



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KOOME & SICHALE, JAJ]

CRIMINAL APPEAL NO. 25 OF 2018

GEORGE ONSELIO MOKADU..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Nairobi, (G.W. Ngenye) dated 10th May, 2016)

IN

HC. CRA NO. 71 OF 2015

JUDGMENT OF THE COURT

The appeal herein is against the judgment of **G.W. Ngenye-Macharia** dated **10th May, 2016**. A brief background to this appeal is that **George Onselio Mokadu** (the appellant herein) was charged with the offence of defilement contrary to section 8(1) as read with subsection (3) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on **22nd October, 2014**, at [particulars withheld] area in Lari District within Kiambu County intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of JWK, (name withheld), a child aged fourteen (14) years.

To support their case, the prosecution called a total of six (6) witnesses.

JWK was subjected to a *voire dire* examination and the court found that she did not understand the nature of an oath. However, as she was possessed of sufficient intelligence, P.W. 1 gave her testimony after being affirmed. She stated that on **22nd October, 2014** at about 10.00 a.m, she left school to go and collect a book from home; that on her way home, she met the appellant who asked her to accompany him to Red Rock; that she followed him to **Kareithi's** house; that while inside the house, the appellant asked her to remove her clothes (blouse, skirt, sweater and panty); that the appellant also removed his clothes; that the appellant used a condom to have sex with her after which he left her to go home; that she arrived home at 2.00 p.m. and lied to her mother, **MMK, P.W.2** that she had been sent home from school to collect a book; that at 6.00 pm, P.W.3 came to her home and informed her mother that JWK had been seen in their plot with the appellant whom she knew well as they lived in the same area; that she feared being beaten by her mother and she escaped to sleep in the forest; that the following morning on **23rd October, 2014**, she came back home and her mother took her to Tigoni District Hospital where she was attended to by **James Kabue, (P.W.5)**, a clinical officer, who found that there was no hymen and no discharge. HIV test was administered on her and she was found to be negative. (She had been treated at Lari Health Centre with analgesics). P.W.5 filled the P.3 form which he produced in evidence together

with treatment notes. On cross-examination, he confirmed that JWK's hymen was perforated. P.W.2 (mother to JWK) later reported the matter at Uplands Police Station and investigations were carried out by No. 97414 **P.C Agnes Mutiso** (P.W.6) of Lari Police Station. P.W.2 identified the appellant as the person who she was informed had defiled her daughter. She knew the appellant before the incident.

On **22nd October, 2015**, at about 11.10 p.m., APC No. **2009022148, George Ndungu** (P.W.4), of Kinale Administration Police Post, while at the road unit camp heard screams and when he moved near, he found people preparing to lynch the appellant on allegation of defiling a minor. He arrested the appellant and took him to Lari Police Station for further investigations.

In his defence, the appellant gave unsworn evidence and stated that on **22nd October, 2014** at about 10.00 a.m, as he headed to **Kareithi's** home, he met with P.W.1, who is his neighbour at the junction of Nyarangi School. P.W.1 informed the appellant that she had been chased from school and they walked together as they headed to the same direction. That they met one **Kareithi** who told him to go and wait for him in his house; that P.W.1 went away; that he got into **Kareithi's** house and did not see P.W.1 until 10.00 p.m. when P.W.1's parents came to his house alleging that he had defiled P.W.1. The appellant denied committing the offence alleging that there was no eye witness and that even the owner of the house did not record any statement. He denied any knowledge of the allegations levelled against him.

In a judgment dated **7th May, 2015**, the trial court found the appellant guilty and sentenced him to twenty (20) years imprisonment.

Aggrieved with the conviction and sentence of the trial court, the appellant filed an appeal to the High Court which was also dismissed by **Ngenye-Macharia, J** on **10th May, 2016**. Undeterred, the appellant filed this appeal before us.

In his amended Grounds of Appeal dated **18th February, 2019**, the learned judge was faulted for failing to accord the appellant a fair trial contrary to Article 25(c) and 50 (2) (a) of the Constitution; erred in affirming the conviction and failing to find that section 211 of the CPC was not adequately complied with; for failing to consider that vital witnesses were not availed to adduce evidence before the trial; for failing to consider that the prosecution's case was not proved beyond reasonable doubt; and finally, for failing to evaluate and analyze the entire record.

On **29th October, 2019**, the appeal came up before us for plenary hearing.

The appellant appeared in person while **Mr. Gitonga**, learned Senior Public Prosecution Counsel appeared for the respondent. The appellant wholly relied on his submissions filed on **18th February, 2019** and **29th October, 2019**. In his submissions, the appellant alleged that penetration, a key element in a charge of defilement was not proved; that the conduct of P.W.1 was consistent with that of an adult; that the prosecution evidence was riddled with contradictions and finally, that the charge against him was not proved beyond reasonable doubt.

In response to the appellant's contention that there was a violation of his Constitutional rights to a fair trial and non-compliance with **Section 211** of the **CPC**, **Mr. Gitonga** stated that **Section 211** of the **CPC** was complied with and indeed, the appellant chose to make an unsworn statement of defence; that the appellant knew the charges he was facing and hence suffered no prejudice. On the appellant's assertion that he was of the impression that P.W.1 was of the age of majority, counsel's position was that this defence was not available to the appellant as P.W.1 was a school girl coming from school. On the failure to call vital witnesses, **Mr. Gitonga** stated that it was within the prosecutions' power to call witnesses to prove the charge against the appellant and the two courts below were satisfied that the evidence upon which the appellant was convicted was sufficient; that in any event, section 143 of the Evidence Act 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"

On failure to prove the age of P.W.1, counsel contended that P.W.1's age was proved through the production of P.W.1's birth certificate. On sentence, counsel submitted that the sentence meted out and affirmed by the High Court was the minimum mandatory term then.

In a brief rejoinder, the appellant stated that he had reformed, he was twenty (20) years old at the time of commission of the offence and is now twenty five (25) years old. He asked the Court to reduce his sentence.

We have considered the record, the oral and written submissions, the authorities cited and the law. This is a second appeal and our mandate is as stipulated for in **Section 361(I) (a)** of the **Criminal Procedure Code**. It provides:

“361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

In so far as case law is concerned, the decision of **David Njoroge Macharia vs. Republic [2011] eKLR** sums up the said mandate. In the said decision, it was stated:

“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.)”

Similarly, in **Karingo versus Republic [1982] KLR 213** it was held as follows:

“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 S/O Karanja versus Republic [1956 17 EALA 146].)”

For a start, the appellant and P.W.1 are persons who were known to each other. P.W.3 also knew the appellant as they lived in the same neighbourhood.

The evidence of P.W.1 was that she followed the appellant into the house of one **Kareithi** and they had sexual intercourse. The Clinical officer found that P.W.1's hymen was perforated. It may be possible that P.W.1 was not a virgin but it is not a condition precedent that before a charge of defilement is proved, the victim must be a virgin. In our view, the judge considered the ingredients of the offence of defilement and stated:

“For the offence of defilement to be proved, three (3) succinct ingredients must be proved, these are: age of the victim, identification of the appellant and penetration.

The ingredient of age was proved by the complainant's birth certificate serial number F.No. 145031 which indicated her date of birth as 5th February, 2000. This brought her age to 14 years as at the time of the incident. a simple application of the evidence on record shows that on the date of her testimony, 3rd February, 2015, she was indeed 15 years old while on the date of her defilement, 22nd October, 2014, she was 14 years. There are therefore no inconsistencies in this respect, since the complainant's age was adequately proved and fell within the ambit of section 8(3) of the Sexual Offences Act.

On identification, the appellant and the complainant knew each other before the day in question. The complainant testified that she knew the appellant before and that they were friends. This fact is further buttressed by the appellant who stated that he knew the complainant as they were neighbours. This statements leave no doubt in this court's mind that JWK knew the appellant before the incident occurred and as such identified him based on this knowledge. This court is thus satisfied that the ingredient of identification was sufficiently proved.

The third ingredient that must be proved is that of penetration. On this issue, the appellant contended that the trial court erred in convicting him based only on the evidence of the complainant.

Further that there was no hymen but that there was an old hymenal tear. That statement presupposes that the hymen was torn long before the date of the examination. This in my view was not inconsistent with the evidence on record as the charge clearly stated that the complainant was defiled on 22nd October, 2014 which was a week before the examination. The conclusion of the clinical officer is that this was a case of defilement”

We agree

On the contention that there was no eye witness, again, the judge considered this and rendered herself as follows:

“There was no doubt from the testimony of the complainant that the appellant had sex with her and that she was telling the truth. I have no reason, accordingly, to doubt her evidence notwithstanding that there is no eye witness. Moreover, the proviso to section 124 of the Evidence Act empowers a court to convict an accused person in a case involving a sexual offence on the evidence of the victim alone if the court believes in it. The entire section provides that:

‘124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him’.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

.....the statement by the medical officer is a clear corroboration of the complainant's evidence that she was defiled. In any case, flowing from the medical records, I make a finding that the appellant did not advance a defence that he reasonably believed that the girl was of mature age when he had sex with her. Accordingly, the medical evidence of P.W.5 sufficiently corroborated the evidence of the complainant”.

We are satisfied that the charge against the appellant was proved to the required standard.

However, as regards sentence, we note that the Supreme Court in its decision of ***Francis Karioko Muruatetu & another vs. Republic [2017] eKLR S.C. Petition No. 16 of 2015*** did away with the mandatory nature of sentencing. The appellant herein was twenty (20) years old at the time of the commission of the offence. P.W.1 as stated by the appellant appears to have been a wayward girl.

She agreed to follow the appellant into the house of **Kareithi**. She had sex with the appellant in circumstances that tend to show there was no force or coercion, but for the age of the victim, that did not permit her to give consent thereby making the act one of defilement.

Taking the totality of the circumstances, we set aside the sentence of twenty (20) years imprisonment and reduce it to a term of ten (10) years.

It is so ordered.

Dated and delivered at Nairobi this 6th Day of March, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

M. KOOME

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR