



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 14 OF 2018

BETWEEN

JOSPHAT KANUKU NGUI NZIOKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment and Order of the High Court of Kenya

at Garissa (Dulu, J.) dated 29th June, 2015

in

H.C.CR. A No. 166 OF 2013)

JUDGMENT OF THE COURT

The appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 13th of June, 2013 at a place named in the charge sheet, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JM, a child aged 6 years. He was also charged with the alternative count of committing an indecent act with a child **c/section 11(1)** of the **Sexual Offences Act** particulars being that on the said date and the said time he committed an act which caused his penis to come into contact with the vagina of the child.

The prosecution called six witnesses in support of its case during the trial.

The prosecution evidence was that JM who was 6 years old at the material time was living with her mother and grandmother, the appellant was their neighbour. On 13th June 2013, JM's grandmother had left her alone in the house and gone to church. The appellant picked JM from the house and carried her on his shoulders without any explanation and took her to a thicket where he defiled her after which he abandoned her. She was walking home when she met her mother **ENM (PW2)** and her grandmother **MMM (PW3)** who noticed that she was walking with difficulty and her clothes were stained with blood. They examined her and found that she had been sexually assaulted and she informed them that the assailant was their neighbour, the appellant.

They rushed her to the hospital where she was examined and **Doctor Joseph Mutua (PW6)** testified before the trial magistrate that he found that JM's genitalia was swollen with wounds and the hymen was broken.

The matter was reported to **Waita AP Post** and later referred to **Mwingi Police Station**. The minor was examined at Mwingi District Hospital, a Post rape care and the P3 forms were filled, and the appellant subsequently charged in Court.

PC Jacob Marwa of Waita AP Post received the minor with her mother and grandmother on the night of the 13th May, 2013 as they reported that the minor had been defiled by the appellant. He went to the home of the appellant and arrested him.

CPL Lucy Mulira of Mwingi Police Station on perusal of the occurrence book noted a defilement report and commenced investigations. She visited the scene of the crime which was in a plantation. She was accompanied by the appellant, the child and others. The child cried uncontrollably at the scene. The witness recovered soiled clothes covered in blood and produced the same in court as part of the prosecution evidence.

That was the evidence placed before the trial magistrate who found that the appellant had a case to answer.

The appellant gave sworn evidence in his defence in which he explained that he was arrested on 16th June, 2013 having spent the day at work digging trenches. He denied having committed the offence. He called three witnesses - **Samson Ngumba**, a cousin to the appellant, who said that he had spent 16th June, 2013 with the appellant. He knew nothing of events that took place on 13th June, 2013. Also called was **Muikai Kata, Assistant Chief** of the area whose sole evidence was to the effect that the chief's office had not received any complaint against the appellant. The appellant also called as a witness, his mother, **Muthengi Nzenze**, who stated that:

“As his mother, I known (sic) he has not been involved in any criminality. I know he did not do it, commit the offence. I was surprised when he was arrested”

The trial magistrate after considering the evidence tendered by the prosecution as against that offered by the defence found that JM was 6 years old; that there was sufficient proof that the appellant was defiled because of her straight forward evidence and JM reported the incident to her mother and her grandmother where she named the appellant as her defiler. There was also the evidence of the Doctor whose evidence confirmed the minor's genitalia was swollen with wounds and they hymen was broken. As regards the identity of the defiler, the trial magistrate believed and accepted the evidence of JM that it was the appellant who defiled her. The trial magistrate therefore convicted the appellant of the offence of defilement and sentenced him to life imprisonment.

The appellant was aggrieved and appealed to the High Court of Kenya at Garissa contending that the medical evidence adduced by the prosecution was not sufficient to sustain the charge of defilement; that the prosecution evidence was full of contradictions; that the examination of the intelligence of the complainant was done after the complainant had already been sworn and therefore the appellant was prejudiced; and that the prosecution case was not proved beyond reasonable doubt.

In regard to the complaint that the examination to determine the intelligence of the minor was not properly done, the High Court held that there was no miscarriage of justice visited upon the appellant due to the procedure adopted by the Court as *voire dire* had been conducted. The Court further found that the age of the minor was proved beyond reasonable doubt by the clinic card and the evidence of the mother. The Court further found that the identity of the appellant was proved beyond reasonable doubt as the appellant was known to the complainant and the incident occurred in broad daylight.

During the hearing of the appeal before us, the appellant appeared in person while the respondent was represented by **Mr. O'Mirera Moses, Senior Prosecution Counsel**. The appellant had filed written submissions which he relied on in arguing his appeal and which submissions we have duly considered.

The appellant relied on the undated grounds of appeal and the supplementary grounds of appeal filed in Court on 28th October, 2019. In his detailed written submissions, the appellant submitted that the 1st appellate Court erred by failing to make specific findings in relation to the burden of proof. The appellant further submitted that there was no evidence in support of the fact that the blood and the spermatozoa was his hence there was no evidence linking him to the offence. The appellant further argued that failure of the prosecution to avail medical evidence linking him to the offence creates doubt as to whether he committed the offence or not hence he is entitled to an acquittal.

Mr. O'Mirera on his part supported the conviction and the sentence. He submitted that there was overwhelming evidence supporting the conviction. In regard to the identification of the appellant, counsel submitted that the two courts below were satisfied that the complainant identified the appellant as the defiler. Counsel further submitted that the age of the minor and penetration were proved beyond reasonable doubt. Counsel concluded by submitting that the appellant's defence was a mere denial as he failed to challenge the facts placed before the Court.

Having considered the appellant's grounds of appeal, the record of appeal, submissions by both parties, and the authorities cited, we take cognizance of the fact that this is a second appeal against the appellant's conviction and sentence, and that by dint of **Section 361** of the **Criminal Procedure Code**, a second appeal is confined to matters of law only. This Court restated as much in the case of **Karingo v R (1982) KLR 213** at p. 219:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”

In **Adan Muraguri Mungara v Republic, [2010] eKLR**, this Court stated the circumstances in which this Court may interfere with the concurrent findings of fact by the trial court and the first appellate court, as follows:

“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.”

Applying the above yardstick, we will address all the issues raised in the appellant's grounds of appeal and his submissions.

On whether there was penetration to establish the offence of defilement, it was the testimony of the complainant (JM) that she was forcibly picked from her home and taken to the thicket, by the appellant where he defiled her. The minor narrated the same to her mother and her grandmother when they returned home and the Doctor confirmed, upon examination, that JM had been defiled.

By the proviso to **Section 124** of the **Evidence Act**, the evidence of the complainant in a sexual offence need not be corroborated as long as

the court is satisfied, for reasons to be recorded, that the complainant is telling the truth. In the case before the trial magistrate, we find that JM gave cogent evidence which was not shaken on cross examination. After being defiled, JM reported the assault to her mother and her grandmother and named the appellant as the assailant. She did the same when they reported the incident to the police.

The Doctor confirmed that there had been penetration, thus the ingredients of the offence of defilement were satisfied. On the evidence before the trial court the appellant was properly convicted and the High Court was right to dismiss the appeal on that aspect.

The appellant also argued that the case was not proved beyond reasonable doubt as there was no medical evidence conducted upon him to link him with the offence. We find no merit in this complaint. There is no legal requirement in a defilement case that the defiler must be medically examined to link him to the offence. What the law requires is that the prosecution proves the charge beyond reasonable doubt and we find that that was done in the case before the trial Court.

On whether the appellant's defence was considered, we note that both courts considered the appellant's defence and we therefore find that this ground lacks merit and it is hereby dismissed.

In regard to the sentence, the Sexual Offences Act creates the offence of defilement and stipulates the sentence to be awarded to an accused person upon conviction, which sentence depends on the age of the complainant. The age of the minor in this case was proved by way of the clinic card and the evidence of the mother and it was established that the minor was 6 years.

The appellant was sentenced to life imprisonment which is the sentence provided for the offence the appellant was charged with. The Supreme Court in the case of **Francis Karioko Muruatetu & Others v R [2017] eKLR** was asked to answer the question whether imposition of mandatory minimum sentences was constitutional. That court returned the answer that Parliament's imposition of minimum mandatory sentences was unconstitutional as trial courts should be allowed to consider the particular circumstances of each case and the mitigation offered, if any, before deciding which sentence to impose to the particular case.

The Supreme Court decision has freed courts from the previous regime where award of sentences was in the form of a straight-jacket where the court's hands were tied and no factor could allow the court to award any but the minimum mandatory sentence.

In the case before the trial court, we note that, upon conviction, the appellant stated that he was sorry. We note the circumstances of the case where the appellant, a neighbour of the defiled minor took advantage of the fact that she had been left alone at home. Societal norm would expect him to protect the child from all forms of harm. The appellant, instead, picked up the child and carried her on his shoulder to a thicket and defiled her, threatening her with dire consequences should she report the incident to anybody. She was aged 6 years and what he did, we find to be beastly conduct, conduct of a person who should be removed from the society so that he does not get the opportunity to be free and molest other children, stigmatizing them for life. The sentence imposed was deserved in the circumstances and the appeal is dismissed in its entirety.

Dated and delivered at Nairobi this 21st day of February, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR