



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, J. MOHAMMED & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 68 OF 2015

BETWEEN

JOSHUA OUMA OTHAO..... APPELLANT

AND

REPUBLIC .....RESPONDENT

*(Appeal from the conviction and sentence of the High Court of Kenya at Migori (Majanja, J.) dated 24<sup>th</sup> October, 2014*

in

HC. C.R.A. No. 44 of 2013)

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JUDGMENT OF THE COURT

This is a second appeal from the original conviction and sentence of the appellant, **Joshua Ouma Othao**, by the acting Principal Magistrate, Migori, in Criminal Case No. 16 of 2012. The charge that was laid against the appellant was that of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006** particulars being that between the nights of 3<sup>rd</sup> and 4<sup>th</sup> January, 2012 at a place named in the charge sheet he intentionally caused his penis to penetrate the vagina of “SA”, a child aged 11 years. There was an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the said **Act** particulars being that on the said night and at the said place he intentionally touched the vagina of the said child aged 11 years with his penis.

Being a second appeal our mandate is restricted by **Section 361(1) (a) Criminal Procedure Code** to dealing only with issues of law but not delve into matters of fact that have been considered by the trial court and re-evaluated by the first appeal court – see for the duty of the court on a second appeal the holding of this Court in the case of **M’Riungu v Republic [1983] KLR 455** where the following statement appears:

**“...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”.**

Our consideration of the facts of the case will thus be for purposes of satisfying ourselves that the two courts before have carried out their duties as required by law.

On the evening of 3<sup>rd</sup> January, 2012 “SA” (PW1) was at home when, after supper, she decided to walk to her auntie’s (PW2 – “RA”) nearby house where she usually spent the night. As she walked the short distance in the dark night she was shocked when a person held her by the neck and threatened to kill her if she raised alarm. The person pushed her to a house or room where:

**“..... He spent the night with me. He did bad things to me. He had sex with me. ...”**

She was alone with this person in the room and saw his face in the morning. She fled the room at the first opportunity the next morning and informed her auntie, RA, of the events of the night. RA, on receiving the child, noted that she wore bloodstained clothes – the skirt and panty were bloodstained. PW1 informed her auntie (RA) that she had been defiled by the appellant – they reported the matter to the police and PW1 was issued with a P3 Form and was examined by **Leonard Omweri**, a **Clinical Officer** at Karungu District Hospital who found

swelling of both labia, vaginal bruises extending to the cervix with whitish discharge and a bloody discharge from the vaginal opening which suggested penetration.

The other piece of evidence presented by the prosecution was that of **No. 2008133899 APC Phanuel Ombat** of the District Officer's office, Karungu. He was in the office on 4<sup>th</sup> January, 2012 when at about 2.30 p.m., upon receiving information that there had been a defilement in the neighborhood he and a colleague rushed to the scene and arrested the appellant who they handed over to Luanda Police Post. **No. 56675 PCW Rinah Watta** of Luanda police post on 4<sup>th</sup> January, 2012 received the appellant who was handed over to her by police. She arrested him, booked him, took witness statements from PW1 and others and thereafter charged the appellant with the offence.

That was the prosecution case upon which the trial magistrate found that there was a case to answer. In an unsworn statement the appellant shifted blame for the defilement to another person who he alleged was known to the police stating that the defiler was a bhang smoker – he did not himself smoke bhang. He blamed the clinical officer for not examining him after examining the child and finally stated that he had been framed because of a land dispute involving his brother.

The trial magistrate analysed the evidence and found that the prosecution had proved the case to the required standard. The appellant was convicted and sentenced to imprisonment for life.

In a first appeal to the High Court of Kenya at Migori (Majanja, J.) the appellant raised various issues – that a named person, Kevin Odhiambo, was the defiler but he (the appellant) had been blamed and charged with the offence; that his names had not been properly stated; that there were unresolved material contradictions in the prosecution case and that he was an orphan and the only bread winner of the family. The learned judge considered the appeal and in a judgment delivered on 24<sup>th</sup> October, 2014 he found no merit in it and dismissed it.

The appellant has in this second appeal raised various grounds of appeal. These range from an attack on the first appellate court which is said not to have considered that the prosecution case was full of contradictions; that the age of the girl child was not established; that penetration was not proved; that there was no medical link to show that the appellant defiled the child and that his defence was not considered. The supplementary grounds of appeal filed by the appellant on 28<sup>th</sup> May, 2019 are more or less what we have summarized here, the only additional ground being that the High Court erred in not considering that crucial exhibits were not produced in court.

The appeal came up for hearing before us on 29<sup>th</sup> July, 2019 when the appellant, who appeared in person, pointed out to us that he had filed written submissions attached to Supplementary Grounds of Appeal. We have perused the same. In a highlight the appellant took issue with the fact that ownership of the house where the offence took place had not been established. He denied committing the offence.

Miss Varoline Lubanga, learned State Counsel, in opposing the appeal fully relied on written submissions filed in court on 16<sup>th</sup> July, 2019 where the ingredients of the offence of defilement are set out. On whether there were contradictions in the prosecution evidence the State submits that those would be matters of fact where we have no jurisdiction to consider in a second appeal.

We have considered the whole record and the submissions made within the context of our mandate in a second appeal.

The Sexual Offences Act creates the offence of defilement and stipulates the sentence to be awarded to an accused person upon conviction, which sentence depends on the age of the complainant. The appellant complains that the age of the complainant was not established. Considering what we have said on the issue of sentence, this (the age of the complainant) is an issue of law which we are mandated to consider.

It was stated in the charge sheet that the complainant was 11 years old. The charge sheet is dated 6<sup>th</sup> January, 2012 and the offence is said to have been committed on the night of 3<sup>rd</sup> and 4<sup>th</sup> January, 2012.

In evidence before the trial magistrate, (taken on 21<sup>st</sup> May, 2012) the complainant, SA, said that she was 11 years old and this was confirmed by the Clinical Officer (PW5).

That issue of age of the complainant was not taken up either before the trial court or on first appeal, but on our own consideration based on the testimony of the complainant and that of the Medical Officer we are satisfied that the complainant, SA, was 11 years old when she was defiled in early 2012.

On whether there was penetration to establish the offence of defilement it was the testimony of SA that she was forcibly pushed into a room by a man, who she later established to be the appellant, who defiled her that night. He locked her up in the room when he left in the morning but she was able to escape. She related the whole incident to her auntie, RA, immediately upon her escape and the Medical Officer confirmed, upon examination, that SA had been defiled.

By the proviso to **Section 124** of the **Evidence Act**, the evidence of the complainant in a sexual offence need not be corroborated as long as the court is satisfied, for reasons to be recorded, that the complainant is telling the truth. In the case before the trial magistrate, SA gave cogent evidence which was not shaken on cross examination. When she managed to escape from the room where the appellant had locked her after satisfying his sexual desires the whole night she informed her auntie, RA, of the happenings and RA observed a bloodied skirt and panty. The Medical Officer confirmed that there had been penetration, thus the ingredients of the offence of defilement were satisfied. On the evidence before the trial court the appellant was properly convicted and the High Court was right to dismiss the appeal on that aspect.

The appellant was sentenced to life imprisonment which was the proper sentence provided under **Section 8(2)** of the **Sexual Offences Act** for an accused person convicted of defiling an 11 year old girl. The High Court was entitled to affirm that holding on first appeal, judgment of the High Court being delivered on 24<sup>th</sup> October, 2014. But the current jurisprudential thinking in Kenya on the imposition of mandatory

sentences has taken a fundamental paradigm shift after the Supreme Court of Kenya was asked in the **Francis Kariako Muruatetu & Others v R [2017] eKLR** case to answer the question whether it was constitutional for Parliament to prescribe a mandatory sentence for certain offences, in that case, murder, under **Section 203** as read with **Section 204** of the **Penal Code**. That court considered the issue and returned the answer that it was unconstitutional for the Penal Code to provide in mandatory terms that a person convicted of murder under the said sections must suffer death.

The Sexual Offences Act provides, in mandatory terms, that a person convicted of a sexual offence under that Act must suffer imprisonment for periods set out in the Act according to the age of the defiled child. That, we think, can no longer be good law in Kenya. Such law deprives the trial court the opportunity to examine specific circumstances of the offence and mitigation that the accused who has been convicted of the sexual offence may have to offer. Each case must ordinarily be decided depending on any peculiar circumstances of that case. In a recent decision of this Court delivered at Kisumu on 28<sup>th</sup> March, 2019 in the case of **Dismas Wafula Kilwake v R Criminal Appeal No. 129 of 2014 (ur)** the appellant had been convicted for the offence of defilement under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The victim girl was aged 14 years when she was defiled and because **Section 8(3)** of the said Act provided a mandatory sentence of “**not less than twenty years**” for defiling a girl aged between twelve and fifteen years the appellant was sentenced to serve 20 years’ imprisonment. A first appeal to the High Court was dismissed leading to an appeal to this Court. On the issue of the mandatory nature of the sentence this Court held:

*“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*

*Being so persuaded, we hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”*

There is also **Section 333(2)** of the Criminal Procedure Code (as amended by **Legal Notice No. 7 of 2007**) where the court, in awarding sentence is required to consider the period served in custody by a convicted person, excluding thereof such period if the convicted person was on bail bond. We note from the record that the appellant was arrested without warrant on 4<sup>th</sup> January, 2012 and was presented to court for plea on 6<sup>th</sup> January, 2012. Although he was admitted to bond the same day he was not able to raise it and remained in custody during the trial which concluded on 16<sup>th</sup> May, 2013 when judgment was delivered. The appellant was not admitted to bail pending appeal at the High Court. That is to say that the appellant has been in police and prison custody since January, 2012.

We have considered the whole matter and find no merit on the appeal on conviction which is hereby dismissed. On sentence, we do not think that the appellant should be in prison for life as found by the courts below. Although the offence was serious we are of the respectful view that a custodial sentence of twenty (20) years imprisonment is appropriate in the circumstances of this appeal. The appellant is sentenced to serve twenty (20) years imprisonment from 4<sup>th</sup> January, 2012.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of November, 2019.**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**