



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, GATEMBU & M'INOTI, J.J.A.)

CRIMINAL APPEAL NO. 47 OF 2018

BETWEEN

JOSEPH KAZUNGU KASENA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya*

*Malindi (Chitembwe, J.) dated 28th October, 2015 in H.C.C.R.A. No. 62 of 2013)*

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JUDGMENT OF THE COURT

The appellant, *Joseph Kazungu Kasena*, was convicted on 18th July 2013 by the *Chief Magistrate's Court* at *Malindi* for the offence of defilement contrary to *section 8(1)* as read with *(3)* of the *Sexual Offences Act* and sentenced to 20 years imprisonment. His first appeal was dismissed by the *High Court (Chitembwe, J.)* on 28th October 2015, and he is now before us on a second appeal.

The evidence adduced before the trial court by five prosecution witnesses is that the appellant is the brother-in-law of *MJ*, a class two girl, at the material time, aged 12 years. On 16th November 2012, *MJ* visited the appellant's home after school and at about 7.30 pm, the appellant offered to escort her back to her home. On the way, the appellant, who was armed with a *panga* or slasher, defiled *MJ* and threatened to kill her if she disclosed the defilement to any person. On reaching home, however, *MJ* informed her parents of the defilement and they took her to *Kon-goni Health Center* and subsequently reported the matter to the police.

*MJ* and her mother, *FN (PW2)*, testified that *MJ* was 12 years old at the time of the defilement. *PW 2* further testified that when *MJ* got home, she was bleeding from her private parts and her clothes were blood-stained. The defilement was confirmed by *Ibrahim Abdullah (PW 4)*, a clinical officer at *Malindi Hospital*, who testified that upon examination, *MJ's* hymen was broken and there was presence of spermatozoa. A *P3 Form* as well as *MJ's* blood-stained clothes were produced in evidence as exhibits. *PW4* assessed *MJ's* evidence to be approximately 15 years.

When put on his defence, the appellant testified that on the material day he went to work in his *shamba* until noon when he felt sleepy and went home to sleep. He confirmed that *MJ* visited his home that afternoon but insisted that after taking lunch at about 3.00 pm he went back to the *shamba* and *MJ* left to go back home. He worked until 6 pm when he returned home. Later at night members of the public came to his home and started beating him up and he woke up the next morning only to find himself in a police cell. He denied having defiled *MJ*.

The appellant's first appeal was based on the grounds that the medical evidence adduced by the prosecution was not reliable because *MJ* had bathed when she got home; that it was not established that the spermatozoa found in *MJ* were from the appellant; that there was no evidence that the blood on *MJ's* clothes was hers; that the appellant was not available to give witness statements; and that the members of public who arrested the appellant were not called as witnesses. As we earlier stated, the High Court found no merit in the first appeal and dismissed it.

This second appeal is premised on the grounds that the prosecution did not prove its case beyond reasonable doubt; that the two courts below erred in relying on the evidence of *MJ* alone which was not sufficient to sustain a conviction; and that both courts below erred by failing to

consider the appellant's defence and also by meting out a sentence that was excessive. The appellant relied on his written submissions where he elaborated on the above four grounds and cited the decision of this Court in **Eliud Waweru Wambui v. Republic [2019] eKLR** and that of the High Court in **Amedi Omurunga v. Director of Public Prosecutions [2019] eKLR**, in support of the contention that sentencing is in the discretion of the court.

Opposing the appeal, **Mr Jami, Principal Prosecution Counsel**, submitted that the prosecution proved all the ingredients of the offence of defilement, namely, penetration, age of the victim, and positive identification of the perpetrator of the offence. On the age of the complainant, counsel relied on **Basil Okaroni v. Republic [2016] eKLR** and submitted that MJ's age was properly proved by herself, her mother and the age assessment report. On penetration, it was contended that it was proved by the evidence of MJ and corroborated by that of PW4. Lastly on identification, it was submitted that there was no question of mis-taken identity because MJ was well known to the appellant, who was married to her sister.

Regarding sentence, Mr Jami submitted that it was deserved in the circumstances of the case but left it to the Court, in light of the judgment of the Supreme Court in **Francis Kariokor Mu-ratetu & Another v. Republic [2017] eKLR**, to mete an appropriate sentence.

Turning to the merits of this appeal, as regards defilement it is obvious to us that the appellant was not convicted on the evidence of MJ alone, even though by dint of the proviso to **section 124** of the **Evidence Act**, the trial court could have properly convicted him on MJ's evidence alone if it were satisfied and noted it on record that MJ was a witness of truth. (See **Denis Osoro Obis v. Republic [2014] eKLR** and **George Kioji v. Republic, Cr. App. No. 220 of 2012**). MJ's evidence was corroborated by that of her mother, PW2, and the medical evidence adduced by PW4.

As for the age of MJ, both herself and her mother testified that she was 12 years old at the time of the defilement. There was therefore credible evidence on the victim's age. And we find no rational basis for discounting the evidence of a mother as regards the age of her child. Indeed, the evidence of parents has been

relied upon to prove the age of their children. (See **Hadson Ali Mwachongo v. Republic [2016] eKLR**) and **Basil Okaroni v. Republic [2016] eKLR**). The age assessment report produced by PW4 indicated that MJ was approximately 15 years old. That was an approximation and we do not think anything turns on whether MJ was 12 years old or 15 years old, because under **section 8(3)** of the **Sexual Offences Act** under which the appellant was charged, the offence of defilement relates to a child between the ages of 12 and 15 years.

On the appellant's defence, the trial court analysed the same on page 3 of the judgment, and concluded as follows on page 4:

*"I have considered the accused's defence. In his defence (he) alleges that they had asked for money but he did not pay up. I note that this did not come up during cross-examination. The mother was on the stand but the issue of money did not come up. I therefore find that this defence is an afterthought and the same is dismissed."*

Similarly, the High Court, in discharge of its duty to re-appraise the evidence as the first appellate court, considered the appellant's defence on page 4 of its judgment and concluded that it did not cast any doubt on the prosecution case. We are satisfied therefore that there is no merit in the contention that the two courts below did not consider the appellant's defence.

Turning to the question of sentence, both courts below proceeded on the basis that the sentence of 20 years imprisonment was the statutory minimum and that the courts had no discretion in the matter. The appellant's appeal on sentence is therefore not merely about severity of sentence, but its legality. The appellant presented a mitigation statement which stated that he was re-morseful, that this was his first brush with the criminal law (first offender), that he deserved a second chance, that he would never commit an offence again, and that he was supporting five children. This mitigation counted for nothing because the courts felt their hands were tied in sentencing. Since its decision in **Francis Karioko Muruatetu & Another v Republic** (supra), the Supreme Court has affirmed that sentencing is in the discretion of the court, depending on the circumstances of each case.

Ultimately, we find no merit in the appellant's appeal against conviction, which is hereby dismissed. We however allow his appeal against sentence, set aside the sentence of 20 years imprisonment and substitute therefor sentence of imprisonment for 10 years from the date of conviction. It is so ordered.

**Dated and Delivered at NAIROBI this 19<sup>th</sup> day of February, 2021**

**W. KARANJA**

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**JUDGE OF APPEAL**

**S.GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**