Case Number:	Criminal Appeal 202 of 2011
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:	Christopher Ochieng v Republic [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C.CR.A. NO. 49 OF 2008
Case Outcome:	conviction set aside
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. 202 OF 2011

BETWEEN

CHRISTOPHER OCHIENG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (D.A. Onyancha, J.) dated 11th July 2011

in

H.C.CR.A. NO. 49 OF 2008)

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JUDGMENT OF THE COURT

The appellant, ***Christopher Ochieng***, was charged in the Principal Magistrate's court with the offence of defilement of a child contrary to ***section 8(1) and (3)*** of the ***Sexual Offences Act No. 3 of 2006***.

The particulars of the offence were that on the 9th November 2007 at around 6.30 p.m. in Busia County, the appellant intentionally and unlawfully did an act causing penetration of ***MO (PW 1),*** a child aged 8 years.

The appellant was also charged with an alternative offence of Indecent Act with a child contrary to ***section 11 (1)*** of the same Act, the particulars of which were that the appellant intentionally and unlawfully touched the private parts of the complainant, ***MO,*** a child aged 8 years.

The appellant denied the offence, and merely stated that he was not responsible for penetrating the complainant.

The prosecution's case was that at about 6.30 p.m, while MO was in [particulars withheld] market selling tomatoes with her two sisters, PW2 and PW4, the appellant approached them to buy some tomatoes for Kshs 5. He gave them Kshs. 100, and PW2 requested him to wait for their mother to return and give him the change. Instead, the appellant requested MO to accompany him to his home to collect Kshs. 5. They rode the appellant's bicycle, and on reaching a sugar cane farm, MO alighted. To her horror, the appellant pushed her onto the ground, removed her panties and defiled her. Thereafter he took her into a nearby forest and again defiled her, after which he escorted her home in the early hours of the morning.

On her return home she informed her mother and a neighbor of what had transpired, and was taken to hospital where she was treated. Both PW2 aged 12 years and PW4 aged 7 years corroborated MO's evidence that the appellant came to buy tomatoes from them, and because they did not have change for Kshs.100, MO had left with him to collect Kshs. 5, and that she did not return until much later.

Thomas Ndiege, a Clinical Officer at Busia District Hospital, testified that he examined MO and found that her hymen was completely torn, and that the vaginal walls were bruised and looking red. There was whitish discharge which was suggestive of

spermatozoa. He concluded that the child was defiled.

The trial magistrate found that the offence was proved to the required standard and convicted and sentenced the appellant to life imprisonment. He appealed to the High Court *(D.A. Onyancha, J.)* which upheld the conviction and sentence of the trial court. The appellant now prefers a second appeal to this Court.

In the grounds of appeal and submissions that were presented in Court, the appellant complained that the charge sheet was defective as it did not indicate what was used to cause the penetration of the child, and that the charge sheet did not state where the penetration occurred. It was his case that the charge sheet must clearly state the manner of penetration so as to enable the appellant appreciate the nature of the case that he was facing, and that a charge sheet short of these requirements was prejudicial to him.

He further contended that no DNA tests were conducted on him; that the High Court misinterpreted the evidence of the clinical officer and failed to evaluate the evidence of identification; that the prosecution evidence was contradictory; that the prosecution did not prove its case; and that the appellant was not accorded a fair and impartial trial as he did not undergo a mental examination.

Mr. Sirtuy, learned prosecution counsel for the State, opposed the appeal and in a brief recitation submitted that the charge sheet was not defective in anyway as alleged; that PW1, PW2 and PW4 identified the appellant, and that the evidence was corroborated by the Clinical Officer, PW8. Counsel further submitted that both courts below properly analysed the evidence and came to their own independent conclusion that the appellant had defiled MO.

This is a second appeal and our duty at this instance is to determine only matters of law. In the case of ***David Njoroge vs Republic [2011] eKLR,*** it was stated;

"Only matters of law fall for consideration as 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 the courts below are shown demonstrably to have acted on wrong principals in making the findings."

We have considered the evidence and the submissions, and are of the view that the grounds to be addressed by this Court are;

i) Whether the charge sheet was defective;

ii) Whether the appellant's right to a fair hearing were violated as the trial commenced without having received a report as to his mental fitness to stand trial;

iii) Whether the appellant should have been subjected to a medical or DNA examination;

iv) Whether the prosecution's evidence was contradictory; and

v) Whether the High Court failed to evaluate the evidence.

Beginning with the charge sheet, was it defective because it did not indicate what was used to cause penetration, and where the penetration occurred" A review of the charge sheet shows that it read as follows;

"On the 9/11/2007 at around 6.30 p.m in Busia District within the Western Province, intentionally and unlawfully did an act causing penetration with (MO)***, a child aged 8 years".***

It is true that the charge sheet does not make any reference to the manner of penetration. But this notwithstanding, the appellant was charged under the Sexual Offences Act. ***Section 8 (1)*** of the Act provides a description of the offence, which is to the effect that ***"… a person who commits an act which causes penetration with a child is guilty of an offence termed defilement".***

And at ***section 2*** of the same Act ***"penetration"*** is defined as ***"… the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

So that when the wording on the charge sheet is considered against the wording of ***section 8 (1),*** what becomes clear is that the words are merely lifted from the wording of the provision. And when this wording is read together with the definition of *"penetration"* there can be no doubt that the offence concerned the penetration of the genital organs of one person with the genital organs of another. In effect, the charge sheet made it abundantly clear that the appellant was facing the offence of defilement under the Sexual Offences Act where he was charged with penetrating MO with his genital organs. The evidence adduced also left no doubt that penetration was by the appellant's genital organ.

Section 134 of the ***Criminal Procedure Code,*** deals with the framing of charges and states that**,**

"Every charge …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 ours**].**

In our view, the wording on the charge sheet sufficiently communicated the nature of the charge and provided the particulars necessary for the appellant to understand the charge and the offence that he faced. Accordingly, the charge sheet was not defective, and we find that this ground is devoid of merit.

Next we turn to whether the appellant's right to a fair hearing was violated as the trial commenced without the court having received a report on his mental soundness to stand trial. It would seem that the appellant would be referring to ***section 162(1)*** of ***the Criminal Procedure Code***, which stipulates;

"When in the course of a trial or committal proceedings, the Court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness."

Section 162(2) further provides;

"If the Court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case."

In the case of ***Charles Mwangi Muraya vs Republic [2001] eKLR*** which set out when a medical inquiry should be undertaken, this Court stated;

"The words of the section, to our minds, are clear and unmistakable. They place a duty on the Court, to invoke the section, at the time, in the trial or committal proceedings, when the issue of unsoundness of the accused's mind arises. That is the stage at which, the Court should carry out an inquiry into the issue. We stress the use of the word "shall" in the section which, to our mind, places a mandatory obligation on the Court to carry out the inquiry at the time at which the issue arises in the trial or committal proceedings."

Clearly, a duty is placed on the court to ascertain the soundness of mind of the accused when the court has reason to believe that the accused is of unsound mind, and therefore would be unable to participate in the proceedings. In this case, no such manifestations were apparent to the court throughout the trial. The appellant conducted his defence without inhibition, and vigorously cross examined all the witnesses. At no time did he raise the defence of unsoundness of mind. As such, there was no reason for a mental examination to ascertain the appellant's soundness of mind, and we find that this ground is without merit.

The next issue was that he was not subjected to a DNA test so as to prove that there was a nexus between the appellant and the offence which was contrary to the provisions of ***section 26*** of the ***Sexual Offences Act*** which provides**,**

"where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

In the case of ***Kassim Ali vs Republic Cr. App. No 84 of 2005 (Mombasa)*** this Court stated,

"[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."

While in ***Geoffrey Kionji vs Republic*** ***Cr. Appeal No 270 of 2010***, this Court found no reason why the same principle should not be applied in the case of defilement, and stated thus,

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

The record shows that the appellant was subjected to a medical examination, but his complaint seems to be was that, he was not subjected to a DNA test. From the above, it is evident that a medical examination or even a DNA test to prove that the accused committed the offence is not a mandatory requirement of law. As such, this ground also fails.

Turning to the allegation that the High Court did not reevaluate the evidence, we have considered the High Court's judgment and are satisfied that indeed the court considered the prosecution's evidence, weighed it against the appellant's unsworn defence, and reached its own independent conclusion that the appellant was responsible for defiling the complainant. In so finding the learned judge stated that;

"Every evidence, from the complainant to PW2 and PW4, pointed to the appellant as the person who before the event, not only took her away but was in her company before she was returned home while complaining and pointing a finger at him."

The learned judge then concluded;

"In this case all the reasonable evidence except appellant's brief denial, pointed to his guilty (sic). The trial court and this court accepts beyond a reasonable doubt that it was the appellant who defiled the complainant."

We therefore find that this ground fails.

Additionally, like the courts below, we are also satisfied that the evidence of the prosecution witnesses was clear, truthful and credible. Though the appellant claimed that it was contradictory, he did not provide any instances of inconsistency or inadequacies in the evidence. PW1's testimony was corroborated by the testimonies of PW2 and PW4, and the clinical officer's evidence and the medical report in turn further corroborated the three girls' testimonies. We can find no inconsistencies in the evidence, and consider this ground to be unfounded, and without merit.

All in all, the appeal against conviction lacks merit, and we order that the same be and is hereby dismissed.

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.

Bearing this in mind, the appellant was provided an opportunity to mitigate in the trial court where he stated that he is a sole bread winner, and was taking care of his two children, as well as his late brother's wife and three children, he craved for leniency. However, the converse is also true, the appellant has committed a heinous crime, and occasioned severe trauma and suffering to a girl young enough to be his daughter. His actions have demonstrated that around him, young and vulnerable children could be in jeopardy.

Needless to say, pursuant to the Supreme Court's decision in ***Francis Karioko Muruatetu & Another vs Republic*** ***(supra)***, we would set aside the sentence for life imposed and substitute it therefor with a sentence of 30 years imprisonment 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

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR