Case Number:	Criminal Appeal 93 of 2014
Date Delivered:	07 Dec 2018
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Daniel Kiio Musinga, Agnes Kalekye Murgor, Kathurima M'inoti
Citation:	Jared Koita Injiri v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	CR.A No. 10 of 2011
Case Outcome:	-
History County:	Kakamega
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM): MUSINGA, M'INOTI & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 93 OF 2014

BETWEEN

JARED KOITA INJIRI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya ay Kakamega, Chitembwe, J) dated 26th May 2014, ***in H.C.CR.A No. 10 of 2011)***

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JUDGMENT OF THE COURT

Jared Koita Injiri, the appellant was charged with the offence of defilement contrary to ***section 8 (1)*** as read with ***section 8 (2)*** of the ***Sexual Offences Act No.*** **3 of 2006**. The particulars were that on 11th May 2010 at E.e village, S.a Sub location, M. location in Mumias District within the former Western Province, the appellant unlawfully had carnal knowledge of the complainant, ***JA (PW1)***, a girl aged 9 years.

The trial magistrate convicted and sentenced the appellant to life imprisonment upon finding that the offence was proved to the required standard. The appellant was dissatisfied with the decision, and appealed to the High Court (Chitembwe, J), which upheld the conviction and sentence of the trial court.

A *précis* of the facts is that, whilst staying with her grandmother, the appellant who was working for JA's grandmother and was inside the house at the time, called JA to get him some water to drink. As JA was fetching the water, the appellant picked her up and carried her to a mattress that was on the floor, pulled down her panties, removed his trousers and defiled her. According to JA, one MN, caught the appellant in the act of defiling her, and pulled him off her. ***MET (M), (PW4),*** a lady who was working for JA's grandmother also said she caught the appellant defiling JA on a mattress on the floor. She called for help, and upon hearing her, the appellant ran out of the house. Mildred telephoned JA's mother who was in Kakamega, and her uncle M to inform them of the incident.

After M informed her that JA had been defiled, JA's mother rushed back home to Musanda where she reported the defilement to the Musanda Police station before going home. She was directed to take the complainant to the hospital. As there was no doctor at Bukhungu Health Centre, she took JA to Butere District Hospital the following morning where ***Emily Nasimiyu Wanyama (PW2),*** the clinical officer examined and treated her. The medical report showed that there were signs of forced penetration, and lacerations on the labia minor. Her hymen was broken and concluded that she had been defiled.

The appellant denied committing the offence and stated in his unsworn defence that he was accused of defiling a young girl whose name was not given to him.

The appellant now prefers a second appeal to this Court on the grounds that the learned judge erred in failing to appreciate that there was a discrepancy between the evidence of JA and Mildred; that Mildred was not a credible witness; that the prosecution evidence was contradictory; in failing to find that the appellant was not properly identified; in failing to find that vital witnesses did not testify; in failing to find that PW1, PW2 and PW4, who were relatives intended to frame him; that there was no first report of his

name made to the police or specified in the Occurrence Book; in failing to realize that the trial court wrongly convicted the appellant under the Criminal Procedure Code.

The appellant who appeared in person, filed written submissions which were presented in Court where he submitted that he was not properly identified as, the complainant stated that the person who defiled her was 'Okembo' who used to work for her grandmother; that his name was not mentioned in a first report or stated in the Occurrence Book. It was further submitted that the evidence of JA and Mildred was at a variance, as the complainant had stated that one MN who was working in her grandmother's home had removed him from the complainant, while Mildred also claimed to have caught the appellant defiling her, yet MN who was a crucial witness was not called to testify.

It was also argued that one M and the complainant's grandmother were also not called to testify.

Mr. Sirtuy, learned prosecution counsel for the State, opposed the appeal and spuriously submitted that the appellant was identified by the complainant through recognition; that the P3 form corroborated the complainant's evidence; that the High Court evaluated the evidence in the exercise of its jurisdiction, and arrived at the correct conclusion.

The case of ***M'Riungu vs Republic [1983] KLR 455*** sets out our obligations as a second appellate court thus;

"Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached the same conclusion, which would be the same as holding the decision is bad in law."

In the circumstances we discern that the issues for our consideration are;

i) whether the appellant was properly identified as there was no first report of his name made to the police;

ii) whether the evidence of PW1 and PW4 was at variance;

iii) whether the prosecution evidence was contradictory;

iv) whether the prosecution failed to call vital witnesses to testify;

v) whether the appellant was framed; and

vi) whether the trial court erred in convicting the appellant under the Criminal Procedure Code.

As concerns his identification, the appellant's complaint is that, in her evidence, JA referred to him as 'Okembo', a person who used to work at her grandmother's house. In addressing this issue, the High Court found that this may have been the appellant's unofficial name, and that at all times it was clear JA was referring to the appellant.

Our view is that, there can be no question that both JA and Mildred properly identified the appellant through recognition. This is because the appellant was working in JA's grandmother's home where she was staying at the time, which he has not denied. He was a person that was known to her. The incident took place at 2 pm in the afternoon, when there was daylight, and both JA who was defiled by the appellant, and Mildred who caught the appellant defiling JA, saw and identified him. Given these circumstances, we are satisfied that the appellant was properly identified, and therefore this ground fails.

The appellant's next complaint was that the evidence of JA and Mildred was at variance, particularly with regard to the identity of the person who caught the appellant defiling JA. It is noteworthy that, when evaluating this evidence, neither the trial court nor the High Court sought to address this discrepancy.

According to JA, one MN, not Mildred, caught the appellant defiling her, while Mildred testified that she found the appellant defiling JA. And that it was after she called for help that the appellant got up and ran out of the house. Since MN was not called to

testify, there is no question that there was a discrepancy in the evidence between JA's and Mildred's evidence as to who caught the appellant defiling JA.

This being the case, we must consider the discrepancy in the light of the entire prosecution evidence to determine whether it rendered the conviction unsafe, and if it occasioned any prejudice upon the appellant.

A review of the evidence in its totality definitively points to the appellant as having committed the offence. JA stated that the appellant, who was known to her, defiled her on a mattress in her grandmother's house. ***Section 124*** of the ***Evidence Act***, allows the court to receive the victim's evidence and proceed to convict, if satisfied that the victim is telling the truth. The trial court found her evidence to be credible and believable, and on this basis it relied on it to convict the appellant. But this is not all. JA's evidence was further corroborated by the clinical officer's testimony and the medical report which concluded that she was defiled.

So that, with or without Mildred or MN's evidence, the prosecution evidence that was before the court was sufficient to reach a finding that the appellant defiled JA, which thereby rendered his conviction safe. We find this ground to be without merit.

As to whether the prosecution failed to call JA's grandmother, M and MN as crucial witnesses, ***section 143*** of the ***Evidence Act*** provides that no particular number of witnesses is required to prove a particular fact. As such, we take the view that it was the prosecution's prerogative to call such witnesses as it deemed necessary to prove its case.

Having said that, M, was not present during the incident, and therefore, he would not have had anything to add to the prosecution's case. And though JA's grandmother was sitting outside her house, she did not witness the incident. And we have already addressed the net effect of MN's evidence above, and do not see what prejudice was occasioned to the appellant following the prosecutions failure to call her as a witness. As a consequence, this ground fails.

Concerning the allegation that he was framed, the appellant does not specify any basis for this assertion. In addressing this issue, the High Court had this to say;

"There is no evidence that the appellant was being framed as it is not stated whether there was any grudge."

We would add that, without any factors to support the existence of a frame up, the allegation is unfounded.

On the complaint that the trial court erred in convicting the appellant under the Criminal Procedure Code, the High Court concluded that there was no prejudice to the appellant, and in any event, when the court was passing sentence, it found the appellant guilty as charged under ***section 8 (2)*** of the ***Sexual Offences Act***.

We would agree that no prejudice was occasioned by the appellant by the mention of the Criminal Procedure Code, instead of the Sexual Offences Act, as at all times he was aware of the charges he was facing, and was convicted and sentenced in respect of those same charges.

This then leaves the question of the sentence. Arising from the decision in ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015*** where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by ***section 204*** of the ***Penal Code*** was unconstitutional. The Court took the view that;

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."

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.

The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic (supra)***, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.

Orders accordingly.

Dated and delivered at Kisumu this 7th day of December, 2018.

D. K. MUSINGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR