



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 30 of 2016

BETWEEN

MESHACK WANDERA MASII.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega, (Dulu, J as read by R. Sitati, J) delivered on 29th January 2015

in

H C Cr. Appeal No. 206 of 2011)

JUDGMENT OF THE COURT

1. Meshack Wandera Masii was charged with defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars are that on the 14th day of September 2009 at about 7.00 am at [Particulars Withheld] Village Matungu Location in Mumias District within Western Province unlawfully had carnal knowledge of SN a girl aged 8 years. He faced an alternative charge of indecent act with a girl contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars are that on the 14th day of September 2009 at about 7.00 am at [Particulars Withheld] Village Matungu Location in Mumias District within Western Province unlawfully and indecently touched the private parts, namely vagina, of SN a girl aged 8 years.
2. The prosecution case rested on the testimony of the complainant, SN (PW1) who after *voire dire* examination gave an unsworn evidence. The trial magistrate recorded that SN was a girl of tender years who was intelligent, did not know the meaning of an oath but spoke boldly without hesitation. The trial court directed that PW1 should give her testimony in camera. The record shows that the provisions of **Section 74 of the Children's Act** was complied with.
3. In her unsworn testimony, PW1 testified as follows:

I am SN I go to school in M Primary in class 3. I know that person. He is called Meshack. One day as I went to school I met this Meshack. On 14th September 2009 at 7.00 am along the way to school. This accused followed me. I was alone. It was this accused. I saw him. He released me and held me by my back. At my neck. One hand held the back of my neck. The other the throat. Then he held me hard and pulled me into a nearby sugar cane plantation right inside. Then he threw me down and pulled off my underpants and my books away. Then he lay on top of me and then he unzipped his trousers. I was now flat on my back. He then lay on top of me. I felt pains in my vagina. He pushed his penis into my vagina. I felt pain and cried out. He then got up then again and put it back in my vagina. He kept doing this on and off till he poured a whitish liquid on me. He poured all over my body till my uniform got wet. Then he got up and zipped up. He then talked to me asking me the class I am in. What is my age. I responded because I feared he may not leave me. Then he left me in the cane plantation. I just slept there in fear. Then I later got up to go home. I used a different route back home. I could not go to school. At home I told my mother what accused had done. She took me to hospital, I was treated at Namulungu Health Centre.

Mother then went to school to report to the head teacher. Mother took me to the police at Namulungu. I told the police what the accused did to me. The next day I saw the accused passing near our home. I called mother then told her that there is the person who did bad things to me. Mother came out and saw accused. She went and called the police. He got arrested.... Mother gave the police my treatment card. I told the doctor what the accused did to me.

4. PW2, AN testified that the complainant (PW1) is the daughter of her brother called PB. That before the incident she used to leave with the complainant. She produced in evidence the baptismal card of the complainant. The card showed that PW1 was born on 10th December 2001. That on 14th September 2009 when the complainant reported to her what some man had done to her, I saw sperm all over her private parts. Her uniform was wet. The next day the complainant showed me the person who had done bad things to her. She pointed the appellant. PW2 knew the appellant as he was a neighbour. PW4 further testified that she went and reported the matter to the school deputy head teacher and at the Police Station at Namulungu. The appellant was then arrested.

5. PW3 Isaack Mukhwana, a clinical officer, testified that he worked at Matungu sub-District Hospital. That he medically examined the complainant and filled a P3 Form. That upon examination, he found that the complainant had suffered an attempted defilement. She had been treated by a different doctor for a year on her hymen. That there was no discharge. That there was no clear indication of full vagina penetration. That she had her pants and green uniform soiled with mucus like substance (dry).

6. In his defence, the appellant gave sworn evidence. He denied committing the offence as charged. He testified that on 14th September 2009, he was at his home digging with friends. That two of his friends with whom he was with were Douglas Osundwa and Hamisi Masinde. That they stayed at the farm until 9.30 am. That the next day they did the same. That on their way back, the Administration Police arrested the three of them. He denied defiling the complainant.

7. Upon evaluating the evidence on record, the trial magistrate convicted the appellant for the offence of defilement and sentenced him to life imprisonment. In convicting, the magistrate held that the complainant properly identified the appellant as the person who defiled her. As regards age, the trial court found that the complainant was born on 10th December 2001 and was thus a minor. The magistrate further made a finding that the medical evidence tendered in court corroborated the testimony of the complainant that she had been defiled.

8. Aggrieved by the conviction and sentence, the appellant filed an appeal before the High Court. The appeal was dismissed. In dismissing the appeal, the learned judge expressed as follows:

On penetration, the clinical officer PW3 who examined the complainant found that there was partial rupture of the hymen. Though he did not treat the complainant, in my view his findings were consistent with forceful sexual penetration of a young girl. Whether that penetration is partial or not does not make a difference in law. It all amounts to defilement. I find and hold that penetration was proved.

The appellant complains that his identification was not positive and free from possibility of error. Indeed, the evidence of identification is that of a single witness who was a minor. Under Section 124 of the Evidence Act, evidence of a minor victim does not require corroboration if it is believable and is actually believed by a trial court.....

In the present case, the minor victim PW1 reported to PW2 immediately after the incident that she had been defiled. She was taken to hospital for treatment. On the next day, she saw the appellant pass by near their home and immediately pointed at him as the culprit. She showed him to PW2 who initiated the reporting to the authorities which culminated to the arrest of the appellant...

The sentence is as provided by the law. It is neither unlawful nor harsh and excessive. In the result, I dismiss the appeal and uphold both the conviction and sentence.

9. Dissatisfied with the dismissal of his appeal, the appellant has lodged the instant second appeal to this Court citing the following grounds of appeal.

- (i) The judge erred in convicting the appellant and failed to find that the charge sheet was defective.
- (ii) The judge erred and failed to find that **Section 211 of the Criminal Procedure Code** was not complied with.
- (iii) The medical report brought before the court showed that there was no indication of injuries and penetration was not proved.
- (iv) That the testimony of PW1 and PW2 did not match the evidence of PW3, the clinical officer and the same were full of contradictions. That PW1 and PW2 talked of penetration while PW3 testified about attempted defilement.

10. At the hearing of this appeal, the appellant appeared in person while the State was represented by the Principal Prosecution Counsel Mr. L.K. Sirtuy. All parties made oral submissions before this Court.

APPELLANT'S SUBMISSIONS

11. The appellant in his submissions reiterated the grounds of appeal as stated in the memorandum of appeal. He further urged that the trial court did not call essential witnesses like the Doctor who treated the complainant or the police officers who arrested him. That an age assessment expert was not called to clarify the complainant's age. That the appellant was never taken to hospital for a medical test to compare the alleged mucus found on the complainant's clothes with the appellant's DNA. That he was not accorded a fair trial and he was not given an explanation on how to defend himself. That the trial court wrongly convicted him on a defective charge sheet.

RESPONDENT'S SUBMISSIONS

12. In opposing the appeal, the State submitted that all the ingredients of the offence of defilement as charged were proved to the requisite standard. That the charge sheet was not defective. That both the charge and particulars of the offence were accurate. That whereas the charge

sheet refers to “carnal knowledge” which is a terminology of the Penal Code, no injustice or miscarriage of justice was occasioned to the appellant by use of the phrase “carnal knowledge.” That the issue of a defective charge sheet was an afterthought - it was never raised before the two courts below. That penetration was proved through the testimony of the complainant as corroborated by the medical report.

13. On the life sentence meted upon the appellant, the State urged us to take into account the Supreme Court decision in the case of **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015**. Nevertheless, it was submitted that the circumstances under which the offence was committed dictates that this Court should not interfere with the life sentence meted upon the appellant.

ANALYSIS and DETERMINATION

14. We have considered the record of appeal as well as submissions by the appellant and the respondent. This is a second appeal that must be confined to questions of law. In **M’Riungu - v- Republic, [1983] KLR 455**, this Court expressed:

“[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.

15. In **Adan Muraguri Mungara -v- Republic, Cr. No. 347 of 2007 (Nyeri)**, this Court set out the circumstances under which it will disturb the concurrent findings of fact by the two courts below in the following terms:

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.” See Aggrey Mbai Injaga v Republic [2014] eKLR.

16. In **John Mutua Munyoki - v- Republic, [2017] eKLR**, this Court stated that under the Sexual Offences Act, the main elements of the offence of defilement are as follows:

(i) The victim must be a minor, and

(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

17. In the instant matter, a ground urged is that the prosecution did not call an age assessment expert to clarify the age of the complainant. In **Paul Otieno Okello - v- Republic, [2019] eKLR**, the learned judge of the High Court correctly and persuasively stated thus:

I hereby reiterate that proof of the age of a victim in sexual offences is very crucial as that has all the bearing in sentencing. If the age of a victim is not properly settled, then a Court may find itself at a cross road in passing a lawful sentence. Ideally, age ought to be proved by way of documents including, but not limited to, a Certificate of Birth, a Birth Notification, medical documents, official religious documents, official school documents, among others. Having said so, it should not be lost that there are instances where none of the said documents may be available and in such a case a court may revert to its observation of the victim or the oral admissible evidence on record.

18. In the instant matter, PW2 produced in court a baptismal card for the complainant. The card indicated that the complainant was born on 10th December 2001. From this item of evidence, we are satisfied that the age of the complainant was proved beyond reasonable doubt. Having proved the age of the complainant through the testimony of PW2, there was no need for the prosecution to call an age assessment expert.

19. On the alleged inconsistencies in the testimonies of PW1 and PW2 with that of PW3, the allegation has no merit. It was urged that both PW1 and PW2 testified that the appellant had penetrated the complainant. That conversely, PW3 testified that the medical P3 Form indicated there was attempted defilement. In our considered view, the alleged inconsistency in the testimony of PW1 and PW2 with that of PW3 as relates to penetration does not dent, dislodge nor cast doubt on the prosecution case.

20. The pertinent legal issue is whether there was penetration by the appellant into the genital organ of PW1. Proof of penetration is established either by the victim’s evidence, medical evidence or any other cogent evidence, (See **Remigious Kiwanuka – v - Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)**). **The slightest penetration is enough to prove the ingredient of the offence of defilement. In the persuasive case of Michael Kihara Kariuki -v- Republic, [2017] eKLR**, it was correctly stated proof of defilement and the key ingredient of penetration is dependent on whether there was cogent, consistent and reliable evidence adduced by the prosecution witnesses to prove the offence.

21. In the instant matter, there is direct evidence by the complainant that the appellant penetrated her. This is corroborated by the evidence of PW2 who examined the private parts of the complainant soon after the offence had been committed and saw sperms all over PW1’s private parts. This item of evidence corroborates PW1’s evidence that the appellant poured a “whitish liquid” over her body till her uniform got wet. We have no reason to doubt the direct evidence of the complainant as regards penetration. The evidence of PW3 that there was attempted defilement is secondary evidence that cannot dislodge the direct evidence of PW1 as regards penetration.

22. At the risk of repetition, in this appeal, the appellant urged that the judge erred in failing to find that crucial witnesses were not called to testify. It was contended that an age assessment expert should have been called and the Doctor who treated the complainant ought to have

been called to testify. The appellant has not demonstrated to our satisfaction how he was prejudiced by failure of the prosecution to call an age assessment expert or the Doctor who examined the complainant. In any event, the appellant was at liberty to call the witness if he so desired. Further, this Court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. **Section 143 of Evidence Act (Cap 80) Laws of Kenya** provides: -

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”

23. In **Keter – v- Republic, [2007] 1 EA 135** it was held *inter alia*:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

24. The appellant further submitted contended that no medical examination was conducted on him to link him to the alleged offence. The contestation has no merit. The record clearly shows that the appellant was not subjected to a medical examination. However, the testimony of PW1 is credible and convincing. PW1’s testimony proves that indeed, defilement took place and that it was the appellant who committed the offence. In this regard, we remind ourselves the decision in **Aml -v- Republic [2012] eKLR (Mombasa)**, where this Court upheld the view that:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

25. On the issue of defective charge sheet and that **Section 211 of the Criminal Procedure Code (CPC)** was not complied with, the appellant has neither pointed out nor demonstrated to us the alleged defect in the charge sheet. The appellant has also not demonstrated to us the basis for asserting that **Section 211 of the CPC** was not complied with.

26. Finally, we now consider the issue of sentence. The appellant has urged that the life sentence meted upon him by the trial court was harsh and excessive. The law on the power and jurisdiction of an appellate court to interfere with a sentence passed by a trial court was correctly expressed in the case of **Ogalo s/o Owuora, 1954 24 EACA 70** to wit that an appellate court has power to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or that the sentence is illegal or manifestly excessive as to amount to a miscarriage of justice.

27. Comparatively, the general principles that an appellate court adopts in an appeal relating to sentence was authoritatively stated by **Nicholas J** in the South Africa case of **R -v- Rabie {1975} (4) SA 855 (A) at 857D-F** as follows: -

1. *“In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-*

(a) should be guided by the principle that punishment is “pre- eminently a matter for the discretion of the trial Court”; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised.

2. *The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”*

28. Further, in the case of **Alister Anthony Pareira –v- State of Maharashtra, {2012}2 S.C.C 648 para 69**, the Indian Supreme 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 straight jacket 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”

29. In Kenya, the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015** held that a mandatory death sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case. This Court has adopted and applied the Supreme Court decision in **Christopher Ochieng – v- R, [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri –v- R, Kisumu Criminal Appeal No. 93 of 2014** to the effect that mandatory sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case.

30. In the instant matter, the trial magistrate meted a life sentence on the appellant. The sentence was affirmed and upheld by the learned judge. We have considered the mitigation on record by the appellant as well as the circumstances under which the offence was committed. We have also taken into account that the two courts below imposed the minimum life sentence because they considered the minimum sentence to be mandatory. This was before the Supreme Court decision in the case of **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015**. Persuaded by the merits of the Supreme Court decision in the case of **Francis Karioko Muruatetu & another, (supra)**, we are inclined to intervene on sentence.

31. In the final analysis, we find that the appeal against conviction has no merit and is hereby dismissed. The appeal on sentence has merit and we hereby set aside the life sentence meted upon the appellant and substitute the same with a term of imprisonment for twenty (20) years with effect from 7th September 2011 when the trial magistrate passed sentence.

32. This judgment is delivered pursuant to rule 32 (2) of the Court of Appeal rules as Odek, J.A passed on before the delivery of the judgment.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.