



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KOOME & MURGOR, J.J.A)

CRIMINAL APPEAL NO 19 OF 2018

BETWEEN

JOHANA LWEBE MUYUGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the High Court of Kenya at Malindi (Korir, J.) dated 22nd June, 2017

in

H.C.CR.C. NO. 9 of 2016)

JUDGMENT OF THE COURT

[1] This is a second appeal by *Johana Lwebe Muyugo* (appellant) who was charged, tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to the provisions of *Section 8 (2)* of the *Sexual Offences Act* before the Senior Principal Magistrate's court at Kilifi. As far as this appeal is concerned our jurisdiction is circumscribed under *Section 361 (1) (a)* of the *Criminal Procedure Code* to only matters of law. In *Karani vs. R [2010] 1 KLR 73* this Court stated as follows:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

[2] In brief, the facts that gave rise to this appeal were that on the night of 21st / 22nd October, 2013, a young girl of about 11 years (NCB) her real name withheld (hereinafter referred to as the complainant) testified that she was on the material night sleeping in her grandmother's house with her other younger siblings and her aunt by the name *D* was in the vicinity. She narrated her ordeal to her grandmother that while she was sleeping, the appellant came through the roof to where she was, armed with a knife. He defiled her and when she attempted to scream, he showed her the knife and threatened to kill her should she scream or tell anybody. The grandmother called *LK (PW3)* who was a community health worker to witness what had happened to the complainant.

[3] *L* testified that when she checked on the complainant, she found her asleep on her back, with her legs spread out; when she looked at her private parts they were swollen and her pants had faeces and creamish matter; when she called her name, the complainant only held her hand as she could not wake up or talk. Lydia went to a nearby school and sought help from the headmaster who called the ambulance and gave her two teachers to accompany her; they took the complainant to Mtwapa Health Centre where she was attended to and referred to Kilifi District Hospital where she was admitted. The P3 Form was completed by *Dr. Faraja* who could not attend court without unreasonable delay as he had left the hospital but it was produced in evidence by *Dr. Ahmed (PW6)* who used to work with him and was familiar with his handwriting. The medical report indicated that the complainant's hymen was broken, there was a yellowish discharge from her vagina, she had vaginitis, had

developed diarrhea and she was very weak. She was treated and taken through counselling and a post rape care form was completed by **Justine Crome** a senior nurse at the hospital.

[4] When this incident happened, **KJ (PW2)** the mother of the complainant was not at home. She had travelled upcountry with her employer when she was informed that her child had been defiled and was admitted at the Kilifi District Hospital. She returned immediately and visited her daughter on the 24th (month not indicated). She found her daughter in a bad state of health as she could not walk. The complaint told **PW2** that it was **Kajiwe** who defiled her; that he had climbed into their house through the roof and after defiling her, he had warned her not to tell anybody. After the complainant was discharged from the hospital, the matter was reported at Mtwapa Police Station to **Cpl. Victoria Nyambura (PW5)** who had also been informed by **PW2** and had visited the complainant at the hospital. The complainant told **PW5** the name of the person who had defiled her was known to her by the nickname **Kajiwe** and used to live in the neighborhood; his official name was **Johana Mlugwe Muyugo** (appellant). According to **PW5** the appellant had moved out of that neighbourhood after this incident but she enlisted the village elders to monitor his movements. After a tip off **PW5** arrested him in a secluded place. **PW5** also produced a copy of the complainant's birth certificate which showed that she was born on 2nd September, 2002.

[5] The appellant was thus charged before the Principal Magistrate's court as aforesaid. After considering the evidence by the prosecution witnesses, he was found to have a case to answer and on being put on defence, he gave a sworn statement which looks more of a mitigation than a defence as he only gave his name, told the court that he had a wife and children who depended on him and asked the court to make a determination as he had nothing else to say.

[6] Ultimately the learned magistrate made a determination that the charge of defilement was proved beyond reasonable doubt, the appellant was convicted and sentenced to **life imprisonment**. He unsuccessfully appealed before the High Court which appeal was heard by **Korir, J.** and a judgment rendered on 22nd June, 2017, the subject matter of this appeal. In dismissing the appeal the Judge made the following findings in some pertinent paragraphs of the said judgment;

“27. On the other hand, the only evidence on identification of the assailant is that of the complainant. This is the evidence that the trial court was to consider. The complainant told the court that she knew the person who defiled her as Kajiwe. Her evidence was that the ‘mkebe’ lamp was still on when he came through the roof. She identified him as a neighbour. She also clearly identified him in court.

28. Her mother (PW2) testified that her daughter told her that Kajiwe had defiled her. She stated that Kajiwe was another name for the Appellant.

29. PW3 testified that the victim identified the Appellant a week after the incident. She stated that nobody told the complainant to name the Appellant as her assailant.

30. The investigating officer told the court that the Appellant went into hiding after the incident. She later found him in a secluded place following a tip-off by elders who had been monitoring his movements.

31. Looking at the evidence on record, I do not find any reason why the complainant would have falsely accused the Appellant.

Although the Appellant was a neighbour of the complainant's family, there no evidence of bad blood between the families.

32. The Appellant did not say much in his defence. He simply made what looked like a mitigation by saying he had a family to take care of. There was therefore nothing to be considered apart from what had come out during cross-examination of the prosecution witnesses by the Appellant. The trial magistrate considered what the Appellant had stated which amounted to a denial. The defence was upset by the evidence adduced by the prosecution. I therefore find that the trial court correctly convicted the Appellant.”

[7] Unrelenting, the appellant is before this Court on second appeal, which is predicated on the grounds that the learned first appellate Judge erred by upholding the conviction and sentence based on evidence of recognition by a single witness in circumstances that were not conducive for positive identification; failing to find the evidence was full of inconsistencies and not safe to sustain a conviction; relying on medical evidence that did not support the charge of defilement and the fact that the appellant was not subjected to medical examination; failing to consider the appellant's defence which was plausible while considered alongside the evidence of **GKK (PW4)** who was supposed to be with the complainant at the time she was defiled but testified that she knew nothing about the incidence.

[8] During the plenary hearing, the appellant who was appearing in person, urged the appeal through his written submissions. The appellant underscored that the three ingredients necessary to prove the offence of defilement such as age of the victim, penetration and identification of the assailant were not proved. Although age was proved, penetration and identification remained unproved. He cited the ancient cases of; **Kipkewende Arap Monsonik vs. Republic (1930) KLR 153**; **Abdalla Bin Mwendo vs. Republic (1953) E.A.C.A 166**, among others to stress that the time was night and the fact that the complainant said he shown a torch on her, it was dark and therefore the circumstances for positive identification were difficult. Even though the complainant said she recognized the appellant, there was need for the two courts below to warn themselves that mistakes are possible and they can be made even by people with such familiarity like

relatives and friends. Thus the appellant submitted that identification was not free from error more so because when the complainant reported to her grandmother about the defilement, the name of the appellant was not mentioned.

[9] The appellant also poked holes on the evidence of the complainant which in his view was full of contradictions. He stated that according to the complainant, she reported to **G** that she was defiled; this was contradicted by **G** who said she was going on with her business when people demanded to know what had happened to the complainant. **G** said she went to the house of her mother-in-law and saw the complainant sleeping and when she asked her why she was not going to school, she did not answer. She testified that the said mother-in-law who is the grandmother of the complainant started asking the complainant why she had left her mother's house and came to her house; the older woman then called **PW3** who was the community health worker.

[10] Next the appellant attacked the inconsistencies in the evidence beginning with the charge sheet where it was indicated that the offence occurred on 22nd October, 2013 which was supported by the evidence of **PW1**, **PW2**, **PW3** and the medical report contained in the P3 Form. However the **PRC** Form indicated that the complainant was defiled on the 19th October, 2013. He cited the provisions of **Section 137 (F)** of the **Criminal Procedure Code**, to underscore the fact that the evidence did not describe the time and date sufficiently. The appellant further submitted that there was variance from the medical P3 Form that stated the complainants injuries were weeks old while the evidence stated that she was taken to hospital the following day that was on the 23rd October, 2013. Lastly the appellant argued that although the complainant was found with an infection described as "vaginitis" the appellant was not subjected to any DNA testing to connect him with the offence. For the aforesaid reasons he urged us to allow the appeal.

[11] Opposing the appeal was Senior Prosecution Counsel Mr. Isaboke, he contended that although the appellant challenges the age of the complainant, this was proved by production of a birth certificate that showed she was born on 2nd September, 2002 therefore at the material time when she was defiled she was about 11 years old. The age was confirmed by the complainant's mother who produced a clinic card that indicated the complainant was born on the said date. On identification, counsel for the respondent submitted that the appellant was well known to the appellant by his nick name "**Kajiwe**". The appellant was a neighbour and when he gained entry to where the complainant was sleeping through the *makuti* roofing, there was light from a tin lamp which was still on, this coupled with the torch that the appellant was carrying aided identification.

[12] The appellant was also armed with a torch and a knife in his hands and the complainant was able to see him. This was identification by recognition which is more reliable; the appellant also threatened the complainant that he would kill her if she dared to scream as he defiled her. According to Mr. Isaboke, the evidence by the complainant regarding the defilement was confirmed by **PW2**, **PW3** and the investigating officer. She was also hospitalized for the same injuries. Further, that the P3 form produced in evidence confirmed that the complainant had been defiled and since all this testimony was uncontroverted, the conviction was safe and the appeal should be dismissed.

[12] On the sentence counsel for the state pressed that even if we were to be persuaded that the life sentence imposed by the trial court and confirmed by the High Court was harsh in view of the Supreme Court of Kenya case in **Francis Karioko Muruatetu & Another vs. Republic – Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015 (Muruatetu's case)** we should consider a term sentence of 40 years as the offence was serious, the life of an innocent young girl was ruined by the effects of pain and injuries she sustained during the ordeal and not to mention the attendant trauma that may have a lifelong psychological effect on her.

[13] Having considered the record, the parties' respective submissions and deliberated on the law, the issues that are discernable for our determination are; whether the prosecution proved its case to the required standard that it was the appellant who defiled the complainant; whether the inconsistencies contained in the dates and the account of how the complainant was defiled affected the weight of the evidence; whether the appellant was identified as the perpetrator; there was penetration and the age of the complainant was determined and lastly whether the mandatory life sentence is an appropriate one in view of the principles articulated in the *Muruatetu case*.

[14] As aforesaid, this is a second appeal where there is concurrent findings by the two courts below. In **Adan Muraguri Mungara vs. Republic, Cr. No. 347 of 2007 (Nyeri)**, this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court, in the following terms:

"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

[15] We will deal with all those issues together beginning with the weight of the evidence of identification and whether the case was proved to the required standard. We note the trial magistrate did not record the proceedings elegantly, they are rather jumbled up in some parts. Nonetheless the testimony of the complainant is clear that she was able to tell her mother and the investigating officer the person who defiled her was “**Kajiwe**” which was the nickname of the appellant. The investigating officer testified how the appellant disappeared from the area and she used the village elders who tipped off the police when they sighted him and she arrested him in an abandoned house. This was identification by recognition it is trite that identification by recognition is more reliable because it is based on the witness’ familiarity with the assailant. The two courts below accepted the account by the complainant that there was a tin lamp that illuminated the place, the appellant was also carrying a torch which enabled the complainant to see him as he defiled her, and he threatened to harm her with the knife if she made noise. When the appellant got wind that he was named as the perpetrator, he moved away from the area and was arrested from an isolated place which in our view was an indication of guilt.

[16] Regarding the ground of appeal that the ingredients of the offence that was age and penetration were not proved; we hasten to add that, the question of whether the prosecution proved the complainant’s age or the act of penetration are issues of facts that were fully considered by the two courts below and are strictly speaking not suitable for consideration before this Court on second appeal. Nonetheless, on the said issue of penetration, the complainant testified and gave a detailed account of how she was defiled by the appellant, a neighbour who was well known to her. **PW2** who was a community health attendant examined the child’s private parts and confirmed that her private parts were swollen, she was discharging a creamish matter evidencing an act of penetration; the complainant was hospitalized for the same injuries which were subsequently captured in the medical report by way of a P3 Form and the Post Rape Report and all the evidence was consistent that the complainant was a victim of defilement. As per the provisions of the **Sexual Offences Act** and the proviso to **Section 124** of the **Evidence Act**, the trial court can convict on the basis of the complainant’s evidence, if satisfied that the complainant is a truthful witness. However in this case the conviction is supported by the evidence of the complainant, **PW3** who was a community health worker, the police officer who visited the complainant at the hospital and the medical report. The trial court believed all these witnesses and found the defence evidence lacking in credibility and in our view it was better placed to judge their credibility as it heard and saw them testify.

[17] Turning to the ground of appeal further challenging identification of the appellant for lack of DNA testing, he also argued that a DNA examination was not conducted to link him to the defilement, in our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of the charge coupled with the five prosecution witnesses whose testimony was found trustworthy as regards the person who had defiled the complainant. We are also aware of the provisions of **Section 36(1)** of the **Sexual Offences Act** which provides as follows:

“Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

The above section does not make it mandatory that an accused person charged with a sexual offence must be subjected to a DNA sampling unless the court believed it was a necessary step to take. Also in the case of **Aml vs. Republic [2012] eKLR (Mombasa)**, this Court upheld the view that:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

[18] We have also considered the ground of appeal on the inconsistencies on the date when the complainant was taken to hospital and the evidence by **G**. First of all it is clear to us that **G** was a hostile witness who refused to co-operate. She said she found the complainant lying down, and asked her why she did not go to school but the complainant did not answer her. There was strong evidence from **PW3** the community health worker which in our view outshone that of **G** because immediately she was called by the complainant’s grandmother she responded; she found the complainant in pain and rushed her to hospital. In our view the minor discrepancies or inconsistencies from the evidence of **G** who was reluctant to come to the aid of the complainant and her reluctance to tell the court the condition in which she found her did not affect the weight of the evidence. It can be ignored and the conviction would not be shaken.

[19] This now takes us to the last issue on sentence; this Court in **Christopher Ochieng -v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri -v- R, Kisumu Criminal Appeal No. 93 of 2014** considered legality of minimum mandatory sentences under the **Sexual Offences Act** and stated:-

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8

(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another -v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.”

Taking into account the holding in the *Muruatetu case*, a sentencing court is required to consider mitigating factors before imposing a suitable sentence even where the law prescribes for a statutory sentence such as in this case. Our perusal of the record reveals that the trial court did consider the mitigation offered by the appellant but posited that the courts hands were tied by the sentences provided by the law that is how the appellant was sentenced to life imprisonment which is the prescribed sentence.

[20] The analogy that has been drawn from the *Muruatetu case* by this Court in the aforesaid cases is that sentencing remains a judicial function and is determined by the severity, proportionality of the offence and the mitigating factors. Thus in our view the mandatory aspect of the sentences especially “death penalty” is what was declared unconstitutional. Life imprisonment is also close to “death penalty” as one remains incarcerated for the rest of their life their age notwithstanding. We think the age of an offender should form a central factor in the determination of sentencing. There is no doubt that an offence of defilement is serious enough and that is why Parliament prescribed a life imprisonment so as to protect the society, punish the offender and at the same time to rehabilitate him. In the circumstances of this case where the mitigation of the appellant was not factored in, when he was sentenced, we are inclined to interfere with the life imprisonment and substitute thereto with a sentence of 25 years (twenty five years).

[20] On the whole therefore, we find this appeal is without merit, except on the issue of sentence. We affirm the decision of the two courts below on conviction but set aside the life sentence and substitute thereto with a sentence of 25 years.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR