REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 211 OF 2017

LINUS MCHONGORI KISAKA...........APPELLANT

VERSES

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence in

Criminal Case No. 47 of 2018 at Chief Magistrates Court Bungoma by

(Hon. J. Kingori – CM on 19th December 2019)

JUDGMENT

1. **Linus Muchongori Kisaka**, the Appellant, was charged with defilement of a child contrary to **Section 8(1)** as read with **Section 8(3)** of the sexual offences **Act No. 3 of 2006.** (Act) Particulars were that on the 24th day of May 2018 at [Particulars Withheld] Village, Bumula Sub-county within Bungoma County, intentionally and willfully caused his penis to penetrate the vagina of **MWN**. a child aged 12 years.

2. Alternatively, he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offence **Act No. 3 of 2006.** Particulars being that on the 24th day of May 2018 at [Particulars Withheld] Village, Bumula Sub-county within Bungoma County, intentionally and willfully caused his penis to come into contact with the vagina of **MWN**. a child aged 12 years.

3. Upon being taken through full trial, he was convicted of the main count of defilement and sentenced to serve Eight (8) years imprisonment.

4. Aggrieved, he appeals on grounds that: The sentence was harsh and excessive; the trial magistrate erred in law and fact by basing the conviction on speculation and speculative evidence; a fabricated birth certificate was used to consider the age bracket; the Appellant should be set at liberty to complete his education; and there was no sufficient evidence to prove the case.

5. The prosecution's case was that MWN accompanied S, her class mate who was unwell to go and swallow medicine at home. They found the Appellant, her boyfriend and an uncle to S hence known to her. S asked her to go to the Appellant's hut and she complied and was served with tea and chapati. Subsequently the Appellant went to the hut, caressed her and took her to bed. He penetrated her vagina, an act that was painful hence she cried. S knocked on the door and the Appellant opened after they had dressed up. He escorted them up to the school gate. A teacher, Catherine on seeing them caused them to be interrogated and she disclosed that they had engaged in coitus. Her grandmother and guardian was summoned and had the matter reported to the police.

6. **PW2 Elias Adoka**, a Clinician at Bungoma County Referral Hospital examined and found her having sustained fresh tears. Her hymen was missing. He filled a P3 form in that respect.

7. **PW3 WS**, an uncle to the complainant arrested the Appellant and subsequently he was taken to the police station.

8. **PW4 Dr. Elizabeth Sunya** a Dentist, assessed the age of the complainant at twelve 12 years as her molars were erupting in the oval cavity.

9. **PW5 No. 52069 Corporal Kensula Wafula** investigated the case and caused the Appellant to be charged.

10. Upon being put on his defence, the Appellant stated that they intended to subdivide their land. While on the way to the Chiefs' Office the complainant's brothers assaulted him, locked him up in the house and later took him to the police station where he was charged. He denied having committed the offence.

11. The trial court considered evidence adduced, and found that the complainant was a child under the age of 18 years; she was penetrated and the culprit was the Appellant hence the conviction and sentence that resulted.

12. The appeal was canvassed by way of written submissions. It was urged by the Appellant that: the sentence was harsh as he needed to pursue education; the issue was fabricated by the family of the complainant which had negative intentions; there was no forensic evidence to prove that he defiled the complainant; both of them should have been examined to establish that the Appellant was the perpetrator as what happened offended **Section 36** of the **Sexual Offences Act** and, that, the clinician attended the complainant after 4 days.

13. That the case was marred with contradictions as PW1 alleged that she was taken to the police station by her teachers following advice of her grandmother, yet PW3 alleged that she was traced at the village elder's house at 5.00 pm, taken home prior to being taken to the police station. That events showed that the Appellant was arrested during evening hours, locked up and taken to the police station in the morning.

14. Further, that there was need for an original birth certificate to prove the age of the complainant as opposed to an age assessment report.

15. The Respondent/State argued that evidence before the court was not speculative as it was proved that the complainant was a child, she had been penetrated and the Appellant was properly identified. On sentence, it was urged that the court ought to have sentenced the Appellant to twenty (20) years imprisonment as provided in law but it exercised its discretion, a sentence meted out that was not harsh.

16. This being a first Appellate Court, I have to analyze and evaluate afresh evidence adduced at trial then draw my own conclusions while bearing in mind that I never saw nor heard witnesses who testified. This was well stated in the case of ***Okeno Vs. Republic 1972 EA 32*** as follows:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."***

17. **Section 8 (1)** of the Act defines defilement as

> ***A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

18. The complainant was alleged to be 12 years old. **Section 8(3)** of the Act provides thus:

> ***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.***

19. To prove the case the prosecution was required to prove

> ***(i) The fact of the complainant having been a child (Age)***
>
> ***(ii) The Act of penetration***
>
> ***(iii) Positive identification of the assailant.***

20. In the case of ***Charles Womukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013*** the court stated that:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

21. The court has been faulted for not relying on a birth certificate to prove the age of the complainant. In the case of **Kaingu Elias Kasomo Vs. Republic Criminal Case No. 504 of 2010,** the Court of Appeal stated that:

> ***"'Age of the victim of the sexual assault under the sexual offences act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved*** ***by credible evidence*** ***for the sentence to be imposed upon conviction will be dependent on the age of the victim....'*** **(Emphasis added)."**

22. In the case of ***Francis Omuroni Vs. Uganda Criminal Appeal No. 2 of 2000 Vs. Uganda*** the Court of Appeal stated that:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may***

also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"

23. In the case of ***Mwalango Chichoro Mwajembe Vs. Republic (2016) eKLR*** the Court of Appeal stated that:

> ***"…the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."***

24. The complainant testified to her age being 12 years. The Clinician who filled the P3 form observed her and opined that she was 14 years old. However medical evidence from a dentist established that she was 12 years old. This was based on her dental formula, and her second molars were erupting in the oval cavity hence the finding of the Dentist. This evidence placed the complainant in the category of the age prescribed under **Section 8(3)** of the Act. It was therefore not erroneous on the part of the trial court to find that the complainant was a child under the age of Eighteen (18) years.

25. Penetration is defined by **Section 2** of the Act as follows:

> ***The partial or complete insertion of the genital organs of a person into the genital organs of another person***

26. The complainant told the court that the Appellant inserted his genital organ into her vagina and She was in pain. Subsequently she was examined by PW2 after she was seen at Kimaeti Hospital. Treatment notes adduced in evidence showed evidence of a missing hymen.

27. The Appellant complained that he was not examined. That he should have been examined because in a case of defilement two people are involved which calls for both to be taken to hospital for examination. He relied on **Section 36** of the Act that provides thus:

> ***Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.***

28. A reading of the provision of law alluded to shows that it is discretionary. The court is therefore not obligated to order for forensic evidence. In the case of ***Charles Karanja Somba Vs. Republic***

(2012) eKLR **i**t was held by Meoli J. that:

> ***"And contrary to the Appellant's assertions in the appeal, there existed no legal burden on the part of the court to order forensic tests as anticipated under Section 36 of the Sexual Offences Act. Moreover, no application was made to the court in the course of the trial."***

29. The Appellant also faults the court to have overlooked contradictions that were apparent. This in particular is in respect to the account given by witnesses regarding evidence of witnesses as to how the complainant was taken to the police station. In particular PW1 having stated that she was disciplined in school and taken to the police station while PW3 said that she was traced at the village elders house prior to being taken to the police station. In the case of **Philip Nzaka Watu Vs. Republic** (**2016)eKLR** the court stated that :

> ***".it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

30. Minor discrepancies as what has been set out by the

Appellant were not material. They did not affect the essential ingredients of the offence as was captured above.

31. The trial court found that the Appellant was well-known tothe complainant who described him as a boyfriend. This was not disputed. In dismissing the defence put up the trial court chose to believe the complainant, a witness it found to have been truthful **(Also see section 124 of the evidence Act**). In the circumstances I find the trial court having not fallen into error.

32. The Appellant laments that the sentence was harsh. **Section 8(3)** of the Act prescribes a minimum sentence of 20 years imprisonment. The sentence meted out by the court was Eight (8) years imprisonment. Principles of interfering with sentence by an Appellate Court are settled. In the case of ***Bernard Gacheru vs. Republic (2002) eKLR*** the Court of Appeal stated that:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these***

> ***alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist (emphasis court's)."***

33. The trial Magistrate who was seized of the jurisdiction then ***(See Francis Karioko Muruatetu & another Vs. Republic (2017) eKLR)*** took into consideration the age of the Appellant and imposed a sentence that would allow him return to the society to rebuild his life. The sentence imposed was indeed proportional to the Appellant's culpability considering circumstances in which the offence was committed and the age of the complainant. I am mindful of the fact that the case of ***Francis Karioko Muruatetu & another vs. Republic (2021) eKLR)*** has since corrected the position in its directions that the discretion is only applicable to murder cases.

34. In the premises, the appeal lacks merit, therefore, it is dismissed in its entirety.

35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 15TH DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Brenda

Appellant

Ms. Mukangu -ODPP