REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO.16 OF 2019

ISHMAEL NYAMBO MWADIME……..……..……..……..……..…APPELLANT

VERSUS

REPUBLIC……..……..…..RESPONDENT

(An Appeal from the original conviction and sentence by Hon. E.M Nyakundi, Resident Magistrate in Senior Resident Magistrate's Court at Wundanyi Sexual Offence Case No. 27 of 2019)

JUDGMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act**. The particulars of the offence were that:-

> ***"On the 6th July 2019 at around 7.30 pm within Taita Taveta County, the Appellant intentionally caused his penis to penetrate the anus of YM a child aged 11 years".***

2. He was also charged with an alternative charge of committing an **indecent act with a child contrary to Section 11(1) of the Sexual Offences Act**. The particulars of the offence being that:-

> ***"On the 9th day of July, 2019 at around 7.30pm within Taita Taveta County, intentionally touched the anus of YM, a child aged 11 years with his penis"***

3. He was tried, found guilty and convicted for the alternative charge offence of indecent assault whereby he was sentenced to serve fifteen (15) years imprisonment vide a **Judgment** delivered on **24th October, 2019** by Hon. E. M. Nyakundi, Resident Magistrate.

4. Being aggrieved by the said decision, the Appellant filed a **Petition** and **Grounds of Appeal** on **5th November, 2019.** However, with leave of Court, on **16th July, 2020**, the Appellant amended his grounds of Appeal, which are as follows: -

> ***1. That the Learned Trial Magistrate erred in law and facts when he convicted and passed sentence upon me yet failed to observe that the provisions of section 207/1 [sic] of the criminal procedure code [sic] were not observed or adhered to.***
>
> ***2. That the Learned Trial Magistrate erred in law and facts when he imposed the excessive sentence that than provided for by the law.***
>
> ***3. That pundits [sic] Trial Magistrate erred both in law and facts when he relied on a poorly investigated case to convict me as at present.***
>
> ***4. That the pundit Trial Magistrate erred both in law and facts when he dismissed my plausible defense.***

Summary of the evidence before the Trial Court

5. PW1 was **YM** [*name withheld*], a minor aged 12 years as per his Birth Certificate. He was taken through *voire dire* examination and gave unsworn evidence.

6. PW1 told court that the Appellant undressed him and also undressed himself, then proceeded to do bad manners to him by inserting his

penis (one he urinates with) in his anus. He stated that he felt pain but he did not scream as the Appellant told him not to.

7. It was PW1's evidence that his uncle told his father what happened, and his father beat him up. He said that he reported the matter at Kese Police Station and later at Wundanyi Police Station. PW1 stated that he was taken to Wesu Hospital. He reaffirmed that he was defiled by the Appellant in a bush near his home.

8. PW2 was **Dr. Furaha Faraji** who was the medical officer attached to Wesu Sub- County Hospital. It was PW2's testimony that the P3 form was filled on the **12th July, 2019** when PW1 came to hospital on **8th July, 2019** alleging to have been sodomized by a neighbour who found him on the way.

9. PW2 stated that PW1 was of a fair general condition and well kept. He went on to state that on examination of the genitalia, there were no discharges or injuries. It was PW2's testimony that PW1 was put on antibiotic and analgesics alongside medicine to prevent HIV. It was stated that no injuries were found on PW1 because he was brought to the hospital one week after the incident. It was further stated that the skin of the anal area is soft and heals very fast.

10. The investigating officer was **No.104959, PC Elizabeth Mwatete** who was stationed at Wundanyi Police Station. She stated that on **8th July, 2019** she received a report from the father of PW1. The report was that PW1 was sodomized by a person known to him. PW3 stated that she took the statement of the child who as per his Birth Certificate was born on **29th December, 2006** and at the time was 13 years.

11. PW3 testified that PW1 reported that he had left a shop to go home when he met the Appellant who dragged him to the bushes, removed both their clothes, then proceeded to insert his penis in his anus. PW1 stated that there were no witnesses. It was PW3's evidence that PW1 was taken to hospital and was treated. The Appellant was arrested and on interrogation he denied everything.

12. The appellant gave unsworn evidence and denied the charges against him. He stated that on **7th July, 2019** he was at Kese, where he had gone to buy maize flour. He went on to state that he goes far for the flour as it is sold cheaper. The Appellant then testified that he came back home where he lives with his parents at around 9 pm. He stated that he fetches water from PW1's homestead and thus knows PW1's parents.

13. It was the Appellant's evidence that he had been warned not to fetch water at PW1's home and that this whole case must have emanated from a grudge that PW1's father has against him since he had to beat his son allegedly to confess.

14. The appeal was admitted for hearing on 9th December, 2019 and on 18th February, 2020 parties were directed to canvass the appeal by way of written submission. The Appellant filed amended Grounds of Appeal and written submissions on 9th July, 2020 while the Respondent filed theirs on 9th December, 2020. They opted to rely on the said submissions as presented. In his written submissions, the Appellant merged grounds one and two and similarly grounds three and four. In regard to grounds (1) and (2), it is the Appellant's submission that he was convicted and sentenced on a charge that was not read to him and that no plea was taken as required under the provisions of **Section 207(1)** of the **Criminal Procedure Code**.

15. According to the Appellant, there were two charge sheets wherein one, he was charged with the offence of Unnatural Act under **Section 162(a)** of the **Penal Code** and its alternative charge was under **Section 11(1)** of the **Sexual Offences Act** while under the second charge sheet, he was charged with the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act** and the alternative charge was under **Section 11(1)** of the **Sexual Offences Act**. The Appellant states that a new charge sheet was introduced but he was not given an opportunity to take plea as required under **Section 207 (1)** and the provisions on amendment or substituting a charge sheet under **Section 214,** both of the **Criminal Procedure Code** which then resulted into an irregular trial process that prejudiced him.

16. It has been submitted by the Appellant that the learned Magistrate imposed an excessive sentence. He has stated that he was convicted on an alternative charge which offence provides for a penalty of ten(10) years imprisonment sentence as compared to the sentence of fifteen (15) years that the trial Magistrate meted.

17. The Appellant has submitted that the actions of the trial court in sentencing him to fifteen (15) years imprisonment violated the principles of the Constitution as provided under **Article 25©** and **Article 50(2)(p)**. He has added that the sentence that was imposed against him was therefore harsh and excessive.

18. With regard to ground three (3) and four (4), the Appellant has submitted that the case against him was poorly investigated. He has stated that PW1's age in his statement is different from what was recorded in the P3 form and treatment notes. He has stated that the age of the victim was therefore not consistent in the evidence presented to court, hence it was akin to misleading the court.

19. He has also stated that the evidence on sodomy was sketched to implicate him for an offence that he did not commit. He has added that in his defence he told the court that he was charged and arrested based on a plot hatched by PW1's parents who did not want him to fetch water from their compound and that the evidence by PW1 was coerced as he had to be beaten to confess, thus proof of the plot.

20. Further, the Appellant has stated that it is very unclear how PW1's uncle was the one who disclosed the incident to PW1's father. The Appellant added that no allegations against him were proved medically and thus believes that he was accused due to the hostility from PW1's relatives.

21. The Respondent through its learned counsel **Ms. Grace Mukangu** filed written submissions on the **9th December, 2020**.

22. **Ms. Mukangu** has submitted that the Appellant was presented before court on the **10th July, 2019** and the charge sheet that contained the offence of defilement contrary to **Section 8 (1) as read with Section 8(2)** of the **Sexual Offences Act** and an alternative charge **of Indecent**

Act with a child contrary to Section 11(1) of the **Sexual Offences Act** were the charges that were read to the Appellant.

23. Also, It has been submitted that the charge sheet dated **9th July, 2019** that contained the offence of unnatural act contrary to **Section 162(a)** of the **Penal Code** but was not read to the Appellant as he was not availed in court on the said date and that the same was not dealt with by the court. It has been submitted that **Section 207(1)** of the **Criminal Procedure Code** was complied with and that the Appellant pleaded to the proper charge of defilement which charge he understood.

24. On the issue of the sentence being excessive, **Ms. Mukangu** has submitted that **Section 11(1)** of the **Sexual Offence Act** provides for a sentence upon a conviction for a term of not less than 10 years imprisonment upon conviction on a charge of indecent assault. It has been stated that **Section 11(1)** of the **Sexual Offence Act** sets a limit of 10 years but does not set a maximum and thus 15 years was an appropriate sentence under the law after the circumstance of the case and the Appellant's mitigation were not considered. Reliance has been placed on the Court of Appeal case of **Bernard Kimani Gacheru –vs- Republic [2002]eKLR,** where the court held that

> ***"On appeal the court should not easily interfere with sentence unless the same is shown to be manifestly excessive in the circumstances of the case, that the trial court overlooked some material factor, took into account some wrong material and or acted on a wrong principle***.

25. It has been submitted that the ingredients of an Indecent Act were proved to the required standard. The ingredients of Indecent Act with a child were proved to the extent that the complainant testified that the appellant used his penis on his anus, the age of the complainant was proved vide the birth certificate brought in court which showed he was 12 years old at the time of the incident and the Appellant was proved to be the assailant as he was specifically identified by the complainant as being a neighbour and thus was not case of mistaken identity.

26. On ground number four (4) of the Appeal, the Respondent has stated that the Appellant gave unsworn evidence which has no probative value as was held in the Court of Appeal case of **Amber May –vs- Republic [1979]eKLR.** It was stated that the Appellant's unsworn evidence could not be subjected to cross-examination or the strict rules of evidence.

27. The Respondent has also stated that it was not their duty to investigate the Appellant's possible defence as he did not avail any possible alibi. It has thus been submitted that the evidence was indeed considered by the trial magistrate and weighed against the whole evidence in the case.

28. In conclusion, the Respondent has urged the court to find that the appellant was properly charged and convicted of the offence of Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**.

Analysis and determination

29. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own independent conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to see their demeanour. The said duty was espoused by the Court of Appeal in the case of **Mark Oiruri Mose –vs- Republic [2013]eKLR,** in the following words: -

> ***"…It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that…"***

30. I have carefully considered the Amended Petition of Appeal and submissions filed herein. I find the issues for determination being as follows: -

> ***i) Whether the trial court failed to observe the provisions of Section 207 (1) of the Criminal Procedure Code;***
>
> ***ii) Whether the prosecution proved their case against the Appellant beyond reasonable doubt;***
>
> ***iii)Whether the trial magistrate disregarded the Appellant's plausible defence and thus imposed an excessive sentence than what is provided for under the law.***

i) Whether the trial court failed to observe the provisions of Section 207 (1) of the Criminal Procedure Code.

31. The Appellant contends that there were two charge sheets, one that read of an offence of unnatural act contrary to **Section 162 (a)** of the **Penal Code** and its alternative was an offence of Indecent Act with a child under **Section 11(1)** of the **Sexual Offences Act No.3 of 2006** whilst the other charge sheet contained the offence of defilement contrary to **Section 8 (1) as read with Section 8(2)** of the **Sexual Offences Act** and an alternative charge **of Indecent Act with a child contrary to Section 11(1)** of the **Sexual Offences Act.** The Appellant stated he was convicted on the latter charge sheet where no plea was recorded as required under **Section 207(1)** of the **Criminal Procedure Code** which provides:-

> ***(1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement"***

32. I have looked at the file and read through the proceedings that were before the subordinate court. I find that indeed it is true that it has the

two charge sheets as alleged. One charge sheet is dated the **9th July, 2019** while the other is dated the **10th July, 2019**.

33. It is the Respondent's claim that the Appellant was not in court on the **9th July, 2019** and thus the said charge sheet dated on even date was not read to him. The Respondent asserts that the proper charge sheet that was read to the Appellant is the one dated **10th July, 2019** that contained the offence of defilement contrary to **Section 8 (1) as read with Section 8(2)** of the **Sexual Offences Act** and an alternative charge **of Indecent Act with a child contrary to Section 11(1)** of the **Sexual Offences Act.**

34. According to the record, the Appellant was availed in court on the **10th July, 2019**, and is recorded to have taken a plea of not guilty on a main charge and an alternative charge. This would imply that the charge sheet that was read to the Appellant was the charge sheet dated **10th July, 2019.**

35. This court thus agrees with the Respondent's submission that the Appellant pleaded to the charge sheet that is dated **10th July, 2019** which contained the offence of defilement contrary to **Section 8 (1) as read with Section 8(2)** of the **Sexual Offences Act** and an alternative charge **of Indecent Act with a child contrary to Section 11(1)** of the **Sexual Offences Act.** Thus, the substance of the charge dated **10th July, 2019** was read to the Appellant in a language that he understood as required under **Section 207(1)** of the **Criminal Procedure Code**.

ii) Whether the prosecution proved their case against the Appellant beyond reasonable doubt

36. The Appellant was charged with the offence of defilement contrary to **Section 8 (1) as read with Section 8(2)** of the **Sexual Offences Act** and an alternative charge **of Indecent Act with a child contrary to Section 11(1)** of the **Sexual Offences Act.** This being a case of defilement, it is trite law that the ingredients of an offence of defilement be proved, which are*;* ***identification or recognition of the offender, penetration*** *and* ***the age of the victim***.

37. In his submissions the Appellant contends that the age of the minor was not clear and that the same was misleading to the court as PW1 was not clear on whether he was eleven (11) or twelve (12) years old. On this issue, PW3 produced a copy of PW1's birth certificate that showed he was born on the ***29th December, 2006*** *which showed that PW1 was twelve (12) years old at the time of the incident.*

38. On identification, the Appellant contends that he could not be the perpetrator as the information was not voluntarily acquired from PW1 as he was first beaten for him to state that he had been defiled by the Appellant. The Appellant added that he was only blamed since PW1's father wanted to warn him not to fetch water from his compound.

39. It is worth noting that the Appellant stated that he knew PW1 as they were neighbours and therefore it was easy for PW1 to identify him as the predator. Further, it is evident from PW1's testimony that he was not coerced to say who defiled him as he was beaten after he had reported to the uncle the fact that he had been defiled by the Appellant.

40. *On penetration, in its Judgment, the trial court made a finding that there were doubts as to whether there was actual penetration and thus convicted the Appellant on the alternative charge of* **Indecent Act with a child contrary to Section 11(1)** of the **Sexual Offences Act.** Indecent act is defined under **Section 2** of the **Sexual Offences Act** as follows:-

> **"*Indecent act*" means an unlawful intentional act which causes-**
>
> ***(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
>
> ***(b) Exposure or display of any pornographic material to any person against his or her will."***

41. The above section shows that what is key for the act complained of to be proved, is that it must be shown that it was intentional and indecent in nature. The act complained of, that has not in any way been rebutted by the Appellant that he intentionally touched the anus of the complainant which amounts to an indecent act. Under **Section 124** of the **Evidence Act**, evidence of a single sexual offence victim does not require corroboration and a court can convict on such evidence upon recording reasons for believing such evidence.

42. In view of the above, this Court is therefore satisfied that the alternative charge of **Indecent Act with a child contrary to Section 11(1)** of the **Sexual Offences Act** was proved beyond reasonable doubt as against the Appellant.

iii) Whether the trial magistrate disregarded the Appellant's plausible defence and thus imposed an excessive sentence that what is provided for under the law

43. The Appellant gave unsworn evidence and stated that on **7th July,2019** he had gone to buy maize flour in an area that was far from home and he came back at around 9.00 pm hence he could not have been the perpetrator as alleged.

44. In his defence, the Appellant is not clear as to when he went to buy the flour nor does he account for what he was doing before he went to buy the flour which makes it plausible that he had enough time to commit the offence and proceed on to go and buy the said flour. The Appellant further did not counter any of the complainant's allegations but insisted on a grudge that seemed to be non-existent. This court finds that his defence was properly considered by the trial court. I am satisfied that the prosecution proved its case against the appellant beyond reasonable doubt.

45. On the issue of the sentence that was meted against the Appellant, the Appellant contends that the trial court sentenced him to fifteen (15)

years contrary to what is provided for an offence of indecent act with a child under **Section 11(1)** of the **Sexual Offences Act** which is ten (10) years. **Section 11(1)** of the **Sexual Offences Act** provides as follows: -

> ***(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

46. It is trite law that sentencing is always at the discretion of the trial court dependent on the circumstances and aggravating factors of each case. Also, following several authorities by the courts, it is settled that the connotation of the law "*not less than*" only sets a minimum sentence but does not deter a trial court from imposing a higher sentence if the circumstance of the case so require. See the Court of Appeal case of **Criminal Appeal No.248 of 2014, M. K. –vs- Republic [2015]eKLR,** where it was stated:-

> ***[15]. Readings of the diverse provisions of the Sexual Offences Act reveal that in most sections, a minimum sentence is provided for. For example, under Section 3 (3), a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years….; Section 4 of the Act stipulates that a person convicted of attempted rape is liable upon conviction for imprisonment for a term which shall not be less than five years….. Section 5 (2) of the Act provides that a person convicted of sexual assault shall be liable to imprisonment for a term of not less than ten years…. Section 8 (3) of the Act provides that a person convicted of defilement when the child is between the ages of twelve and fifteen years shall be liable to imprisonment for a term of not less than twenty years.***
>
> ***[16]. Our reading of the Sexual Offences Act shows that whenever a minimum sentence is imposed, the phrase not less than is used.***

47. Further, I agree with the finding in **Criminal Appeal No.5 of 2016 M M M –vs- Republic [2017] eKLR,** where Kamau J, stated :-

> ***"It is evident that irrespective of the age of a victim, a trial court can mete upon an accused a minimum sentence of ten (10) years. This essentially means that a trial court has the discretion of imposing more than ten (10) years and if circumstances so require, upto life imprisonment in a case where the victim is below (18) years of age.***

48. Clearly, the penalty provided for under **Section 11 (1)** of the **Sexual**

Offences Act allows for imposition of a sentence longer that the prescribed 10 years that has been set as a minimum.

49. I therefore find that the trial Magistrate was within her jurisdiction to sentence the accused to 15 years imprisonment and find no reason to interfere with the said sentence.

Disposition

50. For the foregoing reasons, the upshot is that the Appellant's Appeal is not merited and is hereby dismissed. This court hereby affirms the conviction and sentence that was meted upon the Appellant by the Trial Court.

51. The Appellant has 14 days right of appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26th DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of

Mr. Chirchir counsel for the State

Appellant in person – present

Court Assistant - Otolo