



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 51 OF 2017

BETWEEN

MOHAMED JUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 22nd September, 2016

in

H. C. Cr. A No. 50 of 2013)

JUDGMENT OF THE COURT

1. On 13th February, 2012, FN (PW1), who was at the time 7 years old, after having his lunch at home left at around 4:00 p.m. to attend a private tuition. While on his way he was stopped by a man who held him by the neck and dragged him into a nearby house. Inside the house the man held a knife to his neck causing the minor to fear for his life and deterred him from putting up a fight or screaming for help. The man proceeded to undress both the minor and himself and then inserted his penis into the minor's anus.

2. After the ordeal, the man released FN who went back home and narrated what had transpired to his mother, J K (PW2). J asked her son to take her to the house where he was defiled which he did. J recognized that the house in question belonged to the appellant who was known to her. At that time they did not find the appellant in the house and they decided to return the following day. Upon their return, they found the appellant in the house and as soon as he saw the minor he began accusing FN of stealing his water containers. Nonetheless, J confronted the appellant and attracted the attention of members of the public. The appellant was subsequently arrested and handed over to the police.

3. The minor was taken to hospital where he received medical attention. A few days later, Ibrahim Abdullahi (PW3), a clinical officer, examined the minor and filled the P3 form on 17th February, 2012. He observed that the minor was suffering from what he termed as post sodomy disorder and a small tear on his anal orifice. He concluded that the minor had been sodomized.

4. With the above evidence in hand, the appellant was charged in the Chief Magistrate's Court at Malindi with one count of defilement contrary to **Section 8(2)** of the **Sexual Offences Act** and alternative count of committing an indecent act with a child contrary to **Section 11A** of the **Sexual Offences Act**. The particulars of the main count were that on 13th February, 2012 in Malindi District within Kilifi County, the appellant intentionally and unlawfully caused penetration of his male genital organ namely his penis into the anus of FN, a boy aged 7 years old. On the alternative charge, the particulars read that on the above mentioned date and place the appellant committed an indecent act with a child by touching his genital organs namely, the anus and buttocks of FN, a boy aged 7 years old.

5. In his defence, the appellant gave a sworn statement denying the charges against him. He testified that on 12th February, 2012 he had a disagreement with a female neighbour who he alluded to be J and she vowed to deal with him. On that very day when he returned from work at around 6:00 p.m. he was accosted by the said neighbour who was in the company of other people. Before things got out of hand, he was rescued by a man who was in a nearby mosque. He reported the incident to the police and he was given a letter to take to the village elder. As he was delivering the letter he ran into members of the public who accused him of sodomizing FN and he was arrested.

6. After weighing the evidence, the trial court found that the prosecution had proved its case against the appellant with respect to the main count of defilement. As such, the appellant was convicted and sentenced to 30 years imprisonment. He was dissatisfied with that decision and he filed an appeal in the High Court challenging the same. Be that as it may, the High Court (Chitembwe, J.) agreed with the trial court and by a judgment dated 22nd September, 2016 dismissed the appeal.

7. Unrelenting, the appellant has lodged this second appeal which is premised on the grounds that the learned Judge erred by failing to appreciate that:-

i. The appellant was denied a fair hearing.

ii. The minor's evidence was not admitted in accordance with the law.

iii. The charge sheet was defective.

iv. The prosecution had not proved its case to the required standard.

8. At the plenary hearing, the appellant who appeared in person relied entirely on his written submissions on record. He asserted that his right to a fair hearing as enshrined under **Article 50(2)** of the **Constitution** was violated. This is because, according to him, despite informing the trial court that the trial was proceeding without witness statements being availed to him, the trial court never followed up on the same. Further, the trial court failed to recall witnesses, that is, PW1 and PW2, who had testified before their statements had been availed to him.

9. The appellant went on to attack the veracity of the minor's evidence. He argued that the minor was not a truthful witness and that even the trial court had found that he was unable to understand the nature of an oath thus allowed him to give unsworn evidence. Moreover, the minor had not given any description of the alleged perpetrator to his mother calling into question his identification as the perpetrator.

10. He also asked the Court to draw a negative inference from the prosecution's failure to call the neighbours who were allegedly present when Jumwa confronted him over the offence. In his opinion, the said neighbours were crucial witnesses. In addition, the medical evidence did not link him to the offence.

11. The appellant also took issue with the charge sheet which he argued was defective for omitting **Section 8(1)** of the **Sexual Offences Act** which prescribes the offence of defilement. In conclusion, it was urged that the prosecution had failed to prove its case to the required standard of proof.

12. In response, Ms. Njoki, learned Prosecution Counsel, opposed the appeal and maintained that the prosecution had proved the offence of defilement as against the appellant. Elaborating further, she

submitted that the evidence was clear that the minor was 7 years old and that he had been defiled. On the issue of identification, she opined that the minor's identification of the house wherein the incident took place linked the appellant to the offence. This is because the minor took his mother to the house where he was sodomized and his mother recognized it as belonging to the appellant, a fact he did not deny.

Furthermore, the minor was clear in his testimony that it was the appellant who defiled him.

13. Counsel went on to state that in as much as **Section 8(1)** of the **Sexual Offences Act** was omitted from the charge sheet the same did not render it fatally defective. In her view, the appellant was aware of the charge against him and was not prejudiced by the said omission. She further urged that the minor was a truthful witness regardless of the fact that he did not understand the essence of an oath.

14. Before taking her seat, Ms. Njoki contended that the sentence meted out to the appellant was not proper thus she implored us to enhance the same to life imprisonment.

15. We have considered the record, submissions by the appellant as well as counsel and the law. By dint of **Section 361** of the **Criminal Procedure Code**, our jurisdiction as the second appellate court is limited to consideration of points of law only. As a general rule we are required to show deference to the concurrent findings of fact by the two courts below. However, we can interfere with such findings where it is demonstrated that they are either not based on evidence, or the courts below acted on wrong principles in making the said findings. See **Karani vs. R [2010] 1 KLR 73**.

16. The centrality of the right to a fair trial to an accused person cannot be gainsaid hence its protection as a fundamental right under **Article 50** of the **Constitution**. This right entails that an accused person be supplied with all necessary materials including witness statements to enable him/her know the charge (s) against him and prepare an appropriate defence.

17. In this case, as we can discern from the record, the appellant requested to be supplied with copies of witness statements on 21st May, 2012 before the trial commenced and the trial court directed for the same to be availed to him. The next time the appellant raised the issue of witness statements was on 6th September, 2012 after PW1 and PW2 had testified. The relevant extract of the record is as follows:

“Accused: I have been proceeding with the case without statements.

I have no money to pay for the statements.

Order: Mention on 10/9/12 for purposes of supplying the accused with copies of statement. Copies to be made at the court registry. The police file be availed then.”

On 10th September, 2012 the appellant was not produced in court since he had sought medical attention at Malindi District Hospital. Nonetheless, when the trial resumed on 1st November, 2012 the appellant did not mention the issue of witness statements and the trial was concluded.

18. In light of the foregoing was the appellant's right to a fair trial infringed? We do not think so. Contrary to the appellant's assertion that the trial court failed to follow up on his complaint that he had not been supplied with witness statements, it is evident that the trial court ordered on two occasions (herein above set out) for the statements to be supplied to him. The trial court even went as far as directing that copies of the statements be made at the court's registry. As to whether the last direction by the trial court was complied with, there is nothing to suggest the contrary. The appellant never raised any complaint to that effect but continued with the trial until its conclusion. Similarly, the appellant did not raise the issue in the High Court and only raised it in this second appeal. In the circumstances, we are inclined to find that he was supplied with the witness statements following the second directive.

19. Equally, we find that the appellant never requested or applied for PW1 and PW2 to be recalled for purposes of further cross-examination in line with their witness statements. Accordingly, we see no

reason to fault the trial court for not recalling the said witnesses since it had no notice that the appellant desired to cross-examine them further.

20. It is common ground that the statement of offence in the charge sheet omitted **Section 8(1)** of the **Sexual Offences Act** which prescribes the offence of defilement. What is the consequence thereof? This Court while faced with a similar situation in **Safari Chengo vs. R [2019] eKLR** observed that whether a charge sheet is rendered fatally defective by a defect therein depends on whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. See also **JMA vs. R [2009] KLR 671**.

21. Applying the above principle, we are satisfied that in the instant case the said omission did not in any way prejudice the appellant. In our view, he appreciated the nature of the charge against him and indicated as much in his defence. As a result, we find that the said defect is curable under **Section 382** of the **Criminal Procedure Code**.

22. On the admission of FN's evidence, it is clear that after conducting *voire dire*, the trial court found that the minor did not comprehend the nature of an oath and directed that he should give unsworn evidence. It is on the basis of that observation that the appellant contends that the minor's evidence should not have been admitted. In our view, the foregoing sentiments did not render the minor's evidence inadmissible rather it went to the weight to be attached to his evidence.

23. Besides, it is evident from the record, that FN was extensively cross-examined by the appellant which tested the veracity of his evidence. The Ugandan Supreme Court in **Sula vs. Uganda [2001] 2EA 556** while considering the unsworn testimony of a minor held:

"A child who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."

See also **Nicholas Mutula Wambua & Another vs. R- Mombasa Criminal Appeal No. 373 of 2006 (UR)**.

24. Turning to the merits of the appeal, did the prosecution prove that the appellant defiled FN? It is common ground that three key elements should be proved for the offence of defilement to be established namely; penetration of the victim, age of the victim and identity of the perpetrator.

25. Penetration under **Section 2** of the **Sexual Offences Act** is defined as follows:-

"... the partial or complete insertion of the genital organs of a person into the genital organs of another person; ..."

We, like the two courts below, find that the prosecution had established penetration of the minor. FN gave uncontroverted evidence that on the material day the perpetrator inserted his penis into his anus. His evidence was corroborated by Ibrahim who after observing that there was a tear on his anal orifice concluded that the minor had been sodomized.

26. With regard to FN's age at the material time the evidence adduced by CPL Mwanachangoni Salim (PW5) in the form of his immunization card was clear that the minor was born on 6th August, 2004 thus was 7 years old.

27. As for the identity of the perpetrator, we note that FN did not give a description of his attacker to his mother when he informed her about the incident. Nevertheless, the minor had a good perception of the house he was taken to and he led J to the said house. It is at that point that J recognized that the house in question belonged to the appellant who she had seen hawking things around the area they lived.

28. Thereafter, when J and FN found the appellant in the said house, the minor confirmed that it was the appellant who had defiled him. FN's evidence in that respect remained consistent even when he was

cross-examined by the appellant. Furthermore, the trial court which had the opportunity of observing the minor as he testified found him to be a truthful witness and we see no reason to interfere with the said finding. See **A. M. G vs. R [2013] eKLR**.

29. Accordingly, we find that the appellant’s conviction for the offence of defilement was sound in law.

30. The State’s case for enhancement of the appellant’s sentence is anchored on **Section 8(2)** of the **Sexual Offences Act** which provides that:-

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

31. To begin with, the State did not serve upon the appellant a notice of enhancement of sentence as is the practice. Nonetheless, we bear in mind the holding of the Supreme Court in **Francis Karioko Muruatetu & Another vs. R [2017] eKLR** which recognized that a sentencing court has discretionary power to consider mitigating factors before issuing an appropriate sentence even where a mandatory sentence is prescribed by the relevant Act of Parliament. We find that whilst **Section 8 (2)** prescribed for a mandatory life sentence, the trial court properly exercised its discretion by first considering the mitigation by the appellant and then issuing a sentence of 30 years imprisonment. Consequently, we see no reason to interfere with the sentence meted to the appellant.

32. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 28th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR