REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 67.B. OF 2016

JOSEPH MBURU KIMONDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Nanyuki CM

Criminal Case No 1255 of 2015 – E Bett, SRM)

J U D G M E N T

1. The Appellant herein, **JOSEPH MBURU KIMONDO,** was convicted after trial of defilement contrary to ***section 8(1) & (3)*** of the **Sexual Offences Act,** ***2006*** though he had been charged with defilement contrary to ***section 8(1) & (2)*** of the Act. The particulars of the offence in the charge sheet however made it abundantly clear that he was being charged with defilement contrary to section 8(1) & (3) of the Act. Those particulars were that on 14/11/2015 at 3:00 pm at Kona Mbaya within Laikipia County, he caused his penis to penetrate the vagina of one **EN**, a child aged 15 years. In any case, no issue has been raised in the petition regarding the charge.

2. On 19/08/2016 the Appellant was sentenced to twenty (20) years imprisonment. He appealed against both conviction and sentence. The grounds of appeal in his petition filed on 05/09/2016 are -

(i) That penetration was not proved to the required standard.

(ii) That the evidence of the eye-witness to the defilement was not credible.

(iii) That the trial court wrongly believed the prosecution evidence of the circumstances of the Appellant's arrest.

(iv) That the trial court improperly rejected the Appellant's defence.

3. The Appellant also filed amended grounds of appeal which raised the following additional grounds -

(v) That the complainant's testimony regarding penetration was not clear and did not establish that there was penetration.

(vi) That the charge was not proved beyond reasonable doubt.

4. The Appellant subsequently hired counsel to represent him in the appeal, who filed written submissions on 16/05/2018 without any directions by the court in that regard. That notwithstanding learned counsel for the Respondent sought time on 15/12/2020 to file written submissions, and the court directed that the same be filed and served within 30 days and gave a date for highlighting - 15/02/2021.

5. By 14/04/2021 the Respondent still had not filed its submissions, and the court gave today's date for judgment, with a further order that the Respondent may file and serve its submissions within 14 days of that date. I have not seen on the court record any submissions by the Respondent. The court therefore has not had the benefit of any input by the Respondent's learned counsel.

6. I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have however given due allowance for the fact that I neither saw nor heard the witnesses.

7. I have also considered the written submissions of the Appellant's learned counsel.

8. The age of the complainant is not in dispute. Her birth certificate produced in evidence by the investigating officer of the case (PW4) proved beyond reasonable doubt that she was 15 years old at the time of the offence. This was despite her own statement that she was 8 years old. She was clearly wrong, a fact brought about by the fact that she was mentally challenged. Further, because of her not fully developed mental capacity, she did not understand the nature of the oath or the duty to speak the truth, and she gave unsworn evidence. She was however cross-examined by the Appellant.

9. The complainant was PW2. Though mentally challenged, she nevertheless testified clearly how the Appellant took her to the bush, removed her underpants, lay her on the ground and then did **upuzi** and **tabia mbaya** to her. She also said that while the Appellant was in the act, somebody came, though she could not recall the person.

10. MARY NJOKI (PW3) testified that she saw some figures in the bushes near a neighbour's home. She approached closely and saw the Appellant and the complainant, both whom she knew very well. They were on the ground. The complainant's clothes had been pulled up to the chest-line and she was lying on her panties; otherwise both were naked, with the Appellant on top of the complainant.

11. PW3 screamed when she saw what was happening, but the Appellant did not rise immediately, and she continued to scream. The Appellant then rose off of the complainant. PW3 asked him how he could do such an act to a child of unsound mind. He wore his trouser and said he was not through. Fearing that he might do harm to her, PW3 left to go and look for help, after locking up the complainant in a house. She rushed to a village elder and reported the matter. She also telephoned PW1 and informed her what had happened.

12. Later PW3 heard screams and upon approaching the place where the screams were coming from she found the Appellant surrounded by people who arrested and took him to *Makutano Police Post*.

13. In cross-examination by the Appellant, PW3 stated that he had thrown away his underpants as he was being taken to the police station on a motor cycle.

14. JWK (PW1) was the complainant's grandmother and also the daughter of PW3. When she received the report by PW3 she rushed home and found the complainant. She also saw the Appellant emerge from a bush and go around as if looking for something. She screamed and members of the public came and arrested him. He was taken to *Wiyumiririe Police Post* together with the complainant. PW1 later took the complainant to hospital where she was examined and her medical report (P3) filled up.

15. In cross-examination by the Appellant, PW1 stated that when he was arrested his underwear was in his pocket, and that he threw it away as he was being taken to the police on a motor cycle.

16. DR JOSEPH KARIMI KINYUA (PW5) examined the complainant, filled her P3 and produced it in evidence. He found her to be mentally challenged. She had no injury on any part of her external body. Her hymen appeared to have been long broken. She had no injuries to her genitalia. She had no discharge or blood from her vagina. The doctor concluded that she had had vaginal penetration.

17. PW5 further testified that a laboratory urinalysis showed red blood cells in the urine. He did not say what this might be indicative of. She was nevertheless given treatment for sexually transmitted disease.

18. PC DAVID NGETICH (PW4) was the investigating officer of the case. He received the report of defilement of the complainant and did the needful. He also re-arrested the Appellant from members of the public and subsequently charged him. In cross-examination he stated that the Appellant had been injured when he was brought in by members of the public.

19. In his own defence the Appellant gave sworn evidence. He did not call any witness. His testimony was to the effect that the charge against him was trumped up by PW1 and PW3 on account of him having re-allocated some casual work to other people after PW1 and PW3 failed to show up for the work as agreed. He further stated that PW1 and PW3 had confronted him over that issue and in the process PW1 had called her husband who was nearby who came and assaulted the Appellant with a stick on his mouth, leading to loss of a tooth.

20. The Appellant also stated that it was in fact him who suggested that they should all go to the police station so that he could report the assault upon himself; however, when they got there PW1 and PW3 changed the story and alleged that he had defiled the complainant, whom they had brought along. He denied that he had defiled the complainant on the alleged date or at any other time.

21. That was the totality of the evidence placed before the trial court. It is apparent upon going through the testimonies of the prosecution witnesses that the Appellant never cross-examined them about the quarrel he alleged took place between him and PW1 and PW3, and which led to his alleged assault by PW1's husband and the trip to the police station. There can be only one reason why he did not so cross-examine the witnesses, particularly PW1 and PW3, and that is, that there was no such quarrel between the three of them and that this defence was an after-thought. It was rightly rejected by the trial court.

22. There was the clear testimony of PW3 who was an eye-witness. He found the Appellant with the complainant in very compromising circumstances, and clearly the Appellant was having sexual intercourse with her. The complainant's use of the terms **upuzi** and **tabia mbaya** do not detract from that fact. The fact that the Appellant had not yet ejaculated into the complainant also does not detract from the fact. Finally, the fact that the complainant appeared not to be a virgin and therefore did not suffer any injuries to her genitalia, also did not detract from the fact that the Appellant was found having sexual intercourse with her. This may well not have been the first time for him with her!

23. Upon my own evaluation of the evidence, I am satisfied that the Appellant was convicted upon good and sound evidence. The charge of

defilement contrary to section 8(1) & (3) of the Sexual Offences Act was proved beyond reasonable doubt. The conviction is safe. There is no merit in this appeal.

24. As for the sentence, when he was sentenced the Appellant got the minimum term of imprisonment then allowed by law. Since then the ***Supreme Court of Kenya*** has changed the legal landscape as far as mandatory sentences are concerned. Though the decision of the apex court was with regard to the mandatory nature of the death sentence under section 204 of the Penal Code in respect to the offence of murder contrary to section 203 of the same Code, by parity of reasoning, the declaration of the Supreme Court in the now notorious ***Muruatetu*** case must apply in equal measure to all mandatory sentences.

25. This court is therefore entitled to re-visit the Appellant's sentence, which I hold was manifestly harsh and excessive in the circumstances of the case. I will set the same aside and substitute therefor imprisonment for eight (8) years from the date when he was sentenced by the trial court, 19th August 2016. To that limited extent only does the appeal against sentence succeed.

26. The appeal against conviction is hereby dismissed. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 26TH DAY OF MAY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 27TH DAY OF MAY 2021