REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 224 OF 2019

LAMECK MOGOYA MOMANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence of Hon. R.M. Kitagwa (SRM) in Kibera Chief Magistrate's Sexual Offence Case No. 13 of 2015 dated 5th July 2019*

JUDGMENT

1. The appellant, *Lameck Mogoya Momanyi,* was tried and convicted of the offence of defilement contrary to *Section 8 (1) (a)* as read with *Section 8 (3)* of the *Sexual Offences Act*.

The particulars of the charge alleged that on 24th May 2015, at [particulars withheld] area in Ongata Rongai Township within Kajiado County, he intentionally and unlawfully inserted his male genital organ (penis) into the female genital organ (vagina) of *BK*, a girl aged 7 years.

2. The court record shows that besides the offence of defilement, the appellant was alternatively charged with the offence of committing an indecent act with a child contrary to *Section 11 (1)* of the *Sexual Offences Act* and an additional two counts with the offences of escape from lawful custody contrary to *section 123* as read with *Section 36* of the *Penal Code* and giving false information to a person employed in the public service contrary to *Section 129 (a)* of the *Penal Code*.

3. As stated earlier, after a full trial, the appellant was convicted in the main count of defilement. He was sentenced to serve 30 years imprisonment. He was acquitted of the offences charged in count 2 and count 3 for lack of sufficient evidence.

4. The appellant was aggrieved by his conviction and sentence. He proffered an appeal to this court through what he described as a "memorandum grounds of appeal" filed on 14th November 2020. In his appeal, he relied on three grounds of appeal in which he complained that the learned trial magistrate erred in law and fact by: convicting him on the basis of evidence which did not prove the essential elements of the offence of defilement to the required legal standard; failing to find that he was not properly identified as the perpetrator and failing to find that crucial witnesses were not availed in court to testify in support of the prosecution case.

5. At the hearing, the appellant chose to rely entirely on his written submissions filed on 19th March 2021. In opposing the appeal, learned prosecuting counsel *Mr. Chebii* gave oral submissions. He supported the appellant's conviction arguing that the prosecution had adduced sufficient evidence to prove all the ingredients of the offence including identification of the appellant as the culprit who defiled *B.K* beyond any reasonable doubt. He invited me to dismiss the appeal for lack of merit.

6. This being a first appeal to the High Court, I am guided by the well settled principle regarding the duty of the first appellate court which is to re-visit and exhaustively subject the evidence presented before the trial court to fresh analysis and evaluation bearing in mind that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses and give due allowance to that disadvantage. See: ***Okeno V Republic, [1972] EA 32*.**

7. I have considered the grounds of appeal, the evidence on record and the submissions made by the parties. I find that the appellant's main complaint is that the offence subject of his conviction was not proved to the required legal standard.

8. In his written submissions, the appellant correctly noted that there are three key ingredients of the offence of defilement which the prosecution must prove beyond any reasonable doubt in order to secure a conviction. He itemized them as proof of age of the victim; proof of penetration and identification of the accused person as the perpetrator of the offence.

9. According to the appellant, the medical evidence adduced by the prosecution as proof of penetration did not conclusively prove

penetration as a broken hymen without other corroborative evidence is not evidence that the victim had been sexually assaulted; that he was not positively identified as the victim's assailant and that the prosecution's failure to call vital witnesses mentioned by PW2 in the course of her evidence should have been a basis for the drawing of an inference that had such witnesses been called, their evidence would have been adverse to the prosecution's case.

10. Given the foregoing, it is my finding that the only issue arising for my determination in this appeal is whether the offence of defilement was established against the appellant to the required standard of proof which is beyond any reasonable doubt.

11. As regards proof of age, according to the charge sheet, the child victim was 7 years old at the time the offence was allegedly committed. In her *voire dire* examination, the victim who testified as PW3 stated that she was eight years old and in class three at [particulars withheld]. This was on 9th November 2017. *Dr Shako* (PW1) who examined her and completed the P3 form produced as *Pexhibit 1* and the discharge summary from Nairobi Women's Hospital where PW3 was taken for treatment both indicate her estimated age as 7 years.

12. The learned trial magistrate who saw the victim as she testified in court accepted seven years as the minor's apparent age. Given the foregoing, it is my finding that though the minor's birth certificate was not produced in evidence, there was sufficient evidence before the trial court to prove the age of the victim as between 7-8 years. It is also worth noting that the victim's stated age was not disputed by the appellant.

13. On penetration, PW1 testified that on examining the victim (PW3) on 3rd June 2015, she found that she had three tears in her hymen. According to PW1, the injuries were suggestive of sexual intercourse. The Post Rape Care Report (*Pexhibit 2*) filled at the Nairobi Women's Hospital where PW3 was taken and admitted for treatment for two days immediately after her ordeal, shows that upon examination, her hymen was found to be broken and there was reddening of the labia minora and majora.

On the above evidence, I am satisfied that the ingredient of penetration was proved to the required standard.

14. Regarding the identity of the applicant as the defiler, PW2 and PW3 testified that at the material time, they were living in the same plot with the appellant. The appellant was living with his brother in a house which was next to the house they occupied.

15. PW3 recalled that on the material date, when her mother left her in their house with her younger sister, a person she identified as the appellant talked to her and took her and her sister to his house. He put her on a bed and removed the dress she was wearing. He then removed his trousers and remained only with a T-shirt. He inserted his *"dudu"* in her vagina and warned her not to scream or else he would strangle her. This is the point at which her mother (PW2) appeared and removed him from her.

16. On her part, PW2 testified that she left her two daughters, the victim and B in her house and was on her way to the posho mill when on reaching the gate, she heard her child cry. She went back and found the two girls in the appellant's house and the appellant was on top of PW3. She held the appellant and he pushed her away as a result of which she fell down. She screamed and the appellant ran away while pulling up his trousers. Some good Samaritans who were passing by heard her screams and went to her rescue. They assisted her to take the victim to Nairobi Women's Hospital for treatment. She also reported the matter to Ongata Rongai Police Station.

17. PW2 was adamant in her evidence that she was able to see and identify the appellant as the person she pulled away from PW3 that Sunday evening because she had previously seen him in the plot for five days; that since the appellant disappeared from the plot after the incident, it is his brother who assisted the police to arrest him. This piece of evidence was not challenged or disputed by the appellant.

18. Given the above evidence and considering that the offence was not committed at night, I am satisfied that the appellant was positively identified as the person who defiled PW3. I thus find no reason to fault the trial court's finding on identification of the appellant as the culprit.

19. Regarding the appellant's complaint that the prosecution failed to call crucial witnesses to support its case, the appellant urged me to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution's case. It is trite that in general, the prosecution has discretion to decide who to call as a witness in support of its case and this is the rationale behind

Section 143 of the *Evidence Act* which provides that no number of witnesses is required to prove a fact.

However, where the prosecution calls evidence which is barely sufficient and fails to call vital witnesses without giving a reasonable explanation, the court would be entitled to make an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See: ***Paul Kanja Giari V Republic, [2016] eKLR***.

20. In this case, the witnesses referred to by the appellant were in fact not crucial witnesses since they were witnesses after the fact as their only role was to assist PW2 take PW3 to hospital. In any event, a good explanation was given by the prosecution through PW2 why they could not be called as witnesses. PW2 testified that the said people were just good Samaritans who heard her screams and went to assist her but she did not know them.

21. For the above reasons, I have come to the same conclusion as the learned trial magistrate. I find that the learned trial magistrate carefully analysed all the evidence presented before her including the appellant's defence and correctly found that the offence of defilement had been proved against him beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted. His appeal against conviction therefore fails.

22. On the appeal against sentence, I find that other than stating in his memorandum of appeal that his appeal was against both conviction and sentence, none of the three grounds he advanced in support of his appeal challenged the sentence imposed by the trial court. Be that as it

may, as the first appellate court, I am enjoined to examine the sentence meted out on the appellant to satisfy myself that it was lawful.

23. The court record shows that in sentencing the appellant, the learned trial magistrate considered his plea in mitigation, the nature of the offence and the circumstances in which it was committed. She also considered the mandatory sentence prescribed in *Section 8 (2)* of the *Sexual Offences Act* which is life imprisonment but following the Court of Appeal decision in ***Christopher Ochieng V Republic, [2010] eKLR***, the learned trial magistrate sentenced the appellant to 30 years imprisonment.

24. In the ***Christopher Ochieng case [supra],*** the Court of Appeal followed the Supreme Court's decision in ***Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR***, in which the Supreme Court declared that minimum mandatory sentences are unconstitutional to the extent that they fettered the discretion of the trial court in sentencing.

25. The positon has now changed with the pronouncement of the Supreme Court in the second ***Francis Karioko Muruatetu & Another V Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR***, in which the Supreme Court clarified that the 1st ***Muruatetu*** decision applied only to the mandatory sentence prescribed for the offence of murder and not all mandatory sentences including those prescribed under the *Sexual Offences Act*. I however find that since the Supreme Court's guidelines in the second ***Muruatetu*** decision were issued about $1^1/_2$ years after the appellant was sentenced, they cannot apply to this case because they cannot be applied retrospectively.

26. I am satisfied that at the time of sentencing the appellant, the learned trial magistrate exercised her discretion after taking all relevant factors including the law then applicable into account. In the premises, I do not find any good reason to interfere with the sentence of 30 years imprisonment imposed by the trial court. In any event, the respondent did not file a cross appeal against the appellant's sentence.

In the circumstances, the sentence passed by the trial court is hereby confirmed.

27. In the end, it is my finding that this appeal lacks merit and it is hereby dismissed in its entirety.

It is so ordered.

DATED, SIGNEDAND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2021.

C. W. GITHUA

JUDGE

In the presence of:

The appellant present in person

Ms Akunja for the respondent

Ms Karwitha: Court Assistant