



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 194 OF 2013

JACOB KIIRU MURIGE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the Principal Magistrate's

Court (S. Ngii) at Wanguru, Criminal Case No. 42 of 2013

dated 3rd February, 2014)

JUDGMENT

1. The Appellant herein, **JACOB KIIRU MURIGE** was charged with defilement contrary to **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006** at Wanguru Principal Magistrate's Court **Criminal Case No. 42 of 2013** where he was found guilty on the principal charge and convicted to serve 25 years imprisonment. He was aggrieved by both the conviction and sentence and preferred this appeal. In the petition of appeal, he raised 8 grounds as follows:-

2. (i) *That he pleaded not guilty at the trial.*

(ii) *That the learned Magistrate erred in both law and fact in convicting and sentencing the accused person on the erroneous belief that the Appellant had committed the said offence.*

3. *That the learned Magistrate erred in law by convicting the sentencing the accused person and the same was excessive. (sic)*

(iv) *That the learned Magistrate erred in both law and fact by his failure to show and indicate the language the appellant used in his mitigation.*

(v) *That the learned Magistrate erred in both law and fact by violating the provisions of the criminal procedure code cap (75) of the laws of Kenya.*

(vi) *That learned Magistrate erred in both law and in fact to belief that the appellant committed the offence even when the medics did not indicate any result.*

6. *That the learned Magistrate erred in law by subjecting*

the appellant to a trial when the charge was read to the appellant the language that he cannot

understand.(sic)

7. That the learned Magistrate erred in law by allowing the Appellant's constitutional rights to be violated.

3. The Appellant through his counsel Miss Magara made written and oral submissions in support of the above grounds. The Appellant's counsel contended that trial court erred by relying heavily on the doctor's evidence that there was penetration while in her view the evidence was inconclusive as whether there was any penetration. The Appellant pointed out the absence of spermatozoa on the complainant's vagina as a point that should have persuaded the learned trial magistrate that there was no proof of penetration.

4. The Appellant's counsel also faulted the prosecution for not summoning a crucial witness named Mama Peninah who was said to have found the victim of defilement and taken her to the Police Station to report. The Appellant submitted the witness could have given adverse evidence against the prosecution. He further submitted that the evidence tendered before the trial court was insufficient and that the trial court erred by believing the witnesses summoned to testify.

5. On sentence, the Appellant contended that the sentence meted out against him was excessive and harsh arguing that the law sets a minimum sentence of 20 years but the trial learned magistrate gave 25 years imprisonment.

6. The State through Mr. Sitati opposed this appeal and supported both the conviction and sentence meted out against the Appellant saying the sentence was lenient considering the serious nature of the offence. The State contended that the evidence adduced at the trial court was overwhelming and well corroborated. Mr. Sitati pointed out they were able at the trial to prove two important elements in defilement which he opined as;

1. Proving beyond reasonable doubt that the complainant or the victim had been defiled;
2. Proving the identity of the offender.

7. On the first question, the State told this Court that P.W.1 who was the complainant at the trial court, told the court how she was lured by the Appellant with a promise of being given some clothes and later defiled for 3 days in the Appellant's house. Mr. Sitati pointed out that the evidence of the minor was truthful and sufficient on its own to found a conviction under **Section 124** of the **Evidence Act Cap. 80 Laws of Kenya**. He however, added that the evidence was well corroborated by witnesses including a doctor who noted some lacerations on the labia of the victim's genitalia. The State submitted that the doctor's evidence was sufficient proof that the complainant had been defiled.

8. On the question of identity, the State contended that the victim knew the Appellant prior to the incident. Mr. Sitati argued that the victim was defiled for 3 days by the Appellant and therefore recognition was beyond doubt. He pointed out that the evidence of P.W.5 who resided on the same plot where the Appellant lived and where the incident happened was material and positive on the issue of identification of the Appellant as the minor was reportedly found outside the house belonging to the Appellant.

9. In response to the Appellant's contention that a witness, one mama Peninah was not called to testify, Mr. Sitati pointed out that the said witness was called and testified at the trial court as P.W.5 and was a material witness who supported the prosecution's case.

10. I have considered this appeal and evaluated the evidence tendered before the trial court. I have considered the opposition to the appeal by the Office of the Director of Public Prosecutions represented by Sitati. This Court unlike the trial court did not have the benefit of the trial court who saw the witnesses first hand as they testified before it and therefore able to observe their demeanour as they testified. I have however, carefully gone through the evidence by all the witnesses called by the

prosecution at trial court and the sworn defence put forward by the Appellant.

11. In my view as I have observed in other similar cases of this nature, there are two or three elements which require proof to sustain a charge of defilement under **Section 8 (1)** of the **Sexual Offences Act No. 3 of 2006**.

1. Age of the minor/complainant.
2. Proof of penetration.
3. Identity of the offender.

12. On the first issue, there was no doubt that the complainant was aged 15 years 11 months at the material time of the offence. The prosecution produced a birth certificate as P. Exhibit 1 showing that the minor was born on 5th February, 1997. She was reported to have been defiled on 18th, 19th and 20th January, 2013. It is therefore not in dispute that the charge sheet correctly indicated her age as 15 years eleven months. She was in fact 2 weeks away from attaining 16 years of age. The offence committed against her fell within the provision of **Section 8 (3)** of the **Sexual Offences Act**, which was the principal charge facing the Appellant at the trial.

13. On the issue of penetration, I have looked at the evidence tendered at the trial. The evidence of the minor/complainant before the trial court was graphic and clear on what transpired from the time she was lured to the Appellant's house to the time she was repeatedly defiled for 3 days and later locked out of the Appellant's house. The trial learned magistrate really evaluated the evidence tendered well from the complainant. The doctor's evidence in my view established beyond reasonable doubt that there was penetration. He made the following material observations:

“Lacerations and bruises on the labia were noted and were consistent with penetration.”

The trial court correctly concluded that penetration had been proved by the evidence tendered notwithstanding the absence of spermatozoa which he correctly observed was not a necessary ingredient of the offence. The law under **Section 2 (1)** of the **Sexual Offences Act, No. 3 of 2006** clearly gives the definition of “penetration” and presence of spermatozoa is not a proof in law that penetration has taken place.

14. The Appellant's submissions that there was no lacerations or bleeding on the external examination by the doctor does not hold any water in view of doctor's overall evidence which corroborated the evidence given by the complainant or P.W.1. The doctor's own conclusion was that there was evidence of penetration and that was material in proving the offence.

15. On the issue of identity, I agree with the submissions by Mr. Sitati that the Appellant was positively identified. The evidence indicates that he locked the victim or the minor for 3 days in his house. He was also known to the minor. I do find that the evidence on identity of the Appellant was overwhelming. The Appellant contended that a witness referred to as “mama Penina” was not called but I have looked at the evidence tendered by the prosecution and noted that the witness was called as P.W.5 – **M.N.G.** P.W.6 – **W.M.M.** testified that P.W.5 was also known as mama Peninah and that the two witnesses found the minor crying outside the house of the Appellant and took interest as a result of which they found out what had happened and reported the matter to the Police who swung into action and later arrested the Appellant.

16. The Appellant in his defence really did not allege any ill-will on the part of the complainant or the witnesses who testified against him. The trial learned magistrate was correct to conclude that the prosecution had proved beyond reasonable doubt that the Appellant was guilty of the offence of defilement.

17. On sentence, I am inclined to agree with the Appellant that the sentence meted out is a bit harsh though not excessive as he put it. The law prescribes a minimum sentence of 20 years imprisonment under **Section 8 (3)** of the **Sexual Offences Act** and I find no reason why the Appellant could not be

given the minimum sentence.

In view of the foregoing, on conviction, I find no merit in this appeal.

Conviction is upheld in the light of the aforementioned reasons but the sentence of 25 years imprisonment is set aside and in its place a

reduced sentence of 20 years imprisonment is imposed on the Appellant. It is so ordered.

Dated and delivered at Kerugoya this 1st day of July, 2015.

R. K. LIMO

JUDGE

1.7.2015

Before Hon. Justice R. Limo

Court Assistant Willy

Appellant present

Omayo for State

Jacob Murige present

Miano holding brief for Miss Marangu

COURT: Judgment dated signed and delivered in the open court in the presence of Miano holding brief for Marangu and Omayo for State.

R. K. LIMO

JUDGE

1.7.2015