



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: GATEMBU, MURGOR AND, SICHALE JJ. A]

CRIMINAL APPEAL NO. 24 OF 2019

BETWEEN

JOSEPH KIARIE KARANJA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Kiambu (Nagillah J.) dated 10<sup>th</sup> May, 2017 in **H.C.CR.A No. 44 of 2016**)

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JUDGMENT OF THE COURT

The appellant, **Joseph Kiarie Karanja** was first convicted before the Senior Resident Magistrate's Court at Gatundu and sentenced to thirty five (35) years imprisonment on **15<sup>th</sup> August 2006**. Unfortunately, the original court file was destroyed in a fire that razed the court to the ground and on appeal, the High Court had no option but to order a retrial.

In the retrial before the Principal Magistrate's Court at Gatundu, the charges against the appellant were two counts of defilement contrary to **Section 145(1)** of the Penal code and one count of attempted defilement contrary to **Section 145 (2)** of the Penal Code.

In count I, it was alleged that on **1<sup>st</sup> March, 2006** at Mukurwe village in Thika District of the then Central Province, he had unlawful carnal knowledge of **LWM** (name withheld), a girl under the age of sixteen years. In count II, it was alleged that on **1<sup>st</sup> March, 2006** at the same place and time, he attempted to have carnal knowledge of **CW** (name withheld), a girl under the age of sixteen years. In count III, again at the same place and time, he had carnal knowledge of **MW** (name withheld), a girl under the age of sixteen years.

In the alternatives to each count, the appellant was charged with indecent assault of a female contrary to **Section 144 (1)** of the Penal code. The particulars of the first count are that on the stated date and in the same place, he unlawfully and indecently assaulted **LMW**, by touching her private parts. The particulars of the second alternative count was that on the same day in the same place, he unlawfully and indecently assaulted **CW**, by touching her private parts. The particulars of the third alternative count were that on the same day in the same place, he unlawfully and indecently assaulted **CW** by touching her private parts.

The appellant denied all the charges hence the trial.

A brief background to this appeal is that on **1<sup>st</sup> March, 2006** at around 4.00 p.m, **P.W.1** (**LWM**), **P.W.2** (**CW**), **P.W.3** (**MW**), **P.W.4** (**MW**) and **P.W.7**, (**J.M**) were out playing when the appellant who was known to all of them as "**Kashode**" asked them to escort him. All of them, save for **P.W.3** agreed and followed him down a path leading into a coffee plantation. While in the middle of the plantation, the appellant sent **P.W.7** to buy some cake after which, he asked **P.W.1** and **P.W.2** to remove their underwear so he could confirm whether they were girls or boys. When they obliged, he removed his trousers and defiled each of them in turns. After his actions, he removed a knife and threatened to kill them if they told anyone.

**P.W.7** who did not go to the shop as instructed, hid at a distance and witnessed the entire episodes. **P.W.7** ran home and reported what he had seen.

**P.W.3** also testified that she followed the group, albeit discreetly and observed the whole ordeal. The matter was reported to **Corporal Catherine Migwi (P.W.6)** of Gatundu Police Station. **P.W.6** took the victims to Gatundu District Hospital where they were examined and

found to have bruises on their private parts. She testified that she had produced the P3 forms and clinical notes in the initial hearing but the court burnt down with all the documents tendered in evidence.

In his defence, the appellant gave an unsworn statement. He alleged that he was being framed by **JMM (P.W.5)** who was the father of **P.W.2** and an uncle to **P.W.7** who owed him Kshs. 2,000.00. He stated that on the material day he was in his home when he was ambushed at 5 a.m by **P.W.5** and three youth who roughed him up and took him to the A.P's office. He only came to know of the charges against him after his arrest.

Upon assessing and analyzing the evidence tendered before him, the learned trial magistrate (**Honourable Nyang'ena, SPM**), convicted the appellant on counts I and count II and concluded that **"...there was no evidence linking the accused to the offence under count II (sic)"**. The appellant was sentenced to life imprisonment in each count which sentences were to run concurrently.

Aggrieved by the conviction and sentence of the trial court, the appellant filed an appeal at the High Court which was dismissed by **Nagillah, J.** in a judgment delivered on **10<sup>th</sup> May, 2017**, thus provoking the present appeal.

In an undated Memorandum of Appeal, the appellant raised five grounds of appeal faulting the trial court for:

- i. Convicting him on evidence that was inconsistent and contradictory;
- ii. Failing to make an independent opinion on the burden of proof as required by law;
- iii. failing to evaluate the evidence in light of the defence raised;
- iv. failing to consider that the evidence against him was not proved to the required standard rendering the conviction unsafe; and
- v. failing to consider the existing grudge between the complainant and the applicant.

When the matter came up before us for virtual hearing on **2<sup>nd</sup> June, 2020**, the appellant who appeared in person denied committing the offences and maintained that he was framed.

**Miss Ngalyuka**, Senior Assistant Deputy Public Prosecutor (SADPP) opposed the appeal. She contended that the appellant was rightly charged with defiling **P.W.1, P.W.2** and **P.W.4** who were below the age of 16 and that essential witnesses were called who proved the charges including **P.W.3** and **P.W.7** who were eyewitnesses. She further contended that although there was no medical evidence as it was destroyed by a fire in Gatundu Law Courts, both courts still found that there was overwhelming evidence to convict the appellant.

Lastly, counsel submitted that although **Section 200** of Criminal Procedure Code was not complied with, no prejudice was suffered by the appellant as this was but a technical lapse.

This being a second appeal, our mandate is as set out in **Section 361 (1) (a)** of the Criminal Procedure Code which provision enjoins us to consider only matters of law. The position has been restated in many decisions of this Court including **David Njoroge Macharia vs. Republic [2011] eKLR** wherein the court 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)."**

We have carefully considered the record, the grounds of appeal and the submissions of both sides. In order for us to determine whether there was misapprehension of the evidence, or whether the two courts below acted on wrong principles, it becomes imperative for us to subject the entire evidence to a review.

The two courts below arrived at concurrent findings of law and fact that the appellant committed the offences of defilement as charged. It is not denied that the appellant was well known to **P.W.1, P.W.2, P.W.3** and **P.W.7** as '**Kashode**' and upon the appellant's request, **P.W.1, P.W.2, P.W.3, P.W.4** and **P.W.7** did not hesitate to escort him through the coffee plantation. **P.W.1, P.W.2** and **P.W.4** narrated in detail how the appellant asked them to remove their underwear so as to confirm if they were boys or girls. The appellant then removed his own trouser and then proceeded to defile **P.W.2** who was 7 years old at the time. According to her testimony: **"He called me and lay on top of me.**

**He did bad things to me. I was injured and bled from between my legs"**. The appellant then defiled **P.W.1** who was 10 years. **P.W.1** stated **"He called me and made me lie on the ground. He had carnal knowledge of me"**. Lastly he defiled **P.W.4** who was about 9 years old and who stated that she sustained injuries. The appellant also threatened to stab them with a knife if they told anyone. **P.W.7**, who had been sent to buy cake by the appellant, did not do so, and opted to take cover hence witnessing the entire ordeal. **P.W.3** also testified that although she refused to escort the appellant, she followed them albeit discreetly and also saw the appellant defile **P.W.1, P.W.2** and **P.W.4**.

In our view, all the ingredients of the offence of defilement were satisfied.

There is no denying that the complainants were minors below the age of 16 at the time of the incident. The victims gave sufficient proof of penetration which was corroborated by **P.W.3** and **P.W.7**. In addition, the appellant who was well known to them was identified as the defiler. Despite the lack of medical evidence, which was destroyed in a fire that razed down Gatundu Law Courts, the evidence presented by the prosecution was sufficient to sustain a conviction on defilement of a girl under the age of 16 years contrary to section 145(1) of the Penal Code.

However, the trial court found the appellant guilty in respect of two counts as opposed to three. We however, note that there was no cross-appeal in respect of the count where the appellant was acquitted.

As for the contention of non-compliance with **section 200(3)** of the Criminal Procedure Code by the trial court, we find this to be a non-issue. A perusal of the record shows that the trial was conducted by **Hon. D.G Karani** (SRM) who recorded the evidence of **P.W.1, P.W.2, P.W.3, P.W.4, P.W.5** and **P.W.6**. On **20<sup>th</sup> February, 2012**, **Hon. D.G. Karani** directed that: **“Final adjournment to the prosecution. Since this court is on transfer I direct that proceedings be typed and matter be placed before the incoming court for directions under section 200 CPC as to whether it should proceed from where it has reached or commenced de novo. Further hearing now on 9<sup>th</sup> April, 2012 when directions will be taken. Mention 5<sup>th</sup> March, 2012.”** The matter was then mentioned before **Hon. Kinyanjui** (RM) on **5<sup>th</sup> March, 2012**. The record shows that the appellant applied to recall **P.W.5**. He stated: **“I pray for recall of P.W.5 he did not answer all the questions.”** Although the record is silent on non-compliance with Sec. 200 of the CPC, it is clear that the appellant was given an opportunity to decide on the manner in which he wished to proceed under Section 200 of the Criminal Procedure Code to which the appellant requested for the recall of **P.W.5** who in his view did not answer all the questions.

On sentence, the relevant provision at the time the incident occurred was **section 145(1)** of the Penal Code as amended by the Criminal Law (Amendment) Act, No. 5/2003 which read as follows:-

**“145. (1) any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.”**

We note that the punishment provided for in the above offence was not mandatory and the court had discretion to consider the appropriate sentence depending on the circumstances. (See the case of **Fred Michael Bwayo v Republic [2009] eKLR**). In the instant matter the appellant committed a heinous crime against three innocent young girls. We however take note that the appellant was serving a 35 year sentence imposed on **15<sup>th</sup> August 2006** prior to the re-trial.

Taking the totality of the circumstances into consideration, we set aside the life sentence imposed on the appellant and substitute it with a sentence of twenty- five (25) years imprisonment in Count I and Count II. The sentences to run concurrently from the date of his conviction by the trial court (**15<sup>th</sup> August, 2006**).

It is so ordered.

**Dated and Delivered at Nairobi this 4<sup>th</sup> day of December, 2020.**

**S. GATEMBU KAIRU, (FCI Arb)**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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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**