**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 175 OF 2019**

**MSK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in***

***Criminal Case No. 22 of 2019 at Chief Magistrates Court Bungoma by***

***(Hon. S. W. Githogori – RM on 5th November 2019*)**

**J U D G M E N T**

1. **MSK**, the Appellant, was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(4)** of the Sexual `Offences Act (Act). Particulars being that on the 5th day of February, 2019, at about 6.00am, in Bumula Sub- County, within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of INW, a child aged 16 years.

2. In the alternative, he faced the charge of committing an indecent act with a child Contrary to **Section 11(1**) of the Sexual offences Act. Particulars were that on the 5th day of February 2019, at about 6.00pm, in Bumula Sub-County within Bungoma Country, intentionally and unlawfully caused his penis to come into contact with the vagina of **INW**, a child aged 16 years.

3. Having been taken through full trial, he was found guilty, convicted for defilement and sentenced to serve ten (10) years imprisonment.

4. Aggrieved, the Appellant appeals on grounds that the sentence was harsh and excessive considering the age bracket on both sides and the conviction could also not be sustained as the court relied on fabricated evidence from the prosecution's side.

5. The prosecution's evidence was that on 5th February 2019, the complainant was on her way home from the Posho Mill, when the Appellant, her cousin, emerged from behind her and requested to send her to deliver something to his wife. The Appellant then held her hand and dragged her to a ditch, undressed her and violated her sexually; she screamed and **PW2 Moses Juma Wamalwa** who was herding animals on hearing screams moved animals towards the direction where the screams emanated from, only to see the Appellant stand and run away. Then he saw the complainant crying and she told him that she had been defiled by the Appellant. He took the complainant home and they informed her mother, **PW3 ENW,** who reported the matter to the local administrators who in turn advised them to seek treatment. They sought treatment at Siboti Health Centre and reported the matter to the Police. Investigations were conducted and the Appellant was arrested and charged.

6. Upon being put on his defence, the Appellant gave sworn evidence and stated that he was employed by the complainant's mother (PW2) as a "Boda Boda" rider, and according to their arrangement he was not supposed to give the motorcycle to somebody else. However, he gave it to Kevin Simiyu and this made them to disagree, and she repossessed the motorcycle. That he did not give her some amount of money as agreed which he planned to use to buy a machine for his barbershop, and pay her later. That the complainant's mother wanted her money and vowed to ensure that he did not carry out his business well. That on 6th February 2019 at around 12:00 noon some people who turned out to be police officers went to his shop and asked to be directed to ENW (PW3), he agreed to take them, that is when they arrested him. Subsequently he was charged.

7. The appeal was canvassed by way of written submissions. It was urged by the Appellant that age, a critical ingredient was not properly established. That the complainant purported to be 16 years old, but the assessment report did not indicate how the opinion in that regard was formed. That on cross examination PW3 stated that the complainant was born in 2001 which means that she was 18 years at the time. That no

test was conducted on the Appellant to establish if it matched the specimen found in the complainant and that no one saw the Appellant engaging in sexual intercourse with the complainant.

8. The State /Respondent opposed the appeal. It urged that the Prosecution proved to the required standard that there was penetration and the person responsible was the Appellant. That age was proved by the age assessment report and the sentence meted out was legal and proper. That the defence put up that there was bad blood between him and PW3 was unfounded which must be rejected.

9. This being a first appellate court, I am expected to analyse and evaluate a fresh evidence adduced before the trial court and come to my own conclusions bearing in mind that I neither heard nor saw any witnesses who testified. In **Okeno vs Republic (1972) EA 32**, the Court of Appeal stated that:

> ***"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."***

10. The jurisdiction of the first appellate court was also set out in the case of **Pandya-Vs- Republic [1957] EA 336** where the Court of Appeal stated thus: -

> ***"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."***

11. **Section 8(1)** of the sexual offences Act defines defilement as follows:

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

12. To prove the case, the prosecution was required to prove ingredients of the offence thus:

> ***a) The fact of the complainant having been a child (Age)***
>
> ***b) The act of penetration***
>
> ***c) Positive identification of the assailant***

13. In the case of ***Charles Wamukoya Karani Vs. Republic, Cr. Appeal No.72 of 293*** 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."***

14. On the question of penetration, it is defined by **Section 2** of the Act as follows:

> ***…Partial or complete insertion of the genital organs of a person into the genital organs of another person;***

15. In her testimony, the complainant explained how the Appellant dragged her into the ditch at a bushy area, held her neck and removed her innerwear as she resisted. He lay on her, removed his trouser and innerwear and thrust his penis into her vagina. She resisted and screamed attracting the attention of PW2 who was herding animals nearby who answered her call of distress and when the Appellant saw him he ran away. Subsequently she was examined by **PW4 Elias Adoka,** a clinical officer, based at Bungoma County Referral Hospital who found her having no hymen. She had tears on her labia minora and majora, white smellish discharge and a lot of pus cells. He concluded that it was a case of defilement. Therefore, the victim's evidence that was corroborated together with medical evidence was sufficient proof of the act of penetration.

16. With regard to the Appellant having been the culprit, the incident occurred in broad day light. The Appellant engaged the complainant in a conversation prior to the act. He was a cousin of the complainant therefore PW1 was not mistaken as to his identity. PW2 also saw him running away after the incident. That evidence was not challenged during cross examination. The appellant testified that he worked for the

complainant's mother as her motor cycle rider, although he did not prove, it he could not change his story and claim that he did not know them.

17. It is the contention of the Appellant that he was not subjected to any examination to establish that he was the culprit. It is trite that the offence of defilement is established by the victim's evidence and/or sufficient medical evidence to corroborate the oral evidence. His DNA samples were not necessary to link him to the offence.

18. There is then the question of age. In the case of ***Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010,*** *Th*e Court of Appeal had this to say:

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved 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 will be dependent on the age of the victim."***

19. In the case of ***Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000*** the court held:-

> ***"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."***

20. **PW6 Elizabeth Sunya,** a dentist adduced in evidence the age assessment report following examination of the complainant by his colleague. It was her testimony that at the age of 16 years the wisdom tooth would not have emerged but would be swollen as a sign of teeth coming out. For the case of the complainant, teeth were coming out hence the conclusion. On cross examination, based on the report, she denied the allegation that the complainant was 18 years. The confusion of the age emerged when her mother who had testified in chief that she was 16 years old, on being cross-examined she said that the complainant was born in 2001. This particular witness told the court that she was a farmer; it was not stated if she had any education background, therefore, as stated in authorities cited, medical evidence remains more significant in determining the age of the complainant. This being the case, the learned magistrate did not fall into error in reaching the finding that the complainant was 16 years old, hence a minor.

21. On sentence, **Section 8 (4)** of the Act provides as follows:

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

22. In the case of ***Shadrack Kipkoech Kogo vs - R. Eldoret*** ***Criminal Appeal No.253 of 2003*** the Court of Appeal stated thus:-

> ***"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered"***

23. The Appellant was sentenced to serve ten (10) years imprisonment. The court took into account his mitigation where he stated that he was the sole bread winner of his family, but, it also noted circumstances in which the offence was committed and the gravity of the offence. The sentence was too lenient in the circumstances. However, I do note that the trial court exercised discretion following the decision of the Supreme Court in ***Muruatetu and Another Vs. Republic (2017) eKLR,*** jurisprudence that was developed declaring mandatory death sentence unconstitutional. The Court of Appeal following the decision questioned the constitutionality of minimum and mandatory sentences stipulated in sexual offences cases (See ***Christopher Ochieng -vs Republic ( 2018) eKLR, William Okungu Kittiny - Vs - Republic ( 2018) eKLR*** **)**

However, I hasten to add that this position has since been clarified by the directions in ***Muruatetu & another vs. Republic; Katiba Institute & 5 others (Arucus Curiae) (202) eKLR***

24. The upshot of the above is that the trial court having not acted on any extraneous factors, this court cannot interfere with the sentence meted out. In the premises, the appeal lacks merit and is dismissed in its entirety.

25. 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*