



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & ODEK, J.J.A)

CRIMINAL APPEAL NO. 57 OF 2015

BETWEEN

CHRISTOPHER KIPCHOGE KIBENEI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang, J.) dated 1st October, 2009

in

H.C.CR.A No. 415 of 2007)

JUDGMENT OF THE COURT

1. This is a second appeal against the appellant’s conviction and sentence for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. By dint of **Section 361 (1)** of the **Criminal Procedure Code** this Court’s jurisdiction on a second appeal is restricted to matters of law only. In David Njoroge Macharia -v- R [2011] eKLR it was stated that;

“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.)”

2. The appellant herein was charged with one count of defilement contrary to **Section 8(2)** of the **Sexual offences Act** and an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the main count were that on 11th November, 2006 at Miiri Village in Kiambu District within the then Central Province, the appellant committed an act which caused penetration and did penetrate the genital organs of ENM a girl aged 5 years. On the alternative charge, the particulars were that on the above mentioned date and place, the applicant committed an indecent act with a child namely ENM, a girl aged 5 years by viewing and touching her genital organs.

3. The concurrent findings of fact by the two courts below were that at all material times PW1, ENM , and her younger brother, PW2, JN, aged 4 years, lived with their grandparents. The appellant, **Christopher Kipchoge Kibenei**, who was employed by their grandparents to milk their cows also lived in the same compound. On 11th November, 2006 the appellant followed both ENM and JN into the kitchen which was outside. He removed ENM's underpants, laid her on the ground and proceeded to defile her in the presence of her brother. Thereafter, ENM complained of pain in her private parts to her grandmother, PW3, **E NN (E)**, when she returned home at around 6:00 p.m. E examined her and noticed that her genitals were reddish and had a dry white discharge thereon. Upon inquiry ENM informed her that it was the appellant who had defiled her. The matter was reported on the same day and the appellant was arrested. PW 4, **Dr. Kamau** examined the minor on 30th November, 2006 and observed that her hymen was perforated. In his opinion the minor had been defiled.

4. In his defence the appellant denied committing the offence and maintained that he was at a friend's place from lunch time up to 6:00 p.m. The trial court found that the prosecution had proved its case and convicted the appellant on the main count. Dissatisfied with both his conviction and sentence the appellant preferred an appeal in the High Court which was dismissed by the High Court by a judgment delivered on 1st October, 2009. It is that judgment that has provoked the appeal before us wherein the appellant complains that;

- ***The charge sheet was defective in so far as the particulars of the charge omitted to indicate as to what was used to cause penetration to the genital organs of the minor;***
- ***The conviction was manifestly unsafe due to the defective charge sheet;***
- ***The two courts below failed to note that the medical evidence was doubtful the minor having been examined 19 days after the incident;***
- ***The requisite burden of proof was not discharged by the prosecution.***

5. The appellant who was in person relied on his written submissions as well as oral highlights. He submitted that the charge failed to disclose what object or organ caused penetration on the minor. He faulted the two courts below for not addressing the same. According to him, the omission violated the provisions of **Section 3(1) (a)** of the **Sexual Offences Act** which stipulates what amounts to penetration. He argued that the two courts below proceeded on a defective charge sheet hence his conviction was not safe. He further submitted that the case against him was not proved to the required standard. He argued that ENM never mentioned the date when the alleged incident occurred in her testimony.

Be as it may it was the prosecution's case that the incident occurred on 11th November, 2006 yet the minor was examined on 30th November, 2006, 19 days later. There was no explanation for the delay. The examination only revealed that the minor's hymen had been perforated with no indication as to when it was perforated. He argued that the foregoing gave rise to reasonable doubt. The appellant also submitted that the sentence issued to him was harsh. He urged the Court to allow the appeal.

6. In opposing the appeal, Mr. C.O. Orinda, Assistant Director of Public Prosecution, submitted that the two courts below properly evaluated the evidence and arrived at the correct conclusion. The sentence meted out to the appellant was lawful. Mr. Orinda argued that the appellant was well known by the minor prior to the incident and therefore it was a case of recognition.

According to him, the minor's evidence was consistent and credible. He submitted that the medical evidence established defilement of the minor and the issue of severity of sentence was a matter of fact.

7. Alive to our duty as a second appellate court, we have considered the record, rival submissions by the parties and the law. On the issue of a defective charge,

Section 134 of the **Criminal Procedure Code** provides:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.” (Emphasis added)

In this case as submitted by the appellant, the charge did not specify how the appellant caused penetration on the minor. Is this omission fatal? We are of the considered view that the same was not fatal but curable under **Section 382** of the **Criminal Procedure Code**. From the time the appellant was arraigned and charged in court up to the conclusion of the trial he was aware of the nature of the charges against him. Further, from the evidence of ENM who stated that the appellant pushed his ‘thing for peeing’ inside my vagina, it is clear that the charge against him is that he caused penetration with his penis. In

Joseph Maina Mwangi -vs- R (2000) eKLR it was held:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

8. The crux of this appeal is whether the prosecution had proved its case to the required standard. **Section 8(1)** of the **Sexual offences Act** provides:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”

Section 2(1) of the **Sexual Offences Act** defines penetration as follows:-

“Penetration ‘means the partial or complete insertion of the genital organs of a person into the genital organs of another person.’”

From the foregoing provision, it was imperative for the prosecution to prove that there was actual penetration on ENM and the identity of the perpetrator.

9. The evidence of what actually transpired on the material day was that of ENM and her brother JN. ENM gave a detail account of how the perpetrator followed her into the kitchen and defiled her. JN who was also present during the incident corroborated her evidence. The trial court which had the benefit to observe the two minors during their respective testimonies found them to be credible witnesses and we see no reason to interfere with that finding. In **Nelson Julius Karanja Irungu -vs- R (2010) eKLR** this Court expressed itself as follows:-

“As this court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses.”

10. The two minors were not able to state the actual date of the incident. However, **E**, their grandmother, in her uncontroverted evidence testified that ENM complained of pain on her private parts on 11th November, 2006 and informed her that she had been defiled on the same day. Therefore, what was the consequence of the medical examination that was carried out on the minor on 30th November, 2006? In our view the medical examination corroborated the minors’ evidence of penetration on ENM due to the perforated hymen.

11. As to the identity of the perpetrator, both minors testified that it was the appellant who defiled ENM. The appellant was well known to both minors prior to the incident. Therefore, this was not a case of mistaken identity but of recognition. In **Anjononi & others -vs- R (1976-80) 1 KLR 1566**, this Court held at page 1568,

“This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.”

12. Lastly, on severity of sentence *Section 8(2)* of the **Sexual Offences Act** provides:

“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.”

As this Court had correctly observed in **Stephen Nguli Mulili -vs- R (2014) eKLR** the **Sexual Offences Act** removed discretion in sentences particularly where the victims are minors. Therefore, the sentence provided under *Section 8(2)* is mandatory and not discretionary. We find that the sentence of life imprisonment issued to the appellant was lawful.

13. Having expressed ourselves as herein above we find that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Nairobi this 4th day of March, 2016.

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR