REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 10 OF 2019

RASHID MARO RAMADHAN.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 6 of 2017

of the Principal Magistrate's Court at Hola).

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

The Appellant in person

J U D G M E N T

The appellant was charged, tried, convicted and sentenced of committing the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006. The brief particulars of the offence were that on the month of December 2016 at [particulars withheld] village, in Tana River Sub-County, appellant caused his penis to penetrate one vagina of **F.O.** a child aged 17 years old.

The trial Court having satisfied itself of the ingredients of the offence as proven beyond reasonable doubt on conviction sentenced the appellant to seventeen (17) years custodial sentence with further non-custodial post-conviction of five (5) years under the supervision of the National Police Service.

Being aggrieved with both conviction and sentence, the applicant preferred an appeal to this Court based on the following grievances:

> ***(1). That the Learned trial Magistrate erred in Law and fact by failing to place reliance on a single identifying witness which was insufficient to warrant a safe and justified conviction.***
>
> ***(2). That the Learned trial Magistrate erred in Law and fact by failing to consider that there was no cogent evidence linking the appellant to the commission of the alleged crime.***
>
> ***(3). That the Learned trial Magistrate erred in Law and facts by failing to consider the plausible defence which was reliable.***

Submission line on appeal. The appellant filed submissions on 10.7.2010 in support of his appeal. It was the appellant's submissions that the ingredient of penetration of the victim was never proved beyond reasonable doubt. Further, the appellant took issue, the Medical evidence in the detailed P3 which did not meet the test outlined under Section 77 and 33 of the Evidence Act for reasons that it was produced by a police officer **PC Newama Harusi Ali (PW6).** On this legal proposition. The appellant cited the case of **Sibo Makoyo v Republic.**

Further, the appellant submitted that in absence of a DNA test, the Trial Magistrate erred to conclusively arrive at a finding that the unborn child was an outcome of the Sexual penetration of the victim as alleged by the prosecution witness. He concluded therefore that there was no evidence to corroborate the victim testimony to the effect that she was unlawfully and intentionally penetrated by the appellant.

In support of these line of submissions appellant placed reliance in the cases of **Woolmington v DPP (1935) AC Rose Auma Otawa v**

Republic (2011) EKLR; Simiyu V Republic 2016) EKLR, Joseph Kinyua Nyagah V Republic CR Appeal No 142 of 2016

Finally, the appellant submitted on Sentence with regard to the failure by the learned trial Magistrate to take into account accordance his actual age at the time of conviction of the offence and that the alleged sexual offence was consensual between two minors.

In essence therefore appellant contended that the Learned Trial Magistrate erred the law not to apply the provisions of Section 189, 190, 191 of the Children's Act to make it permissible for a non-custodial sentence. In support of this legal progression, the applicant cited the cases of **Karama v Republic (2017) eKLR, Sanita Ngumbao Cr Appeal No. 17 PF 2015.**

The appellant in a nutshell submitted and urged the court to quash both conviction and sentence as the charge was never proved beyond reasonable doubt to warrant such a punitive and excessive sentence.

On the part of the respondent, **Mr. Mwangi**, the prosecution Counsel submitted and vehemently opposed the appeal. Learned Counsel for the respondent pitched on the strength of their case on the provisions of Section 124 of the evidence Act and positive identification of the appellant by the Victim of the offence Learned Counsel further contended that the sentence of 17 years and a further post sentence police supervision of 5 years by the probation directorate to be too harsh and manifestly excessive given the age of the appellant. That formed the basis the points raised by the prosecution in this appeal.

Analysis and Determination

This is indeed a first appeal, governed by the principles in **Okeno v R (1972 EA 32**. There is no dispute that the appellant was convicted and sentenced for the offence of defilement. In this regard, the prosecution was under a duly to present evidence to discharge the burden on the following ingredients: -

(a) That the appellant sexually penetrated the genitalia of the victim who was found to be under the age of 18 years.

(b) That there was cogent evidence on the identification/recognition of the appellant which squarely placed him at the scene of the crime.

What the appeals Court would endeavor to establish is whether or not in line with the appellant submissions, the prosecution failed to prove its case as required by Law beyond reasonable doubt. It is trite that the principle underpinning disapproving innocence of an accused person vests with the prosecution and as such any accused bears no burden except in a few exceptional circumstances on case to case basis.

In this regard Section (III) of the Evidence Act expressly provides that on such matters an accused person may be called upon to shed light on material demonstrated by the prosecution and which might have been within his personal knowledge. However, notwithstanding that statutory provision the standard of proof principally rests with the prosecution. It is a very high standard as propounded by **Lord Denning** in **Miller v Minister of Pensions (1947) 2 ALL ER 372 at pages 373 – 374.** This hallmark doctrine in the administration of criminal justice leaves no room for an accused person to answer suspicious things.

As regards penetration its trite Law under Section 2 of the Sexual Offences Act that it may be either partial or complete insertion of the genital organ of the applicant into the genital organ of another person, in this case that of his victim **(PW1) F. O.**

On the ingredients it's clearly established such a fact may be proved by evidence of a single witness without the necessity of corroboration. Although, the law empowers the trial court to test that evidence of a single witness on reliability, admissibility and probative value to proof a fact in issue beyond reasonable doubt. The evidence of a single identifying witness is also entrenched in the proviso of Section 124 of the Evidence Act and a conviction for the offence of defilement can safely be upheld subject to the well-known exceptions for the trial Magistrate laying the foundation of that evidence and it also suffices to warn himself or herself in placing reliance upon the testimony of a single witness. As a result, it becomes necessary to give reasons that inspite of absence of corroboration such testimony of the victim was fundamentally truthful and worthy of believe to convict the appellant.

In the case of **Neville & 5 others v R CR Appeal R – 150** the Court fully expressed itself as follows:

"On a charge of a sexual offence against a woman or girl, the Judge should direct the jury in clear and simple language that it is dangerous to convict on the uncorroborated evidence of the complainant, because human experience in Courts had shown that women and girls, for all sorts of reasons and sometimes for no reason at all, tell a false story which is very easy to fabricate but extremely difficult to refute."

Therefore, notwithstanding anything to the contrary contained in our Constitution more specifically Article 27 of our Constitution which outlaws discrimination of any kind, a statement made on oath by a single identifying witness in criminal proceedings shall be admissible as evidence to secure a conviction upon the trial Court complying with the safeguards in the proviso of Section 124 of the Evidence Act. In the opinion of the Court, the scenario contemplated in Neville's case is where a complainant or victim of defilement may purpose to shield the real culprit from being subjected to a trial and subsequent criminal sanctions associated with the offence.

I therefore hold that, it is obligatory on the Courts to give non-corroboration warning in cases involving a single identifying witness as evidence to proof a fact or facts in issue. There should be no misconception that the rule on a single identifying witness did away with the need for corroboration evidence in sexual offences. The decision in **Neville's case (supra)** may appear primafacie to conflict with the proviso of Section 24 of the Evidence Act, both ordinarily corroboration rule is deeply rooted in our framework on administration of justice. That it's the first part of call by each trial Court. It is not in any way trying to discredit women and girls as potential witnesses with a propensity to lie or labelled as unreliable. Hence the reason for the direction for the Court to interrogate the evidence given to ensure it

meets the criteria of admissibility, reliability and is of probative value in proving existence or non-existence of a fact in issue to obtain Judgment against an accused person.

As far as this ingredient is concerned its considered the victim **(PW1)** gave a narration on how the appellant seduced her through physical contact and phone communications, to request her to be her girlfriend. It was further the testimony of **(PW1)** the that in the month of December 2017 she spent time with the appellant. This time, appellant went to their home and severally had sex initially using a condom which in the course busted. This was followed with other episodes of sexual intercourse and in months of January 2017 **(PW1)** missed her menstrual cycle. It is against this background in the month of May 2017 her mother **(PW3) J. O** realized she was pregnant. According to the evidence by **PW2, (O. A)** the father to **(PW1)** and **(PW3) (J. O)** the mother on interrogation it emerged that the owner of the pregnancy to be the appellant. The next step taken by **(PW2)** and **(PW3)** was to have the matter investigated by the police with a view to taking action against the appellant. It was at Hola Police Station **(PW6 - PC Mwana Harusi Ali),** booked the report and carried out the necessary investigations. This involved reading of witness statements. According to **(PW6),** the P3 Form documented the act of defilement and the fact that the victim was pregnant. However, for unknown reasons from the record that P3 form was never part of the documentary exhibit tendered by the prosecution, though, for identification by **(PW1).** Nevertheless, in so far as **(PW1)** testimony was concerned on 13.8.2017 she gave birth to a son as a product of that defilement act which occurred in December 2016 with the appellant. It also transpired from the evidence of **PW4 (A.D.O).** that **(PW1)** was 14 years old her mother specifically explained that in the month of December 2016 appellant and **(PW1)** used to stay in the house chatting. The evidence by **(PW4)** discloses that the appellant used to spend a night at their home. In company of **(PW1)** moreover according to **(PW4)** it all happened when both parents **(PW2)** and **(PW3)** were away from the family home due to work related activities. **(PW4)** further testified that later he saw **(PW1)** pregnant as the appellant stopped going to their home. Considering the sequence of evidence as stated by **(PW1)** it can safely be accepted that she was defiled and the perpetrator identified as the appellant. Again, Courts have held severally as it's in the case of **Kasaim V Republic (2006) eKLR** that

> ***"The absence of Medical Evidence to support the fact of rape or defilement is not decisive as the fact of rape or defilement can be proved by the oral evidence of a victim of rape or defilement or circumstantial evidence."***

Further, in **Mujuna Apollo v Ugawa VCA Cr Appeal No 261/1999 and Chila V Republic (1967) EA 722, the Court observed that:-**

> ***"even a mere touch of a male organ on a female organ, without inflicting any injuries was defilement. Hymen, need not even be raptured at all"***

In the instant case its noted that the P3 although marked for identification to be produced as exhibit under Section 48 as read with Section 77 Evidence Act that was never to be the case in that trial. However, given the evidence of **(PW1),** and **(PW4)** absence of Medical Evidence did not diminish the reliability and cogency of the prosecution evidence that proved commission of the sexual act on the victim **(PW1).** All what the prosecution was required to proof against the appellant to me was the fact of sexual intercourse with the victim, notwithstanding absence of medical evidence. In the present case the victim on both examinations in chief and cross examination was consistent and candid on the alleged time, act and scene of the offence. That the evidence demonstrated under which circumstances the appellant defiled **(PW1).** From this evidence **(PW1)** confirmed missing her menstrual cycle the following month, a possible sign that she was pregnant. It did not take long before **(PW2)** and **(PW3)** confirmed that **(PW1)** was pregnant and the appellant was held responsible for it. **(PW4),** a brother to **(PW1)** gave undisputed evidence which indicated that the appellant and **(PW1)** used to spend a night together at their house. The description given by **(PW4)** was accurate and fitted the appellant as one who used to chat with **(PW1)** as others left to go and sleep. According to **(PW4),** this was not a one off incident but a relationship extended over the month of December 2016 while **(PW2)** and **(PW3)** were away. Thus it was after all not a case of a single identifying witness, as its equivocated with that of **(PW4).** No doubt it was a case of recognition other than identification. The evidence scrutinized within the perimeters and guiding principles in the **Roria V R (1967) EA Wamunga v Republic 1989 KLR 424 Simiyu and another v Republic (2005) 1 KLR 192.** Therefore, as matters stand the crucial evidence on recognition of the appellant in connection with the commission of the offence in this appeal is that of **(PW1)** and **(PW4).**

These two witnesses were categorical and consistent in their evidence that the appellant being a neighbor well known to the family intentionally defiled the victim during the month of December 2016. According to **(PW4)** he used to have a conversation with the appellant in those days while at home to chat with **(PW1).** With these evidence in agreement that the appellant was properly recognized at the scene of the crime.

This fact is consonant with the testimony of **(PW1)** that the appellant used to undress her by removing her clothes placing her on the bed so as to engage in sexual acts. There is therefore no doubt as to the preparation, opportunity and intention on the part of the appellant to create an enabling opportunity sufficient to commit the offence. In the discharge of the standard of proof vested with the prosecution I am satisfied that on both the elements of penetration, age and identification of the appellant there is no major controversy in rebuttal from the defense. I find these grounds on absence of medical evidence and non-proof of defilement inconsistent with the direct and circumstantial evidence presented by the prosecution. For that reason, I find no merit in the appellant's appeal based on these grounds.

On the other hand, there is no contestation as to the age of the victim in this defilement case. The Law on this ingredient is now well settled in the various superior court decisions. In such as the cases of **Hurdson Ali Mwachungo v RC (2016) eKLR Moses Nato Raphael v Republic (2015) EKLR** applying the absence principles the record shows that the birth certificate produced as exhibit 4 provided sufficient evidence on the age of the victim being born on 28.7.2000.

Although the Court agrees with the findings in the age of the victim, I have always had serious reservations being cognizant of the fact that non-represented accused persons navigate the terrain of our criminal justice system and its processes or procedures. From a practical point of view, lack of right to legal representation deprives an accused person to a large extent if not substantially the most vital right to a fair hearing as espoused in Article 50 of the Constitution.

It follows that the trial of such an accused person before a trial Court in relation with the features and characteristics of a criminal trial mounted by state prosecutors well versed in Law remains flawed. It is evident from the records of appeal both on statements on oath, the level of cross-examination and written submissions of the accused/ herein appellant is a matter of public knowledge that there exists disputes

apparent between the structured prosecution case and that of the accused defence. It is true and I do agree with the dicta by **Lord Denning in Pett v Greyhound Racing Associataion (1968) 2 ALL ER 545 at 549** where he remarked as follows:

> ***"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weariness in the other side. He may be tongue-tied, nervous, confused, or wanting in intelligence. He cannot examine, or cross-examine witnesses. We see it everyday. A Magistrate says to a man, you can ask any questions, you like. Where upon the man immediately starts to make a speech. If justice is to be done, he ought to have the heep of someone to speak for him, and who better than a lawyer who has been trained for the task."***

In the same context the **Trial Chamber 1 of the special Court for Sierra Leone in Samwel Hunga Norman v DPP & Alien Kondowa Case No. SCSL 04-14-T** observed as follows:

> ***"The role of a defence counsel is constitutional and is meant to serve not only his client, but also those of the Court and the overall interests of justice." "First, that the right to counsel was predicated upon the notion that representation by counsel is an essential and a necessary component for a fair trial. Secondly, that the right to counsel, relieves trial Judges of the burden to explain and enforce basic rules of Court room protocol and to assist the accused in overcoming routine and regular obstacles which the accused may encounter in if he represents himself, for, the Court to our mind, is supposed, in the adversarial context, to remain the arbitrator and not a pro-active participant in the proceedings."***

The main inquiry here then, how are the self-represented accused persons expected to participate in a trial when there is outright inequality in terms of knowledge of the Law and available resources clearly endowed to the state. Given the nature and character of our adversarial system contest, its to be observed that in that process of dealing with criminal adjudication Courts cannot remain as silent actors only ready to pronounce the outcome of the case.

An option that is open to the Court is to explain to the accused available rights as enshrined in the Constitution under Article 50 on the due process clauses and in plain language, any available criminal defences or tools the legislature provided for in respect of the alleged offence. The first route for me is for the trial Magistrate to draw the appellant's attention to the specific defences under Section 8 (5) and 11 (2) of the Sexual Offences Act. Whether his failure to do so means that the appellant was prejudiced and not given a fair hearing at his trial for that indictment of defilement, is moot.

Be that as it may it's a general principle of Law that the legal capacity of the party to any litigation in relation to any specific offence or civil remedy sought be primarily ascertained as a threshold issue. The issue of the age of the victims which accrues in borderline cases of 17-18 category should be one of greater concerns for trial Court given any existence of exceptional circumstances in which they present themselves as 'adults' to and ripe to engage in sexual relationships.

In my opinion, it's the duty of the Court to look into any substantial question of fact relevant to the matter at hand, even though the unrepresented accused person did not raise it as an issue for determination. This was the position taken by a **South African Court in S v Andrews {1982} 2 S.A. 269 N.C.** in which the Court held that:

> ***"Considerations of fairness require that where a statute raises a presumption which needs to be rebutted by the accused, if undefended, should be informed of the presumption, and a failure to inform him thereof can lead to the quashing of his conviction if he was prejudiced by such a failure."***

In **Allan Willard v R CR Appeal No. 33 of 2016**, the **Malawian Court** also delved into the dichotomy of this jurisprudential question. Thus the Court observed interlia:

> ***"Suffice it to say, that the statutory defence provision would be rendered useless, unless if unrepresented accused persons were left into the dark as to its existence and eventually got such accused persons incarcerated. The Law would seem to be favouring the financially able who are represented. This could go against the constitutional provision of ensuring a fair trial and one against discrimination."***

Such a position would be consistent with the statutory provision and the rights to a fair hearing that arise under Article 50 of the Constitution. Its crystal clear from the record that trial Court did not give any such directions contemplated in **Allan's case**. Taking such a direction to me would reflect the fairness of the process and the reality within which self-represented person suffer prejudice and a failure of justice under the **rubric maxim *"that ignorance of the Law is no defence."*** It is a matter of ignorance of lack of knowledge on the Law and how Court's system works. More importantly, the Constitution established independent organs like Courts under Article 50 (1) of the Constitution as neutral, umpires in terms of the public interest to administer justice. The concept of interest of justice as a criterion of decision making process of Judges/Magistrates is guided as declared by Article 10 of the Constitution. On national values and principles of governance that is the rule of Law, human dignity, equity, social justice, equality, non-discrimination, the protection of the marginalized transparency, accountability, integrity inclusivity etc.

Therefore, it is instructive for the trial Court to consider the manner in which the interests of justice in the context of the prosecution case and that of unrepresented accused person evolves in the entire process. The interests of justice criteria would demand that prior to proceeding with the trial an accused person be informed of the gravity of the crime, the provisions on prescribed sentence, the victims age and nonetheless, any statutory defence as expressly provided for by parliament. It is deemed by the statute in providing the defences, even among the most responsible person to a sexual offence may not be prosecuted in the interest of justice. Considering closely the aforesaid provisions on criminal defences to a sexual offence imports with it the doctrine of clean hands, which arises out of the concept of in *parti delicto* (of equal fault).

In the premises there is need for a paradigm shift to look at the different levels of culpability of the victim and the offender to a crime specifically those in the borderline age bracket to maturity in order to determine faulty and liability. Such as in defilement and indecent offences, connivance of the victim or her perceived immoral conduct may serve as a defence to bar a criminal prosecution.

Primarily the sexual offence Act obligates the Court to pass a particular minimum sentence, most notably for the offence of incest, rape and defilement. The appellant in this matter was brought under Section 8 (1) as read in conjunction with 8 (4) of the sexual offences Act which provides for a minimum sentence of not less than 15 years' imprisonment. It is noted that the Learned trial Magistrate not only surpassed the minimum sentence of 15 years to sentence the appellant to 17 years' imprisonment but in addition did order him to be placed under police supervision for 5 years after completion of the custodial period in prison. This sentence does not seem to address the problem inherent in sentencing convicted offenders under the Sexual Offences Act.

More so on defilement strictly, specifying. There are various interventions on case Law which have laid a basis encompassing imposition of an alternative sentence at variance with the mandatory minimum sentence one approach is in terms of the **Supreme Court alicta** in **Francis Karioko Muruatetu v Republic (2017) eKLR** that held that**;-**

> ***"the mandatory death sentence prescribed for the offence of murder under Section 204 of the Penal Code does offend article 25 and 50 of the constitution on the right to a fair hearing as it deprives the trial court legitimate jurisdiction to exercise discretion on sentencing and for the accused not being given an opportunity to offer mitigation before the trial verdict. This conceptualization of the principle on mandatory sentence being considered."***

In consonant with the above principles by the court of Appeal on **Christopher Ochieng v R Cr Appeal No 202 of 2011 (2018) eKLR** to the extent of mandatory sentences stipulated by Section 8 (i) (2) (3) and (4) of the Sexual Offences Act, the court opined that the principle in **Muruatetu** applies **Mutatis Mutandis** to the stipulated provisions. The Court of Appeal on that basis set aside the sentence for life imprisonment imposed by substituting it with a sentence of thirty (30) years imprisonment.

In the **Muruatetu case** the Supreme Court while expressing a spectrum of view regarding mandatory death sentence under Section 204 of the Penal Code, the Court unfortunately concluded the sentence to be unconstitutional. The Court further concluded that sentencing as a function is discretionary which continue to be informed by various parameters like, the age of the offender, his or her antecedents, the gravity of the offence, the sentencing policy, goals and guidelines.

Building directly on this decision, the Court of Appeal opened a window for the mandatory minimum penalties to benefit with a measure of discretion to leverage on the length custodial sentences for a lesser excessive sentence. The question of mandatory minimum sentences and their impact on the criminal justice system and prison authorities remain quite controversial. In our jurisdiction going by the sentencing policy and key purposes mandatory sentences ensure adequate attribution for offending conduct of sex offenders. Retribution emphasizes the principle that those who engage in defilement or other sexual acts deserve to suffer.

However, in essence, one can say that mandatory sentences do offend the principle of proportionality:

> ***"That the penalty imposed be proportionate to the offence in question."***

In the pursuasive case of **Markanan v The Queen (2005) 228 CLR 357 the Court in Australia** had this to state:

> ***"There are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors, substantially unaltered, may be quite in wrong. The task of the sentence is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all."***

In **R v Raddict (1954) NZLR R 86 – 87** the Court held:

> ***"One of the main purposes of punishment is to protect the public from commission of such crimes by making it clear to the offender and to other persons with similar imputes that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment and it still continues so."***

As noted from the record, its clear that the Learned trial Magistrate imposed an enhanced sentence of seventeen (17) years and in addition order for five (5) years post release supervisory sentence. It is a fact that the Sexual Offences Act prescription of mandatory imprisonment sentences leads many Courts to impose sentences that are disproportionate to the seriousness of the crimes committed and seen to be inconsistent with reform strategies of the offender.

In sum, applying the predominant principles in **Muruatetu (supra),** I vary the structured mandatory minimum sentence with a variance of enhancement to seventeen (17) years by the Learned trial Magistrate to a custodial remand of seven (7) years imprisonment. The additional range of post-release sentence of five (5) years supervision based on the interpretation of the statute be and is hereby quashed. As a consequence, the appeal on conviction is affirmed, the sentence partially set aside with a substitution of seven (7) years imprisonment with effect from 21.8.2018.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021

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R NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the state

2. The Appellant