



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 198 OF 2016

[CORAM: KOOME, OKWENGU & SICHALE JJA]

BETWEEN

PAUL MUSEMBI MUTUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Nyamweya J.)

dated 15th November, 2015 In H.C.CR.A No. 146 of 2014)

JUDGMENT OF THE COURT

Paul Musembi Mutua (the appellant) has preferred this second appeal challenging the conviction and sentence for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the **2nd September, 2013** in Makueni County, he intentionally and unlawfully caused his genital organs (sic) namely penis to penetrate the female genital organ namely vagina of NS a child aged 8 years.

A brief background to this appeal is that the evening of **22nd September, 2013** at about 8 p.m., the complainant's aunt sent her out together with **Paul Musembi Mutua** (the appellant herein) whom P.W.1 knew and identified as '**Uncle Musembi**' to one **Ngokundu's** place, presumably to buy some alcohol.

Somewhere along their way back home, the appellant undressed himself then forced P.W.1 to remove her clothes and thereafter proceeded to defile her. Despite her pain and screams, he was not deterred. Not in vain, the screams attracted the attention of a passer-by who interrupted the appellant and threatened to report him to the police. Having done his part, the passer-by went on his way leaving P.W.1 and the appellant alone.

As they proceeded home the appellant promised to give P.W.1 Kshs.10/= so as not to reveal what he had done. On the following day, P.W.1 revealed what had happened to her grandmother **ZN (PW2)**. On **25th September, 2013**, P.W.1 was taken to hospital for examination and the matter reported to the police. The investigating officer, **Corporal Joyce Iha (PW4)** accompanied P.W.1 for medical examination at Makindu Sub-District Hospital. The P3 form presented by **Dr. Musyoki (PW3)** showed that P.W.1's hymen was torn and that she had a lot of discharge and blood stains.

The trial court was satisfied that the evidence presented satisfied the three requisite ingredients for the offence of defilement: age of the complainant; proof of penetration and positive identification of the assailant. The appellant was convicted of defiling P.W.1 and sentenced to life imprisonment.

Aggrieved, the appellant lodged a first appeal to the High Court against both his conviction and sentence. The High Court (**Nyamweya J.**) found no reason to interfere with the decision of the trial court and upheld both the conviction and sentence.

Undeterred, the appellant has lodged a second appeal to this Court on grounds that:

- i. the trial was conducted in violation of his Constitutional rights to fair trial contrary to Article 50(2)(b)(c) and (j);
- ii. the age of the complainant was not conclusively proved;

- iii. the trial court wrongly applied Section 124 of the Evidence Act;
- iv. the appellant was not conclusively linked to the offence of defilement therefore the prosecution had failed to prove its case beyond reasonable doubt; and
- v. essential witnesses were not called to establish the appellant's guilt therefore his conviction was not safe.

The appellant, representing himself, filed his undated written submissions to further expound on his grounds of appeal. On the first ground, the appellant submitted that the state was obligated to supply him with witness statements but not at his cost as directed by the trial magistrate. He also faulted the trial court for failing to recall P.W.1 and P.W.2 as at the time they testified, he did not have their witness statements. He prayed that this Court finds that his trial was a nullity.

Secondly, the appellant submitted that the prosecution had failed to produce documents to prove the age of the P.W.1 which is a key and critical ingredient for the offence of defilement; that the only available evidence regarding the age of P.W.1 was her testimony in *voire dire* examination where she stated that she was ten (10) years old.

On the third ground, the appellant felt that the trial court wrongly relied on Section 124 of the Evidence Act to convict him and ignored material contradictions in P.W.1's testimony. Additionally, the appellant pointed out that the trial court had failed to expressly indicate why it believed P.W.1's testimony contrary to the stipulation in Section 124 of the Evidence Act which provides that a Court can convict on the evidence of a victim if for reasons to be recorded in the proceedings, it is satisfied that the victim is telling the truth.

Fourthly, on identification, the appellant submitted that P.W.1's evidence was inconsistent and therefore not credible; that the evidence arose out of a counter accusation as P.W.1 only implicated the appellant after she was confronted by P.W.2, (her grandmother) for borrowing money from the appellant; that P.W.1's evidence was procured by coercion and duress as she was being punished by her grandmother.

Finally, the appellant contended that the prosecution had made no attempt to find the passer-by who had intervened to stop the defilement which can only be explained by an ulterior motive on the part of the prosecution. He argued that failure to do so weakened the prosecution's case, especially in view of the fact that he had already demonstrated that P.W.1 was not a credible witness.

When the appeal came up for hearing before us on **7th April, 2019**, the appellant chose to rely on his written submissions and added that the two courts below failed to account for the medical evidence by P.W.3 that revealed that P.W.1 was HIV positive while the appellant was HIV negative. For those reasons the appellant urged the court to allow the appeal, quash his conviction and set aside his sentence.

The appeal was opposed by **Ms. Wang'ele (SPPC)** who referred the Court to the P3 Form which showed that the HIV test revealed contrary to the appellant's assertions that P.W.1 was negative and not HIV positive. On the issue of age, counsel submitted that the doctor who examined P.W.1 placed her (P.W.1) to be nine (9) years old. Counsel defended the identification evidence as one of recognition, since the complainant knew the appellant by name and identified him as her "*Uncle Musembi*". Counsel thus urged the court to dismiss the appeal.

The appeal herein 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. It provides:

" 361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-

a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

The above provision of the law has been restated in many decisions of this Court. In **Karani vrs. R. [2010] 1 KLR 73** this Court expressed itself thus:

"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."

In this appeal, the two courts below arrived at concurrent findings of law and fact that the appellant committed the offence of defilement as charged. The appellant was well known to P.W.1. P.W.1 narrated how the appellant undressed her and defiled her. P.W.1 was asked by the appellant not to reveal what he had done to her mother and in return, he would give her 10/= . The P.3 which was filled on **25th September, 2013** assessed P.W.1's age as 9 years. P.W.1 told the court that she was 10 years old and that she was in class 2. This was when she testified on **4th February, 2014**. The doctor also found that P.W.1's hymen was torn and she had a discharge and blood stains in her genitalia.

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

On the issue of not being granted a fair trial as the appellant was not given witness statements before P.W.1 & P.W.2 testified, we find that nothing much turns on this. P.W.1 & P.W.2 testified and the appellant cross-examined them. The appellant cannot now turn around and state that he was prejudiced for lack of witness statements having fully participated in the trial.

The appellant’s other complaint was that Section 124 of the Evidence Act was not complied with. Section 124 of the Evidence Act provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.

From the record, the trial magistrate conducted a *voire dire* examination and came to the conclusion that the “***minor is intelligentand understands the difference between telling the truth and lying***”. Suffice to state that the said magistrate believed that P.W.1 was telling the truth. Besides, there was corroboration as the P.3 indicated that P.W.1 had a torn hymen and that her genitalia had a discharge and blood stains.

In our view, the trial magistrate and the first appellate court correctly came to the conclusion that there was sufficient evidence to convict the appellant of the offence charged.

Be that as it may, we are aware of the recent jurisprudence in the case of **Francis Karioko Muruatetu & another vs. Republic SC Petition No. 16 of 2015**, where the Supreme Court of Kenya held that the mandatory death sentence for the offence of murder contrary to section 204 of the Penal Code is unconstitutional. This Court has had occasion to apply the dictum in the above case in Sexual Offences. In **Christopher Ochieng vs. Republic [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011**, this Court 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 vs. 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”.

Bearing in mind the mitigation of the appellant was not taken into consideration, we are persuaded that the two courts below did not weigh the proportionality of the life sentence *vis-à-vis* the circumstances of the offence.

In mitigation, the appellant told the trial court that he is an orphan. He was employed at Makindu Sikh Temple as a gardener. Taking the appellant’s mitigation into consideration, it is our view that had the two courts below considered the above mitigation, which was not done as the life sentence was deemed mandatory, they would have arrived at another sentence. The appeal on conviction fails but we substitute the life sentence with a term of 20 years. Accordingly, we reduce the sentence of life imprisonment imposed on the appellant to twenty (20) years imprisonment from the date of conviction on **4th July, 2014**.

It is so ordered.

Dated and Delivered at Nairobi this 8th day of November, 2019.

M. KOOME

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR