



IN THE COURT OF APPEAL

AT ELDORET

[CORAM: OUKO (P), OKWENGU & SICHALE, JJA]

CRIMINAL APPEAL NO. 265 OF 2018

BETWEEN

BENJAMIN LIHURU MATINI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Eldoret (C.W Githua, J) dated 8th October, 2015

IN

HC. CRA NO. 158 of 2013)

JUDGMENT OF THE COURT

Benjamin Lihuru Matini (the appellant herein) was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 31st day of October 2012 at (*particulars withheld*), Wareng District of the then Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (Vagina) of AK a child aged 5 years.

In the alternative charge, the appellant was charged with indecent assault contrary to section 11 (I) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge being that on the same day and at the same place, the appellant intentionally and unlawfully committed an indecent act on the said **AK**, a child aged five (5) years.

The appellant was convicted in the main charge and sentenced to life imprisonment. Being dissatisfied with both the conviction and sentence of the trial court, he moved to the High Court challenging the trial magistrate's findings. In a judgment delivered on **8th October 2015, C.W Githua, J**, dismissed the appellant's appeal in its entirety.

Undeterred, the appellant has now filed this appeal before us via undated Memorandum of Appeal listing seven (7) grounds of appeal which he later condensed into four (4) in a Supplementary Memorandum of Appeal filed on **9th December 2020**, faulting the 1st appellate court and the learned trial magistrate for; not according him an opportunity to cross examine the complainant; imposing a harsh sentence considering his age; that penetration was not conclusively proved and that the credibility of PW3 was questionable.

The appeal came up before us for hearing on **15th December 2020**, where the appellant pleaded with us to note that he was an old man and further that the doctor did not examine him or take his blood or urine for analysis.

In opposing the appeal, **Ms Kipyego** Learned State Counsel urged the Court to dismiss the appeal and dismissed the lack of medical explanation complained of by the appellant as unnecessary.

We have considered the record, the rival oral and written submissions, and the law.

The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code we are mandated to consider only matters of law. In **Kados vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)** this

Court rendered itself thus on this issue:

“...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”

In David Njoroge Macharia vs. Republic [2011] eKLR it was stated that under Section 361 of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic [1984] KLR 213).”

A review of the evidence is however crucial in order to determine whether the two courts below misapprehended the evidence and /or whether they acted on wrong principles in arriving at their determinations.

With regard to the first issue raised by the appellant, namely that he was not accorded an opportunity to cross examine the complainant, it is not in dispute that the appellant never raised this issue before the first appellate court. The learned Judge while dressing this issue at paragraph 12 of the judgment rendered herself thus:

“the only aspect of the trial that has caused me some concern is the fact that the complainant minor was not cross examined by the appellant for reasons not recorded. I note that the appellant has not complained that he was denied an opportunity to cross examine the complainant. That notwithstanding, it is my finding that failure to cross examine the complainant in the circumstances of this case did not occasion the appellant any prejudice or a miscarriage of justice since for reasons that will become clear shortly, even if the evidence of the complainant was to be expunged from the record, the offence of defilement would still have been proved against the appellant by the oral and documentary evidence adduced by the other prosecution witnesses”. (Emphasis supplied)

In the case of Mark Oiuri Mose V Republic [2013] eKLR this Court differently constituted stated as follows as regards failure to cross examine a complainant:

“However, having said as above, we still think, even if the evidence of the complainant was expunged because of that omission the trial court still had the evidence of her mother, the evidence of her grandmother, and the evidence of Victor, the clinical officer upon which the appellant could still have been convicted as there was clearly evidence of penetration of the victim’s vagina with the appellant’s penis and the evidence of her age being six years was not challenged.”

From the circumstances of this case and the learned Judge having found that failure to cross examine the complainant did not occasion the appellant any prejudice or a miscarriage of justice since the offence of defilement would still have been proved against the appellant by oral and documentary evidence adduced by other prosecution witnesses, it is our considered opinion that there is no basis upon which we can fault the learned Judge’s finding on this issue. The evidence of the other prosecution witnesses and especially PW3 who caught the appellant red handed with the complainant remained strong, cogent, reliable and unshaken even in cross examination. Consequently, nothing turns on this point.

Turning to the other issue raised by the appellant and as to whether the sentence was harsh considering his age, we shall address the same before we conclude this judgment.

The other issue raised by the appellant was that penetration was not conclusively proved since there was no evidence that was adduced by the complainant to show that such an attempt was made to penetrate her private parts. PW1 the doctor who examined the complainant stated that on examination, the hymen was noted to be red but there were no tears, there was a whitish foul smelling vaginal discharge and the urine revealed pus cells and infection called *Trichomonas Vaginallis*. He concluded there was sexual activity since the infection is spread through sexual intercourse. In cross examination he reiterated that the complainant was found with a sexually transmitted disease and that there was a possibility of partial penetration. In the case of Mutali Nyamwea v Republic [2019] eKLR this Court stated as follows as regards penetration

“We have carefully considered the issue of law raised in the appeal.

Section 8 of SOA upon which the main charge was laid against the appellant provides as follows:

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

Clearly under the section, 'penetration' is a major element of the offence. Under section 2 of the SOA, it is defined to mean:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

It follows that, for the offence of defilement to be proved, the prosecution evidence must show that the appellant inserted his penis into the vagina of the child. It is not sufficient that the said organs came into contact. However, partial insertion suffices for the purposes of penetration as the said insertion need not be complete.

The Court further went on to state as follows:

“Secondly, the finding of injuries in the child’s genitalia as well as a foul smell suggested that there was partial penetration. As the court stated in the case of George Owiti Raya vs. Republic [2013] eKLR: -

“There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant’s hymen was found to be intact, suffice it that there was evidence of partial penetration.” (Emphasis added).

From the circumstances of this case the complainant’s hymen having been noted to be red, the whitish foul smelling vaginal discharge and the urine which revealed pus cells which was indication of an infection as a result of sexual activity, it is our considered opinion that contrary to the appellant’s contentions, there was penetration as defined by Section 2 of the Sexual Offences Act. Consequently, nothing turns on this point too. The offence was committed in broad daylight and the appellant was well known to the complainant, PW3 (who found the appellant in the act) and PW4 all placed him at the scene of crime and there is no doubt that it is the appellant who defiled the complainant. The appellant in his oral submissions contended that he was not examined by the doctor to link him with the offence. Indeed, PW1 confirmed that the appellant was not brought for examination. Suffice to say there is no requirement for an accused person to be medically examined for offences of this nature. This Court in the case of Aml vs Republic (2012) eKLR (Mombasa) stated thus

“The fact of rape or defilement is not proved by the way of DNA test but by way of evidence. This was further affirmed in the case of Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 Mombasa where the court stated;

“The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by way of oral evidence of a victim of rape or by circumstantial evidence and so is the offence of defilement”.

We need not say more as regards the appellant’s contention that he was not medically examined.

The other issue regards the credibility of PW3. The appellant seemed to cast aspersions on the credibility of this witness on the basis of the fact that when PW 3 found the appellant in bed with the complainant, she did not take instant action. PW3 in her evidence in chief stated that she did not take any action as she was worried of her own child who was of the same age as the complainant and that she got shocked and went to check on her. We find nothing unusual in the action PW3 took. PW3 further stated that the reason why she did not take any action was because she feared the public would have reacted by lynching the old man (the appellant). Her evidence towards this respect remained unchallenged even in cross examination. Indeed, PW3’s evidence was corroborated by PW4’s evidence who testified both in her evidence in chief and cross examination that the appellant agreed to go with her to the police station since a mob wanted to lynch him. Be that as it may, the trial court at page 50 lines 7 to 20 of the record clearly gave its reasons as to why it rejected the appellant’s defence and indeed the first appellate court was right in not interfering with the trial court’s finding regarding the credibility of the prosecution witnesses and we find no reasons to interfere with both the trial court’s and the first appellate court’s findings on this issue. Indeed, as was aptly put by the first appellate court, nobody could have said it better than the learned trial magistrate who had the advantage of seeing the witnesses testify and more particularly so PW3.

The upshot of the foregoing is that we are satisfied that the two courts below properly analyzed and re-analyzed the evidence and came to the conclusion that the appellant was guilty as charged for the offence of defilement. In the end, we find that all elements of the offence of defilement were proved to the required standard. Consequently, the appeal on conviction fails and is dismissed.

On sentence, the appellant was sentenced to life imprisonment. He has contended that this sentence is harsh considering his age. Section 8 (2) of the Sexual Offences Act prescribes a mandatory life imprisonment for a person convicted of the offence of defilement where the victim is eleven years of age and below. The sentence imposed on the appellant in this case was therefore lawful being that prescribed by law.

Be that as it may, in Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015, the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional as the mandatory nature deprived the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case.

Applying the reasoning of the Supreme Court in the Muruatetu Case (*supra*), in the case of Christopher Ochieng v Republic [2018] eKLR, this Court stated thus:

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis”

However, the appellant committed a very serious crime which will no doubt have very serious ramifications on the life of the complainant, a young innocent girl, young enough to be her granddaughter and who at the time was aged 5 years old. We find that the sentence of life imprisonment is befitting of the circumstances of this case.

The appeal on conviction and sentence is hereby dismissed.

It is so ordered.

Dated and Delivered at Nairobi this 7th Day of May, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR