REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.59 OF 2018.

BENSON OMUNGALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. Y. I. KHATAMBI (SRM) IN CRIMINAL CASE NO.194 OF 2017 DATED 6TH JULY 2018)

JUDGEMENT

1. **The appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section8 (2) of the Sexual Offences Act no 3 of 2006.** The particulars of the offence were that on the 4th day of September 2017 in Nakuru East within Nakuru County unlawfully and intentionally caused his penis to penetrate the anus of NA a child aged 8 years.

2. **The alternative charge was committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act no 3 of 2006.** The particulars of the charge were that on the 4th day of September 2017 in Nakuru East within Nakuru county unlawfully and intentionally touched the anus of NA a child aged 8 years with his penis.

3. After a full trial the appellant was convicted and sentence to life imprisonment hence this appeal which has raised several grounds. When the matter came up for hearing the court ordered that the same be determined by way of written submissions which the parties have complied. Before looking at the merits or otherwise of the appeal it shall be necessary to summarise the evidence as presented during trial.

4. **PW1** the complainant after a *voire dire* examination gave sworn evidence stating he was a class 2 pupil at [Particulars withheld] primary school. He said that on the material day he was called by the appellant while he was playing with his friends. Their houses were not far from each other. They entered his house where he told him to remove his trouser as he closed the door. He lied on his bed and the appellant as well removed his trouser and his inner wear.

5. The complainant went on to state that the appellant inserted his penis into his anus as he lay flat on his stomach. He felt pain. One mama Mbugua pushed the door but the appellant had already completed defiling him and the complainant was already wearing his trouser.

6. The said mama Mbugua told the complainants mother and the appellant was roughed up by the members of the public. They later went to the police station and the he was taken to the hospital. He said that he knew the appellant as he had seen him before.

7. **PW2 MC** testified that the complainant was her son born on 3rd May 2009. She said that she left for work on 4th September 2017 at around 12 noon. That one mama Mbugua called her and informed her that the complainant had been to the appellant's house twice. She asked the complainant why he went there and he told her what the appellant had done to him.

8. The appellant coincidentally was around but on being questioned he denied the offence but was beaten up by the members of the public as she restrained them. He was taken to the police station where they recorded statements and the complainant taken to the hospital. She said that she had not seen the appellant before.

9. When cross examined by the appellant she maintained that she had not seen him before and that that was the first time.

10. **PW3 FLORENCE NDUTA** testified that she was a vegetable vendor and she knew the appellant as they were neighbours. She said that on 4th September 2017 as she went to her work she met PW2 on the way and she warned her to stop PW1 from going to their plot as there was a man who had moved there.

11. PW2 asked him why he had been going there but the boy ran away. After a while she came back and told her what the boy had told her. He told PW2 that they should report the matter at the police station. As they were talking they saw the appellant walking along the road and

she showed PW2. The accused was apprehended by the members of the public who beat him up but were stopped by PW2.

12. She said that she had known the appellant who had moved to the plot some months before the incident. She said that the complainant used to enter the appellants house and the door would be locked.

13. On cross examination she said that she did not take any action the first time the complainant went to his house as she did not know what he did with the child. She denied that she had any affair with the appellant.

14. **PW5 PC ROSEMARY MWIRU** from Bondeni police station carried out the investigation and recorded statements from the witnesses after the matter was reported at the said police station. She also visited the scene where she found that the appellant lived in a mud house and had his beddings on the floor beside other household items.

15. She said that at the time of the offence the complainant was 8 years old. She also produced post rape form (PRC).

16. When cross examined by the appellant she said that the appellant did not have a wife and the neighbours identified the house as his.

17. **PW6 EDWIN PETER** a clinical officer from Nairobi Women Hospital Nakuru examined the minor and filled the PRC form on **4th September 2017**. He concluded that there was blunt trauma and anal penetration. That the child felt pain during examination and he could not penetrate the anus.

18. **PW7 SERAH GITAHI WATUMA** from the civil registry department produced the minor's certificate of birth which indicate that he was born on **3rd May 2009.**

19. When placed on his defence the appellant gave unsworn evidence denying the charge. He said that on **4th September 2017** at 6 am he left for work and went to Nakuru. He said that before he reached his house PW3 called him and asked for his phone which he gave her. She went away with it and he followed her till the next house where two men came and began assaulting him. He got away and went to Bondeni police station where two women came and claimed that he had defiled the complainant.

20. He went on to state that his wife had fought in June with PW3 and that it was her who was framing him. He denied knowing the complainant.

ANALYSIS AND DETERMINATION.

21. The summary of the grounds of appeal by the appellant centres around the evidence tendered. He argued for instance that the facts and evidence as tendered were based on a defective charge sheet; that the evidence of the sole identifying witness in this case the minor was insufficient; that there was no prove of penetration; ,that **Section 211 of the CPC** was not complied with that the appellant was not accorded the chance to cross examined the witnesses after the charge sheet had been amended and that the sentencing of life imprisonment was contrary to the provisions of the Constitution.

22. The state opposed the appeal by stating that all the ingredients of the offence had been established and that there were no contradictions at all as submitted by the appellant's counsel. That if there were such contradictions the same were minor and would not go into the root of the case as was decided in the case of **C.K.M. V.REP (2019) eKLR**.

23. She also went on to submit that it was not true that the trial court failed to comply with **section 211 of the CPC** as advanced by the appellant.

24. On the question of mandatory sentence, the respondent submitted that the appellate court shall only interfere if it finds that the same was manifestly excessive in the circumstances. She urged the court to dismiss the appeal.

25. The court has perused the proceedings herein as well as the submissions and the cited authorities. The duty of the court is to re-evaluate the evidence afresh with a full understanding that it did not have the benefit of seeing the witnesses and their demeanour like the trial court. See **OKENO VERSES REP. (1973) E.A .32.**

26. The three ingredients of the offence of defilement are now known namely, the age of the complainant or victim, whether there was penetration and the identity of the perpetrator.

27. In the matter at hand the age of the minor was never contested as the same was proved by the production of the certificate of birth as well as the testimony of her own mother PW2.

28. As to the issue of penetration, the complainant's testimony was collaborated by the medical documents produced by the clinical officer namely post rape form (PRC). PW6 found that there was blunt trauma on his anus and there was penetration as well.

29. The appellant has taken up this issue by stating that the same was not feasible as there were no bruises, lacerations and tears. This court respectfully disagrees with that line of submission for the simple reason that for penetration to be proved there need not be other injuries to the private part. It must only be established that there was penetration however slight it might be.

30. In this case PW6 did examination on the same day and he filled the PRC form. He went on to testify that he could not undertake mush tests since ***"the pain on pelpetor was felt when I touched the anus. Due to pain I did not penetrate the anus."***

31. This court consequently finds that the element of penetration was proved sufficiently.

32. On the element of identification, it is apparent that the incident took place during daytime when the children were playing outside. PW3 saw the appellant going inside his house with the minor and she became suspicious.

33. The graphic evidence by the minor sufficiently proved that it was the appellant who had defiled him. This was someone whom they lived not far from each other. This court does not find any reason to doubt the minor's evidence even though there was no eye witness to the incident. In any even there was nothing to suggest that the minor would frame or fix the appellant for any other reason.

34. The appellants defence was simply not believable. Being unsworn he could not be cross examined and therefore the allegations of his wife's fight with PW3 could not be ascertained. It was in summary of not much probative value.

35. The argument that the trial court did not comply with **Section 211 of the Criminal Procedure Code** is untenable for the simple reason that the proceedings are clear as the court did explain to the appellant in Kiswahili language which he understood.

36. Neither is the argument that the court should have allowed the appellant to recall witnesses who had testified before the amendment to the charge sheet. The same was merely a misspelling and did not go into the root of the case. Moreover, he continued with the matter thereafter by cross examining the subsequent witnesses without much difficulty.

37. On the issue of sentencing the appellant has submitted that life sentence meted against the appellant was inhuman and degrading and **contrary to Articles 29, 39 and 50 of the constitution.**

38. This court does not agree with the above sentiments. The charge against the appellant was serious and the punishment was life sentence. What else was the trial court expected to have done yet the punishment was clearly stipulated.?

39. This court does not find any merit in this appeal. All the ingredients of the offence were proved by the respondent. What may not be clear is whether the appellant had been abusing the complainant before this day. The evidence of pw3 seemed to suggest so. Whichever way, the appellant on the date mentioned was found to have defiled the minor and the medical evidence corroborated that same. The minor too was clear and there was no trace of doubt at all.

40. However, on the question of sentencing the trial court should have considered the authorities emanating from various superior courts after the decision of **Francis Muruatetu and another (2017) eKLR** by the Supreme Court of Kenya. The issue of mandatory sentence by a statute was tampered with and the courts given leeway to consider other available sentencing. This however ought to be considered on a case to case basis and not a *carte blanche.*

41. The Court of Appeal for example in the case of **JARED KOITA INJIRI VS. REPUBLIC (2019) eKLR** expressed itself as hereunder;

> ***"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;***
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> ***"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."***
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> ***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.***
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> ***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.***
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> ***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."***

42**.** The appellant herein committed a heinous offence upon a young innocent soul. He is however a first offender a fact attested by the respondent at the lower court. Jailing him for life may not be totally efficacious. In the course of his time in prison perhaps he shall reform and be a good citizen of this country.

43. **In the premises this appeal is hereby dismissed, the life sentence meted against the appellant is hereby set aside and substituted with 20 years' imprisonment from 5th September 2017. The court takes into consideration that he was tried while in custody all through.**

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 29TH DAY OF APRIL 2021.

H K CHEMITEI

JUDGE