REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 189 OF 2019

STANLEY MULIRO SITUMA..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal against the original sentence in Criminal Case No.58 of 2019 at the Senior

Principal Magistrate's Court Kimilili by Hon. G. Adhiambo – PM on 20/11/2019)

J U D G M E N T

1. **Stanley Muliro Situma,** the Appellant was charged, convicted and sentenced to serve ten (10) years imprisonment for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act. Particulars being that on the 2nd day of June 2019 at [Particulars Withheld] village in Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of **CN** a child aged 15 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 2nd of June 2019 at [Particulars Withheld] Village within Bungoma North Sub-Count within Bungoma County caused his penis to come into contact with the vagina of **CN** a girl aged 15 years.

3. Facts as presented by the prosecution were that **CN** a child aged fifteen (15) years went to pick a hoe from the appellant's home. The appellant lured her into his room and locked it. She spent there a night and the appellant had penetrative sexual intercourse with her. She stayed until 2nd June 2019 when **PW3 Joseph Masika,** traced her and caused the appellant to be arrested. The complainant was subjected to medical examination by **PW4, Victor Sironi Wekesa**, a Clinical Officer based at Milo Health Centre who found her hymen broken, the vaginal wall had bruises, and there was presence of epithelial cells. He formed the opinion that the complainant had engaged in sexual intercourse.

4. In his defence the appellant stated that he was an orphan who was raised and educated by a neighbour.

5. The trial court considered evidence adduced and was of the view that the testimony of prosecution witnesses was consistent and credible. That despite overwhelming incriminating evidence adduce against the appellant, he had nothing to say. Therefore, the court found that the appellant defiled the minor on diverse dates between 28th May 2019 and 2nd June 2019.

6. Aggrieved, he faulted the entire judgment of the trial court but at the point of hearing of the appeal he opted to abandon the appeal against conviction and mitigated on sentence. His argument was that he was a first offender, he did not know the exact age of the complainant. The relationship between him and victim was not considered. He promised to reform such that if granted another chance he would not repeat such an act.

7. In response thereto the State/Respondent urged that the age of the victim was proved to be 15 years. That the act of penetration was proved by medical evidence adduced. That the argument of whether or not there was bad or good relationship between him and the victim was not raised at trial hence could not be raised on appeal as it was not raised at trial.

8. Relying on the case of ***Simon Kipkurui Kimani Vs. Republic (2019) eKLR*** it was urged that the sentence meted out was proper considering the age of the minor.

9. This being a first appeal, the court is mandated to re-consider and re-evaluate what transpired at trial, the entire record and have in mind the fact of not having had the opportunity of seeing or hearing witnesses and based on that reach its, own conclusion. (Also ***See Okeno Vs Republic (1972) EA 32).***

10. It is a principle of law that in order for an appellate court to interfere with the sentence of the trial court, the appellant must demonstrate that the court misdirected itself by acting on wrong principles. And if the sentence imposed is harsh and excessive.

This principle was well captured in the case of ***Ogolla s/o Owour vs. Reginum (1954) EACA 29*** where the Court of Appeal stated that:

> ***"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice."***

11. **Section 8(3**) of the Sexual Offences Act provides that:

> ***A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than*** **twenty years.**

12. The fact of the age of the complainant was proved by a Birth Certificate which showed that she was born on 6th May, 2004. Therefore, at the time of the act she was fifteen (15) years old.

13. The law provides for a minimum mandatory sentence of twenty (20) years imprisonment. I note that the trial court called for a pre-sentencing report which made it opine that the character of the appellant required rehabilitation prior to being released to the community. It did note the age of the appellant who was a young adult aged 21 years and exercised discretion by sentencing him to serve ten (10) years imprisonment.

14. The question of correcting the sentence imposed cannot arise since there was neither a cross appeal nor a notice for enhancement of sentence. **(**See ***Sammy Omboke & another vs. Republic (2019) eKLR)***. Secondly, it was meted out at a time when courts were deemed to have jurisdiction to exercise discretion in such matters consequent to the decision by the Supreme Court in the case of ***Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR***, that found death sentence to be unconstitutional. The Court of Appeal reasoned that the rationale could be applicable to the mandatory minimum sentences in the Sexual Offences Act. **(**See ***Jared Koita Injiri Vs. Republic (2019) eKLR)***.

15. However, this position has since been corrected by the guidelines in the case of ***Francis Muruatetu & Another Vs. Republic, Katiba Institute & 5 Others (Amicus Curie) (2021) eKLR.*** It is clear that the discretion only applies to murder cases but not Sexual Offences.

16. In the circumstances the court acted on proper principles and the sentence imposed was lenient. In the result, I have absolutely no reason to interfere with the sentence.

Accordingly, the appeal against sentence which is devoid of merit is dismissed.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY,

THIS 29TH DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Ayekha - ODPP

Court Assistant – Immaculate