



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM): OUKO (P), M'INOTI & MURGOR, JJA)

CRIMINAL APPEAL NO. 20 OF 2017

BETWEEN

SNM..... APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from judgment of the High Court of Kenya at Nairobi, (Kimaru, J.) dated 19<sup>th</sup> April 2016,*

*in*

*H.C.CR.A No. 197 of 2013)*

\*\*\*\*\*

JUDGMENT OF THE COURT

**SNM, the appellant** was charged with the offence of defilement contrary to **section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006** and in the alternative with the offence of committing an indecent act with a child contrary to **section 11(1)** of the same Act. The particulars of the main offence are that on diverse dates between the month of April and June 2012 in Kajiado North County, the appellant intentionally caused his penis to penetrate the vagina of **AW, the complainant (PW1)**, a child aged 15 years.

In the alternative count, the particulars are that on diverse dates between April and June 2012 in Kajiado North County the appellant intentionally touched the buttocks, breast and vagina of AW.

The trial magistrate (*Hon. Mwangi*) convicted and sentenced the appellant to 25 years' imprisonment upon finding that the offence was proved to the required standard. The appellant was dissatisfied with the decision, and appealed to the High Court (Kimaru, J.), which upheld the conviction and sentence. The appellant was aggrieved by the conviction and sentence, and appealed to this Court against that decision.

The case the appellant faced was that on diverse dates between April and June 2012, he defiled AW at their home in [Particulars Withheld] while her mother **GN, PW2** was at work or had gone to church; that on those occasions the appellant would remove his trousers and after ordering AW to remove her underpants, he would defile her on the bed he shared with her mother or on cushions on the living room floor. Sometimes he defiled AW on a table on which her mother kept her clothes. She testified that this would occur during the day when her mother was away.

The acts of defilement came to light after AW was invited to stay with her grandmother, **PW4** in Kariobangi, when, following extensive counselling, AW told **Prisca Watiti Murigi PW3 (Prisca)**, who worked with displaced children and the elderly, of the 'bad things' that the appellant had done to her. She disclosed to Prisca that the appellant would threaten to kill her with a panga he kept in the house, if she told any one of his sexual exploits. Thereafter, accompanied by AW's uncle, Prisca took AW to a hospital where she was examined by **Dr. Joseph Maundu (PW5)** who found that though she did not have any lacerations or bruises, her hymen was ruptured, and there was white discharge from her genitalia, a sign of infection. It was after the doctor had completed and signed the P3 form that they lodged a report at the police station. **Corporal Henry Ileri (PW6)** carried out investigations into the allegations and charged the appellant with the offence of defilement. During her testimony, AW's mother stated that her daughter was born on 27<sup>th</sup> October 1997, and produced her Immunization Card as evidence of her age. She also stated that she had lived with the appellant for 14 years as her husband, and that AW was born prior to her marriage to the appellant.

In his defence, the appellant denied committing the offence, and called one witness. He stated that he had taken AW to live with her

grandmother in Kariobangi in June, where she was attending school, and that he was arrested in February the following year.

The testimony of **Lucy Mwangi, DW1**, the appellant's sister, was a long drawn out expose that dwelt mainly on AW's sister, and the marital difference between AW's mother and the appellant.

In the grounds of appeal filed in this Court, the appellant complained that, the learned judge failed to re-evaluate the entire prosecution case before holding that age and penetration were proved beyond reasonable doubt; in failing to appreciate that the prosecution's case was bedevilled with material contradictions; by relying on corroborative evidence without testing the truthfulness of AW's evidence; in disregarding the appellant's defence merely because he failed to highlight it during cross-examination of the prosecution witnesses, and finally that the trial court imposed a disproportionate sentence which was unconstitutional as it violated **Articles 160** and **159** of the Constitution.

The appellant who appeared in person filed written submissions wherein he contended that the prosecution's case was not proved beyond reasonable doubt, as neither AW's age nor penetration was proved.

With respect to AW's age it was submitted that the medical examination report indicated her age as 12 years, and that her age on the charge sheet was later amended to 15 years; that AW's age ranged between 12 and 15 years which differences emanated from the child, the Health card report, and from her mother, with the result that, an approximation of the complainant's age was used as the basis of the appellant's conviction and sentence.

Concerning whether penetration was proved, it was submitted that this was not proved beyond reasonable doubt, and that if it was, it was not demonstrated that the appellant was the perpetrator; that furthermore, the investigating officer did not ascertain whether the complainant was being truthful since the medical evidence did not point to the appellant as the defiler; that the absence of her hymen was not conclusive proof of penetration since it could have been lost through other factors and, that the complainant did not explicitly exclude having had sexual relations with other persons. It was further argued that the absence of bruises or physical injuries, or spermatozoa was inconsistent with penetration.

The appellant also took issue with the learned judge's observation that the appellant's defence was an afterthought because his assertion that the allegations arose from a misunderstanding with PW2 did not arise when he cross-examined the prosecution's witnesses; that in effect, the judge shifted the burden of proof to him.

Lastly, the appellant submitted that the mandatory custodial sentence of 25 years imposed on him by the trial court was harsh and excessive; that more particularly it was unconstitutional following the Supreme Court's decision in **Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 of 2015**, which determined that mandatory sentences which deprived the court of judicial discretion in determining the sentence to be imposed were unconstitutional.

**Mr. Hassan Abdi**, learned counsel for the State opposed the appeal, and submitted that the appellant had not specified in what manner the learned judge erred in arriving at his decision; that the learned judge reanalysed the evidence and concluded that the conviction was safe as AW's age was proved, that the appellant was identified as the perpetrator, and the evidence demonstrated that there was penetration. Counsel urged us not to interfere with the decision of the courts below.

We have considered these submissions and carefully read the record of appeal. This being a second appeal and by dint of **Section 361(2)** of the **Criminal Procedure Code**, this Court can only address a point or points on law. In the case of **Karingo vs Republic (1982) KLR 213** this Court stated,

***"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 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."***

Having regard to the circumstances of this case, it is our view that the issues for consideration are whether the learned judge failed to re-evaluate the evidence and reach his own independent conclusions; whether the learned judge rightly found that there were no material contradictions in the prosecution's case and that AW was truthful; and whether the sentence imposed by the trial court was disproportionate or an unconstitutional sentence.

In ascertaining whether the High Court properly reevaluated the evidence, we will begin by considering whether the ingredients for defilement namely, the complainant's age, the appellant's identity and penetration were proved to the required standard.

According to the charge sheet, AW was 15 years of age when the offence was committed. As proof of her age, her mother produced a Ministry of Health -Child Health Card which showed her date of birth as 28<sup>th</sup> October 1997 indicating that she would have been 15 years old at the time. As concerns the appellant's complaint that the P3 form specified her age as 12 years, while the Child Health Card indicated that she was 15 years, we consider that no prejudice was occasioned to the appellant as he was charged under **section 8 (3)** of the Act which is with reference to the defilement of a child between the ages of 12 and 15 years, meaning that AW's age fell within the defined age bracket. We find this complaint to be without merit.

On the next ingredient, which is whether the appellant was properly identified as the perpetrator of the offence, this cannot be in doubt. The appellant had lived with AW, her mother and siblings for over 14 years. He was therefore well known to AW, and she firmly maintained her stance, even after being recalled to testify that it was the appellant who had incessantly defiled her.

As to whether penetration was proved, AW provided cogent and explicit evidence depicting how the appellant would order her to remove her

clothes and would defile her while her mother was away. She described the incidents in minute detail specifying the locations in the house where she was defiled, how he went about it, and the manner of defilement.

This evidence is supported by the P3 form and Dr. Maundu's evidence which indicated that her hymen was ruptured and she had white vaginal discharge, all of which confirmed that she had been defiled.

Based on this evidence there can be no question that the trial court considered the necessary ingredients of the offence and rightly concluded that they were properly proved beyond reasonable doubt. In turn, the High Court properly reevaluated the evidence and also came to the same conclusion that AW had been defiled and that it was the appellant who had defiled her.

On the assertion that there were material contradictions in the prosecution evidence, and that the trial court failed to weigh out AW's truthfulness against the evidence, we are satisfied that the trial court considered AW's credibility and properly concluded that she was a truthful witness. After analysing AW's evidence which detailed the different occasions when the appellant defiled her, together with the evidence of PW2, PW3 and PW4 which it found to be consistent, the trial court went on to add that;

***“This fact coupled with the fact that I observed her demeanor when she testified in court makes me believe that she was being truthful...”***

The trial court, having believed and recorded the reasons for such belief that AW was being truthful, was entitled under the proviso to **section 124** of the **Evidence Act**, to convict the appellant for the sexual acts committed on AW even on her evidence alone. Her evidence was uncontroverted and there is no reason to fault the trial court for finding that AW was truthful.

Concerning the appellant's contestation that his defence was not taken into account by the two courts below, in considering his defence, the trial court had this to say;

***“DW1 claims that Maggy told her that she had never seen such action being done by the accused is not admissible. This Maggy should have come to court and speak for herself and DW1 cannot purport to give evidence on behalf of Maggy... DW1's testimony is an attempt to rescue her brother and is of no evidential value. The defence by the accused is also a weak attempt to exonerate himself and shift the blame to some unknown person but there is overwhelming evidence against him. I discuss (describe)? the same as a mere denial and find that I am convinced from the evidence adduced that the accused had on several occasions penetrated PW1's vagina using his penis.”***

Also with reference to his defence the High Court stated;

***“The defence of the appellant was to the effect that he was framed does not hold since the prosecution established every element of the charge. The Appellants defence was self-serving. It was justly dismissed as not sufficient to displace the prosecution case.”***

As such, contrary to the appellant's assertions, the above excerpts make it apparent that the courts below did consider the appellant's defence. And when it was evaluated against the prosecution's case they both came to the conclusion that it lacked credence and was unworthy of belief. On our part we are satisfied that the defence was considered in its totality, following which, it was justifiably rejected.

On the final issue of the appellant's sentence, the trial court sentenced the appellant to 25 years' imprisonment as stipulated by **Section 8 (3)**. The provision specifies that ;

***“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

AW's age having been ascertained at 15 years meant the trial court imposed a sentence of not less than 20 years.

However, bearing in mind the edicts of the Supreme Court in ***Francis Karioko Muruatetu & Another vs Republic (supra)***, on the unconstitutionality of mandatory sentences, after considering the appellant's mitigation and the plea for mercy and, bearing in mind the suffering and anguish the child had experienced at the appellant's hands, a person who was entrusted with her care and well-being, we see no reason to interfere with the trial court's sentence.

In so concluding, the appeal is dismissed in its entirety.

***It is so ordered.***

***Dated and delivered at Nairobi this 24<sup>th</sup> day of July, 2020.***

**W. OUKO (P)**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

*Signed*

**DEPUTY REGISTRAR**