REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO 180 OF 2019

KENNEDY MIKALO MBOYA.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(An appeal from conviction and sentence in Eldoret CMCRC No 252 of 2019 by N.Wairimu (PM))

JUDGMENT

1. KENNEDY MIKALO MBOYA (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.** The particulars of the charge were that in the month of November 2013 within **UASIN GISHU** County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **GC** a child aged 4 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, being that in the month of November 2013 in UASIN GISHU county, he unlawfully and indecently caused his genital organ (penis) to come into contact with the genital organ (vagina) of GC a child aged 4 years.

3. The appellant denied the charges, and after trial in which five witnesses testified, whereas the defence had two witness, he was convicted and sentenced to ten years imprisonment on the alternative charge.

4. The background to this matter is the minor had visited her grand-mother where the appellant lived. Upon her return to her parents' home in late November 2013, GC's mother **(PW2 LC)** noticed that she appeared sickly and seemed to have difficulty in walking. When she asked the child what was wrong, the latter said the appellant would spank her, but after some persuasion, she disclosed that the appellant was in the habit of putting his finger into her vagina, and that he had opened his trousers, defiled her, and urged her not to tell anyone. PW2 then questioned the appellant who admitted committing the act, and sought forgiveness.

5. PW2 examined the minor, then took her to hospital where **DR YATICH** who examined her, could not detect any injuries or abnormalities in the genitalia as the matter had been reported too late and it was difficult to tell whether there had been any penetration, and that there was no conclusive proof that the child had been defiled However the child disclosed to the Dr, that the person used to apply Vaseline to her private parts, then open his zip and defile her. She repeated the same narrative at the trial- identifying the appellant as 'ÚNCLE' whom she also knew as Ken.

6. PW4 (SC) the father of the minor, told the trial court that as he was escorting the appellant to the police station, he confessed to the offence and sought forgiveness.

7. In his defence, whereas the appellant admitted that he knew the complainant and her family, and that he lived with the minor's grandfather, when one day he was called by the other family members who told him that they suspected he was defiling the child. He was so shocked at that disclosure as he had lived with the family for 8 years without any incidences, so he got up and walked out.

8. The defence witness **THOMAS MIKALO** who said he sent for the appellant to go to help him at his Nai Farm in Kitale, and they were together from 2/12/2013 until 9/1/21014.

9. The trial court noted the inconclusive medical findings and that there was no indication that the child had been defiled'. It was however held that the child's age had been proved by the birth certificate which was produced and the P3 form which also gave an age estimation of 4 years. The court held that the minor had given a description of how the appellant would remove her undergarments and lay her on the bed, and put his fingers inside her.

10. It was also pointed out by the trial court that the perpetrator's identity was by recognition as the appellant was known to the minor, something which even the appellant acknowledged.

11. Taking into consideration the provision to Section 124 of the Evidence Act as well as past decision, the trial court stated:

> "***Having observed the deameanour of the complainant, and noted that there was no evidence of penetration, it would be safe to conclude in my view, that indeed an indecent act was committed against the complainant".***

12. The alibi evidence was rejected as it related to a period after the incident. He was thus convicted on the alternative charge of committing an indecent act with a child.

The appellant who is represented by Mr Angu contested the outcome on grounds which I condense to the following:

a) the alleged confession was not admissible under Section 25 of the Evidence Act

b) the ingredients of the offence were not proved

c) the defence was plausible

d) the sentence was harsh and did not pay regard to the sentencing guidelines

13. The appeal was canvassed through written submissions where Mr. Angu on behalf of the appellant citing the provisions of Section 25A of the Evidence Act points out that no evidence was led to establish that the appellant confessed to the offence.

Further that corroboration was necessary to prove the offence beyond reasonable doubt, so the burden of proof was not discharged.

Counsel also argued that the sentence was harsh due to its mandatory nature.

14. In opposing the appeal, Miss Okok on behalf of the DP submits that the evidence as presented proved the charge beyond reasonable doubt and urged this court to uphold the conviction. She also urged this court not to interfere with the sentence, pointing out that although the emerging jurisprudence on the mandatory minimum sentence has now resulted in giving courts discretion to sentence in all offences, in this instance, bearing in mind the age of the victim and the accompanying trauma.

15. From the onset, there is no dispute regarding the age of the minor, and the fact that the medical examination could not establish whether there had been penetration. Did the trial court convict the appellant on the basis of what PW2 said that he confessed to the offence? I acknowledge that Section 25A of the Evidence Act provides as follows:

Section 25A provides that –

> **(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.**
>
> **(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.**

16. However, in this instance, what Mr Angu reproduces as a confession incorporated by the trial court, is in my view, a misapprehension of the court record. I think the trial court was simply capturing what the witness told the court. The trial court did not say it believed that the appellant had made a confession the paragraph reproduced from the judgment to the effect that:

> ***The witness further stated that she examined the child went to court with the dispensary and when they questioned the accused he admitted that he had put his finger into the child and asked for forgiveness but they took him to Chukura AP post from where he was taken to Moi's Bridge Police Station and they were referred to the Moi Teaching and Referral Hospital where the child was treated and she later recorder her statement"***.

17. The trial court was very clear as to why it believed the incident had taken place- pointing at the deameanour of the minor, the fact that the appellant was well known to her even before the incident, and indeed the proviso to section 124 of the Evidence Act recognises that sexual offences are by their nature such that requiring corroboration may lead to injustice, hence the leeway given to courts to convict based on the evidence of the victim alone even in the absence of corroboration, as long as the court records reason why it believes the witness.

18. I take note that the trial court had the advantage of physically seeing the witness, observing her demeanour and making comments on the demeanour. The child was very graphic in describing what took place during her encounter with the appellant, both to the doctor and to the trial court. The details of what the appellant would do to her were too fine to be shooed away as being childish fantasy akin to a fairy tale.

I cannot fault the trial court's findings and indeed the conviction was safe and is upheld.

19. As regards sentence, the principles underlying sentencing are set out in the judiciary sentencing policy guidelines to include: - **Proportionality:** The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is

merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.

20. In this instance the nature of the conduct complained of and the age of the victim, paints a very reprehensive picture that does not endear itself to mercy whatsoever. Surely for an adult to find pleasure in dwindling with a young child's genitals is so offensive and does call for a sentence that is punitive, and I am persuaded that in this instance, the sentence was proportionate to the offence.

I decline to interfere with the sentence which is hereby confirmed. The appeal is dismissed in its entirety

DELIVERED THIS 17TH DAY OF MARCH 2021 AT ELDORET

H. A. OMONDI

JUDGE