** form

and hospital treatment card.

PW4 P. C. Julius Mbaluka, the investigating officer was at the station when the report was made, the case was assigned to him, he escorted the victim to hospital, he arrested the appellant.

PW5 Doctor Hindi Abdulhman examined the minor at Kiambu General Hospital, noted laceration on labia majora & the hymen was partially intact.

After evaluating the above evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section **211 C.P.C**. The accused elected to give sworn evidence. He stated on the material day he was at work at Karatina, that he closed at 9.00pm, and upon arriving at home he prepared dinner and slept. On 14. 5. 12 he was attacked by a group of women prompting him to run to the police station. On cross examination he admitted he knew the complainant, he knew her mother was working in a bar, that she used to come home late and at times she would not come. He also gave his house number and the number of the complaints' house.

The learned magistrate in her judgement analysed the evidence of all the witnesses and the above defence, framed issues for determination and addressed her mind to the relevant sections of the law under which the appellant was charged and concluded that the appellant was guilty as charged and convicted him on the main count and dismissed the alternative count.

After hearing the accused in mitigation the learned magistrate considered the seriousness of the offence and the maximum sentence provided under the law and sentenced the appellant to **life imprisonment.**

Aggrieved by the above verdict, the appellant appealed to this court seeking to quash the conviction and sentence. The appellant raised **3** grounds in his substituted grounds of appeal, namely:-

i. Evidence was contradictory.

ii. That he was detained for more than 24 hours.

iii. There was no medical evidence to show he committed the offence.

iv. No prima facie was established.

In his submissions, the appellant stated that he was held more than 24 hours at the police station, that the age of the victim was not proved by birth certificate, that the prosecution evidence was contradictory, that his defence was not considered and that he was not properly identified because it was at night.

Learned State counsel opposed the appeal and submitted that the evidence adduced was manifestly sufficient. On the issue of the appellant having been held for more than 24 hours, counsel relied on the decision in the case of *Anthony Kinyanjui vs Republic**[6]*** where citing *Julius Kamau Mbugua vs Republic**[7]*** it was held that *"..the appellant cannot be exonerated and acquitted of crime on that basis alone ....."*

As **Justice Mutungi** stated in the case of *Ann Njogu & 5 others V Republic*, [8] whose sentiments I share:-

"…. the section is very clear and specific – that the applicants can only be kept in detention or the cells, for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants….."

There is a litany of authorities in relation to the right of an accused person to be brought to court within a prescribed period of time. In the case of *Albanus Mwasia Mutua vs Republic* [9]the court of appeal held

that the appellant's constitutional rights guaranteed under *section 72 (3)* of the constitution had been grossly violated because he was taken before the trial magistrate some eight months from the date of his arrest and no explanation at all was offered for that delay. The court made the following pertinent remarks:

"At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. ....."

It is worth noting however that an accused person is not automatically entitled to an acquittal where the prosecution has not been given a chance to offer an explanation for failing to bring him to court on time. In the case of *Eliud Njeru Nyaga vs Republic**[10]*** stated

"While we would reiterate the position that under the fair trail provisions of the constitution, an accused person must be brought to court within twenty four hours for non capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in automatic acquittal."

In the case of *Paul Mwangi Murungu v/s Republic**[11]*** the court of appeal observed:-

"We do not accept the proposition that the burden is upon an accused person to complain to a Magistrate or a Judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under section 72 (3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court as the ultimate enforcer of the provisions of the constitution must raise the issue."

All the above cases point to the need for courts to strictly observe the fair trial provisions in our constitution. The law of the land has to be obeyed particularly by those entrusted to enforce it. The police should be in the forefront of obeying the law and enforcing it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable.

Even though the delay herein has not been explained, I note that the appellant was arraigned in court on the third day and considering the nature of the offence before the court and the evidence adduced, I hold the view that it would not be fair to exonerate the appellant on account of the aforesaid delay only.

On identification, counsel submitted that the minor knew the appellant and that all the evidence that was tendered was credible.

I have carefully considered the submissions made by the appellant and the state counsel. I have also reviewed the evidence on record and the relevant law. Section **8(1) & (2)** of the Sexual Offences Act[12] provides that:-

8(1)*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

8(2)*A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

Section **8 (1)** cited above provides the key elements of the offence of defilement. These are *"Penetration,"* and *"Child."* The act defines *"penetration"* as partial or complete insertion of the genital organs of a person into the genital organs of another person while *"child"* has the meaning assigned thereto in the children's Act. Before we exit the definitions it is extremely important that we bear in mind the category of persons defined in Section **2** of the act as *'vulnerable person'* which *means a child, a person with mental disabilities or an elderly person and 'vulnerable witness'* shall be construed accordingly. I find no difficulty in concluding that the minor in this case was vulnerable persons.

Section **8 (1)** defies the offence of defilement and therefore before section **8 (2)** comes into play, the prosecution must prove the offence of defilement was committed. As stated above, an important element of defilement is penetration. From **PW1's** evidence which was collaborated by **PW5** and **PW3** confirmed that there was penetration. Indeed **PW1** testified that the appellant inserted his "thing" in her private parts. To me this evidence is cogent and was not rebutted and is sufficient to show that there was penetration, an essential element of an offence of this nature.

Even without considering the presence or otherwise of medical evidence, it is my view that an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. My position in this regard is fortified by the holding of the court of appeal in *Martin Nyongesa Wanyonyi vs Republic***[13]** citing *Kassim Ali vs Republic***[14]** where the court stated:-

"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"

The evidence of **PW1** and in particular her assertion that the appellant inserted his penis in her private parts is in my view sufficient especially when we consider the rest of the evidence and in particular the medical evidence. The appellant never rebutted this evidence. In fact the appellant admitted that they live in the same plot, and gave the house number for his house and the complainants and even stated that the complainants mother was working in a bar and used to come home late and sometimes would not come home. This details show that the appellant knew the complainant & her family hence in my view and creates a reasonable basis for me to conclude that the complainant knew the appellant too and the possibility of not being properly identified is remote. In any event the appellant never raised the issue of identification in the lower court.

Regarding age, it is clear that the complainant is a child within the definition in the Children's Act and secondly she was below **11** years within the provisions of section **8 (2)** and that the child was a vulnerable person within the above cited definition. Commenting on the age of a victim in cases of this nature the court of appeal in *Kaingu Elias Kasomo vs Republic***[15]** had this to say:-

"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

Exhibit 6 is a baptismal card which shows the child was born in 2001. The offence was committed in 2012. Also, the complainants age is indicated in the P3 form as 11 years. In defilement cases, the age of the complainant is an important factor especially when sentence is being considered. In the case of *Dominic Kibet Mwareng –vs- Republic***[16]** it was held thus:-

"The critical ingredients forming the offence of defilement are:- the age of the complainant, proof of penetration and positive identification of the assailant. ……"

In the case of *Hilary Nyongesa Vs Republic*[17] **Mwilu J** (as she then was) stated that:-

"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved…And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."

I agree and add that while the court may in certain circumstances rely on evidence other than an age assessment report or birth certificate and in this conne ction i find useful guidance in the case of *John Cardon Wagner –vs- Republic*,[18] where **Warsame J** (as he then was) held that:-

"In defilement cases, the age of the complainant is proved by either medical evidence or through other evidence since the sexual offences act have different categories of ages and sentences of different ages…"

Mutende J in *Musyoki Mwakavi –vs- Republic*[19] held that:-_

"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".

In the case of *Francis Omuroni vs Uganda*,[20] it was held thus:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

I find that age of the child was sufficiently proved.

I have reviewed and analysed the defence offered by the appellant. I am fully aware that the legal burden of proof in criminal cases never leaves the prosecution's backyard. A close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case. In my view, the defence did not rebut the serious allegations made in support of the charges against the appellant.

After evaluating the evidence adduced, the law and authorities, I am satisfied that the prosecution proved the offence of defilement under section **8 (1)** as read with section **8 (2)** and that the necessary ingredients of the offence as enumerated above where proved beyond doubt. The upshot is that the learned magistrate correctly analysed the evidence and properly convicted the appellant. Hence, I hereby up hold the conviction.

Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.[21] In *Shadrack Kipchoge Kogo vs Republic*,[22] the court of appeal stated:-

"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

The Supreme Court of India in *State of M.P. vs Bablu Natt*[23]stated that:-

"the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with."

In *Alister Anthony Pareira vs State of Maharashtra*,**[24]**the court held that:-

"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula

for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[25]

Section **8 (2)** of the Sexual Offences Act[26] provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for life. I have considered the seriousness on the said offence, the age of the victim at the material time and the principles of sentencing, and I find no reason to interfere with the sentence imposed by the trial court.

The upshot is that this appeal on both conviction and sentence fails and the same is hereby dismissed.

Dated at Nyeri this **2nd** day of **March** 2016

John M. Mativo

Judge

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[1] No. **3** of 2006

[2] Ibid

[3] {1972) E.A, 32at page 36

[4] See Pandyavs Republic {1957}EA 336

[5] See Peter vs Sunday Post {1958}EA 424

[6] Criminal Appeal No. 157 of 2007

[7] Criminal Appeal No. 50 of 2008

[8] Misc. Cr. App. No. 551 of 2007

[9] {2006} eKLR

[10] {2007} eKLR

[11] Criminal Appeal No. 35 of 2006

[12] Supra

[13] Criminal Appeal no. 661 of 2010,(Eldoret), D. K. Maranga, D. Musinga& A. K. Murgor JJA

[14] Criminal Appeal No. 84 of 2005 (Mombasa)

[15]Criminal Appeal no. 504 of 2010 cited in Martin NyongesaWanyonyivs Republic, Criminmal Appeal no. 661 of 2010

[16] {2013}eKLR

[17] High Court Cr Appeal No. 123 of 2009, Eldoret

[18] High Court Criminal Appeal No. 404 of 2009 (Nairobi)

[19] High Court Criminal Appeal No. 172 of 2012

[20] Criminal Appeal no 2 of 2000- Court of Appeal

[21]See Makhandia J (as he then was in Simon NdunguMuragevs Republic, Criminal appeal no. 275 of 2007, Nyeri.

[22]Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu&Onyango JJA)

[23] {2009}2S.C.C 272 Para 13

[24] {2012}2 S.C.C 648 Para 69

[25] See Somanvs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India

[26] Supra