REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 65 OF 2020

PETER NGIGI MUIRURI.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the Judgment of the Senior Principal Magistrate's Court at Kikuyu, ***D. Onsarigo, SRM*** *in Sexual Offences Case No. 27 of 2015 dated 19th September 2019)*

JUDGMENT

1. ***PETER NGIGI MUIRURI*** was charged before Kikuyu Principal Magistrate's Court with the offence of defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act,** as the main charge and was also charged with alternative charge of the offence of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act.** After trial, he was convicted on the main charge and was sentenced to life imprisonment.

2. The duty of the first appellate court was stated in the case ***DAVID NJOROGE MACHARIA VS. REPUBLIC (2011) eKLR*** as follows:-

"*SELLE V. ASSOCIATED MOTOR BOAT CO. LTD. [1968] EA 123* ***and*** *OKENO V. R. [1972] EA 32****, are among decision of this Court and the Court of Appeal for East Africa, before it, which lay down the duty of a first appellate Court.*** *Sir Clement De Lestang, V. P.* ***expressed the view of the Court of Appeal for East Africa on the principles to guide the court, in the first of the two cases, as follows:-***

> ***'Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally*** *(ABDUL HAMEED SAIF V. ALI MOHAMED SHOLAU* ***(****1955) 22 E.A.C.A 270).'"***

3. In remaining faithful to the requirement of the duty set out in the above case of the first appellate court, I will reconsider the evidence of the trial court bearing in mind the caution set out above.

4. **LN** was few days shy of her 9th birthday when the present offence occurred. On 24th September, 2015, the appellant, who was known to her found her alone at home watching cartoons on television. Appellant, on removing hers and his clothes, defiled her. LN said she unsuccessfully tried to push him away. After defiling her, the appellant threatened to beat her if she told anyone.

5. LN's mother arrived at home later and noted LN was bleeding and LN told her mother what appellant had done to her. LN said that she knew appellant since he was employed at their place of residence.

6. LN's mother in her evidence stated that on the subject day when she arrived at home from work, she found LN with blooded panty. She took LN to Nairobi Women Hospital. The mother said that LN informed her that it was appellant who defiled her.

7. Clinical Officer, Gerald Mutiso from Tigoni Hospital testified on behalf of another Clinical Officer called Kinoti. Kinoti examined LN and filled in the PW3 Form. He found LN had blood stains and that there was evidence of penetration. There was redness on her vagina and her hymen was broken.

8. Clinical Officer, Peter Wanjama, from Nairobi Women Hospital, testified on behalf of Maina Grace. Maina Grace on examining LN

found she was bleeding from her private parts and noted LN's underwear was blood stained. The doctor found LN had blood clot and her hymen was broken and that her vagina was inflamed.

9. The Investigating Officer (IO) produced LN's birth certificate which showed LN was 8 years old and also produced two of LN's panties that were blood stained.

10. Appellant offered an unsworn statement in his defence.

11. By that statement, appellant denied knowing LN and blamed the charges against him to a grudge, which he attributed to his refusal to work for LN's family. He however confirmed that he worked for LN's parent's neighbours whom he referred to as *"shosho and guka"*.

12. The trial court in dismissing appellant's defence pointed out contradiction in that defence and termed it an afterthought. The trial court convicted appellant for the offence of defilement. Appellant raised the following grounds of appeal:-

> *a. THAT the learned trial magistrate erred in law and fact and violated the applicant's right to representation by failing to call the witnesses.*
>
> *b. THAT the trial magistrate erred in matters of law and fact by conducting the trial in violation of the appellant's constitutional rights.*
>
> *c. THAT the learned trial magistrate erred in law and fact by failing to find that the prosecution's case was filled with contradictions which impugns the credibility of the witnesses.*
>
> *d. THAT the learned trial magistrate erred in fact and law when he failed to properly evaluate the evidence on record and relied on insufficient uncorroborated and incredible evidence and came to the writing decision that the appellant had defiled LN.*
>
> e. *THAT the trial magistrate erred in law by failing to note that the burden and standard of proof by the prosecution was not discharged and thus the prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice*.

13. On the ground (a), appellant submitted that the trial court violated his right of representation by counsel. Appellant made reference to **Article 50(2)** of the Constitution, which Article provides what constitutes fair trial. That ground stems from the trial court's refusal by its Ruling dated 14th November, 2018, to recall prosecution's witness.

14. The background to that Ruling was that appellant's trial commenced on 15th April, 2016 when LN testified. Thereafter, the trial case was taken over by another magistrate and on directions being given, as provided under **Section 200(3)** of the Criminal Procedure Code, the appellant elected to start the trial *de novo* before the new trial magistrate. LN was recalled and prosecution also called LN's mother and the doctors. At this stage in the trial, a counsel appeared for the appellant and requested all prosecution's witnesses who had testified up to that point be recalled for cross-examination. That application was opposed by the prosecution and by the victim's family counsel.

15. The trial court by its ruling dated 14th November, 2018 rejected the prayer for recalling of the prosecution's witnesses. The trial court in refusing to recall those witnesses found that the appellant failed to give good reason why those witnesses should be recalled and also stated that LN who was still undergoing counselling and who had testified twice in the trial would be prejudiced if she was recalled again. The trial court did find that to allow those prosecution's witnesses to be recalled would lead to the trial being delayed.

16. The Court of Appeal in the case ***THOMAS ALUGHA NDEGWA VS. REPUBLIC [2016] eKLR*** stated that although the right to legal representation at State's expenses is a fundamental human right and essential to realisation to fair trial it however stated that that right is not absolute and that there are instances it can be limited.

17. Did the trial court err in declining to re-call prosecution's witnesses?

18. Recalling of witnesses is provided under **Section 150** of the Criminal **Procedure Code (CPC)**. It provides:-

> ***"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> ***Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."***

19. That power to recall witness is discretionary and having examined the trial court's ruling, I find the trial court cannot be faulted in declining to recall witnesses. It gave the reasons for so declining and I find the most persuasive reason to decline the recall is the welfare of LN, a child.

20. In my considered view, the rights of appellant were not violated in the trial court's refusal to recall prosecution's witnesses. Appellant, as

the proceedings of trial court reveal, did cross examine LN when she testified twice.

21. Appellant faulted the trial court for admitting medical evidence of those that did not examine LN and for the failure of the trial court to inquire if the appellant objected to the production of that medical evidence.

22. LN was taken to Nairobi Women's hospital after the defilement. The doctor who examined her was no longer working for that hospital and hence why the doctor who was familiar with her writing testified on her behalf.

23. I shall call upon the provisions of **Section 72** of the Evidence Act which permits such evidence to be adduced by another person. **Section 72** of the Evidence Act provides:-

> ***"where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in handwriting and that the signature of the person executing the document is in the handwriting of that person".***

24. **Section 77** of the Evidence Act also provides a basis of permitting such evidence. That Section provides:-

> ***"(1) In criminal proceedings any document purporting to be a report under the handwriting of a Government Analyst, Medical Practitioner or of any Ballistics expert, Document Examiner or Geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume the signature of any such document is genuine and that the person signing it or the office and qualifications which he processed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, Ballistics expert, Document Examiner, Medical Practitioner, or Geologist, as the case maybe, and examine him as to the subject matter there of".***

25. My considered view is that the trial court cannot be faulted for permitting other doctors, who worked with the makers of the reports, to produce the reports.

26. Appellant faulted the prosecution for failing to have him examined to confirm he was the person who defiled LN. There is no requirement for an accused to be medically examined, in cases of sexual offences to prove their guilt or otherwise. See the case of ***KASSIM ALI V. REPUBLIC (2006) eKLR***.

27. On the whole, I find that the prosecution proved the case against appellant beyond reasonable doubt. The prosecution proved LN was defiled by medical evidence and also by LN's own clear uncontradicted evidence and proved that she was a child. Prosecution met the criminal standard of proof discussed in the case ***STEPHEN NGULI MULILI VS. REPUBLIC 2014 eKLR*** where it was stated that:-

> ***"The standard of proof required is*** *"proof beyond reasonable doubt."* ***In reference to this Lord Denning in*** *MILLER V MINISTRY OF PENSION [1947] 2 ALL ER 372* ***stated: -***
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> > ***'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"***

28. For that reason, the appeal against conviction is rejected.

29. The appellant on conviction was sentenced to life imprisonment. I will interfere with that sentence in view of the Supreme Court's holding which was discussed by the Court of Appeal in the case ***FRANCIS OWINO OTIENO VS. REPUBLIC (2020) eKLR*** thus:-

> ***"The reasoning in the above*** *FRANCIS MURUATETU* ***case has been extended to mandatory minimum sentences imposed under the Sexual Offences Act and by extension, to all other statutes prescribing minimum sentences by the Court of appeal in DISMAS WAFULA KILWAKE V R [2018] eKLR, and in JARED KOITA INJIRI V REPUBLIC [2019] eKLR where the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:***
>
> ***'In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in*** *FRANCIS KARIOKO MURUATETU & ANOTHER V. REPUBLIC, SC PET. No. 16 of 2015],* ***which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the*** *Sexual Offences Act****, which do exactly the same thing.***
>
> ***Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing,***

should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by *Section 8* ***to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.***

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.'

The Court of Appeal in CHRISTOPHER OCHIENG V R [2018] eKLR stated as follows:

"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… Needless to say, pursuant to the Supreme Court's decision in *FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC* ***(supra) we should set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court."***

DISPOSITION

30. The judgment of this Court is as follows:-

(a) Appellant's appeal against conviction is dismissed.

(b) Appeal against sentence succeed to the extent that the trial court sentence is set aside and ***PETER NGIGI MUIRURI*** is hereby sentenced to 20 years imprisonment. His sentence shall start from 30th September, 2015.

JUDGMENT DATED and DELIVERED at KIAMBU this 20th day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Appellant: ……Present

Respondent: ……...…Ms. Kathambi

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE