Case Number	Criminal Appeal E026 of 2020
Parties	Peter Gitonga Gituma v Republic
Case Class	Criminal
Judges	Reuben Nyambati Nyakundi
Advocates	Mr. Mwangi for the state
Case Action	Judgment
Case Outcome	Appeal dismissed
Date Delivered	15 Sep 2021
Court County	Nakuru
Case Court	High Court at Malindi
Court Division	Criminal

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E026 OF 2020

PETER GITONGA GITUMA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Principal Magistrates Court at Mariakani by Hon N. C. Adalo (SRM) delivered on 27th February, 2020 in SO Case No. 33 of 2018)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

J U D G M E N T

This appeal arises from the Judgment of the trial Court given on 27.2.2020 by the subordinate Court of the first class holder at Mariakani. In that Judgment the appellant was convicted on a charge of defilement of a girl stated to be aged nine (9) years old contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act, thereafter, the appellant was sentenced to serve life imprisonment.

Being aggrieved with the conviction and sentence, the appellant filed this appeal premised on the following grounds:

(a). That the defilement was never proved beyond reasonable doubt.

(b). There were no investigations carried out.

(c). The present charges were borne out of malice and ill will.

(d). The sentence imposed was harsh and unjustified.

The evidence at the trial was graphically given by the victim **(PW1)** who stated at lengthy on how the appellant defiled her on the material day. According to **(PW1)** together with other children, they had picked a bicycle from the appellant's compound. They later returned it and that is how he was confronted by the appellant. This involved some acts of assault, being forced to chew miraa, or smoke a cigarette. That criminal conduct of the appellant did stop there. In the testimony of **(PW1),** the appellant stretched it further by inserting his penis to the anus, which act he committed the whole night. In addition, **(PW1)** told the Court that he also pulled his penis. On leaving the scene he brought the ordeal to the attention of **(PW2).** It happened according to **(PW2)** that the son **(PW1)** had not made it back home from school.

When he presented himself in the morning and on receipt of the complaint together with his father **(PW3),** the incident was booked at Mariakani Police Station. Besides making the formal complaint, **(PW2)** and **(PW3)** told the Court that a P3 issued at the Police Station was taken to the hospital for further action. It was at the hospital **(PW3)** told the Court that on examination, the clinical officer established that indeed his anus had been penetrated. He also confirmed that a quick physical examination on **(PW1)** showed the presence of spermatozoa oozing out of the genitals. He also stated to have seen evidence of lacerations and cuts to the anal orifice.

(PW4) – No. 53311 Sgt. Mwaro of Mariakani Police Station had this to tell the Court. That on 22.6.2018, a defilement complaint was lodged with the station. Soon thereafter, he embarked on interrogating the victim **(PW1)** and his father **(PW2)** who had accompanied him to the police station. That inquiry was followed with issuance of a P3 in order to have **(PW1)** examined by the medical officer to prove or disapprove the allegations. From the medical examination, it was concluded that the anal orifice of the victim had been penetrated by a male sexual organ. With the assistance of the members of the public and witness statements recorded, there was *primafacie case* of culpability of the appellant. That therefore rendered **(PW4)** to move and effect an arrest to cause him to be charged with the offence.

Further to this, **(PW5) Mwongolo**, the Chief clinical officer testified on the sufficiency of evidence gathered during an examination of **(PW1)** who came to the hospital with a history of having been defiled. After considering the findings, **(PW5)** told the Court that **(PW1)** had sustained bruises and pain to the anal orifice with a minor tear. In support of **(PW5)** observations and diagnosis, he formed the opinion that **(PW1)** had been defiled. The P3 and treatment notes were then admitted as documentary evidence to that effect.

In his defence, the appellant denied the charge by giving a chronology of events tactically aimed at rebutting the prosecution case. In his defence, the appellant acknowledges that the victim had earlier on passed through the workshop and picked a bicycle without his consent. That bicycle apparently was returned with damages as some parts were missing. According to the appellant, this was all a fabrication coerced by the mother to the complainant. He told the Court that there was a brief discussion with the father of the victim on his delinquent activities stealing books from other pupils, mobile phones of teachers etc. It was further the appellant's evidence that the father agreed to repair the bicycle without the necessity of a police station.

Nevertheless, the matter ended at the police station. The police confronted him with the allegations of defilement which offences he denied committing initially and even at the trial itself. These allegations according to the appellant though appearing as genuine are all false fabrication engineered by the mother of **(PW1).**

On appeal submissions by the appellant relied on his written submissions dated 25.1.2021. His first concern was on lack of proof of the offence beyond reasonable doubt. By his submissions, the appellant contention was that the Court made a wrong impression on the demeanor and credibility of witnesses. The appellant argued and submitted that the findings by the Learned trial Magistrate were in contrast with the principles enunciated in **Gilbert Nyongesa Oloo & Anor v R {1998} eKLR, Arthur Mshila Manga v R {2016} eKLR, John Cardon Wagner v R {2011} eKLR**.

Applying the above cases in support of his appeal, appellant contended that the experience by the victim if indeed it happened could have traumatized and disturbed him to a point of experiencing difficult in walking. In his view the appellant submitted that contrary to the allegations made the victim was in good physical health. In his line of attack, the appellant submitted on the poor investigations carried out by the investigating officer on the alleged offence. He contended that the defilement claim was neither reported nor investigated but on tramped up charges he was forced to undergo a trial for an offence he did not commit. That the entire indictment was one borne out of malice on the part of the mother to the victim. In support of this contention, appellant cited and relied on the case of **Ndungu Kimani v R {1979} KLR.**

Last but not least, appellant dwelt at length on the issue of sentence as being harsh, excess and unjustified so that extent he invited the Court to apply the principles in **Francis K. Muruatetu v R {2017} eklr, S v Jarsen {1999} SACR 368, Gaston January Stephen v R, Yussuf Arog v R HCCR No. 110 of 2006**. Blending the above principles the appellant argued and submitted the set fundamental elements shaping the judicial sentencing decision were ignored by the Learned trial Magistrate. The appellant prayed for the appeal to be allowed with both conviction and sentence being set aside. It looks from the record, that the prosecution counsel did not manage to file the relevant submissions within the stipulated period.

Resolution

Being a first appeal, the Court is under a duty and obligation to examine, and re-evaluate the evidence adduced at the trial Court with a view to draw its own conclusions. In doing so, the only rider is to give evidence to the advantage of trial Courts to see, hear and appreciate the demeanor of witnesses and their capacity to tell the truth. **(See Okeno v R {1973} EA 32).**

In the case bar the trial Court was expected to establish that the following elements were proven beyond reasonable doubt:

(1). That the act of carnal knowledge of the minor took place by penetrating his genitals.

(2). That the appellant used his penis to penetrate the victim.

(3). That a sufficient evidence existed to place the appellant squarely at the scene.

The evidence as represented above elsewhere in this analysis is to be tested in line with the provisions provided for under Section 107 (1) and 108 of the Evidence Act. In addition, the settled principles on the elements of what constitutes the doctrine of beyond reasonable doubt and its impact in securing a conviction of the accused. **(See Woolmington v DPP {1935} AC 462).**

It is therefore necessary for this Court to evaluate the threads of evidence as adduced by the prosecution touching the

various ingredients of the offence of defilement against the appellant.

The first critical element is that of penetration. This is defined under Section 2 of the Sexual Offences Act as the partial or complete insertion of ones genital organ into the other being, whether male or girl for that matter. That evidence to prove that fact may be embodied in the testimony of a single witness of the complainant or a number of witnesses who directly witnessed the crime or circumstantially their testimony adds value to the entire spectrum of the offence.

On appeal, the appellant asserted that the trial Court erred by reason of relying on unreliable evidence of the prosecution witnesses. That the trial Magistrate failed to record in her Judgment whether she believed the complainant as a truthful witness. In the context of the appeal various aspects of the evidence at the trial has been scrutinized to draw an independent conclusion as to the commission of the crime. First, the testimony of the complainant **(PW1)** provided a logical sequence of events which culminated in his defilement. That before the occurrence of the crime the complainant and his friends on the material day picked a bicycle from the appellant's premises without his consent. In reference to that the complainant told the Court that upon finishing cycling they were in agreement that he returns it to the same location. It is at that moment the appellant got hold of the complainant with a view to punish him for taking the bicycle without his knowledge. The plea for forgiveness by the complainant failed to dissuade the appellant from extending mercy to him.

As explained by the complainant, that unlawful act by the appellant extended to giving him a cigarrete to smoke and khat to chew. In defiance of it he was threatened with actual violence. By way was showing his anger the complainant testified that the appellant took a further step assaulting him combined with inserting his penis to the anal orifice. The complainant describes the ordeal as one which went on the whole night. As stated by the complainant, for the appellant to have a better freedom of access to commit the crime, he tied his legs and hands with a rope when the appellant accompanied his mission, it was time for the complainant to find his way home. The very features of the evidence by **(PW2) MMM**, the mother to who testified on **(PW2)** and **(PW3) JMM**, the father to the complainant gave a graphic detail of the missing of their son who had not returned from school the previous day. It emerged after a while, search and found the complainant was launched involving the agencies like the police. In one of those encounters, **(PW3)** asserted that he met the appellant who confirmed that the complainant had spent a night at his house in the night of 21.6.2018. The explanation by the appellant to **(PW3)** did not stop there, but also 'confessed' to have punished the complainant for stealing his bicycle.

Base on that evidence, it did not take long before the complainant appeared and on physical assessment **(PW2)** and **(PW3)** confirmed that he had suffered injuries to the wrist and anus. This necessitated a further medical examination at Mariakani Sub-County Hospital with regard to the evidence of **(PW5) Chigulu** – on examination the complainant was found to have suffered bruises in anal orifice with a minor tear. He therefore opined that an act of sodomy had taken place as against the complainant to buttress the medical examination **(PW5)** produced the P3 and treatment notes to that effect. The ultimate declaration made by the Learned trial Magistrate as to the characteristic of defilement of the complainant are therefore as set out in his own testimony and corroborated with that of **(PW2)** and **(PW3).** The effect of the evidence of **(PW2)** and **(PW3)** created a context of a complainant found traumatized and in a distressful condition which is especially attractive to definitive findings in cases of this nature. A determination of the relevance of that evidence bears directly to the conversation **(PW3)** had with the appellant. Its grounded on the admitted facts of the appellant that the complainant had indeed been punished for taking his bicycle and did even spend a night at that scene of the crime. That revelation by the appellant asserts the flow of evidence given by the complainant to **(PW2)** and **(PW3)** respectively.

On the other hand, an immediate medical examination conducted by **(PW5)** at Mariakani Sub-County Hospital squarely addressed the abuse or defilement for that matter against the complainant. The medical evidence as summarized by **(PW5)** constituted fresh and independent evidence alluding to the circumstances as clearly narrated by the complainant.

In so answering to the question whether he defiled the complainant, as seen from the narratology of appellant he denied any such intentional or unlawful sexual acts as alleged by the prosecution witnesses. Given, his defence the appellant particularly raised issues on the theft of his bicycle, by the complainant. In relation to the indictment appellant steadfastly maintained that it was a conspiracy between the father of the complainant, **(PW3)** and the police which he considered as malicious and miscarriage of justice. Put simply, the appellant's defence never controverted the direct evidence asserted by the complainant implicating him with the crime. There was also the circumstantial evidence of **(PW3)** which establishes that his first encounter with the appellant provided positive leads on what had happened to the complainant the previous night.

Once again the Learned trial Magistrate clearly appreciated the prosecution evidence and the defence raised to rule that the prosecution proved the charge beyond reasonable doubt. In summary, the submissions made by the appellant on the application of Section 124 of the Evidence Act on the probative value and reliability of a single identifying witness is in these circumstances incompetent to impeach the findings of the trial Court.

It was also contended by the appellant that the level of investigations carried out by **(PW4)** was an exercise that did not ensure the fairness of the trial.

In the present case, it's difficult to find any serious discrepancies or events which are relevant to impugn the investigations and the decision making to indict the appellant. It is obvious that all the critical elements highly desirable with regard to the fact of implicating the appellant with the offence were dealt with by the investigating officer. In relation to the evidence of the clinical officer, the correct rule is that his evidence was properly admitted under Section 48 of the Evidence Act. The appellant was able to properly cross-examine the witnesses on the findings made on examination of the complainant. In this context, it is important to note that the strength of the prosecution case remained quite overwhelming to identify the appellant as the perpetrator of the defilement. There was no obvious need for the clinical officer to ascertain the degree of harm. In any event the appellant has not shown how he was prejudiced by that mission or error to address the degree of harm in the P3 Form. It is appropriate to state that at the trial, evidence is presented and the Learned trial Magistrate as a fact finder evaluates the evidence of each witness, and demands of their credibility and demeanor. As an appellate Court, I am not in the position to utilize that tool being an advantage to the trial Court. An appellant, therefore set to impugn any of the statements made on oath by a witnesses must indeed provide the aspects of such irrelevant material taken into account which impacted on the trial, for this Court to interfere with the conviction, unfortunately that is the case here.

The other element of significance in this appeal is whether the age of the complainant was proved beyond reasonable doubt. From the record its crystal clear that in determining this ingredient consideration of the testimony by **(PW2)** and **(PW3)** both parents to the complainant was material and of a decisive nature. This was corroborated by dispositive documentary evidence of clinical card in support of the age of the complainant. The findings of the Court below were supported with such critical evidence.

The case against the appellant stands on a footing of identification. The facts as laid down by the complainant and that of **(PW3)** give detail account on holding him responsible for the offence.

In constructing the evidence of **(PW1)** and **(PW3)** both falls to be in consonant with the principles in **Roria v R {1949} 16 EACA 135.** The second category of the father to the complainant **(PW3)** is to be believed under the scope of the principles laid down in **Kipkering Koske v R {1949} 16 EACA.** Having set out the evidence of the complainant **(PW1)** and largely that of **(PW3)** it is difficult to take any other escape in route than that of a finding of the appellant having principally identified as the perpetrator of the offence.

Finally, as far as the sentence of life imprisonment is concerned, the appellant appeals against the key imposition of the sentence. He avers that the sentencing Court erred in its failure to consider the principles in **Francis K. Muruatetu v R {2017} eKLR, S v Jansen {1999} SA CR 368, Gaston Stephen v R.** All these cases address the principles on mandatory sentences and judicial discretion in sentencing of offenders. In considering the imposition of sentence on appeal, I am guided by the provisions under Section 382 of the Criminal Procedure Code and other settled principles on this subject matter. The enquiry is not whether the sentence was right or wrong but whether, the trial Court acted regularly, legally, correctly and justly in the exercise of its discretion.

Whether or not the session trial Magistrate exercised her discretion reasonably depends on various factors and guiding principles in sentencing processes. What is important is for an appeal Court to guard against eroding such a discretion at whim or caprice not guided on any known judicial principles. Clearly in sentencing there is much at stake in getting it right even on appeal. At present the Law is settled that an appeal Court can only interfere with a sentence of a trial Court in a case where the sentence is wrong, in appropriate or totally out of scope prescribed by parliament or disproportionate to the offence. **(See Ahamad Abolfathi Mohammed v R {2018} eKLR).**

In the case at bar, I am of the view that the trial Court evidence balanced with all the relevant factors turned on the imposition of the life imprisonment as the applicable sentence for the offence. I find nothing compelling or substantial to move this appeal's Court to disturb the sentence. I am satisfied that there is no other reasonable hypothesis inconsistent with the appellant's guilt and conviction. The appeal in its entirety be and is hereby dismissed.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

……

R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for the state