



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 25 OF 2018

JOSEPH GATHURU NYARIARA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. J. Kituku – PM Kiambu dated and delivered on the 2nd day of March 2018 in the original Kiambu Chief Magistrate’s Court Sexual Offence No. 4 of 2017}

JUDGEMENT

The appellant is serving a sentence of life imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the offence were that on 22nd January 2017 at Githurai 44 within Kasarani Sub-county in Nairobi County he intentionally caused his penis to penetrate the vagina of LW a child aged six years five months. He has appealed against the conviction and sentence on the following grounds: -

- “1. THAT, the learned trial magistrate erred in points of law and facts when he failed to ascertain that the penile penetration was insufficiently proved against the accused person herein.**
- 2. THAT, the learned trial magistrate erred in points of law and facts when he exercised his discretion by not calling vital reliable witnesses without giving satisfactory explanation and if they could have been produced they could have shed full light to the prosecution.**
- 3. THAT, the learned trial magistrate erred in points of law and facts by relying on the evidence of single witness whereas the complainant mentioned other essential friends who could have grounded the true course of justice.**
- 4. THAT, the learned trial magistrate erred in points of law and facts by failing to recognize that the prosecution did not prove its case to the required threshold as per the standard that is required in a matter that carried capital sentence.**
- 5. THAT, the learned trial magistrate erred in points of law and facts when he refuted my defence statement which was brief and direct without giving points of determination.”**

The appeal was canvassed by way of written submissions. The appeal is vehemently opposed.

I have carefully considered the grounds of appeal, the rival submissions and the cases cited. As the first appellate court I am also obligated to evaluate the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses myself making provision for it (*see Okeno v Republic [1972] EA Page 32*).

In this case the age of the complainant was conclusively proved through a clinic card which indicates she was born on 26th July 2010 meaning that at the material time she was seven months’ shy of her seventh birthday. I also find it a fact from the evidence that penetration was also proved beyond reasonable doubt. The complainant vividly narrated how the perpetrator of the heinous crime approached her as she played outside with her friends. She vividly described how he led her by the hand to his house and after laying her on the bed he removed his clothes and her pants and inserted his “*kasusu*” meaning penis into hers. She stated that although she felt a lot of pain she could not cry because he had covered her mouth. Whereas **Section 124 of the Evidence Act** did away with the requirement for corroboration in cases such as these, the complainant’s evidence finds corroboration in the evidence of Doris Kerubo (Pw3) a clinician working with Medecins Sans Frontieres. This witness testified and tendered reports to the effect that the complainant was examined at their facility on 22nd October 2017 at 10.30pm. She stated that the complainant had no obvious injuries on the body but there was reddening of her vulva walls and a tear in her hymen. In my view the reddening of her vulva as well as the tear corroborate her evidence that there was penetration. I am therefore satisfied that her age and penetration were proved beyond reasonable doubt.

The other crucial ingredient of the offence is identification of the perpetrator. The complainant knew the appellant well to the extent that she knew his name and his house. Her mother (Pw3) corroborated this and stated that the appellant was her employee. This was identification by recognition which is more assuring, more satisfactory and more reliable (*see Ajononi & another v Republic [1980] KLR 59*) and because the offence occurred during the day when circumstances favoured a positive identification I am satisfied the appellant was positively identified as the perpetrator of this offence.

The appellant invited this court to draw an adverse inference from the prosecution's failure to call as witnesses the children the complainant was playing with when he committed the offence. I have considered this ground and come to the conclusion that this is not a proper case to draw such an inference as the evidence adduced was cogent and not barely sufficient as to require further evidence. (*See the case of John Irungu v Republic [2016] eKLR* where the court cited the case of *Bukenya & others v Uganda [1972] 549*). Moreover, **Section 143 of the Evidence Act** provides that the prosecution does not require to call a particular number of witnesses to prove a fact.

Having found that all the elements of the offence were proved beyond reasonable doubt I find that the appeal against conviction has no merit.

In regard to the sentence, it is clear from the record that the trial Magistrate imposed the life sentence only because it was the mandatory minimum prescribed by the law. I agree with the appellant that the mandatory nature of the sentence is unconstitutional. This was held to be so in the case of *Evans Wanjala Wanyonyi v Republic [2019] eKLR* where the Court of Appeal stated: -

“25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another -v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng -v- R (supra) and Jared Koita Injiri -v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015.

That being the position I find that although the appellant did not offer any mitigation, he has made a good case for reduction of the sentence. I must however take cognisance of the seriousness of this offence, the age of the victim, the beastly manner in which the offence was committed and the repercussions it is likely to have on the child's life. In the premises while the sentence of life imprisonment is set aside it shall be substituted with one for a term of thirty (30) years. The same shall be effective from the date the appellant was sentenced by the lower court. The appeal succeeds only to that extent. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this. 9th day of November 2020.

MARY KASANGO

JUDGE