



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & SICHALE, J.J.A)

CRIMINAL APPEAL NO. 108 OF 2019

BETWEEN

GABRIEL MUYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Kimaru, J) dated 18th May 2016)

in

H.C. CR. A. 82 of 2013)

JUDGMENT OF THE COURT

[1] *Gabriel Muya*, (the appellant) was charged, tried, convicted and sentenced to life imprisonment before the Chief Magistrates' Court at Kiambu for the offence of defilement. His appeal before the High Court was also dismissed. This is therefore a second appeal against the judgment of the High Court at Nairobi (*Kimaru, J.*) whereby the appellant's appeal against conviction and sentence was dismissed as aforesaid.

[2] The appellant faced two (2) counts of defilement of two children under the age of eleven (11) years contrary to **Section 8(1)** as read with **Section 8(2)** of the, **Sexual Offences Act**. The particulars of the first count being that on 15th August, 2010 at about 9.30pm at Keha Farm in Kiambu District, within Central Province, the appellant unlawfully and intentionally committed an act which caused penetration of his genital organ namely penis, into the genital organ, namely vagina, of A (name withheld), a girl child aged eleven (11) years. The particulars of the second count stated that on the same day, and in the same place, the appellant unlawfully and intentionally committed an act which caused penetration of his genital organ, namely penis, into the genital organ, namely vagina, of F. (name withheld), a child aged eight (8) years.

[3] The appellant also faced two (2) alternative counts of committing an indecent act with a child under the age of eleven (11) years contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the first alternative count being that on the same day, and in the same place, the appellant committed an indecent act on A, a child aged eleven (11) years by touching her private parts. The particulars of the second alternative count was that on the same day in the same place, he committed an indecent act on F, a child aged eight (8) years by touching her private parts.

[4] We will restate albeit briefly, the facts as presented by the prosecution before the trial court so as to contextualize and identified issues of law in a second appeal. On 15th August, 2010 the two complainants namely A, (PW1) aged 11 years, her sister F, (PW2) aged 8 years and their younger brother M, left their home in Githurai 45 with the intention of visiting their grandmother at her home in Muchatha. They boarded a matatu which dropped them off at a place identified as KK Promote, which was way past their intended destination. At the time, it was around 7p.m. and as darkness had set in, the children realized they were lost and so they began to cry. It was then that they ended in the hands of an alleged good Samaritan.

[5] PW1 and PW2 who were the complainants gave evidence before the trial court and narrated what transpired. This was after the learned trial magistrate conducted a *voire dire* examination of the complainants and found that the two complainants were intelligent enough to understand the proceedings, but were lacking an understanding of the meaning of an oath. The court therefore affirmed them and took their

evidence in Kiswahili language. The complainants testified how, upon alighting from the matatu and while crying as they realized they had lost their way to their grandmother's house, a watchman who was dressed in uniform approached them to find out the matter. The complainants tried to explain to him that they had lost their way to their grandmother's house. However, the watchman could not help them as he was on his way to work and could not take them with him.

[6] However by what would have appeared as a stroke of twisted luck, a stranger who turned out to be the appellant, approached the children and upon hearing their predicament, offered to accommodate them in his house for the night and then take them to their grandmother's home the next morning. The complainants further testified that they went with the appellant to his house where he prepared for them a meal of *ugali*, *sukuma wiki* and sausage. Thereafter the appellant told **M**. to shower, but because the water was cold, **M** started crying. The appellant threatened to throw him to the dogs, so **M** complied and even the complainants followed the que and took a shower. Afterwards the appellant took the children to a bedroom which had three beds. He told **PW2** to sleep with **M** and **PW1** to sleep on the other bed with him.

[7] **PW1** testified that she refused to sleep in the same bed with the appellant and sat on a chair and started crying. The appellant picked her up from the chair and put her on the bed and took off her underwear after which he inserted his fingers in her vagina and licked it; he then slapped her on her back and cheeks and threatened to throw her to the dogs if she cried. The appellant then removed his clothes and defiled **PW1** and after he finished with her, he took **PW2** to the bed, undressed her and defiled her as well.

[8] It was the testimony of **PW1** and **PW2** that the appellant continued to defile them in turns until morning when he ordered them to get up and wash their faces. He then took the children to a place where they saw a 'Bata' sign post and instructed them to follow a path that would take them to Kawaida area. Once again, the children realized they were lost as they could not find their grandmother's home. As they were wondering on the road, and **M**. was playing on the road, a woman spotted them and expressed concern how three minor children were roaming on their own. Upon inquiring, the children explained that they had lost their way to their grandmother's house, and that their grandmother worked as a trader at Marigiti Market. The woman apparently knew a lady who worked at Marigiti market, she tried to lead the children to her house but unfortunately the lady was not in the house so she asked the lady's daughter to take the children to their aunt's workplace in Muchatha. As their aunt was off-duty, they spent the night at their aunt's employer's but the following day, they finally made it to their grandmother's house in Muchatha.

[9] At the grandmother's house, the children found their father **JK N (PW3)** who was worried and had been frantically looking for his children. **PW3** testified that when the children did not return home on 15th August, 2010, he made a desperate search for them which took him to their grandmother's home the next day. When the children appeared, he noticed that the complainants were walking with difficulty and looked distressed. **M** told him that they had spent the night in a house with fierce dogs. The complainants also opened up and told **PW3** that they had been defiled and had pain in their genitals. **PW3** reported the matter to the police and the complainants led the police to the house where they had been defiled. The appellant was arrested when he came to the house driving in a van. The appellant admitted he knew the complainants but denied having defiled them.

[10] **Richard Munene, (PW4)** a clinical officer at Karuri Health Center examined the complainants. He observed that **PW1** had bruises on her genitalia, the hymen was torn and there was a foul-smelling discharge from the vagina, an indication of mild vaginal infection. He concluded that **PW1** had been sexually assaulted. On examining **PW2's** genitalia, **PW4** noted that she had bruises on her genitalia and her hymen was also torn. He produced the two medical reports as evidence that the complainants had been defiled.

[11] **PC Grace Opiyo (PW5)** from Karuri Police Station recorded the complainants' statements on 17th August, 2010 after taking them to hospital where the clinical officer confirmed that they were victims of defilement. In her investigations of the complaints of allegations of defilement, **PW5** said that she established the house where the complaints were defiled was occupied by the appellant; that the house belonged to the appellant's employer and the complaints identified it, there were fierce dogs in the said compound. She also ascertained the ages of the complainants from their birth certificates and proceeded to arrest and charged the appellant as aforesaid and during the hearing she produced the complainants' birth certificates showing the complainants were minors at the time of the incident.

[12] Placed on his defence, the appellant gave an unsworn statement and did not call any witness. He testified that he used to work as a matatu driver and lived at Kiamba Kawaida. That on the material day, he left work at 9.30 p.m. reaching his home at 10pm and spent the night with his wife and children and no strangers came to his house. He denied having committed the offence as he claimed that he took himself to the police and asked that he be subjected to DNA testing to confirm that he was not the one who had defiled the complainants but none was done.

[13] At the conclusion of the trial, the appellant was convicted on two counts of defilement and was sentenced to life imprisonment as prescribed by the law. Aggrieved by the conviction and sentence, the appellant filed an appeal to the High Court at Nairobi (**Kimaru, J.**) and in a judgement dated 18th May 2016, the court upheld the conviction and life sentence prompting the present appeal.

[14] The appeal is predicated on five (5) grounds in which the appellant faults the learned Judge failing to take note that; ***the charge sheet was defective for non-conformity with the evidence adduced; failing to find that penetration was not proved; failing to find that the prosecution's evidence was inconsistent and contradictory; failing to find that essential witnesses necessary to corroborate the prosecution's case were not called; and failing to give regard to the appellant's defense of alibi.***

[15] During the plenary hearing of the appeal on 5th February, 2020 the appellant acting in person, relied on his written submissions and did not make any oral highlights. In his written submissions, he argued that, the charge was defective in that it failed to accord with the evidence given at trial; that there was no evidence to show there was penetration of the complainants' vaginas, and if there was. that it was the appellant who did it; that there was no medical evidence connecting the appellant with the offence of defilement; that the prosecution's case was filled with inconsistencies and contradictions which cast doubt on the credibility of its witnesses; that the prosecution failed to call material witnesses to corroborate the complainants' statements; and that the appellant's defense of *alibi* was not considered. The appellant urged us to allow the appeal and in the alternative pleaded for leniency arguing that he had been rehabilitated. He also cited some recent decisions by this Court in **Evans Wanjala Wanyonyi vs. Republic [2019] eKLR** and **George Kuria Mwaura vs. Republic [2019] eKLR**

where this Court substituted prescribed mandatory sentences for defilement to 10 years and 15 years sentences respectively.

[16] The State opposed the appeal, **Mr. Obiri** learned Assistant Deputy Public Prosecutor submitted that the ingredients of defilement were proved and that the complainants' evidence that they were victims of defilement was corroborated by the medical report submitted by **PW4**. On the issue of identification, counsel argued that the complainants had spent the whole night with the appellant and that they were the ones who led their father and the police back to the house the next day. That the complaints also identified the appellant to the police. On the life sentence, counsel argued that the offence committed against the complainants who were aged eleven (11) and eight (8) years was serious and had all the aggravating elements. The appellant took advantage of the minors, threatened them and defiled them the whole night, thus he deserved to serve the sentence of life which is what is prescribed by the Act. Counsel urged us to find the appeal lacked merit and dismiss it.

[17] We have considered the record of appeal and deliberated on the submissions by parties as well as the law. This is a second appeal and as has been stated by this Court many times before, we will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, are based on a misapprehension of the evidence, or the two courts below are shown demonstrably to have acted on the wrong principles in making the findings (See **Chemangong vs. Republic [1984] KLR 611**).

[18] Upon extrapolating the evidence as summarized above, the issues of law that are discernable for our consideration are basically **whether the offence of defilement was proved beyond reasonable doubt and whether the evidence that was relied on by the two courts below was legal and safe to sustain the conviction of the appellant**. To begin with, the critical ingredients forming the offence of defilement are:

(a) the age of the complainant;

(b) proof of penetration; and

(c) positive identification of the assailant.

(See **Dominic Kibet Mwareng vs. Republic [2013] eKLR**).

[19] On the issue of the complainants' age, **PW5** produced the birth certificates showing that **PW1** was born on 27th February, 1999 and **PW2** was born on 27th January, 2002. The medical reports also assessed **PW1** as being eleven (11) years old and **PW2** as being eight (8) years old at the time of the incident. There being no evidence to the contrary, we find that the ages of the complainants were not in dispute and that in fact they were minors at the time of the incident.

[20] On proof of penetration, it was the appellant's contention that there was insufficient evidence that the penetration was by a penis and not by some other blunt object. **Section 2** of the Sexual Offences Act defines penetration thus,

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

However, **Section 8 (1)** of the **Sexual Offences Act** defines the offence of defilement in the following manner: -

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

In this case the P3 form indicated that **PW1's** and **PW2's** genitalia were bruised and both hymens were torn. The medical report in respect of **PW1** also indicated that there was tender swelling on the left ear and cheek and there was tenderness on her back which was consistent with the evidence of **PW1** that the appellant slapped her and pulled her cheeks. **PW4** also explained that the basis of the diagnosis of defilement was made considering the bruises on the genitalia and the broken hymen showing penetration of both complainants. This evidence coupled by the evidence of both complainants shows there was proof of penetration thereby establishing a key ingredient of an offence of defilement. This finding is based on the complainants' evidence that was corroborated by medical evidence.

[21] On identification, the only evidence available was that of the complainants who testified and were subjected to cross examination by the appellant. We also hasten to add that under the proviso to **Section 124** of the **Evidence Act**, a trial court can convict on the sole evidence of the victim(s) of a sexual offence. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief. (See **Arthur Mshila Manga vs. Republic [2016] (eKLR)**). The trial court found the complainants possessed sufficient intelligence; they were reliable witnesses and they had had sufficient time to interact with the appellant from 7 p.m. on the night of the incident to the following morning. Furthermore, they were able to lead their father and the police to the house where the incident took place. They gave a detailed description of the events that took place that night including that there were fierce dogs in the compound. The learned Judge agreed with the trial court stating that: -

“From a careful examination of the evidence on record, this court finds the complainants as reliable witnesses. Their evidence was not shaken when they were cross examined by the appellant. They both corroborated each other in their identification of the appellant. Further, the complainants had stayed with the appellant throughout the night and therefore had sufficient time to properly identify the appellant as the person who defiled them. This court therefore, finds that the complainants identified the appellant as the perpetrator of the offence to the required standard of proof satisfying the final ingredient of the offence.”

We see no reason to interfere with the findings of the two courts below regarding credibility of witnesses and identification of the appellant.

[22] The appellant also argued that the prosecution's case was weakened by its failure to call crucial witnesses who were mentioned by the

complainants. On this, we wish to state as it has been stated before by this Court time without number, that proof of a fact is not dependent on the number of the witnesses called but rather on the weight and cogency of the evidence adduced (no matter the number of witnesses). It is only where the prosecution calls evidence that is barely adequate or marginal that a court may be entitled to draw an adverse inference. (See **Bukenya & Others vs Uganda** [1972] E. A. 549). In the case of **Erick Onyango Ondeng' vs. Republic** [2014] eKLR this Court observed that, whereas the prosecution has a duty to call all the witnesses necessary to establish the truth of a matter, in the absence of any requirement by the provision of the law, no particular number of witnesses shall be required to prove any fact. This is in line with **Section 143** of the **Evidence Act** which provides thus: -

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

[23] On the ground of appeal regarding the appellant’s defence which he argued was disregarded; the record of the two courts below show there were concurrence findings that the appellant’s defence which was a mere denial did not dent the strong case put forth by the prosecution’s witnesses. Similarly, the defence of *alibi* was dislodged by the prosecution’s evidence that placed him at the scene. In **Victor Mwendwa Mulinge vs. Republic**, [2014] eKLR this Court expressed as follows: -

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see Karanja v. R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

We too have no reason to interfere with the concurrent conclusions as above stated.

[24] On the last issue of sentence, the appellant pleaded for leniency, stating that he regretted the events of that material day and had since gone through serious rehabilitation. He urged us to exercise our discretion and set aside the mandatory life sentence and substitute it with a more lenient sentence. Following the Supreme Court decision in **Francis Karioko Muruatetu & another vs. Republic** [2017] eKLR, this Court has had several opportunities to reduce the mandatory life sentences under the **Section 8(1)** of the **Sexual Offences Act** to more lenient sentences depending on the circumstances of each case. (See **Jared Kioita Injiri vs. Republic** [2019] eKLR ; **Robert Simiyu Wafula & another vs. Republic** [2019] eKLR and **B.W vs. Republic** [2019] eKLR).

[25] We recognize that in **Muruatetu Case**, the Supreme Court recommended sentencing guidelines that looks into the possibility of reform and social re-adaptation during sentence re-hearing. This suggests that where an appellant has been in custody for a considerable period of time, courts ought to inform itself as to whether the appellant is fit for release back into society. In the instant appeal, however, the circumstances surrounding this matter are disturbing; so are the gravity of the appellant’s acts of 15th August, 2010 when he lured helpless children to his house under the guise of helping them and he used threats by suggesting he would throw them to the ferocious dogs if they cried. Then he violently defiled the complainants’ in turns throughout the night. We find the appellant acted intentionally and sadistically. This kind of prolonged physical, psychological and emotional torture must have caused irreparable damage to the children which might affect them for the rest of their lives. The appellant merely posed as a good Samaritan but he is a sexual predator who deserves to be kept away from the society. For those reasons we are not persuaded to reduce the life sentence meted out by the two courts below even after bringing to bear the sentencing guidelines under the **Muruatetu Case**.

[26] In the upshot of the foregoing, we find this appeal lacking in merits, the conviction and sentence of the appellant is well founded. We hereby dismiss the appeal in its entirety. We thus find the sentence meted out on the appellant by the two courts below appropriate.

Dated and delivered at Nairobi this 22nd day of May, 2020

M. K. KOOME.

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JUDGE OF APPEAL

M. WARSAME

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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