Case Number:	Criminal Appeal 5 of 2011
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Case Class:	Criminal
Court:	High Court at Garissa
Case Action:	-
Judge:	Stella Ngali Mutuku
Citation:	MWENDWA MUTAMU V REPUBLIC[2012]eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	-
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Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 5 of 2011

MWENDWA MUTAMU……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Introduction

1. Mwendwa Mutamu (the appellant) was tried by the Senior Resident Magistrate at Kyuso, convicted and sentenced to serve twenty one (21) years imprisonment for the offence of defilement. The charge is framed as follows: Defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge read that on 30th of June 2010 at Mumoni District within Eastern Province intentionally caused his penis to penetrate the vagina of **J. K** a child aged 16 years.

Grounds of appeal

2. The appellant had initially filed seven grounds of appeal but with leave of the court the appellant filed amended grounds of appeal totalling ten in number. He informed the court that he wished to abandon the initial seven grounds of appeal and submit on the amended ten grounds of appeal. My understanding of the grounds of appeal is that the appellant is challenging the following:

i. That the arrest was illegal because it was executed without a warrant of arrest and that he was kept in custody for two days without being submitted to the police thereby contravening his constitutional rights.

ii. That the magistrate erred in law and fact by placing the minor on oath without conducting the voire dire examination.

iii. That the prosecution evidence was contradictory and lacked corroboration.

iv. That there was no investigation to ascertain the truth.

v. That the age of the complainant was not ascertained.

vi. That the magistrate convicted without the medical evidence to prove (sic) contrary to section 36 of the Sexual Offences Act.

vii. That the language of the court is not recorded and it is not shown how the appellant gave his defence, whether on oath or otherwise.

viii. That the magistrate erred by ignoring and disrespecting the appellant's alibi defence.

ix. That the sentence imposed is excessively harsh.

x. That the trial magistrate erred in law by not considering that the credible witnesses especially the one who gave name was not called to testify.

Appellant's submissions

3. During the hearing of the appeal, the appellant informed the court that he would rely on the written submissions fully and he did not wish to add anything more. He submitted as follows:

(a) On illegal arrest he argued that he was arrested by the elders of the chief on 11th July 2010 and kept in custody of the chief for two days before being handed over to the police and this infringed on his constitutional right because it offends the 24 hour period allowed by the constitution. He further submitted that the police kept him in custody for three days from 12th July to 15th July 2010 without taking him to court.

(b) On ground two he submitted that the magistrate did not conduct a voire dire examination on the complainant as required by section 19 of the Oaths and Statutory Declarations Act.

(c) On ground three he submitted that the magistrate relied on evidence that was contradictory and uncorroborated especially on identification in that the complainant said she was attacked by two boys who were not known to her on 30th June 2010 and that she was examined on 2nd June 2010 and again that the P3 form is dated 1st July 2010; that the description of the people who had attacked the complainant was not given to the police and that no identification parade was conducted. He further submitted that the complainant testified that she accompanied police to arrest the appellant while PW5 told the court that the appellant was arrested by the Assistant Chief.

(d) On ground four, the appellant submitted that the case was not investigated since the Investigating Officer told the court that he saw the appellant in court and he did not arrest him; on ground five, the appellant submitted that the age of the complainant was not ascertained; on ground six the appellant states that there was no DNA test to establish whether he committed the offence. The appellant submitted on ground seven that the language of the court was not recorded and the trial magistrate failed to record how the appellant was to adduce evidence.

Respondent's submissions

4. The appeal was opposed by the learned state counsel who made oral submissions that the appellant was not brought to court within the time stipulated and that there was no explanation. However, the law now is settled on this issue and any aggrieved party can claim compensation by way of damages in a civil suit **(see Julius Kamau Mbugua v. Republic in Court of Appeal Criminal Appeal No. 50 of**

2008); on voire dire examination the learned state counsel submitted that there is no requirement that all children must be subjected to such test and in this case it was not necessary since the complainant was not a child of tender years; on identification the learned state counsel submitted that the complainant saw the appellant well and that was sufficient identification and finally that there was adequate evidence to base a conviction on. He asked the court to dismiss the appeal and uphold the conviction and sentence of the lower court.

Determination of the appeal

5. This court is required by law to examine all the evidence adduced at the lower court and evaluate the same afresh with a view to arriving at its own independent findings. Allowance is given that this court did not benefit from observing the witnesses as they testified. This court cannot therefore comment on their general demeanour.

6. The prosecution called five witnesses to testify in the lower court. **J.K**, the complainant who testified as PW1 told the court that she had been sent by her father to go to her sister's place to get an employee but failed to get the person. She decided to go home. On the way she found two boys selling avocados. One of the boys followed her and at a river where there were big rocks the boy blocked her path. He took her mobile phone and smashed it. He held her by the waist and dropped her down, removed her underpants, removed his pants and defiled her. He threatened her not to scream or he would kill her. PW1 ran home after the attack and reported to her mother **A.N** who testified as PW2. Her mother informed her father who went to report to the Assistant Chief. PW1 was referred to the police who referred her to hospital. She was treated on 1st July 2010 and a P3 form completed. PW2 confirmed that her daughter had been sent to fetch a worker around 8.00am on 30th June 2010 and that she returned home at 6.00pm and reported to her that she had been raped. PW2 observed that her daughter's clothes were dirty and her phone had been damaged. The trial magistrate considered all the evidence placed before him and was convinced that the offence had been proved beyond reasonable doubt.

7. On the issue of infringement of constitutional rights I agree with the learned state counsel that the law is settled where it is shown that a suspect was not taken to court within 24 hours without explanation as to the reasons for the delay. Such a person can claim damages and can be adequately compensated (see **Julius Kamau Mbugua** case above). On voire dire examination of a child as to whether they understand the nature of oath, section 19 (1) of the Oaths and Statutory Declarations Act states that **" Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."** It is clear that it is a child of tender years who should be subjected to voire dire examination but even without being so subjected such a child can still give evidence unsworn and such evidence would be allowed where the court is of the opinion that such a child understands the duty of telling the truth. A child of tender years is defined by section 2 of the Children's Act to mean a child of less than 10 years and definitely PW1 does not fall under this definition.

8. On contradictory evidence, I find the evidence very clear that PW1 was sent to her sister's place on 30th June 2010 and was attacked on the same day. The matter was reported to the police on 1st July

2010 and PW1 referred to hospital on the same date. This evidence is corroborated by the P3 form and the evidence of PW5. I have no reason to doubt this evidence and although PW1 mentions 2nd June 2010 in her evidence it must have been an oversight on her part. On corroboration of the evidence and the issue of lack of medical evidence, it is my view that the evidence of PW1 is well corroborated by that of PW2 and the medical evidence. She went home with dirty clothes and damaged phone and told her mother that she had been raped. On being medically examined, she was found to have a broken hymen. I admit that the doctor who examined her did not go into great detail required of defilement cases but I have no doubt that this evidence confirms that PW1 was defiled.

9. On the issue of lack of investigations, PW5 told the court that the appellant had been arrested by the Assistant Chief and handed over to the police. She said she saw him in court and did not know him before. She said the exhibits in the case were handed over to her by the OCS Kyuso. My understanding of the evidence of PW5 is that she had been summoned at Mwingi Police Station by another officer named as Wangari who introduced PW5 to PW1 and PW2 and then she received exhibits from the OCS Kyuso. It seems the matter was handled by officers from both Mwingi and Kyuso Police Stations. The role played by PW5 to me is investigations although this may not have been detailed since we are not told who recorded the statements. However this does not go to the substance of the case especially where evidence confirms defilement did take place.

10. On the issue of language of the court, the lower court record showed that Kiswahili was used as the medium of communication. The coram of the lower court does not indicate the language of every day but I have no doubt that the appellant understands Kiswahili the language indicated on the date the plea was taken. Indeed the appellant has used Kiswahili during the course of appeal proceedings. The record further shows that the appellant's age was medically assessed and confirmed to be 19 years.

11. On the defence of alibi, I have found no record of alibi in the defence of the appellant. His evidence in the lower court is about how he was arrested as he went to church and denies knowledge as to why he was arrested. On the age assessment of PW1 it is true that this was not done. Our courts have been strict on the requirement of age assessment of the victim and for good reasons; the penalty in defilement cases is based on the age of the victim. In **Fappyton Mutuku Ngui v. Republic [2012] eKLR** Justice Ngugi was of the view that 'conclusive' proof of age in sexual offences cases does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate although such documents may be necessary in border line cases. I do not want to ignore the persuasive value of this authority. In the case before me evidence is that PW1 was aged 16 years at the time of the offence as per the evidence contained in the P3 form. When she was testifying, PW1 informed the court that she was aged 17 years and said she was in standard seven. In our school system a child of seventeen (17) years in standard 7 would have joined standard one (1) at about 10 years. This is late but not out of ordinary in Kenya's rural setting. This would put her age within the provisions of section 8 (4) of the Sexual Offences Act. It is my finding that the evidence on record points to PW1 being under 18 years.

12. I have noted that the appellant did not raise the issues of defective charge. In the **Fappyton Mutuku Ngui** case above, Justice Ngugi discussed this issue and concluded that no miscarriage of justice had been occasioned on the accused because he understood what he was charged with and fully participated in the trial. In this case the charges facing the appellant were understood by him and he participated in the trail. In view of this it is my finding that the defects of the charge are curable under section 382 of the Criminal Procedure Code.

13. In conclusion, it is my finding that all the other grounds of appeal raised by the appellant, other than that of sentence being excessive, have no merit and are hereby dismissed. However, it is worth

discussing the sentence passed by the trial court. The appellant challenges the sentence as being excessive. The sentence prescribed by section 8 (4) of the Sexual Offences Act as follows: **"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."** By sentencing the appellant to 21 years imprisonment, the trial magistrate was within the law but this court will intervene under section 354 (3) (b) of the Criminal Procedure Code and reduce the sentence to fifteen (15) years imprisonment. It is noted that the appellant has been serving sentence from October 2011. The final orders are that the appeal is hereby dismissed, the conviction upheld and the sentence reduced to 15 years imprisonment. The appellant will continue serving the reduced sentence of fifteen (15) years from 27th October 2011 till completion. Those are the orders of this court.

Stella N. Mutuku, Judge.

Dated, signed and delivered this 29th November 2012.