



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 92 OF 2013

BETWEEN

KAUNI GICHOVI MUGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Majanja, J.)

dated 30th October, 2013

in

H.C.CR.A No 31 of 2012

JUDGEMENT OF THE COURT

1. Kauni Gichovi Mugo, the appellant was charged with the offence of defilement contrary to **Section 8 (1) & (3)** of the **Sexual Offences Act** with an alternative count of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**.

2. The particulars of the offence of defilement were that on 25th March, 2007 at [Particulars Withheld] in Embu District of the Eastern Province, the appellant intentionally and unlawfully had carnal knowledge of S K K, a girl aged 15 years without her consent. On the alternative count, the particulars were that on 25th March, 2007 at [Particulars Withheld] in Embu District of the Eastern Province, the appellant unlawfully assaulted S K K thereby occasioning her actual bodily harm.

3. The appellant pleaded not guilty to both counts paving way for a trial in which the prosecution called five witnesses. It was the prosecution's case that on 25th March, 2007 at around 5 p.m. PW 1, S K (S), went to the back of their family home to collect baby clothes which had been put out to dry. Her Mother PW2, K K (K) was not home at the time as she had taken her brother to hospital. As S went about collecting the clothes, she felt someone grab her neck whilst covering her mouth from behind. The appellant pushed S towards his house which was not far away from where S's family lived. The pair passed through a deserted path leading to the appellant's house, with S trying to free herself from the appellant's grip, albeit unsuccessfully. Upon arrival, the appellant unlocked the door and led S into the

two roomed house before locking the door. The appellant then took S to the bedroom, placed her on the bed and defiled her. According to S, the ordeal lasted for about two hours during which period the appellant covered her mouth to prevent her from screaming. The appellant maintained a firm grip on S preventing her from getting out of bed.

4. S persisted with the struggle to free herself from the appellant's grip, an effort which finally bore fruit and gave her the chance to scream for help. Her screams attracted the attention of her Mother (K) who had since returned home; and that of the neighbours who came to her rescue. Her rescuers hit the door and it opened as the appellant got off S and moved towards the door in a bid to escape only to be caught. S then got off the bed as her Mother (K) proceeded to call the Police at the nearby Police Station. By the time the Police arrived, the appellant had escaped. The Police did not get into the appellant's house but left shortly thereafter only to return later to collect S's pant from the appellant's house. It was also S's testimony that the appellant was arrested later on the same day at 7 p.m.; and that upon learning of this development her Mother (K) escorted her to the Police Station, from where she recorded a statement. S was also issued with a note for purposes of getting medical attention and procuring a P3 Form.

5. PW 2, (K), PW 3, APC Philip Maswai (APC Maswai) and PW 4, Jane Rose Wambeti (Jane Rose) tendered evidence which corroborated S's account. Their respective testimonies remained unshaken during the trial. PW 5, Dr. Godfrey Njuki Njiru (Dr Njiru), a medical doctor, testified that he examined S and noticed that there was tenderness on the anterior aspect of the neck. The injuries were approximately 2 days old and were caused by a blunt object. He assessed the degree of physical injury as harm. Dr Njiru also testified that there were no obvious tears on the labias, the hymen was perforated and that spermatozoa was absent even after carrying out a vaginal swab. He attributed the last finding to the lapse of two days from the time of the incident. The doctor's conclusion was that there was penetration on account of the perforated hymen. It was the prosecution's case that at the material time Susan was 15 years old.

6. In his defence the appellant gave an unsworn statement. He testified that on 25th March, 2007 at 5p.m., he came home from work and found his house broken into. Be that as it may, he got into his house and slept. Later, Administration Police Officers from Kathangari Police Post roused him from his sleep, arrested him and took him to the nearby Police Post. He was informed that he had defiled a child called S K and was subsequently charged with the offence of defilement. It was also the appellant's testimony that he had sold three Lorries of bones worth Kshs. 20, 000/= and that he had kept the same in his house. According to the appellant the money was stolen when his house was broken into. The appellant further testified that S and her Mother (K) had framed him so that he could stay in jail because they knew he had money. The appellant denied committing the offences he was charged with.

7. The trial court convicted the appellant on both counts and sentenced him to 30 years imprisonment on the first count; and two years on the second count. Both sentences were to run concurrently. Aggrieved by the decision of the trial court, the appellant lodged an appeal at the High Court which was dismissed vide a judgment dated 30th October, 2013. It is that decision which has given rise to the present appeal before us.

8. At the hearing of this appeal, the appellant appeared in person while the state was represented by Mr. Kaigai, Assistant Deputy Public Prosecutor. The appellant submitted that the sentence which had been meted out on him was excessive, and urged the court to reconsider the same. Mr. Kaigai in opposing the appeal submitted that the case had been proved to the required standard, that the appellant had been caught red-handed defiling the complainant; and that the Doctor's report corroborated what needs to be proved in defilement namely penetration. The Assistant Deputy Public Prosecutor also submitted that the minimum sentence for the offence of defilement was 20 years and that 30 years appeared excessive for a first offender.

9. We have considered the record, submissions by counsel, the appellant and the law. By dint of **Section 361** of the **Criminal Procedure Code** only matters of law fall for our determination in an appeal such as the present one. See ***Chemagong –vs- Republic, (1984) KLR 213*** at page 219 where this court held that:-

“A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja –vs- Republic 17 EACA 146).”

10. Section 8 (1) of the Sexual Offences Act states that:-

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

Accordingly, the key ingredient whose existence the prosecution had to establish was that of penetration, which they did successfully. The trial court and the first appellate court arrived at concurrent findings to the effect that S had been defiled by the appellant. We see no reasons to disturb those findings. See ***Kaingo V R, (1982) KLR 213.***

11. Having come to the conclusion that the appellant defiled S, we turn to the subject of the sentence which was meted out by the trial court. **Section 8 (3)** of the **Sexual Offences Act** provides that:-

“A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than twenty years”.

The appellant herein was sentenced to thirty years imprisonment; which sentence the appellant submitted to be harsh and excessive. Thus the question becomes: can we review or reduce the sentence which was meted out by the trial court? In ***Samuel Githua Njoroge –vs- Republic - Criminal Appeal No 53 of 2006-unreported (Nakuru)*** this court held that:-

“The principles upon which an appellate court can interfere with the discretion of a trial [Magistrate] as regards sentence are well settled. The appellate court can only interfere where the trial [Magistrate] in assessing the sentence has acted on wrong principles or imposed a sentence which is manifestly inadequate or manifestly excessive”. See also ***Diego Vs Republic [1985] KLR 621”.***

12. The operative phrase in **Section 8 (3)** of the **Sexual Offences Act** in our considered opinion is: ***“imprisonment for a term of not less than twenty years”.*** Going by the principles which have been set down in the Njoroge case (supra) we cannot fault the trial Magistrate for acting on the wrong principles. The question for determination becomes whether a prison term of 30 years for the offence of defilement is manifestly inadequate or manifestly excessive. We hold and find that the trial Magistrate adhered to the minimum sentence provided by **Section 8 (3)** of the **Sexual Offences Act** hence the sentence in question cannot be said to be manifestly inadequate. But in the same vein we pose the question: would the addition of ten years to the minimum provided qualify the sentence as manifestly excessive? We answer in the affirmative bearing in mind that the appellant is a first offender. There is also the compelling need to rehabilitate the appellant on one hand; and to do justice to the complainant on the other hand. In ***Ogalo s/o Owuor, (1954) EACA*** at page 270 the predecessor of this court stated:

“The Court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James V R, (1950) 18 EACA 147 “it is evident that the judge acted upon some wrong principle or overlooked some material factors’ To this we would also add (sic) third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case: R V Shershewsky, (1912) CCA 28 TLR 364.”

13. In ***Amolo Vs R, [1991] KLR 392*** at Page 397 this court stated:-

“As a matter of law we have, as learned Principal State Counsel submitted, jurisdiction to restore a sentence which has been altered on wrong principles which, we are satisfied, occurred in this

case. To do so does not, we think, infringe the principles set out in Section 361 (1) (a) of the Criminal Procedure Code, which otherwise takes away our power to reduce a sentence which is manifestly too severe.”

In *David Kundu Simiyu Vs Republic*, [2009] eKLR-Criminal Appeal No 8 of 2008 this court stated as follows with regard to the respective sentences spelt out by *Section 8* of the *Sexual Offences Act 2006*:

“Those are minimum sentences and Parliament appears to give no discretion to the courts to impose sentences below those specified as minimum. The provisions accord with the prime objectives of the act which is “prevention and protection of all persons from harm from unlawful sexual acts”.

We are persuaded in view of the case law we have set out herein above that the appellant’s sentence with regard to the offence of defilement is amenable to reduction. Accordingly, we set aside the sentence of thirty (30) years imprisonment as it is excessive and substitute the same for a sentence of twenty (20) years imprisonment from the date of conviction by the trial court. We shall interfere only to that extent.

14. We find the subject of the detention of the appellant in Police Custody beyond 24 hours to be moot with all due respect as his remedy lies in damages in a separate action. Moreover, the law is now settled that the detention of an accused person in Police Custody in excess of 24 hours does not automatically entitle the accused person to an acquittal. See *Julius Kamau Mbugua Vs Republic*, [2010] eKLR-Criminal Appeal No 50 of 2008. The appeal is otherwise dismissed.

Dated and delivered at Nyeri this 17th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

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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